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THE
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ROCKWELL v. BOWERS, Street Commissioner, et al.

(Supreme Court of Iowa. May 13, 1893.)

INJUNCTION AGAINST OPENING STREET—REMEDY AT LAW.

Since an owner of land condemned for a street, having knowledge of the action of the city council, could have protected his interests by certiorari, and, being made a party to the condemnation proceedings, could have defended on the ground that the proceedings were not authorized by the action of the council, he is not entitled to have the opening of the street enjoined for defects in the proceedings of the council.

Appeal from district court, Calhoun county; Charles D. Goldsmith, Judge.

Action in equity to restrain the opening of a street within the limits of the incorporated town of Rockwell. There was a hearing on the merits, and a decree in favor of plaintiff. The defendants appeal.

Stevenson & Lavender, for appellants. O. J. Jolley, for appellee.

ROBINSON, C. J. On the 1st day of October, 1890, the council of the incorporated town of Rockwell adopted a resolution, a copy of which is as follows: "Be it resolved by the town council of the incorporated town of Rockwell, Calhoun county, Iowa: That Custer street, as shown by the recorded plat of J. M. Rockwell's addition to the town of Rockwell, be extended south to the north line of the southeast quarter of section thirty-six, in township eighty-eight north, of range thirty-three west of the 5th P. M., and there terminating, and that the width of said extended street be established at sixty feet, and the committee on streets and alleys be, and they are hereby, instructed, authorized, and empowered to take immediate action to condemn the same, and have the costs thereof assessed as by law provided, and to open the same for public use." Plaintiff claims to own the land required for the proposed extension. Acting under the resolution, the committee on streets and alleys applied to the district court of Calhoun county for the condemna-

tion of the land, and procured an order directing possession to be taken of it on the payment into court, or to plaintiff, of the amount of damages awarded by reason of such taking. The damages so have been paid to the clerk of the court, and the council has ordered ants, the street commissioner and mittee on streets and alleys of the rated town of Rockwell, to open the sion provided for in the resolution. plaintiff claims that the council had no power to order the extension of a street by resolution; that it can make such an order only by ordinance duly passed as provided by law; that the resolution did not give to the district court jurisdiction to act; and that all the proceedings had in that court, including the order made, were void, and of no effect. He asks that defendants be restrained from opening the extension ordered. A temporary injunction was issued in vacation, but was dissolved upon motion and answer. Thereafter the town of Rockwell took actual possession of the land included in the extension. The defendants insist that the council had authority to extend the street by resolution; that its right to do so was adjudicated in the condemnation proceedings; that, by reason of such proceedings, plaintiff is estopped to assert any claim to the premises in controversy; and that he has a plain, speedy, and adequate remedy in the ordinary course of the law. The district court adjudged that plaintiff was entitled to the relief demanded, and directed the defendants to vacate the land appropriated for the extension. The allegation of title to the land in controversy, contained in the petition, is denied by the answer, and is not sustained by the stipulation as to facts; but, as appellants base no claim upon failure of proof as to title, we will not further notice it.

Whether the council of an incorporated town has power to extend and open a street, and provide for the condemnation of land required for that purpose, by resolution, or whether an ordinance is necessary for that purpose, we do not find it neces-

sary to determine. It is a well-established rule of law that courts of equity will not afford a party aid, to protect his rights, when the remedy obtainable in the courts of law is plain, adequate, and speedy. 1 High, Inj. § 28. When there is no appeal or other special means for obtaining relief from the acts of an incorporated city or town in laying out, opening, or extending streets, such acts may be reviewed and corrected by certiorari, and courts of equity will not interfere. 2 Dill. Mun. Corp. §§ 476, 727, 740; 1 High, Inj. §§ 579, 502. Cities and incorporated towns have power to open, vacate, and extend and establish streets. Code, § 404. It was said in *Stubenrauch v. Neyenesch*, 54 Iowa, 567, 7 N. W. Rep. 1, that certiorari is a proper remedy to test the right of a city council to vacate a street, and, in effect, that a court of equity will not interfere to prevent such action, for the reason that the remedy by certiorari is full and complete. The rule of law, as thus announced, is applicable to this case. The plaintiff could have tested the power of the town council to extend the street in question in the manner attempted, by certiorari, and would not have been entitled to an injunction to prevent the adoption of the resolution. It is said, however, that, if the council had no power to open the street by resolution, its act in attempting to do so was void, and imposed no obligation upon plaintiff to test it by direct proceedings, and that he retained the right to resist the opening of the street by an independent action. In answer to that claim it may be said that appellant knew of the action of the council in due time, and could have protected his interests fully by certiorari proceedings. Moreover, he was made a party to, and was served with notice of, the condemnation proceedings in the district court. If those proceedings were not authorized by the action the council had taken, the fact could have been pleaded and shown in defense. It is true sections 476, 477, of the Code, under which such proceedings were had, do not, in terms, authorize an inquiry as to the validity of the proceedings; but they do provide for the ascertaining of the compensation to be paid by a mode of procedure as in an action at law, so far as applicable, for the settling of the rights of claimants of the property to be condemned, and for the delivery of the possession of the property. It necessarily follows that the rights of the parties to such a proceeding may be asserted therein by suitable pleadings, and settled by a trial, and an order or judgment of the court. See *Railway Co. v. Donnell*, 77 Iowa, 221, 42 N. W. Rep. 178. If the town of Rockwell had not taken the steps necessary to the condemnation of the property, it was not entitled to an assessment of the damages which would be caused by taking it, nor to an order for its possession. The district

court had jurisdiction of the parties, and the subject-matter of the proceeding. There was any defect in the acts of council, it does not appear that the council had any means of knowing that such was the case. The council had power to provide for the extension of the street, and condemnation of the land required for it. Under these circumstances, if there was any defect in the proceedings of the council, it was the duty of appellant to show it to the court, or to acquiesce in the action it should take. Having had ample opportunity to assert and protect his rights in the ordinary course of the law, a court of equity will not give him relief. The decision of the district court is reversed.

STATE v. McENTURFF.

(Supreme Court of Iowa. May 10, 1893.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—INDICTMENT—ATTORNEYS' FEES.

1. Code, § 1543, provides that whoever shall erect or use any building or place for the purposes prohibited in sections 1540-1542, shall be deemed guilty of a nuisance; section 1525 relates to the illegal manufacture of intoxicating liquor; section 1541 provides for the punishment of persons without a permit, sell intoxicating liquor; section 1541 provides that any person who manufactures intoxicating liquor with beer, wine, or cider and sells the same, shall be guilty under section 1540; section 1542 prohibits all persons from owning or keeping intoxicating liquors sell within the state, or to permit the same to be sold therein. *Held*, that an indictment under section 1543 need not charge that intoxicating liquors were kept for sale or sold in place resorted to by persons desiring to buy as that is not a necessary element of nuisance, as defined by section 1543.

2. Acts 21st Gen. Assem. c. 66, § 4, provides that whoever is convicted of keeping a nuisance under Code, § 1543, as amended Acts 20th Gen. Assem. c. 143, § 12, shall pay a fine and costs, including a reasonable attorney's fee, to be assessed by the court. *Held*, that though the attorney's fee is to be determined by the court, and not by the jury, when the value of the services is disputed, the court should hear any evidence submitted concerning their value.

Appeal from district court, Shelby county. N. W. Macy, Judge.

The defendant was convicted of the crime of nuisance, alleged to have been committed by erecting and maintaining a building, and keeping for sale and selling therein intoxicating liquors in violation of law. From a judgment which required him to pay a fine and costs he appeals. The state appeals from so much of the judgment as fixed the amount of the fee for the county attorney.

Benj. I. Salinger, for appellant. John Stone, Atty. Gen., Thos. A. Cheshire, and J. B. Whitney, for the State.

ROBINSON, C. J. The indictment charges that on a date specified, in the county of Shelby, in the state of Iowa, the defendant

did "erect, establish, continue, and use a building, erection, and place, with the intent and for the purpose then and therein to sell intoxicating liquors contrary to law, and with the intent and for the purpose then and there and therein to own, keep, and be concerned, engaged, and employed in owning and keeping intoxicating liquors, with intent unlawfully to sell the same within said state, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Iowa." The appellant contends that the indictment was defective in omitting to charge that liquor was either kept for unlawful sale, or unlawfully sold, in a place resorted to by persons desiring to buy intoxicating liquors, and that the court erred in charging the jury that proof that the place was so resorted to was not essential to a conviction. The indictment was found under section 1543 of the Code. That provides that "whoever shall erect or establish or continue or use any building, erection, or place for any of the purposes prohibited in said sections [1525, 1540-1542, of the Code] shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly." Section 1525 relates to the illegal manufacture of intoxicating liquors. Section 1540 provides for the punishment of persons who shall without a permit sell, or, in consideration of the purchase of any other property, give, to any person intoxicating liquors. Section 1541 provides that any person who shall mix any intoxicating liquor with any beer, wine, or cider by him sold, and shall sell or keep for sale as a beverage such mixture, shall be deemed guilty under section 1540, and be punished accordingly. Section 1542 prohibits all persons from owning or keeping, or from being in any manner concerned, engaged, or employed in owning or keeping, any intoxicating liquors, with intent to sell the same within this state, or to permit the same to be sold therein in violation of law. It will be noticed that the acts of manufacturing in violation of law, or selling, or giving away in consideration of the purchase of other property in violation of law, or mixing intoxicating liquors with any beer, wine, or cider, and selling or keeping for sale as a beverage the mixture, or the owning or keeping, or being in any manner concerned, engaged, or employed in owning or keeping, any intoxicating liquor, with intent to sell or to permit it to be sold in this state in violation of law, constitute the offenses prohibited in the sections specified, without regard to the place in which the prohibited acts are performed. Section 1543 is designed to prevent and punish the erection, maintenance, and use of buildings and other places for the purpose of doing therein those things which are prohibited by the other sections. It does not require that such places be resorted to by persons desiring

to buy intoxicating liquors, to constitute the crime of nuisance. Under section 1542 the finding of the liquor named in the indictment in the possession of the accused in his private dwelling house, or its dependencies, if it be a tavern, public eating house, grocery, or other place of public resort, is presumptive evidence that the liquor was kept or held for sale contrary to the provision of that section. Sales are not essential to the commission of any of the offenses prohibited by sections 1525, 1541, and 1542, and the sales prohibited by section 1540 may be made as readily to the person who visits the place of business of the seller for an object sanctioned by law as to one who resorts to it for the purpose of buying the liquor. No doubt the statute is designed in part to prevent the maintenance of places to which persons may go for the purpose of buying liquors, which cannot be sold except in violation of the law; but it is not true that the resorting to the place in which the liquor is manufactured, or kept, by persons desiring to purchase it, is a necessary element of the crime of nuisance, as defined by section 1543, and it is not necessary that such resorting to be charged in the indictment. Our conclusion is supported to some extent by the following cases: *State v. Price*, 75 Iowa, 244, 39 N. W. Rep. 291; *State v. Viers*, 82 Iowa 398, 48 N. W. Rep. 732. We are not unmindful of the fact that in *State v. Harris*, 64 Iowa, 288, 20 N. W. Rep. 439, it was said that the state, in order to convict, "must establish that intoxicating liquors were sold, or kept with intent to sell, in a building or place which is resorted to by persons desiring to procure intoxicating liquors." That was said with special reference to the indictment and evidence then under consideration, and cannot be regarded as a correct statement of a rule of law of general application to cases arising under section 1543. We conclude that there was no error in the matters of which defendant complains.

2. At the time judgment was rendered against defendant, the county attorney asked leave to introduce testimony to prove that the value of his services in conducting the trial on the part of the state was from \$125 to \$150, and requested the court to fix the attorney's fee at \$125. The court refused to hear any testimony as to the value of the services, and assessed the amount to be allowed as an attorney's fee at \$25. It is contended on behalf of the state, in effect, that section 1, c. 68, of the acts of the 21st General Assembly governs the taxing of attorneys' fees in cases of this kind. That section provides that "if successful in the action, the plaintiff shall be entitled to an attorney's fee of not less than twenty-five dollars, to be taxed and collected as costs against the defendant." In *Craig v. Werthmueller*, 78 Iowa, 606, 43 N. W. Rep. 606, it was said that, where there

is no controversy as to the amount which should be taxed under that provision, it may be fixed by the judge, upon his knowledge of the services rendered and the record, without testimony; but that, where there is contention as to the amount to be taxed, testimony should be heard, and the amount determined from the testimony and record alone. The section provides for the taxing of attorneys' fees in civil actions to enjoin nuisances, defined by section 1543 of the Code, and has no application to criminal cases prosecuted by indictment under that section. Attorneys' fees in such criminal cases are authorized by the fourth section of chapter 66, referred to, which provides that whoever is convicted of keeping a nuisance under section 1543 of the Code (as it is amended by section 12, c. 143, Acts 20th Gen. Assem.) shall pay a fine and costs of prosecution, "and the costs shall include a reasonable attorney's fee, to be assessed by the court." By section 1, the attorney's fee is "to be taxed," and by section 4 it is "to be assessed by the court." The effect of those two provisions is substantially the same. To tax a fee, within the meaning of the statute, is to fix or determine it, and to assess a fee is to do the same thing. Actions to enjoin nuisances are triable by the court without a jury, but criminal cases are triable by jury; and it was deemed proper by the general assembly to provide that in such cases, under section 1543, an attorney's fee should be allowed, but that it should be determined by the court, and not by the jury. The amount assessed must be reasonable, depending upon the skill, time, and labor the attorney has properly devoted to the case. Where there is a controversy in regard to the value of the services rendered by the attorney, it should be determined upon the record of the case and the evidence which may be submitted. In this case, if the value of the services rendered by the attorney for plaintiff was what he claimed it to be, the amount assessed as an attorney's fee was not reasonable. It appears that the time occupied by the attorney in preparing the case for trial and in trying it was three or four days. We think the court erred in refusing to hear evidence in regard to the value of the services. So much of the cause as involves the assessment of an attorney's fee will be remanded for further action in the district court. The judgment of that court on the appeal of defendant is affirmed. So much of it as is involved in the appeal of the state is reversed.

WRIGHT v. EVERETT.

(Supreme Court of Iowa. May 10, 1893.)

LANDLORD AND TENANT—EVICTION OF LESSEE—
DAMAGES—APPEAL.

1. A lease required the lessee to plant, properly work, and harvest all crops grown on

the premises, and provided that the lessor might re-enter for default in any covenant. During the term the lessor foreclosed a mortgage on the lessee's personal property, so that he was left without any means of cultivating the land. The lessor then gave notice to quit, and afterwards went on the land, and put in a crop, without objection from the lessee. The lease did not permit a subletting without the lessor's consent. *Held*, that the evidence was not sufficient to show that the lessor wrongfully took possession of the land during the term.

2. In estimating the damages suffered by the lessee, the proper inquiry should have been as to the value of the farm to the tenant after paying the rent.

3. Where in an action at law, in which the evidence was taken by a shorthand reporter, there was a skeleton bill of exceptions which properly identified every item of evidence, so that the clerk of the court was enabled to make up his transcript with certainty, the evidence is sufficiently identified and preserved to be properly in the record on appeal.

Appeal from district court, Monona county; George W. Wakefield, Judge.

This is an action between a farm tenant and his landlord. The plaintiff and another rented a farm of the defendant for the years 1888, 1889, and 1890. The plaintiff's partner in the enterprise was one Collins. The farm was cultivated by plaintiff and Collins in the year 1888. In January, 1889, the defendant gave Collins and the plaintiff notice to quit the premises, and defendant, while the said tenants yet occupied the house on the land, went upon the premises and commenced farming operations in March, 1889, and after a time the plaintiff and Collins quit the possession of the house. Plaintiff claims that Collins assigned to him all claims which he had against defendant, growing out of the lease of the land, and this suit was brought on five counts or causes of action, which included a cause of action for alleged malicious prosecution. The defendant met these claims by denials, and he also set up a counterclaim for damages for failure to properly cultivate the land for the year 1888, and for boarding, wood, hay, and other items, including a balance for some \$78 on a promissory note. There was a trial by jury, and separate findings were made upon each cause of action and upon the counterclaim. A motion to set aside the counterclaim was overruled, and judgment was entered thereon. The defendant appeals.

Wright & Hubbard, for appellant. Mo-Millan & Kindall, for appellee.

ROTHROCK, J. 1. The first cause of action was for work and labor on the farm, in ditching, shingling a house, and making a cave on the farm. The jury found that there was no merit in this claim. The second count was for work and labor during the years 1887 and 1888, part of it being done on the leased farm. The jury found for plaintiff on this count in the sum of \$37.17. The amount claimed was \$108.75. The third claim was for the alleged wrong-

ful, unlawful, and malicious seizure of certain personal property of the plaintiff. The evidence shows that the seizure of this property was made under a chattel mortgage, and the jury found that it was a rightful seizure. The fourth count was for damages for forcibly and unlawfully taking possession of the said farm while plaintiff and Collins were rightfully in the possession thereof under their lease, and thereby depriving them of the profits and benefits arising from its cultivation for the years 1889 and 1890. The averment setting forth this alleged wrong was in these words: "That, notwithstanding said lease and its covenants, defendant, about March 1st, 1889, by force, and unlawfully, and against the protest of said lessees, did take forcible and undue possession of said premises, and forbid and prevent plaintiff from cultivating said land for the balance of the term; that the value of the use of said premises for the unexpired term was and is eight hundred dollars." The jury found for the plaintiff, on this count, in the sum of \$647.10. On the fifth count, for the alleged malicious prosecution, the finding was \$250 for the plaintiff. On the defendant's counterclaim the verdict was for the sum of \$224.29 in favor of the defendant. The findings of the jury indicate that a large part of the claims preferred by the plaintiff were unfounded. Indeed, the very nature of many of the charges indicates that they have no merit. No complaint is made of the special finding that the plaintiff is entitled to recover the sum of \$250 for the alleged malicious prosecution, nor for the \$37.17 allowed for work and labor; and the defendant does not claim that he should have been awarded a larger amount on his counterclaim. The sole ground of complaint is that the verdict, so far as it awards \$647.10 to the plaintiff for the alleged wrongful taking possession of the farm, is not supported by the evidence. The lease required the lessees "to plow, plant, sow, properly work, and harvest all crops grown on the premises, in good and proper season, giving no preference to harvesting and storing their shares, to the detriment of the first party, and give as rental two fifths of the grain in the crib, two fifths of the hay in stack, on March 1st in each year; said first party to keep fences and buildings in good repair, second party to haul out all the manure they can, and all the stock to run in the field of both parties after crops are gathered, until March 1st of each year." It was further provided in the lease that, if the lessees defaulted in any covenant therein, it should be lawful for the lessor to re-enter the premises, and that the lessees should surrender the same. There is strong evidence in the case that there was a signal failure, on the part of the lessees, to properly cultivate the farm and harvest the crops for the year 1888. The

defendant had a chattel mortgage upon the property of the lessees used in farming the land. The mortgage was foreclosed in the usual manner, and on the 14th day of January, 1889, the property was sold to satisfy the mortgage. This sale was not wrongful. The third count of the petition is a claim for damages for seizing the property and foreclosing the mortgage, and the jury rightfully found that the plaintiff was not entitled to damages therefor. The plaintiffs were then on the land without teams to cultivate it. On the 14th day of January, 1889, the defendant gave them written notice to quit the farm. They made no response to this notice, except that the plaintiff said to the person who served the notice that he (plaintiff) calculated to stay there. When the proper time arrived to commence spring work on the farm, the defendant commenced operations thereon, and there is no one word in evidence to the effect that any objection was made by plaintiff. He testified, in his examination as a witness on that subject, as follows: "Defendant gave notice to quit the premises January 14th, and took possession in March, 1889. He went in and went to work. I was living there at the time, and making it my home. I was working at a neighbor's, and home nights. I lived on the land there under the lease. He went in and knocked down the stables, and commenced to farm. I never permitted him to go there. I remained there until March some time, and Collins also. Defendant did not use any force. He went in and took possession and began to cultivate it, and I quit. There was no force used to eject me. I told the man that served the notice on me that I calculated to stay there. I did not stay, but left." It appears to us that there was no evidence authorizing a finding that the possession was taken wrongfully. The defendant was under no obligation to allow the farm to lie without cultivation, and, under the lease, the lessees had no right to sublet it without the consent of the defendant; and the lessees had no means of farming it for the year 1889. The verdict of the jury was without support in the evidence, for the further reason that there was really no competent evidence of the value of the use of the farm to a tenant under this lease. The lease required the tenant to give two fifths of the crops raised to the defendant as a rent. The evidence in relation to the value of the use did not go to the real question. Most of it was based on the rental value of the land. The true inquiry was, what was a farm worth to a tenant after paying the rent? Or, in other words, if the lessees had sold or assigned their lease, what was its value to the assignee, taking into account the rent required to be paid? As no complaint is made as to any other finding of the jury, the judgment will be affirmed

in all respects, excepting as to the amount of \$647.10. As to that item the case is reversed, and remanded for a new trial.

2. A question is made involving the insufficiency of the record in this court. We are asked to strike the evidence from the abstract, on the ground that it has not been properly identified and preserved by bill of exceptions, or otherwise. We have examined this question, and our conclusion is that the motion to strike is not well taken. This is an action at law. The evidence was taken by a shorthand reporter. There was a skeleton bill of exceptions, which properly identified every item of evidence, so that the clerk of the court was enabled to make up his transcript with certainty. It is not necessary that we should elaborate our decision on this question. Reversed.

STATE v. STONE.

(Supreme Court of Iowa. May 9, 1893.)

ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER
—APPEAL.

1. An assault with intent to commit manslaughter is a crime in Iowa. *State v. McGuire*, (Iowa,) 54 N. W. Rep. 202, followed.

2. Where the record in a criminal case does not show that it contains all the evidence, the verdict will not be disturbed on appeal, on the ground that there is no evidence to support it.

Appeal from district court, Hamilton county; D. R. Hindman, Judge.

Indictment for an assault with an intent to commit murder. Verdict of an assault with intent to inflict a great bodily injury. From the judgment on the verdict, the defendant appealed.

Hyatt & Hyatt, for appellant. John Y. Stone, Atty. Gen., and Thomas A. Cheshire, for the State.

GRANGER, J. 1. It is said that the evidence fails to show that the offense was committed in Hamilton county, where the indictment was returned. The case is before us on an abstract by appellant and an amendment by appellee. Both abstracts contain testimony, but there is no showing whatever as to whether they contain all the testimony, or, if not all, what part they contain. Under such a condition of the record we could not reverse the case, even if we found the testimony in the record insufficient. *State v. Carr*, 43 Iowa, 418. We have, however, examined the evidence as presented, and think the verdict, in the particular of this complaint, has abundant support.

2. The court, in effect, instructed the jury that an assault with intent to commit manslaughter was a degree of the offense charged in the indictment, and of this appellant complains, on the ground that no such crime is specified in the statute. This

precise question was determined in *State v. McGuire*, at the January term, 1893, of this court, and the case is reported in 54 N. W. Rep. 202. The case sustains the action of the district court.

3. There are complaints as to certain instructions given by the court, and of refusals to give others asked by defendant. The complaints are not so much of the law, as stated in the instructions, as of the "negative form" of presenting the propositions, and of the "manner" of their being stated. The complaint in this respect, in argument, is quite general, and no intelligent discussion of the merits of the different instructions can be presented without setting them out in the opinion, which we think it unnecessary to do. We think the instructions given by the court correctly state the law, and in a manner that is fair to the defendant and just to the state. Those asked by defendant are not more so. Defendant has no just grounds of complaint because of the instructions given.

4. There is also a complaint as to the rulings of the court on the admission and exclusion of evidence. The argument refers us, in a general way, to the record, but no complaint or argument is made as to any particular ruling. We have examined the record, as we must do in such cases, and discover no error. We may also state, in this connection, that the complaint that the verdict is without support in the evidence is not subject to review under the conditions of the record as first noticed in the opinion. Before we can reverse on such a ground, it must appear that the record contains all the evidence. We may not improperly add that, with our views of the evidence in the record, we could not reverse the judgment for want of support.

Affirmed.

ABNEY et al. v. OLARK et al.

(Supreme Court of Iowa. May 11, 1893.)

HIGHWAYS—PROCEEDINGS TO ESTABLISH—TIME OF
APPOINTING APPRAISERS—NOTICE TO CLAIMANTS OF DAMAGES—ILLEGAL PROCEEDINGS—REMEDY—APPEAL—CERTIORARI.

1. Code, § 940, relating to highways, provides that when claims for damages are filed, and on the day appointed for filing the same, the auditor must appoint three appraisers to view the ground on the day fixed by him, and report the damages sustained by the claimants; such report to be filed in the auditor's office within 30 days after the appointment. Held that, where appraisers were appointed prior to the day appointed for filing claims, without notice to the claimants, the proceedings were illegal.

2. The fact that such claimants had filed their claims for damages before the appraisers were appointed does not render the time of the appointment of the appraisers immaterial, since claimants were entitled to be present when such appointments were made, and to be heard in relation thereto.

3. Since the appraisers possessed no jurisdiction, an appeal from the allowance of dam-

ages by the board of supervisors would furnish no remedy for the illegality in the proceedings, and certiorari will lie to review the same.

Appeal from district court, Calhoun county; Charles D. Goldsmith, Judge.

Certiorari to the defendants, as members of the board of supervisors of Calhoun county. It appears from the petition and return to the writ that the board of supervisors made its final order establishing a highway along a line on which the plaintiffs were landowners, and were entitled to damages; that the proceedings of the board are regular up to the appointment of appraisers to appraise the damages upon the claims filed; that the report of the commissioners to review and report upon the expediency of establishing the highway was filed October 21, 1889, and the 8th day of February, 1890, was properly fixed as the time for filing objections, and claims for damages. The time of appointing the appraisers does not definitely appear, but they met, in pursuance to the order of appointment, and made return of their doings, on the 30th day of January, 1890. One of the plaintiffs had, before the appointment of the appraisers, filed its claim for \$1,000 damages; and the other two, theirs for \$500 each. Each was allowed by the appraisers \$50, and the final order establishing the road was made November 3, 1890. The district court sustained a motion to dismiss the petition on the ground that the petition and the return to the writ show the plaintiffs to be entitled to no relief whatever. From the order of the court the plaintiffs appealed.

M. H. Baugh, for appellants. E. C. Stevenson, Co. Atty., for appellees.

GRANGER, J. 1. It will be observed that the appraisers were appointed, and made their appraisal, before the day fixed for the claims to be filed,—February 8, 1890. It is admitted, because of an undenied averment in the petition, that plaintiffs had no notice or knowledge of the appointment of the appraisers, or their doings, until after the final order establishing the road, but they did have notice of the time fixed for filing claims. By Code, § 940, it is provided: "When claims for damages are filed, and on the day appointed for filing the same, the auditor must appoint three suitable and disinterested electors of the county as appraisers to view the ground on the day fixed by him, and report upon the amount of damages sustained by the claimants. Such report shall be made and filed in the auditor's office within thirty days after the day they are appointed." It is insisted that the appointment of the appraisers before the day fixed by the statute renders the proceedings void, the claim being that the fact of such appointment is jurisdictional. On the other hand, it is claimed that, inasmuch as the

claims were filed when the appointment was made, the day of the appointment is not material, and would not affect the proceedings.

Statutes fixing the time and manner for officers in the discharge of their duties are often held to be directory, but it is not so held when the time and manner of doing the act is fixed with reference to the rights and opportunities of third persons. The statute is specific,—that when claims are filed the auditor must appoint the appraisers on the day appointed for the filing of the same. The language certainly favors a particular time for making the appointment. By a previous section of the statute, notice of the time fixed for the filing of claims must be served on the owners of land abutting on the proposed highway. The law fixes that as the day for appointing the appraisers. The requirements of the law that claimants shall have notice of the time of filing claims, and that the appraisers must be appointed on that day, are the equivalent of a requirement that claimants shall have notice of the time of the appointment. The duties of the appraisers have a special reference to the rights of claimants for damages. These claimants have a direct interest in the appointment, and it seems to us reasonable to say that the time for the appointment is fixed at the time claims must be filed,—that is, on the day for filing,—that claimants, by virtue of their notice thereof, may be present, to be heard, if they desire. Without so specific a statute, such a rule would accord with a high sense of natural justice, and has the sanction of many adjudications, more or less direct, where private interests are involved. The statute formerly was that commissioners to view and locate highways must be appointed on some of the regular days of the sessions of the board of supervisors, or at some time then fixed. An appointment at another time was held invalid; and, speaking of the time fixed for the appointment, this court, in *State v. Kimball*, 23 Iowa, 531, used the following language: "This is to enable those who may be affected by the proposed road to be present, and be heard upon the question as to who shall be appointed commissioner, and upon the question whether the statutory prerequisites have been complied with." It is certainly as important, and as much a matter of personal right, for a claimant to be present for such a purpose when appraisers upon his claim are to be selected, as for an interested party to be present at the appointment of a commissioner who views and reports upon the expediency of establishing a highway. In that case it is said that the failure to appoint at the time specified deprived parties "of the right expressly and plainly secured to them." Such a deprivation is equally true in this case. But it is said the parties in this case had notice in time to have taken an appeal, if not satisfied with the allowance. It must

be remembered that this right of appeal is given in addition to the right of an appraisal made under a proper observance of the law. The claimant is entitled, first, to a due appraisal, which he may accept, if he so elects, or from which he may appeal, if he deems it inadequate. Appellees cite us to *State v. Kinney*, 39 Iowa, 226. The law required that the time fixed for final hearing should be 60 days from the coming in of the commissioners' report, and the time fixed was really less. The case holds that, with the law observed as to the presentation of the petition, the posting of notices and the appointment of a commissioner, jurisdiction obtained, and that the fixing of the time was only an irregularity, that did not render the proceeding void, or liable to a collateral attack. The defect in that case was not as to notice, but only as to the time of final hearing; and it does not appear that due notice was not given of the time actually fixed, so that all persons interested might be heard. The cases are unlike. Again, it is only held in that case that the proceeding was not absolutely void. It is not held that because of the irregularity the proceedings were not voidable at the instance of a party prejudiced. In this case the attack is direct, and by parties prejudiced by the illegal procedure. It is not necessary that we should determine that the proceedings in this case are absolutely void, so as to be of no validity for any purpose; but in our judgment the failure to observe the law as to the time of appointing appraisers was an illegality that affected the final action of the board in establishing the road, and that the same should be held for naught.

2. Appellees insist that, inasmuch as an appeal is allowed, there is a plain, speedy, and adequate remedy at law, and hence that certiorari will not lie, and cite several cases in support of the claim, all of which are distinguishable for the same reason, and we need notice but one of them. The rule that certiorari will not lie where an appeal is allowed, and affords a plain, speedy, and adequate remedy, is not to be doubted. *Ransom v. Cummins*, 66 Iowa, 137, 23 N. W. Rep. 301, was certiorari to a justice of the peace, and the illegality averred was an erroneous ruling as to the qualification of a juror in the case. It was held that an appeal gave the remedy contemplated by law. In cases pending before a justice of the peace, where jurisdiction obtains as to the parties and the subject-matter, it is quite difficult to imagine a situation where the law, by writ of error or appeal, does not afford a sufficient remedy to a party aggrieved because of illegal procedure. In the above case, and others cited, the illegal act complained of could in such a way have been reviewed, so that the remedy would have been plain, speedy, and adequate. In the above-cited case it is said,—speaking of the

justice,—“he had jurisdiction to determine every question of which complaint is made. The jurisdiction of the appraisers to view and determine depended upon their appointment. If the appointment was illegal, it possessed no authority or jurisdiction. The appeal furnished no remedy for such an illegality. The appeal is not from the act of the appraisers, nor that of the audit in their appointment. It is from the decision of the board of supervisors, only permits a review of the claim for damages. Code, § 959; *Pollard v. Dickinson*, 71 Iowa, 438, 32 N. W. Rep. 418. He on appeal there would be no remedy for the illegality complained of, and which still holds exists. It would only permit such a view as plaintiffs would be entitled to under a legal appraisal, because of which they felt aggrieved. They were entitled to a legal appraisal and the appeal. The law claimed by appellee would deprive them of the former. It is said in this connection that certiorari will not lie “when the question sought to be reviewed is only the amount of damages, or the failure to make an award on a proper day.” Reference made to *Railway Co. v. Whelan*, 64 Iowa, 694, 21 N. W. Rep. 141. The case is in harmony with our holding. It states, as a basis for its conclusion, the facts as to notice given, time to give the sheriff's jury jurisdiction to assess damages. It holds that there is no remedy for errors in the proceeding, an appeal would afford an adequate remedy. In this case the appraisers had been duly appointed, so as to have been vested with power to act, the same rule might be applicable. We doubt if there is a case to be found, not in harmony with our conclusion. Appellees refer in argument to a motion to strike appellants' abstract from the docket, but no such motion is to be found.

The judgment is reversed.

TWISS v. GUARANTY LIFE ASS'N IOWA et al.

(Supreme Court of Iowa. May 11, 1886.)
MUTUAL BENEFIT INSURANCE—CONTRACTS—ULTRA VIRES—ESTOPPEL.

1. A contract by which a mutual benefit society undertakes to pay the death loss of another insurance company is ultra vires and void. *Lucas v. Transfer Co.*, 80 N. W. Rep. 771, 70 Iowa, 542, followed.

2. The society is not estopped from denying its liability under such contract, when the company was bankrupt at the time the contract was made.

Appeal from district court, Polk county, W. F. Conrad, Judge.

This is an action to recover the amount claimed to be due upon a policy of insurance on the life of David M. Twiss. The plaintiff herein is the beneficiary named in said policy. No defense was made in whole or in part of the defendant the Guaranty

Association, and a judgment was rendered against it for the sum of \$2,000 and interest, being the full amount claimed. The defendant the Southwestern Mutual Benefit Association made defense. A trial by jury was had, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

Caswell & Meeker, for appellant. Mitchell & Dudley and Nourse & Nourse, for appellee.

ROTHROCK, J. 1. It is admitted that David M. Twiss held a valid policy of insurance upon his life in the Guaranty Association, and that the same was in full force at the time of his death, which occurred in the month of May, 1880, and that the plaintiff herein is the beneficiary under said policy. The appellant was in no way a party to the contract of insurance, but it is claimed that it is liable to pay the amount of the loss, by reason of an alleged written contract, which it is claimed was entered into between the said two insurance companies after the death of said David M. Twiss. The written agreement was made and entered into by one H. S. Halbert, who was secretary of the Southwestern Association, and by one Pickell, who styled himself president of the Guaranty Life Association. The following is a copy of said written agreement: "This agreement, made and entered into between the Southwestern Mutual Benefit Association, of Marshalltown, Iowa, and the Guaranty Life Association, of Des Moines, Iowa, and H. M. Pickell, as trustee for the benefit of the policy holders, severally, of said last-named company, witnesseth, that the said company first above named hereby agrees with the said Guaranty Life Association and H. M. Pickell, as trustee, that it will, in consideration of the transfer to it by the Guaranty Life Association of all its assets, books, and furniture, perform all and singular the undertakings, agreements, and covenants heretofore made and now outstanding against said Guaranty Life Association in favor of its policy holders, and will pay all its liabilities for losses unpaid. In consideration of the premises, the said Guaranty Company agrees that it will, and it does hereby, transfer and convey unto said first above named company all its books, furniture, and its assets of every kind and nature, and agrees not to further transact its business of life insurance in the state of Iowa or elsewhere. [Signed] Southwestern Mutual Benefit Association, by H. S. Halbert, Secretary. Guaranty Life Association, H. M. Pickell, President. Des Moines, Iowa, June 18th, 1889." There can be no doubt that, if this were a valid agreement, it is an end of the controversy. It plainly provides that the appellant shall

pay all the liabilities of the Guaranty Company for losses unpaid. The policy in suit was a valid, existing, unpaid loss. But it is contended in behalf of the appellant that the written agreement is void because it was an act and undertaking not authorized by the corporate articles of association of either of the defendants, and that it was entered into by the parties, and the same was signed, without authority from their respective boards of directors. It is further claimed that said Pickell induced said Halbert to sign the agreement by certain alleged false and fraudulent representations as to the resources of the Guaranty Company, and that said agreement is void by reason of said fraud. We do not regard it as necessary to examine this question of fraud. The evidence is in conflict with reference thereto, and a jury might properly find for either party on that issue. And it is unnecessary to determine whether Pickell, the alleged president of the Guaranty Life Company, was authorized by his board of directors to make the contract upon which the action is founded. We have directed our attention to the question as to whether the contract was such an obligation as the Southwestern Association was authorized to make by its articles of incorporation. If it was in excess of its power, it is void, and cannot be enforced as a contract; and while in such case, where an ultra vires contract has been partly performed, the party repudiating it may be compelled to account for whatever benefits may have been received by reason of it, yet this exception, or rather modification, of the rule, has no application in the case at bar. The fact is that the appellant did not receive any real benefit from the transaction. It paid the sum of \$1,500 to the said Pickell, and received in return about \$1,200, and some office furniture worth about \$100. It is true that the two persons who assumed to make this contract undertook to transfer the membership of the Guaranty Company to the appellant company, and, in response to a circular sent out to said members, about 400 of them did agree to the transfer.

Much has been urged in argument to the effect that appellant, by reason of this accession of members, has received a sufficient consideration to uphold the transaction, or to require it to pay the losses of the Guaranty Company. We do not think that this claim can be maintained. The aggregate amount of said losses is about \$11,000. If the appellant should pay that amount for 400 members it would be a palpable fraud upon all of the other members of the appellant company. It would be the payment of a bonus of about \$25 each for new members. It would be a withdrawal and appropriation of \$11,000 of trust funds, without the semblance of any authority to do so, either by the insurance laws of this

state, or by any provision of the articles of incorporation. This proposition is so plain that it requires no further consideration. That the making of the contract was in excess of the power of appellant there should be no question. We need not set out the articles of incorporation or the by-laws. It is enough to say that the contract, so far as it attempts to bind the appellant, is contrary to the whole scope and purpose of the corporation. The payment of these losses would be a diversion of trust funds to other objects than those authorized by the charter, and would be a crime. Code, § 1072. Both of these companies were organized upon the assessment plan. The assessments were made quarterly, and a fixed amount was required to be paid. A certain amount was set apart for an expense fund, and the remainder was designated as the mortuary fund. The articles of association explicitly provide as to the disposition to be made of these several funds. There is not one word in the whole record which by the remotest implication can be construed as authorizing the secretary, or even the board of directors, to use any part of the proceeds of these quarterly payments for such a purpose as paying the death losses of any other insurance company. It is unnecessary to further discuss this question. It appears to us that the undertaking to pay the losses of the Guaranty Company is plainly in excess of the power of the appellant or any of its officers. The facts of the case bring it within the rules announced in *Lucas v. Transfer Co.*, 70 Iowa, 542, 30 N. W. Rep. 771; *Davis v. Railroad Co.*, 131 Mass. 258. And see, also, 2 Mor. Priv. Corp. §§ 580, 581, 591, 607, 609.

2. But it is claimed in behalf of appellee that the contract is executed, and that the appellant is estopped from questioning its validity. As we have said, where an ultra vires contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account; in other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate wrong and injustice. But this case presents no such features. It is conceded that the Guaranty Company was bankrupt when the contract in question was made. Complaint had been made to the state auditor that it was not paying its death losses promptly, and it was unable to obtain a certificate authorizing it to continue in business. It is said by the counsel for appellee, in argument, that for the payment of these death losses the Guaranty had no means whatsoever except of its annual premiums, payable in quarterly installments. It had no certificate authorizing it to do business after March, 1889. The death losses had been such as to require the proceeds of the mortuary calls to meet the claim, and, in addition, had used up the reserve fund. It was in this condition when the insured, David M. Twiss, died, and the

claim of the plaintiff accrued. It is urged with apparent confidence that, as there were some 567 members of the Guaranty Company when it failed, the appellant should be required to pay its death losses upon the ground that by the contract it acquired some 400 new members. We have already said that the appellant was not authorized to buy members in this way, and on any such terms. Let us see whether there is any ground for the alleged estoppel. If there is any reason for such a claim, it must be because the appellant, by seeking a transfer of the membership, put it out of the power of the plaintiff to compel payment by the Guaranty Company. The wrong and injury to the plaintiff, if any, consists in taking away the membership so that the members did not pay their quarterly dues to the Guaranty Company, by the payment of which the plaintiff would have received the amount due on the policy. It appears to us that this is a most unwarranted assumption. It is based upon the theory that, if the contract had not been made, the 567 members would have continued to pay quarterly installments to the Guaranty Company until all of the death claims were satisfied and all other claims paid. That this would have occurred is not only not probable, but highly improbable. Members of such organizations are not more likely to pay money for nothing than other people. The fact is, the record shows beyond all question that, if the contract had not been made between the two companies, the plaintiff's claim was absolutely worthless. That the position of the plaintiff was in any manner changed, to her prejudice, by the contract, not only does not appear, but the face of the transaction shows that it was not. That is about all there is of this case. It was tried by a jury, and the defendant moved that a verdict be directed for the defendant. The motion was overruled. We think it should have been sustained, on the ground that the conceded facts in the case showed that the plaintiff was not entitled to recover. Reversed.

SCRIBNER v. YORK et al.

(Supreme Court of Iowa. May 12, 1893.)

MORTGAGES—FORECLOSURE—RES JUDICATA.

A decree of foreclosure in a suit by a junior mortgagee, to which the senior mortgagee was made a party, is no defense to an action by the senior mortgagee to foreclose, where it was amended so as to provide that it should not prejudice the senior mortgagee's rights, and, as amended, was affirmed on appeal.

Appeal from district court, Polk county; Charles A. Bishop, Judge.

This is an action in equity to foreclose a mortgage on real estate given by the defendant York to the plaintiff. The defendant Bentley Worth and others were made defendants, as having some interest. The defendant Worth alone appeared and answered.

Decree was entered in favor the plaintiff, from which the defendant Worth appeals.

H. E. Long, for appellant. St. John & Stevenson, for appellee.

GIVEN, J. Appellant, Bentley Worth, sets up as his defense the decrees as originally entered in the three cases of Bentley Worth v. Ira P. Wetmore et al. The record shows that subsequently these decrees were amended by the district court by providing that they should not prejudice the rights of this plaintiff under her prior mortgage. The action of the district court was affirmed on the appeal of said cases to this court. See 54 N. W. Rep. 56. As thus amended and affirmed, the appellant's defense must fail, and the decree of the district court is therefore affirmed.

In re DEWELL'S ESTATE.

(Supreme Court of Iowa. May 12, 1893.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW.

Under Code, § 2375, providing that the court shall, if necessary, set off to the widow, and children under 15 years of age, of a decedent, sufficient to support them for a year, the amount of the allowance is within the court's discretion; and where a widow, with two children under the specified age, has no means of support except from the estate, an allowance of \$500, in addition to \$400 worth of exempt property, \$80 in money, and clothing, is not unreasonable, where the estate is of the value of \$40,000.

Appeal from district court, Cedar county; James D. Giffin, Judge.

Proceeding upon the application of Amanda Dewell, widow, for an allowance and for certain orders, and the objections of the administrators and heirs thereto. An order was made, allowing the widow \$500, from which the administrators and heirs appeal.

J. P. Ferguson and J. S. Dewell, for appellants. Wolf & Hanley and Geo. McLeod, for appellee.

GIVEN, J. Section 2375 of the Code is as follows: "The court shall, if necessary, set off to the widow, and children under fifteen years of age, of the decedent, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them for twelve months from the time of his death." The necessity for an allowance is to be determined largely from the facts of each particular case. The application is addressed to the discretion of the probate court, and this court will not interfere where such discretion is fairly exercised. *Caldwell v. Caldwell's Estate*, 54 Iowa, 456, 6 N. W. Rep. 714; *In re Peet's Estate*, 79 Iowa, 185, 44 N. W. Rep. 364. The facts in this case are that appellee was left with two children under fifteen years of age, without other means

of support than she is entitled to from the estate. Two horses, two cows, one swarm of bees, and the household furniture were set off to her as exempt, valued at about \$400. The other exempt property is retained by the administrator to carry on the farm, he having been authorized to continue the business. Appellee received from the sale of the cream about \$50, and from the sale of hogs about \$30, and the administrator paid for some clothing for herself and the children. The personal estate of the deceased is valued at about \$15,000, and the real estate at \$25,000. It is certainly no abuse of discretion, under the circumstances, to allow appellee \$500 for the support of herself and infant children. An allowance was manifestly necessary, and the amount is reasonable. Numerous other questions are discussed by appellant, some of which do not arise upon the record, and others that are not of sufficient merit to require notice in an opinion. The order of the district court is affirmed.

DURHAM v. HUSSMANN.

(Supreme Court of Iowa. May 12, 1893.)

PUBLIC LANDS—ENTRY UNDER BOUNTY WARRANT—CANCELLATION—POWER OF LAND OFFICE—TAX TITLE—PATENTS—RELATION BACK.

1. Act Cong. June 23, 1860, authorizes the interior department to cancel bounty warrants which have been lost or destroyed; and where the petition in an action alleges, and the answer does not deny, that a certain warrant was canceled after its location, and the answer alleges that it had been lost, it will be presumed that it was regularly canceled, even conceding that the department would have no power to cancel a warrant unless lost or destroyed; and it is immaterial that the answer also alleges that before the warrant was lost it had been assigned in blank, and that it was found by some one, and purchased in good faith by the person who located it, where such allegations are not proven.

2. In the absence of any showing to the contrary, it will be presumed that due notice was given to all persons interested before the warrant was canceled.

3. Where, before a patent is issued, the commissioner of the general land office is advised that the assignment of a bounty warrant which has been located by the assignee is a forgery, he has power to suspend further proceedings under the entry, and, upon a proper showing, to vacate it.

4. Where neither the person who located the warrant, nor any one claiming under it, complains of the action of the land office in going further, and canceling the warrant, complaint cannot be made by one claiming under a sale of the land for taxes after such cancellation, which it is contended were illegal because the title was in the United States.

5. Where, before a patent was issued, a bounty warrant located by an assignee thereof was canceled by the land office, and the entry vacated, on the ground that the assignment was forged, no title, legal or equitable, passed out of the United States, and a levy of taxes on the land, and sale thereunder, were void and of no effect.

6. In such case the fact that it was the practice of the land department to afford a per-

son, where he had located a warrant in good faith, and the location had been set aside for some defect in the warrant, an opportunity to purchase the land, or to locate another warrant, cannot help the holder of the tax title, where the person who had made the location did not exercise the privilege.

7. Where, after the tax sale and execution of a tax deed, a grantee of the person who had located the warrant paid money as a substitute for the warrant, as provided by a rule of the land department, and received a patent, the patent did not relate back to the original location of the warrant, so as to support the tax title, as the doctrine of relation could only apply for the protection of those in privity with the original locator, and the holder of the tax title did not stand in privity.

8. Nor could the holder of the tax title acquire any title by adverse possession after receiving his tax deed, as the statute of limitations does not run against the United States, and the land, when sold for taxes, belonged to the United States.

Appeal from district court, Carroll county; J. P. Conner, Judge.

Action in equity to have canceled a tax deed purporting to convey land which the plaintiff claims to own. From a decree in favor of plaintiff, the defendant appeals.

Theodore G. Paine and Cole, McVey & Cheshire, for appellant. Barcroft & McCuaughan and C. A. Berry, for appellee.

ROBINSON, C. J. On the 19th day of May, 1858, Robert Craig located a bounty land warrant, issued to one William Long, upon the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, of section 27, in township 83 north, of range 35 west, in Carroll county. A certificate of location was issued and recorded in the office of the recorder of that county. No patent was issued upon the warrant, and on the 1st day of February, 1864, the warrant was canceled and declared void as against the United States by the department of the interior, on account of the forgery of the assignment purporting to be that of William Long, but the location made by Craig was not canceled or set aside. On the 20th day of July, 1875, the department of the interior published rule No. 41 in regard to locations and assignments of bounty land warrants which has since been in force, and which provides as follows: "When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issuance of a patent by filing, in the office for the district in which the land is situated, an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or any kind of scrip legally applicable to the class of lands embraced in the entry." On the 19th day of March, 1886, the plaintiff, by a regular chain of conveyances from Craig, became the grantee of the interest Craig had acquired in the land in controversy. The land had been assessed and taxed for the years 1860, 1861,

1862, and 1864, and on the 5th day of October, 1868, was sold for the taxes of those years, which had not been paid. In December, 1871, a treasurer's deed for the land was issued and recorded. In February, 1874, defendant acquired the tax title to 80 acres of the land, and in September, 1881, he acquired that title to the remainder. By virtue of the title thus acquired he claims the right to substitute for the canceled warrant, and to enter the land and receive a patent therefor, and has attempted to make the substitution. The plaintiff claims the same right, and in June, 1888, furnished \$150, which were paid to the land office in Des Moines, under the direction of the secretary of the interior, in the name of F. M. Hunter, trustee, as a substitute for the warrant. The terms imposed by the secretary provided for the issuing of a patent in the name of Craig, to be held by the trustee until the rights of the adverse claimants should be judicially determined by a court of competent jurisdiction. A patent was issued in the name of Craig in October, 1889. The plaintiff contends that the land was not taxable for the years 1860, 1861, 1862, and 1864, and that the tax deed was void. The defendant insists that the location of the warrant by Craig created a taxable interest in the land, and that the tax deed is valid. He also claims that he and his grantors had been in the actual and adverse possession of the land more than ten years when this action was commenced; that such possession was continuous, open, and notorious; and that, having been under a claim of right based upon the tax deed, it is sufficient to defeat the claim of plaintiff. The district court adjudged the tax title to be void, and that plaintiff had the right to substitute money for the warrant, and quieted his title as against the defendant.

1. The second paragraph of the petition alleges that on the 1st day of February, 1864, the warrant which was located by Craig upon the land in question was canceled and declared void by the department of the interior, and that allegation is admitted to be true. The order canceling the warrant was indorsed upon it in words as follows: "This warrant has this day been canceled and declared void as against the United States, on account of forgery in the assignment thereof." The appellant contends that the department of the interior possessed no power to cancel a land warrant in any event, for the reason that the question whether the assignment was forged was judicial; but that, if it had such power, it could not be exercised without notice to the parties in interest; and it is claimed such notice is not shown in this case. The power to cancel bounty land warrants which have been lost or destroyed was conferred upon the secretary of the interior by an act of congress entitled "An act to authorize the reissue of land warrants in certain cases, and for other pur-

poses," approved June 23, 1880. The act authorized the secretary to issue new warrants in lieu of those canceled, and provides that, when new warrants shall be issued, the original warrants shall be deemed and held to be null and void. The answer in this case alleged that the warrant was lost by Long, and the case is therefore brought within the purview of the act of congress cited. It is true that the answer alleges that before the warrant was lost it had been assigned in blank, and duly witnessed and acknowledged, according to the rules of the department of the interior; that while in that condition it was found by some person to defendant unknown, from whom Craig purchased it in good faith, without notice of the loss, and inserted his name in the blank. Whether these averments, if true, show that Craig acquired a good title to his warrant, we need not determine, for the reason that they are not confessed, and are not sustained by any proof. The facts admitted show that the warrant was lost to the rightful owner, and that an officer of the government, clothed with powers to act, ordered that it be canceled. The record before us shows nothing as to the proceedings had in connection with the cancellation of the warrant, and, in the absence of averment and proof to the contrary, we must presume that they were regular. The action of which appellant complains may have been taken after due notice to all parties interested in the warrant canceled, and a new warrant in lieu of it may have been issued to the rightful owner of the original, and accepted by him in satisfaction of his claim. In this condition of the record we cannot say that the cancellation of the warrant was without authority, but, on the contrary, we must presume that it was valid.

It is not necessary, however, to rest our conclusion in this case upon the act of congress specified. It was said in *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. Rep. 122, that "the power of supervision possessed by the commissioner of the general land office over the register and receiver of the local land offices in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department." The officers of the land department are not only required to determine whether lands are subject to entry, and whether the applicants are qualified to make entries, but, in the case of land warrants, it

is within their province to ascertain whether the person seeking to locate it is the person to whom it was issued, or one lawfully claiming through him, and, in case of an assignment, whether it is genuine. Therefore, when the commissioner of the general land office was advised that the assignment of the warrant in question was forged, he was authorized to suspend further proceedings under the entry, and, upon a proper showing, to vacate it, so far as it depended upon the warrant. That he did more than to suspend proceedings under the entry, and canceled the warrant, is a matter of which no one interested in the warrant is complaining. Long is not a party to this cause, and the assignee of Craig is satisfied with the action of the land department, which terminated in the issuing of a patent to Hunter, as trustee. That action must therefore be regarded as valid and final for the purposes of this case. What we have said in regard to the powers of the secretary of the interior and commissioner of the general land office is not intended to apply to a case where a patent has been issued before an attempt to cancel or suspend the entry is made. *Moore v. Robbins*, 96 U. S. 530.

2. Although the warrant located by Craig was canceled, the location or entry was not set aside, and it is insisted that it gave to him such an interest in the land that it became subject to taxation by the state. But the warrant located did not belong to him, and the government acquired nothing by its surrender, but was liable to the rightful owner for that warrant, or a new one in lieu of it. Craig paid nothing for the entry, and it conferred upon him neither the legal nor the equitable title to the land. It is true that it was the practice of the land department, at the time the warrant was located, to afford a person who had located such a warrant, when such location was set aside because of some defect in the warrant, an opportunity to secure the land by purchase, or by the location of another warrant, where the location set aside was made in good faith. *Lester*, Land Laws, 615; and rule 41 of 1875, made definite the practice in such cases. But the right thus given was in the nature of a privilege, which might be exercised at the option of the person for whose benefit it was given, but, until exercised, the title to the land, both legal and equitable, remained in the general government. Lands in the general government in this state are not taxable, nor can they be taxed for the year in which they are entered, located, or sold. *Reynolds v. County of Plymouth*, 55 Iowa, 82, 7 N. W. Rep. 468; Code, § 797, subd. 7. It is true that lands derived from the general government may be taxable before patents therefor have been issued. *Cedar Rapids & M. R. Co. v. Carroll County*, 41 Iowa, 159; *Land Co. v. Fitchpatrick*, 52 Iowa, 244, 3 N. W.

Rep. 40. But such lands are taxable only when the equitable title has passed from the general government, and the person who has acquired it has done all which can be required of him, and has a completed right to the patent. *Railroad Co. v. McShane*, 22 Wall. 444; *Railway Co. v. Prescott*, 16 Wall. 603. Neither the legal nor the equitable title to the land in controversy passed from the general government until the 24th day of June, 1888, when plaintiff paid to the receiver, at Des Moines, the money required as a substitute for the patent. It follows that the land was not taxable before the year 1889, and that no title was conveyed by the tax deed. It is said that the patent, when issued, related back to the original location, and *Wheeler v. Merriman*, 30 Minn. 372, 15 N. W. Rep. 665, is relied upon as supporting that claim. It was said in that case that "it is well settled that land purchased of the United States and paid for, though not patented, is subject to taxation." That may be conceded, subject to such limitations as are imposed by the state in which the land is situated, but when, in law, is payment in such a case as this made? Certainly not when a warrant which cannot be received legally is tendered in payment. For some purposes a patent, when issued, operates to vest the title in the patentee, by relation back to the date of the certificate of location or entry, as, to make of no effect an intervening duplicate certificate of entry. *Heirs of Klein v. Argenbright*, 26 Iowa, 494. In *Gibson v. Chouteau*, 13 Wall. 92, it was said "that the doctrine of relation is a fiction of law, adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title." But there is no privity between the defendant and Craig. A tax title is not derivative, but is new and independent of former titles; and to hold that by reason of the payment of June, 1888, the equitable title to the land passed from the United States 30 years before that time would be not only unauthorized, but contrary to the doctrine of relation as stated. Our conclusion is sustained by the case of *Reynolds v. County of Plymouth*, 55 Iowa, 93, 7 N. W. Rep. 468, and *Calder v. Keegan*, 30 Wis. 126. The statute of limitations does not run against the United States. Since Craig acquired no taxable interest in the land by his location, the tax deed conveyed no title, and defendant has acquired no right by the possession of the land held by himself and his grantors. The general land office treated the entry of Craig as sufficient to enable him and his assignee to perfect his entry, and thus acquire title to the land. The plaintiff has acquired all

rights which the original entry conferred upon Craig, and, by his payment of money in lieu of the warrant and the issuing of the patent, has become entitled to the land. The decree of the district court is affirmed.

LE MOYNE v. BRADEN et al.

(Supreme Court of Iowa. May 11, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — PREFERENCES — ESTOPPEL — ADMISSION OF EVIDENCE.

1. The fact that, on the day of an assignment for the benefit of creditors, judgments were confessed against the assignor on instruments executed by him from two months to four years before, and that on that day entry was made on the books of a corporation of assignments of stock previously made to creditors, does not constitute the entering of judgment and transferring of stock part of the general assignment, and therefore render it void, as an attempt to make a general assignment, with preferences, in violation of Code, § 2115.

2. The fact that an assignee has commenced an action to set aside a transfer of stock by the assignor, as in fraud of his creditors, does not estop the assignee, in an action against him by another, from claiming that the assignment is valid.

3. It is not an abuse of discretion to refuse permission to allow a party, after close of a trial, to amend his pleading, and offer additional, newly-discovered evidence, where the witness whose testimony was to be introduced testified in the cause, and the testimony proposed was such as the pleadings and evidence should have suggested inquiry for, and no diligence to procure it is shown.

Appeal from district court, Monona county; George W. Wakefield, Judge.

Action in equity to recover the amount due on account of a promissory note, indorsed by defendant D. W. Braden, and to subject to its payment certain lands claimed by defendant Isaac K. Wood as assignee of Braden. There was a hearing on the merits, and a decree in favor of the assignee. The plaintiff appeals.

McMillan & Kindall, for appellant. R. H. Hanna, for appellees.

ROBINSON, C. J. The parties to this action are nonresidents of the state of Iowa, and at the time the note in suit was given, and for some time thereafter, they were residents of the state of Pennsylvania. The note was given on the 19th day of October, 1889, to Braden, for the sum of \$3,000. It was payable four months after its date, and was transferred by Braden to plaintiff by an indorsement in blank. On the 27th day of November, 1889, Braden made a general assignment for the benefit of his creditors to the defendant Wood. At that time Braden was the owner of 80 acres of land in Monona county, and of 200 acres of land in Union county, in this state, which his assignee claims under the deed of assignment. The plaintiff transferred the note by indorsement. It was duly protested for nonpayment at maturity, and he was compelled to pay it. This action was brought to recover the

amount so paid, with interest, and was aided by attachment; writs having been issued and levied upon the lands described. Plaintiff asks that the deed of assignment be set aside, and that the lands be subjected to the payment of his claim. The defendant Braden, although duly served with notice of the action, failed to appear. The defendant Wood, as assignee, appeared and filed an answer, which included a counterclaim. In that he sets out his title to the land, and asks that it be confirmed and quieted, as against the claim of plaintiff. After the action was brought, the land in controversy was sold, in accordance with the stipulation of parties, and the proceeds thereof were deposited in bank, subject to the decree to be rendered in the case. The district court, on final hearing, dismissed the petition of plaintiff, gave to defendant Wood, as assignee, the relief demanded, and ordered the bank to pay to the assignee the money deposited with it.

1. The appellant contends that the assignment to Wood was void because made with preferences. It appears that Braden was the owner of several tracts of land, of a house and lot, and of an interest in several other houses and lots, in Greene county, Pa., where he then resided; that, on the day he made the assignment, several judgments, valid under the statutes of Pennsylvania, were entered in the court of common pleas in and for Greene county, some of which may have created liens upon the real estate of Braden in that county, paramount to the deed of assignment; that the judgments so entered were upon instruments in writing made by Braden, in which he empowered any attorney of any court of record to appear for him, and confess judgment against him for certain specified sums, and that the assignee, Wood, was his brother-in-law. It is claimed, also, that on the day of the assignment, and before it was made, Braden transferred to his mother-in-law, to his daughter, and to one Dr. Brock, shares of the capital stock of a bank, and of certain cattle and horse companies, and that these various acts, including the assignment to Wood, should be regarded as parts of a single transaction; hence that certain creditors were preferred, and that the assignment was for that reason fraudulent and void. It is further claimed that the deed of assignment did not describe, and was insufficient to convey, the lands in controversy; that the certificate of acknowledgment was defective; that the deed was not recorded in the proper record of Monona county; and that the record thereof did not impart constructive notice of the deed.

If it be true that the giving of the authority to enter the judgments, and the transfer of the certificates of stock, and the execution of the deed of assignment, should be regarded as parts of a single transaction, it would be contrary to the provision of

section 2115 of the Code, and void, under the laws of this state, as being an attempt to make a general assignment with preferences. *Clement v. Johnson*, (Iowa,) 52 N. W. Rep. 502, and cases therein cited. The instruments by virtue of which the judgments against Braden were entered were given on various dates, commencing on the 24th day of November, 1885, and ending on the 21st day of September, 1889. That they were given in good faith, for valid considerations, is not questioned. Braden had no power, unless by their payment, to prevent the entering of the judgments upon them. No evidence was offered which authorizes the conclusion that the judgments were entered at the request or instance of Braden, and it is our opinion that they must be treated as transactions independent of the general assignment. Braden transferred to Dr. Brock shares of the capital stock of the Farmers' & Drovers' National Bank of Waynesburg, of the value of \$7,250, to secure the payment of about \$7,750. Braden was then owing to Brock a part of that amount, and, for the remainder, Brock was security for Braden. The stock was transferred on the books of the bank on the day the assignment was made, but in fact was assigned to Brock about two weeks before that time. Braden owned \$31,800 of the capital stock of the Dowlin & Rush Cattle Company; and the books of that company show that \$5,000 of that amount was transferred to his daughter, Mrs. Foster, on the 14th day of December, 1889, and that \$10,000, on the same date, was transferred to his mother-in-law, Mrs. Howden. It appears, however, that the original assignments were made on the certificate of stock on the 27th day of November, 1889, and undisputed evidence shows that they were so made before the deed of assignment was executed. It appears that Braden also transferred to his daughter 30 shares of the capital stock of the Rock Creek Horse Company, on a date not shown, although it was before the deed of assignment was made. In March, 1890, the defendant Wood, as assignee, commenced an action in equity in the court of common pleas of Greene county, Pa., to set aside the transfer of stock to Mrs. Howden, on the alleged ground that it was fraudulent as to his creditors, but the action has not been determined. The fact that such an action has been commenced proves nothing as to the character of the transfer, nor is the assignee estopped thereby to claim in this action that the assignment is valid. The allegations in his pleading in the Pennsylvania court do not purport to be based upon his personal knowledge, and are entitled to little, if any, weight, as evidence in this case. The transferring of the stock on the day the general assignment was made is a circumstance calculated to arrest atten-

tion, but does not, alone, establish fraud. If it was an independent transaction, in no way connected with the assignment, it was authorized by law, and does not affect the assignment. *Farwell v. Cunningham*, (Iowa,) 52 N. W. Rep. 1128. That Braden was indebted to his mother-in-law and daughter in large amounts—larger than the value of the stock transferred to them—is shown, and not seriously questioned. We are satisfied, from a careful examination of all the evidence submitted, that plaintiff has failed to show that the entering of judgment and the transferring of stock were any part of the general assignment.

The certificate of acknowledgment attached to the deed of assignment when it was executed did not comply with the requirements of the statute of this state, and plaintiff was not charged, by the recording of the deed in this state, with constructive notice of its contents; but he was informed on the day that it was executed that Braden had made a general assignment of all his property for the benefit of his creditors, and therefore had actual knowledge of the fact. The deed was on a later date properly acknowledged, and is valid. It is said, however, that it was defective in that it did not describe the land in controversy. The deed purported to assign and transfer to the assignee "all of his [Daniel W. Braden's] property, of every kind and nature, whether real, personal, or mixed, and wherever situated; the principal part thereof being situated in Greene county, Pennsylvania, * * * Union, Adair, and Monona counties, Iowa. * * *" No inventory of the property conveyed, nor list of creditors, was annexed to the assignment, as required by section 2117 of the Code; but that section and section 2124 together provide that the inventory shall not be conclusive as to the amount of the estate conveyed, that the assignment shall vest in the assignee the title to any property of the debtor not specified in the inventory, and that the failure to file an inventory and list shall not render the assignment fraudulent or void. A statute of Pennsylvania requires the filing of an inventory or schedule of the property assigned within 30 days after the execution of the assignment. It is shown that such an inventory was filed, that it included the land in controversy, and that the assignment is valid under the laws of Pennsylvania. We are of the opinion that no sufficient reason for holding it to be invalid under the laws of this state has been shown.

2. The cause was tried to the district court and submitted in June, 1891. Some time thereafter the trial judge notified the attorneys of the parties to the action that the decision would be in favor of the defendant Wood, but that a decree would not be entered until the September term, in order to give the plaintiff an opportunity

to appeal, and preserve his attachment liens. On the 3d day of October, 1891, the plaintiff filed a motion asking leave to amend his answer to the counterclaim of Wood by pleading, in effect, that one or more of the judgments entered against Braden on the 27th day of November, 1889, were entered pursuant to an agreement with Braden that they should be so entered before the deed of assignment should be delivered, in order to create preferences in favor of the judgment creditors, and that one or more of such judgments were entered, pursuant to such agreement, before the deed of assignment was executed, thereby creating preferences. The motion also asked for leave to introduce newly-discovered evidence, which, it was alleged, would sustain the averments of the proposed amendment. It was overruled, and of that ruling plaintiff complains. The witness whose testimony the plaintiff asked leave to introduce had testified in the cause, and, so far as is shown, had answered fully all questions asked him. The additional testimony proposed was of such a nature that the pleadings and evidence on which the cause was tried and submitted should have suggested inquiry for it, but no diligence to procure it is shown. We are of the opinion that the court did not abuse its discretion in refusing to permit the plaintiff to amend his pleading, and offer additional evidence.

The decree of the district court is affirmed.

STATE v. SMITH.

(Supreme Court of Iowa. May 11, 1893.)

RECEIVING STOLEN GOODS—INDICTMENT—INTENT.

1. An indictment for receiving stolen goods alleged that defendant, at a specified time and place, "22 pairs of striped pants, not all of same color, but all striped, each pair of the value of \$5, and all of the value of \$110, of the goods and chattels and property of [naming the owner,] then and there being lately feloniously stolen, did receive, buy, and conceal, with the intent to defraud the said [owner] thereof, and he, the said [defendant,] then and there well knowing said goods and chattels and property to have been feloniously stolen as aforesaid, contrary," etc. *Held*, that the indictment is neither ambiguous nor uncertain.

2. Under an indictment for receiving goods, knowing them to have been stolen, it is not necessary to show a guilty intent, further than the fact that defendant knew the goods were stolen.

Appeal from district court, Boone county; J. L. Stevens, Judge.

The defendant was indicted and convicted of the crime of receiving stolen goods, knowing them to have been stolen. He appeals.

E. L. Green, for appellant. John Y. Stone, Atty. Gen., and Thos. A. Oheahire, for the State.

KINNE, J. 1. The indictment charges "that C. W. Smith, on or about the fifth day

of April, 1889, in the county of Boone, state of Iowa, twenty-two pairs of striped pants, not all of same color, but all striped, each pair of the value of five dollars, and all of the value of one hundred and ten dollars, of the goods and chattels and property of Mish & Company, a partnership, the members of which are J. J. Mish and S. L. Mish, then and there being lately feloniously stolen, did receive, buy, and conceal, with the intent to defraud the said Mish & Company, owner thereof, and he, the said O. W. Smith, then and there well knowing said goods and chattels and property to have been feloniously stolen, as aforesaid, contrary to the statute," etc. It is said that this indictment is insufficient; that it is ambiguous and uncertain. The indictment clearly charges the offense under our statute. It cannot be said that a person of common understanding would not know therefrom what was intended to be charged. *State v. Thompson*, 19 Iowa, 299; *State v. Johnson*, 26 Iowa, 407; *State v. Hockenberry*, 30 Iowa, 504; *State v. Close*, 35 Iowa, 570. Besides, the indictment is drawn in the form given in Wharton's *Precedents of Indictments and Pleas*. See, also, Wharton, *Crim. Law*, §§ 597-1003.

2. It is also urged that the court erred in giving the first paragraph of the charge. Counsel concede, if the indictment is good in form, then this objection is not well taken. Holding, as we do, that the indictment is sufficient, we need give this alleged error no further consideration.

3. Claim is made that the court erred in giving to the jury the second and fourth paragraphs of its charge. The alleged error is based on the fact that in instructing the jury as to what constituted the material allegations of the indictment, which must be established beyond a reasonable doubt, the question of the defendant's intent was ignored. Our statute says nothing about the intent. Under it the material facts which must be established are that the goods must have been the property of the person mentioned in the indictment; that they had been recently stolen, taken, and carried away, by some person or persons, from the said owners; that defendant bought, received, or concealed them, knowing them to have been stolen; and that said acts were done in the county and state, within three years immediately prior to the finding of the indictment in the case. The instruction contained all these facts. They are all that are essential, under the statute, to constitute the crime charged. Many authorities are cited from other states, holding that intent is a necessary ingredient of this crime. Whatever the law may be in that respect elsewhere, intent is not, by our statute, a necessary fact to be averred or proven in such a case. Even if intent was necessary to be shown to establish defendant's guilt, it is difficult to conceive how he could have received,

purchased, and aided in concealing stolen goods, knowing them to have been stolen, without having a guilty intent. *State v. Turner*, 19 Iowa, 144; *State v. Lane*, 63 Iowa, 384, 27 N. W. Rep. 266. The jury were plainly instructed as to the necessity of finding, beyond a reasonable doubt, every fact which, under the statute, is necessary to constitute the crime charged. More than this is not required.

4. The fifth and sixth instructions are claimed to have been erroneous. We need not set them out. They both go to the question of the defendant's knowledge that the goods were stolen. We have carefully read these instructions, and have no doubt that they properly state the law.

5. Finally, it is said that the evidence was not sufficient to warrant a conviction. A careful reading of it satisfies us that the jury were fully justified in finding the defendant guilty. It is impossible to see, if the testimony on behalf of the state is to be believed, how any other result could have been reached. We discover no other error in the case, and the judgment below is affirmed.

STATE v. STICE.

(Supreme Court of Iowa. May 12, 1893.)

LEWDNESS—INDECENT EXPOSURE—INTENT—EVIDENCE OF OTHER SIMILAR ACTS.

1. On trial of an indictment for lewdness, committed by the willful exposure of defendant's person on a particular day, in a public place, in the presence of the prosecuting witness, it is not error to admit evidence of similar acts by defendant at the same place, on the same day, and on the preceding day, and in the presence of other persons than the prosecuting witness, where, by instructions, the consideration of such evidence is limited to the determination of whether or not the act charged was willfully done.

2. On such trial it is proper, as bearing on the question of intent, to admit evidence that, in connection with one of such other acts, defendant made an indecent proposal to a lady.

Appeal from district court, Appanouse county; W. I. Babb, Judge.

The defendant was indicted for lewdness. He pleaded not guilty, was convicted, and sentenced to the county jail, and appeals.

J. A. Elliott and Geo. D. Porter, for appellant. John Y. Stone, Atty. Gen., Thos. A. Cheshire, and C. F. Howell, for the State.

KINNE, J. 1. The defendant was indicted for the crime of lewdness, committed on March 20, 1892, by willfully exposing his person (private parts) in a public place, in plain view of a public thoroughfare where people were passing. The case is submitted to us upon a complete transcript, but without argument on behalf of either party. The crime for which defendant was indicted and convicted is alleged to have been committed on Sunday, March 20, 1892, in the presence of a young lady, whose name need not be

mentioned. On the trial the court admitted evidence of acts of a similar character committed by the defendant at the same place, on the same day, and also on the preceding day, which were committed in the presence of parties other than the prosecuting witness. It is insisted that this evidence was incompetent. The general rule is that evidence of distinct and separate offenses is not admissible to establish the defendant's guilt of the particular offense charged. There are certain well-recognized exceptions to this rule, as in cases where knowledge and intent are necessary elements of the offense charged. 1 Greenl. Ev. (15th Ed.) § 53, note; Rosc. Crim. Ev. pp. 90-94; Whart. Crim. Ev. § 44; 2 Rice, Ev. pp. 521, 522; Com. v. Sawtelle, 141 Mass. 140, 5 N. E. Rep. 312; Thomas v. State, 103 Ind. 419, 2 N. E. Rep. 816. In the class of cases mentioned it is held that, as such evidence is admissible to show guilty intent in doing the act charged. It is no ground of objection thereto that it may also show that the defendant is guilty of another crime. This exception to the general rule has often been recognized by this court. State v. Walters, 45 Iowa, 389; State v. Jamison, 74 Iowa, 617, 38 N. W. Rep. 509; State v. Saunders, 68 Iowa, 370, 27 N. W. Rep. 455; State v. Kline, 54 Iowa, 183, 6 N. W. Rep. 184. The evidence of other acts, introduced by the state, showed that, both before and after the commission of the offense with which the defendant was charged, he had made like exposures of his person to young ladies. Surely such facts are competent to establish the claim that the offense for which he was on trial was designedly committed. Under the statute it is incumbent upon the state to show that the act was designedly done,—that is, intentionally,—and we know of no better way to establish that fact than was pursued in this case. The jury were instructed to consider the evidence of these acts for the sole purpose of determining whether the public exposure made by the defendant of his person, for which he was charged, was done willfully and designedly. In connection with one of these other acts, it appears that defendant also made an indecent proposal to the young lady. This was likewise admissible, as tending to show the intent with which he committed the act for which he was on trial.

2. Error is assigned in the giving and refusing of instructions. We have examined the instructions given, and those refused, and discover no error. The court's charge was full, and clearly set forth the law applicable to the case.

3. It is said that the verdict is contrary to the evidence. As is our duty in such cases, we have read the evidence with care, and have fully examined the entire record, and discover no error. The record impresses us with the conviction that the defendant had a fair trial, that the doubts were re-

solved in his favor by the court below, and the verdict was justified by the evidence. The judgment below must be affirmed.

HOYT v. McLAGAN.

(Supreme Court of Iowa. May 11, 1893.)

APPEAL—TRIAL DE NOVO—DISMISSAL OF ACTION—COUNTERCLAIM—ESCROW.

1. Errors in the abstract of the record filed on appeal will not prevent the trial de novo of a case tried below in equity without objection, where, on the abstract being questioned, a complete transcript is filed.

2. Dismissal of an action by plaintiff does not affect his right to insist on the prayer of his reply for reformation of a contract, pursuant to which he executed a deed to defendant, for breach of covenant, in which defendant sets up a counterclaim in his answer.

3. Where persons executing deeds to each other leave them in the hands of a third person until they get proper abstracts of title, reserving to themselves the determination of whether the abstracts are proper, they will be held to have been left in escrow, and not delivered, though each party took immediate possession under the deed to him.

4. Where there is no exception to the covenant of warranty of a deed left in escrow, though a building on the land belonged to a third person, the deed will not, when delivered, relate back to the time of its execution, when it appears that prior to the delivery the grantee paid for the building, and the evidence shows that he did this because he had agreed to take the lot subject to the right of the third person to remove it.

Appeal from district court, Carroll county. J. P. Conner, Judge.

Plaintiff brought this action to recover damages for an alleged breach of the covenants of warranty in a deed. Defendant answered, admitting the execution of the deed, denying every other allegation, and setting up a counterclaim for damages for an alleged breach of the covenants of warranty in a deed, executed by the plaintiff to him, for lot 1, and the east 10 feet of lot 2, block 21, in the town of Carroll, Iowa. The breach claimed is that a certain building situated on said lots belonged to one Sprague. Plaintiff replied, admitting the execution of the deed, and alleging that it was made in pursuance of a written contract, and that by mistake and oversight there was left out of the contract the reservation of the right of Sprague to remove the building; that, prior to the delivery of said deed, defendant released plaintiff from liability by reason of said building, by agreement in parol, whereby plaintiff was induced to deliver said deed. Plaintiff asked that the written contract be reformed, and that the reservation made with reference to said building be inserted therein, and that the contract so reformed, be decreed to be a part of said deed. The case was tried as in equity, and, after the evidence was introduced, the plaintiff dismissed her cause of action without prejudice, and judgment was entered in favor of the defendant on his counterclaim for

\$180, with interest at 6 per cent. from February 1, 1890, from which plaintiff appeals.

Beach & Hoyt and C. C. & C. L. Nourse, for appellant. S. M. Elwood, F. M. Powers, and Cole, McVey & Cheshire, for appellee.

GIVEN, J. 1. Appellee contends that "this case cannot be tried de novo here because there is no authenticated abstract of the record." Appellee filed an abstract, in which he says "there are a few material errors in appellant's abstract, (evidently the fault of the printer,)" and then points out five particulars wherein he claims appellant's abstract is erroneous. Appellant filed an additional abstract, admitting that appellee's abstract is correct as to the three errors last named therein, and denying that it is correct as to the first two, and therewith filed a complete transcript. The transcript shows appellee's abstract to be correct, and as, by the transcript, we have the complete record before us, we may try the case de novo, it having been tried as in equity below, without objection.

2. Appellee insists that, as the plaintiff dismissed her action, she is not entitled to be heard upon her claim for a reformation of the contract. Her action was upon the covenants in the deed from the defendant to her, and no reformation is asked as to those covenants. The reformation asked is of the contract as it relates to the deed from plaintiff to defendant, upon which the defendant bases his cause of action. The reformation asked is in reply to the defendant's action, and the case stands as though the action had been originally brought by the defendant, and the plaintiff had answered, setting up the matters stated in his reply. The prayer for a reformation of the contract pertains to the defendant's cause of action, and was not withdrawn by the dismissal of plaintiff's action.

3. The questions before us arise solely upon the defendant's cause of action, stated by way of counterclaim, and the plaintiff's answer thereto, by way of reply. The following facts appear without dispute: On October 30, 1880, these parties entered into a contract in writing, whereby the plaintiff was to convey to the defendant the lots in Carroll, and the defendant was to convey certain lands in Sac county to the plaintiff; each to convey to the other "by good and sufficient warranty deed, free and clear of all incumbrances whatsoever." The deed from the plaintiff to the defendant was to be "subject to lease made to one Nolen, on the northeast corner of said lots." On the same day each executed a deed, with covenants of general warranty, to the other, which deeds, when executed, were left with Mr. Beach "until we got proper abstracts of title." Immediately after the deeds were executed, each party went into the possession of the property for which he had traded,

and made improvements thereon, the defendant making extensive and valuable improvements upon the lots in Carroll. One S. S. Sprague owned a building standing on the lots conveyed to the defendant, which building he had a right to remove. No reservation was made in the contract as to this building, nor was any reservation made in the deed to defendant as to it or to Mr. Nolen's lease. Soon after the execution of the deeds, contention arose between the parties as to Sprague's building, the plaintiff claiming that it was understood and agreed by the defendant that Mr. Sprague had a right to remove his building, and that this right was reserved in their agreement, but omitted from the written contract by mistake and oversight. The defendant denied any such agreement or reservation, and upon this subject there is a conflict in the evidence. The plaintiff testifies plainly and explicitly that such was the agreement, and he is corroborated by several witnesses, who testified to statements made by the defendant tending strongly to show that he understood that he was not to have the Sprague building. His own testimony on that subject stands without corroboration, and is not direct nor convincing. In January, 1890, while the deeds yet remained with Mr. Beach, and while the plaintiff was insisting that the defendant must take the lots subject to Mr. Sprague's right to remove his building, the defendant paid Mr. Sprague \$180 for the building, and it is this amount which he seeks to recover as damages. The matter with Mr. Sprague having been thus adjusted, each party, with the knowledge and consent of the other, on the 6th day of March, 1890, received from Mr. Beach the deed executed by the other party.

4. Appellant contends that the deeds were not delivered until March 6, 1890, when they were taken from Mr. Beach, and therefore appellee cannot recover upon the covenants in the deed for the money previously paid to Mr. Sprague for his building. Appellee contends that, as each party took possession under the deed to him, there was a delivery; that the deeds were not left with Mr. Beach as escrows, but simply as a stimulant to each party to procure his abstract, and that the delivery to Mr. Beach was a delivery to the respective grantees. "The question of delivery is always one of intention of the parties." *Steel v. Miller*, 40 Iowa, 406. "An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession and of the power of and control over the deed by the grantor for the benefit of the grantee at the time of delivery. * * * As has been well observed, a conditional deed—that is, one delivered conditionally—is not a deed, but an escrow; a mere writing having the form of a deed, but the effect of which depends wholly upon the happening of the

conditions or events upon which it is to be delivered to the grantee." *Prutsman v. Baker*, 30 Wis. 644. The authorities are uniform in holding that, to constitute a good delivery, the grantor must part with all power and control over the deed, and the right to revoke it. *Shirley v. Ayres*, 14 Ohio, 307; *Berry v. Anderson*, 22 Ind. 37; *Cook v. Brown*, 34 N. H. 460; *Fitch v. Bunch*, 30 Cal. 213. The defendant testified: "After the deeds were signed that day, they were put into the hands of Mr. Beach. Mr. Hoyt said we would leave them in the hands of a third party until we got proper abstracts of title." This is uncontradicted, and is the only evidence upon the subject. It is clear that there was no intention that these deeds should pass or take effect until proper abstracts were furnished. No doubt the parties had confidence that proper abstracts would be furnished, and therefore exchanged possession, but each reserved to himself control over his deed until the other produced a proper abstract. If the intention was to then part with control over their respective deeds and pass title, why were they left with Mr. Beach? They could have obtained proper abstracts with the deeds delivered to each other, as well as in the hands of Mr. Beach. Another fact that shows that a delivery was not intended is that Mr. Beach was not authorized to determine whether the abstracts were proper or not. This the parties reserved to themselves. We are of the opinion that the deeds were not delivered at the time of their execution, and that they were escrows in the hands of Mr. Beach, subject to the condition that each party furnish to the other a proper abstract.

5. Appellee contends that, though the deeds were delivered as escrows, when the conditions were performed they will be held to relate back to the time of their execution, "where the ends of justice require it." Conceding such to be the law, and it is so held in many cases, the question remains whether, under the facts of this case, "the ends of justice require" that we hold the deed to defendant to relate back and take effect from the time of its execution. As already stated, the plaintiff testifies explicitly that it was agreed that the defendant was to take the lots subject to the right of Mr. Sprague to remove his building. The evidence shows that at all times she so insisted in each of the several interviews with the defendant, between the time the deeds were executed and the time they were taken from Mr. Beach. Mr. Nolen testifies that about the 3d to the 6th of November, 1889, when settling with the defendant concerning his building, the defendant said, "We are to settle with you and with Sprague." Mr. Sprague testifies that he was present at an interview between these parties about the 22d of November, 1889; that the plaintiff said: "If we are going to have

any trouble about these buildings,' he says, 'you just walk up the office, and we will exchange papers.' He says, 'I would rather give them up than have trouble about these buildings.' Mr. McLagan said, 'I supposed the building belonged to the lot.' Hoyt says, 'You know better; you know I told you, about two or three times, the buildings did not belong to the lot, and that you could take the rents, or move the buildings off;' and Mr. McLagan says he guessed it would be all right when Kentner came home. Mrs. Hoyt says, 'This must all be fixed up in good shape before I will deliver that deed. You must settle with Sprague, and fix it all up;' and he said he would as soon as Kentner came home." It was after this that the defendant did settle with Mr. Sprague. The preponderance of the evidence is clearly in favor of the conclusion that the defendant purchased and paid for Sprague's building because he had agreed to take the lot subject to Sprague's right to remove the building. It surely cannot be said, under these facts, that the ends of justice require that we hold the deed to the defendant to have taken effect from the time of its execution. As the deed under which the defendant claims had not been delivered at the time he settled with Mr. Sprague, and was afterwards delivered because he had so settled, a reformation of the written contract is not required to enable plaintiff to maintain her defense to defendant's cause of action. Our conclusion is that the defendant is not entitled to recover upon the cause of action set up in his counterclaim. The judgment of the district court is therefore reversed.

SEEBERGER v. CAMPBELL et al.

(Supreme Court of Iowa. May 13, 1893.)

MORTGAGES—JUDGMENTS—PRIORITY OF LIENS.

Where lots are purchased with the proceeds of the sale of a farm owned by a married woman, and occupied as a homestead, and the title to such lots is taken in the name of the husband, the latter holds such title in trust for his wife,—the equitable owner; and the liens of mortgages given thereon by the husband and son, and their wives, who each occupied separate portions of such lots as homesteads, are superior to the liens of prior judgments against the husband and son, in the absence of any equities in favor of the judgment creditors.

Appeal from district court, Marion county; A. W. Wilkinson, Judge.

Action in equity to determine the validity of two mortgages upon certain real estate. The mortgages are held and owned by the plaintiff, and were executed by the defendants W. B. Campbell and Greeley Campbell, and their wives. R. Ritz and the State Insurance Company, the other defendants, claim to own judgments against W. B. Campbell and Greeley Campbell which are prior in point of time to the plaintiff's mort-

gages; and the question presented by the record is whether the said judgments attached as liens on the property before the mortgages were made. There was a decree against the plaintiff, and he appeals.

L. Kinkead, for appellant. Hays Bros., for R. Ritz. O. B. Ayers, for State Ins. Co.

ROTHROCK, J. We have had very great difficulty in arriving at a decision in this case. The record is confused, and there was an abstract filed by appellees which sets forth additional evidence. The correctness of this abstract is denied by appellant, and we have been compelled to examine the transcript of the evidence. For some reason the appellees have not presented anything in the way of brief or argument. Sometimes it occurs that an omission of this kind can be accounted for on the ground that the decision of the district court is so clearly right that it requires no argument to sustain it. No such presumption can be indulged in this case. The facts are very much involved, and a clear and concise statement of the claim made by the defendants would have been of very great assistance to the court.

It appears that W. B. Campbell and M. E. Campbell are father and mother of Greeley Campbell, and that many years ago they owned some real estate in Jefferson county, which they occupied as a homestead. They sold that property, and purchased a farm in Munroe county, upon which they resided as a homestead. In the year 1883 they sold that farm, and purchased three lots in the village of Hamilton, upon which they removed, and occupied the same as a homestead. As we understand the record, they were occupying these lots as a homestead when this suit was commenced. Greeley Campbell, the son, was married prior to the purchase of the Munroe county farm. He lived in a house on the farm, and when the removal was made to Hamilton, and the three lots were bought, there was a dwelling house thereon, which has been rebuilt and repaired, and occupied by W. B. Campbell and wife. Another house was built on the premises, which was used as a home by Greeley Campbell. The father and son engaged in the hardware business, as merchants, and the mortgages of the plaintiff were given to secure the payment of valid claims against the partnership.

The evidence shows quite conclusively that the Jefferson county home and the Munroe county farm were purchased with money which Mary E. Campbell, the wife of W. B. Campbell, owned in her own right, and the Munroe county farm was actually conveyed to her in the year 1878. But when the purchase of the lots in Hamilton was made the conveyance was taken in the name of W. B. Campbell. It is claimed that the husband has held, and now holds, the naked

legal title in trust for his said wife, and that, as between the wife and the defendants Ritz and the State Insurance Company, the lien of the plaintiff is superior, and that she, in conjunction with her husband, had the right to mortgage the same to the plaintiff. We think that this position must be sustained. It is supported by the evidence, and is in accord with the cases of *Jones v. Brandt*, 59 Iowa, 332, 10 N. W. Rep. 854, and 13 N. W. Rep. 310; *Crouse v. Morse*, 49 Iowa, 386; *Schmidt v. Holtz*, 44 Iowa, 449, and other cases. It does not appear that there are any equities in favor of the claims of the defendants, as that credit was extended to W. B. Campbell because for part of the time the title to the property was in him. On the contrary, by a fair construction of the pleadings in the case, the claim of Mrs. Campbell to the property is not really denied by the defendant Ritz. It may be that it might be held, under the evidence, that the part of the property occupied by Greeley Campbell ought not to be regarded as part of the homestead of his father and mother. But that question we do not determine. It is said in argument for appellant that the judgments were held to be a lien superior to the mortgages because Greeley Campbell was the real owner of the house, and land upon which it was situated, and in which he lived. From our examination of the evidence we do not reach that conclusion. There does not appear to be such an equity in the land in his favor, or to create liens in favor of the judgment creditors. Our conclusion is that Mrs. M. E. Campbell was the equitable owner of the property, and that W. B. Campbell held nothing but the naked legal title in trust for her, and the mortgage made by them was superior to any claim of the defendants. The plaintiff is entitled to a judgment and decree as prayed in his petition. Reversed.

ROCK et al. v. RINEHART et al.

(Supreme Court of Iowa. May 13, 1893.)

COUNTIES—SALE OF SWAMP LANDS FOR ERECTION OF COURTHOUSE—ELECTION—DUPLICIOUS BALLOTS.

1. Lands received by a county as swamp and overflowed lands, or as indemnity therefor, under the laws of congress and of Iowa, are within the contemplation of Acts 1862, c. 77, § 1, and may be sold, and the proceeds thereof applied to the erection of public buildings for the use of the county.

2. The county board may, upon a petition being presented under Acts 1862, c. 77, for the sale of swamp lands for the erection of a county building, without formal vote, agree to order an election; the order being thereupon duly recorded, and the record read and approved.

3. Under Laws 1876, c. 80, § 1, (Miller's Code, p. 80,) it is not competent for the county board to order the erection of a courthouse, when the probable cost will exceed \$5,000, without first submitting the proposition to the

voters of the county. Under Laws, 1802, c. 77, counties owning swamp and overflowed lands may devote the proceeds thereof to the erection of county buildings, provided that the question be first submitted at some election to the people of the county. *Held*, that a ballot submitting the question whether a courthouse, to cost not to exceed \$50,000, shall be erected "from the proceeds arising from the sale of lands belonging to said county," is not objectionable as containing two propositions,—the erection of the courthouse, and the sale of the lands.

Appeal from district court, Iowa county; J. H. Preston, Judge.

Plaintiffs, citizens and taxpayers of Iowa county, brought this action, in three counts, against the defendants, the board of supervisors of said county, to enjoin them from selling certain lands belonging to said county, and expending the proceeds in the erection of a courthouse in the town of Marengo. Defendants' motion to strike certain parts of the first count was sustained, also their demurrers to the remainder of said count, and to the third count. Plaintiffs elected to stand on said first and third counts, and thereupon the case was submitted on the issues joined, and decree was entered against the plaintiffs, from which they appeal. The issues and facts appear in the opinion.

Ranck & Wade, T. S. Kitchen, and J. W. Kaffensberger, for appellants. J. T. Beem, Hedges, Rumble & Lake, and F. C. Hormel, for appellees.

GIVEN, J. 1. The following will be a sufficient statement of the proceedings had by the defendant board of supervisors: On the 14th day of November, 1891, a petition as follows, signed by resident taxpayers of the county, was presented to the defendant board, then in session, and filed and considered: "To the board of supervisors of Iowa county, Iowa: The undersigned, residents and taxpayers of Iowa county, respectfully petition your honorable body to submit to the legal voters of Iowa county the question of authorizing the land belonging to the county in Ida and Cherokee to be sold, for the purpose of applying the proceeds to the construction of a courthouse and other public buildings at the county seat; the question to be submitted, under such objections and restrictions as the board sees fit to be imposed, at a special election to be held at an early date." On the same day said board, in session, agreed to, and entered upon its record an order for, a special election, as shown in the following notice, which was published as required by law. "Notice of Special Election. To the legal voters of Iowa county, Iowa: Notice is hereby given that the board of supervisors of Iowa county, Iowa, on the 14th day of November, A. D. 1891, ordered that a special election be held within and for said county on Tuesday, the 29th day of December, A. D. 1891, and that at such election there be submitted to the legal voters of said county the following

question, to wit: 'Shall the board of supervisors of Iowa county be authorized to order and contract for the erection of a courthouse at Marengo, the county seat of said county, at a cost not to exceed the sum of fifty thousand dollars, from the proceeds arising from the sale of the lands belonging to the county, lying in the counties of Ida and Cherokee, in the state of Iowa: provided, that no sum shall be appropriated therefor except that received from the sale of said lands: and further provided, that in the sale of said lands no more than one quarter section shall be sold to any one purchaser, and that same be sold for not less than one fourth of the purchase money cash in hand, and balance on time, not to exceed five years, with interest at 7 per cent. per annum, payable annually: and further provided, that said board of supervisors, before entering into a contract for the erection of such courthouse, shall require a bond, with approved security, in the penal sum of twenty-five thousand dollars, conditioned that no part of the cost of said courthouse shall be paid by said county, other than by the proceeds arising from the sale of said lands.' Ballots shall have printed thereon the above question, and those voting in favor thereof shall have the word 'Yea,' and those voting against the same shall have the word, 'No,' underneath said question. Of all of which, all persons interested will take due notice. Given under my hand and official seal, at Marengo, Iowa, this 14th day of November, A. D. 1891, by order of the board of supervisors of Iowa county, Iowa. [Seal.] J. T. McGuire, Auditor of Iowa County, Iowa." An election was held in pursuance of said order and notice, at which 3,786 ballots were cast, 1,856 of which were for, and 1,830 against, said proposition, showing a majority of 126 for the proposition. The ballot cast was as follows: "Ticket. Shall the board of supervisors of Iowa county be authorized to order and contract for the erection of a courthouse at Marengo, the county seat of said county, at a cost not to exceed the sum of fifty thousand dollars, from the proceeds arising from the sale of the lands belonging to said county, lying in the counties of Ida and Cherokee, in the state of Iowa: provided, that no sum shall be appropriated therefor except that received from the sale of said lands: and further provided, that in the sale of said land no more than one quarter section shall be sold to any one purchaser, and that same be sold for not less than one fourth of the purchase money cash in hand, and balance on time, not to exceed five years, with interest at seven per cent. per annum, payable annually: and further provided, that said board of supervisors, before entering into a contract for the erection of such courthouse, shall require a bond, with approved security, in the penal sum of twenty-five thousand dollars, conditioned that no part of the cost of said courthouse shall

be paid by said county, other than by proceeds arising from the sale of said lands?" The lands belonging to said county, lying in the counties of Ida and Cherokee, were received by said county as swamp and overflowed lands, or as indemnity therefor, under the laws of congress and of this state. On January 15, 1892, the plaintiffs commenced this action to enjoin the defendant board from further proceeding under authority of said election. The claims of the plaintiffs are that said lands are not swamp and overflowed lands, and therefore not subject to be disposed of for the purposes of the erection of county buildings, under chapter 77, Laws 1862, (Miller's Code, p. 1483.) That the proceedings ordering said election were illegal for that no vote was taken thereon by the defendant board, and that the election is illegal for that the proposition submitted and voted upon contained two separate propositions, so joined in the ballot that a vote for one necessarily resulted in a vote for the other.

2. It will be observed that the contention is solely as to the legality of the proceedings ordering the election, and of the election itself, in the three respects named. The matter stricken from the first count of plaintiffs' petition is statements covering about $3\frac{1}{2}$ closely-printed pages, as to contests had in previous years about changing the location of the county seat of Iowa county, the diversity of opinion on that subject, and in relation to the swamp lands, and the erection of a new courthouse. It is not necessary that we set out these statements more in detail. It is sufficient to say that there is nothing that is relevant or material to this case. They do not form an introduction or inducement to the facts upon which plaintiffs base their action, and are not within the rule announced in *Childs v. Griswold*, 15 Iowa, 438, nor *Bellows v. Township*, 70 Iowa, 320, 30 N. W. Rep. 582. The four pages of the first count that remain are the statement of the proceedings had by the defendant board, and of the election, the kind of ticket voted, what the statute required for the construction of a courthouse, and that unless enjoined the defendant board would proceed under said election. The count, as it remained, failed to show any illegality in the proceedings or election. The demurrer was therefore properly sustained. The third count, after setting out the proceedings, election, and result, alleges that the swamp-land fund cannot be diverted to the erection of public buildings, but can only be used for the purposes designated in the statute. We are in no doubt but that the lands in question are within the contemplation of section 1, c. 77, Acts 1862, and that the proceeds thereof may, by proper proceedings, be applied to any of the uses named in said section, including the erection of public buildings for the use of the county. The right to apply the proceeds

of such lands to other than drainage purposes has been too long and frequently recognized to now be questioned. It follows from this view that the third count did not state a cause of action, and the demurrer was therefore properly sustained.

3. It appears that when said petition was taken up for consideration, and after some discussion, each member of the board consented to ordering a special election, and thereupon the order was duly recorded, and the record read and approved. Appellant contends that the action is illegal for the reason that no formal vote was taken, and cites *Thompson v. Linn*, 35 Iowa, 361. This complaint is based upon an omission to pursue parliamentary rules in agreeing to an order for an election. The rules under consideration in *Thompson v. Linn* were those which the board of directors were authorized to prescribe touching the employment of teachers by subdirectors, and are not in point. We find nothing in the rules adopted by the defendant board, nor in the law, that required them to pursue the forms of parliamentary rules in agreeing to this order. We have the fact that all the members consented to the order, and it was duly recorded, approved, and signed. It is this consent, recording, and approval that gives it legal life and vitality. See *Griggs v. Kimball*, 42 Iowa, 512.

4. The remaining and important question is whether, in view of the form of ballot cast at said election, the defendant board may legally proceed to order and contract for the erection of a courthouse at Marengo at a cost not exceeding \$50,000, to be paid by the proceeds arising from the sale of said lands. Under section 1, c. 80, Laws 1876, (Miller's Code, p. 80,) it is not competent for said board to order the erection of a courthouse, when the probable cost will exceed \$5,000, "until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all voting for and against such proposition." Under chapter 77, Laws 1862, it is made lawful for counties owning swamp and overflow lands to devote the same, or the proceeds thereof, in whole or in part, "for building county buildings: * * * provided, that before any of said land, or the proceeds thereof, shall be so devoted to any of the purposes aforesaid, the question whether the same shall be so done shall be submitted, at some general or special election, to the people of the county." By chapter 135, Acts 1870, the board is authorized, for that purpose, "to call a special election, if properly petitioned for by the legal voters of the county." The ballot cast follows the order and notice for the election, and the contention is upon the following part of the ballot: "Shall the board of supervisors of Iowa county be authorized to order and contract for the erection of a courthouse at Marengo, the county seat of said

county, at a cost not to exceed the sum of \$50,000, from the proceeds arising from the sale of the lands belonging to said county, lying in the counties of Ida and Cherokee, in the state of Iowa?" No question is made upon the other conditions contained in the ballot, and hence they are not further noticed. Appellants contend that two separate and distinct propositions are contained in this ballot, so joined that a vote for one necessarily resulted in a vote for the other, namely: "Shall the board of supervisors of Iowa county be authorized to order and contract for the erection of a courthouse at Marengo, the county seat of said county, at a cost not to exceed the sum of \$50,000?" "Shall the swamp-land fund belonging to Iowa county be devoted wholly to the construction of a courthouse at Marengo, in Iowa county?" Elections like this are governed by the same rules that apply to the election of officers. In canvassing the vote the intention of the voters must be ascertained from their ballots. The language of the ballot is to be construed in the light of facts connected with the election. *Hawes v. Miller*, 56 Iowa, 396, 9 N. W. Rep. 307. Appellants cite and rely upon *McMillan v. Lee Co.*, 3 Iowa, 312, and *Gray v. Mount*, 45 Iowa, 591. In the Case of *McMillan*, the proposition submitted to be voted on at the same time was whether or not the county would subscribe to the capital stock of three different railroad companies, \$150,000 in each, with a provision as follows: "That the said subscription shall not be made to either of said companies unless the vote shall be carried in favor of each and all of them." While it is intimated that the three propositions might have been submitted at the same time in such a manner as to be voted upon separately, it is held that under the clause last quoted no single question was submitted, but the fate of each proposition was made to depend upon the result of all three. Thus combined, the voter who favored one or two of the propositions, and opposed the others, could not vote his sentiments. He must vote for or against all. The vice in such a submission is that by thus joining different propositions a popular and desirable proposition may be made to carry one that is not desired; or an undesirable measure, to defeat one that is desirable. In *Gray v. Mount* the proposition submitted was: "Shall the swamp-land fund of Guthrie county, Iowa, be devoted by the board of supervisors of said county to the erection of a courthouse at Guthrie Center, in said county, and a county high school in the town of Panora, in said county, in the proportion of two thirds thereof to the erection of said courthouse, and one third to the erection of said county high-school building?" In passing upon the legality of this proposition this court held that the object is of the essence of the proposition; that the appropriation for a given object is the proposition submitted; that, if

there are two objects, there are two propositions, and, if submitted together, the voter cannot vote for one, and against the other. *Supervisors, etc., v. Mississippi & W. Ry. Co.* 21 Ill. 373, and other Illinois cases follow it, are also cited by appellants. In the cases, as in *McMillan v. Lee Co.*, the proposition was in aid of more than one railroad company, and was held bad under the statute. *Lewis v. Commissioners*, 12 K 213, cited, holds that the commission could not, by construction, enlarge the authority given by a vote upon a single proposition so as to include another. A careful reading of the ballot under consideration, the light of facts connected with the election, shows marked distinctions between it and the cases cited. There is but one object, the erection of a courthouse,—where in those cases there were two or more. Following *Gray v. Mount*, supra, we must say that, there being but one object, it was but one proposition.

It is contended that as the authority submit the question of devoting the proceeds of swamp lands is under one statute and to erect a courthouse, under another they are necessarily separate propositions and must be voted on separately. If a proposition was submitted and carried under chapter 77, Laws 1862, authorizing a board of supervisors to devote, say \$50,000, of proceeds of the county's swamp lands to the erection of a courthouse for the use of the county, it would hardly be claimed it did not authorize the board to erect a house, and pay for it out of that fund. Why have a separate election or vote upon a proposition necessarily and expressly contained in that already submitted? If a proposition was to erect a courthouse at a cost exceeding \$5,000, to be paid for by levying taxes, it would be exclusively under chapter 80, Laws 1876. Such a proposition would be of no effect unless accompanied by a proposition to levy the necessary taxes. *Starr v. Board*, 22 Iowa, 492. It cannot be said that the proposition is double because it provides the means of payment, and that is all this proposition does. It authorizes a \$50,000 courthouse to be paid out of the swamp-land fund. The proposition voted was to devote \$50,000 of the proceeds of the swamp lands to the single object of erecting a courthouse for the use of the county. It follows from the conclusion announced that the judgment of the district court must be affirmed.

IOWA ECLECTIC MEDICAL COLLEGE ASS'N v. SCHRADER et al., Board of Medical Examiners.

(Supreme Court of Iowa. May 9, 1894.)
PHYSICIANS — BOARD OF STATE EXAMINERS—
TIFICATES—REFUSAL TO ISSUE—REQUIREMENTS.
1. McClain's Code, § 2546, provides that a graduate in medicine, desiring a certificate

practice, must present his diploma to the state board of examiners, who shall determine if it is issued by a medical school legally organized and in good standing. Section 2547 authorizes any member of the board to administer oaths and take testimony in all matters relating to their duties as examiners. *Held*, that the board had power to receive charges against a school that it was conducted in violation of law, to notify its officers to appear before the board, to take testimony, and, if satisfied the charges were true, to withhold certificates from its graduates.

2. Where the board had recognized a school as in good standing, it could not afterwards arbitrarily refuse to issue certificates to a graduate of such school until its standing should have been redetermined.

3. Under such statute the board has power to adopt a schedule of minimum requirements as to qualifications of students on entering such school, branches to be taught, how to be taught, length of course and attendance, and facilities for teaching.

4. Such statute is not in conflict with Const. art. 1, § 6, providing that all laws of a general nature shall have a uniform operation; and that the general assembly shall not grant to any class of citizens privileges or immunities which, on the same terms, shall not equally belong to all citizens.

5. Such board is not a corporation, within Const. art. 8, § 1, providing that no corporation shall be created by special laws, but a branch of the government.

Appeal from district court, Polk county; C. P. Holmes, Judge.

Action by writ of certiorari to inquire into the legality of certain action of the defendant board with respect to the plaintiff college. Judgment was entered in the district court dismissing the petition, from which judgment plaintiff appeals.

C. C. & C. L. Nourse, for appellant. John Y. Stone, Atty. Gen., and Thos. A. Cheshire, for appellee.

GIVEN, J. 1. The inquiry in this kind of proceeding is whether the defendant has "exceeded his proper jurisdiction, or is otherwise acting illegally." Code, § 3216. When the defendant has jurisdiction, and is given a discretion, the courts cannot, on certiorari, inquire into the correctness of its decisions upon matters of fact, nor review the exercise of the discretion given. *Hildreth v. Crawford*, 65 Iowa, 339, 21 N. W. Rep. 667; *Darling v. Boesch*, 67 Iowa, 702, 25 N. W. Rep. 887; *Smith v. Board*, 30 Iowa, 531; *Tiedt v. Carstensen*, 61 Iowa, 334, 16 N. W. Rep. 214. Our inquiry is exclusively as to jurisdiction and legality of action, and if jurisdiction existed, and the action was legal, we must affirm, even though the motive was wrongful. *Polk Co. v. City of Des Moines*, 70 Iowa, 351, 30 N. W. Rep. 614. To understand the acts complained of and the complaints made, it is necessary to notice the following facts: At, and for some time prior to, and ever since, the action complained of, the plaintiff was a legally incorporated and organized medical college, carried on for the purpose of giving instructions in medicine and surgery, and to confer degrees upon and issue diplomas to

its graduates. The defendants, Schrader et al., constituted the board of medical examiners of the state, as provided in section 2546, McClain's Code. It is required by our statute that every person practicing medicine, surgery, or obstetrics within this state shall first procure a certificate from the board of medical examiners of his right to do so. Said section 2546, after providing that graduates in medicine desiring such certificates shall present his or her diploma to the state board of examiners for verification as to its genuineness, provides as follows: "If the diploma is found genuine, and is issued by a medical school legally organized and in good standing, of which the state board of examiners shall determine, and if the person presenting and claiming such diploma be the person to whom the same was originally granted, then the state board of examiners shall issue its certificate to that effect, signed by not less than five physicians thereof, representing one or more physicians of the schools on the board, and such certificate shall be conclusive as to the right of the lawful holder to practice medicine, surgery, and obstetrics within this state." At a meeting of the defendant board, May 30, 1888, "it was moved that the Iowa Eclectic Medical College, located at Des Moines, be recognized as in good standing." This motion was adopted by a vote of five ayes to two nays, and thereupon and thereafter certificates were issued to graduates of said college. On March 22, 1890, C. P. Evans, a graduate of said college in the class of 1889-90, exhibited his diploma to the secretary of the defendant board, which was then verified as to its genuineness, and returned to the applicant with a blank for making application for a certificate when he desired to do so. His application was not received until May 21, 1890, and no other application from plaintiff's graduates was before the defendant board during that time. The defendant board, at its organization, adopted a schedule of minimum requirements as to qualifications of students on entering college, branches to be taught, how to be taught, length of course and attendance, facilities for teaching, and that "the aggregate graduates of a college shall not exceed forty-five per cent. of its aggregate matriculates during the period of five years ending with any session subsequent to sessions of 1885-86." At the regular meeting of the board, May 7, 1890, and when the board was about to adjourn until the regular meeting in November, written charges were received from Thomas A. Brazill against the plaintiff college, charging that it was conducted and operated in violation of the laws of the state, and specifying certain particulars. The specifications show a disregard of the requirements in every respect, except as to the per cent. of graduates. On receipt of these charges it was moved and carried

that they be placed on file, and a copy be furnished to plaintiff, with notice to appear at the next meeting of the board and answer the charges. Dr. Clark offered the following resolution, which was carried: "Resolved, that this board will not issue certificates to graduates of the Iowa Eclectic Medical College at Des Moines, for the session of 1889-90, until the standing of said college shall have been determined." Following this action the board adjourned until the November meeting. At the regular November meeting the following proceedings were had: Thomas A. Brazill, the complainant, and Dr. John Cooper, dean of plaintiff college, being present, were each sworn and examined. At the conclusion of the evidence the following was adopted, by unanimous vote: "Resolved, that in the opinion of this board the charges against the Iowa Eclectic Medical College, preferred by Mr. Brazill, are not fully sustained, no witness for the prosecution other than himself having testified; but on the testimony of the dean of the faculty of the college aforesaid, to wit, Dr. John Cooper, himself, we find sufficient corroborative evidence to satisfy us that the teaching in said college is not up to our minimum requirements, and therefore we feel constrained to withhold certificates from the graduates of said college. On motion, the secretary was authorized to withhold all applications from colleges not now authorized by this board until next meeting of the board. The secretary called attention to the application of Charles P. Evans, a graduate of the said Iowa Medical College, on file in the office of the secretary since May 12, 1890." The record of this date (November 20, 1890) shows the following relative thereto: "Charles P. Evans, a graduate of the Iowa Eclectic Medical College for the season of 1889-90, applied for a certificate to practice medicine in the state of Iowa. It was moved and seconded that the application be rejected, on the ground that he fails to furnish satisfactory evidence of having graduated from a college recognized by this board as in good standing."

2. Appellant's contentions are that said action of the defendant board is illegal because not authorized by the statute, and, if authorized, is illegal because a statute so authorizing is in violation of the constitution. There is a diversity of opinion as to the necessity for such statutes, but with that we have nothing to do. Our inquiry is whether the statute authorized the action had, and, if so, whether that authority is in contravention of the constitution. In pursuing these inquiries we must have in mind the purpose of these statutes, which evidently is the protection of the public against incompetent persons practicing medicine, surgery, or obstetrics, by restraining the practice of those sufficiently learned in that profession. As a means of determining who are thus learned, the board of medical examiners was created,

with authority, subject to certain restrictions, to determine who are entitled to certificates authorizing them to practice medicine. This they determine upon examination of the applicant, or upon his diploma. "Issued by a medical school legally organized and in good standing." A genuine diploma from such a school is made sufficient evidence of learning to entitle the holder to a certificate. It must be ascertained, however, that the diploma is genuine, that it is to the person presenting it, and that it was issued by a medical school legally organized and in good standing. The statute (McClain's Code, § 2546) expressly authorizes the state board of examiners to determine these matters. That board may determine not only the identity of the applicant, the genuineness of the diploma, but also whether it was issued by a medical school legally organized and in good standing. To the end that such determinations may be intelligibly and properly made, section 2547 authorizes any member of the board "to administer oaths and take testimony in all matters relating to their duties as examiners aforesaid." The statute contains no other provision as to how these matters shall be inquired into and determined; but as said in *Wood v. Farmer*, 69 Iowa, 537, 29 N. W. Rep. 440, "it is a familiar rule of law that authority to do an act implies authority to do all other acts necessary to be done in executing the power conferred. The law will always presume the existence of authority to do acts incidental and necessary to the discharge of lawful power." We think it clear that the defendant board did have power, by proper investigation, to determine the identity of applicants, the genuineness of their diplomas, and whether they were issued by a medical school legally organized and in good standing.

3. The first action complained of is that of May 7, 1890, upon the charges being filed resolving that the board would not issue certificates to graduates of the plaintiff college of the class of 1889-90 until the standing of the college had been determined. This action was unauthorized, unjust, and arbitrary. It was taken without investigation, and without other cause or information than the filing of charges by a stranger, who did not even present them in person, but by a messenger. It was taken when no application for a certificate was pending, Evans not having presented his until May 21st. It was in the face of their former action determining the plaintiff college in good standing, upon the faith of which the course of instructions were continued, and students encouraged to attend. It deprived the graduates of the class of 1889-90 of receiving certificates, without investigation, and, by adjourning until November, left the college and its graduates without even the hope of investigation or relief until that time.

The future of the college depended upon whether the defendant board would continue to recognize it as in good standing, for without such recognition it must close its doors. It was known that its next term commenced in October, and that this action must tend to lessen its patronage; yet the adjournment was until November, without providing for an earlier meeting, as the statute authorizes, and as a due regard for the rights of the plaintiff college and its graduates would have suggested. There is surely much in this action of the defendant board to warrant the criticism that is made upon it by plaintiff's counsel. It was illegal because it reversed the former action of the board without any investigation and without sufficient cause. The constitutionality of the statute might well be questioned if it authorized the board to determine, without investigation, that a particular medical school was not in good standing, and especially so when that school had been previously determined to be in good standing. We do not say that the board is concluded, by having once determined that a school is in good standing, from thereafter determining differently, but only that it has not power to do so arbitrarily and without investigation. We do not say that such inquiries must be attended with the formality of a trial in court, but the determination must be based upon inquiry and facts, and not upon the mere arbitrary will of the board.

4. The remaining complaint is against the action taken upon the investigation had November 21, 1890. The complaint is not against the manner of the investigation, but against the result as shown in the resolutions copied above. The finding was "that the teaching in said college is not up to our minimum requirements." The board having authority to determine the standing of colleges, it was certainly proper that they should advise them in advance what would be required of them. The requirements prescribed, save the one quoted above, look to the thoroughness of the education to be given, and are in harmony with the purpose of the statute. The standing of a college, as contemplated in this statute, is rather what the college is, in respect to the thoroughness of its course, than what it may be reputed to be. The board was fully authorized to determine, upon proper investigation, that a college was not in good standing that did not meet the minimum requirements as to extent and thoroughness of its course. The legality of the requirements as to the per cent. that may graduate is not involved in this case, but, as it has been discussed, we may say that it is certainly questionable. While the graduation of an unusual per cent. may be ground for closer scrutiny, it may well be questioned whether the defendant board may arbitrarily say that but 45 per cent. shall be permitted to graduate. The stand-

ing of the plaintiff college was a matter within the jurisdiction of the defendant board to determine, and on November 21, 1890, after a full and fair examination, it determined that said college was not in good standing because its teaching was not up to said minimum requirements. The board having jurisdiction to determine this question of fact, and having determined it, upon full investigation and evidence by unanimous vote, we must hold their action legal, even though we might reach a different conclusion on the facts, if it were our province to consider them. Much is said in argument about the composition of the defendant board as to the different schools of medicine, but, as the statute does not require that the different schools shall be represented on the board, its composition cannot affect its jurisdiction or the legality of its acts in the respect under consideration.

5. Appellant's remaining contention is that, if the statute conferred power upon the defendant board to do the acts complained of, it is in violation of section 6, art. 1, and section 1, art. 8, of the constitution. Said section 6 is as follows: "All laws of the general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Section 1 of article 8 is as follows: "No corporation shall be created by special laws; but the general assembly shall provide by general laws for the organization of all corporations hereafter to be created, except as hereinafter provided." The exceptions provided have no application to this case. In *McAunich v. Railroad Co.*, 20 Iowa, 343, the rule was announced as follows: "These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." This rule has since been followed in many cases, notably in *Land Co. v. Soper*, 39 Iowa, 112; *Deppe v. Railroad Co.*, 36 Iowa, 52. The statute under consideration is clearly within this rule "because every person who is brought within the relations and circumstances provided for is affected by the law." It is uniform in its operation "upon all persons in the like situation," and grants no privileges or immunities that do not equally belong to all citizens. Article 8 of the constitution, it will be observed, relates to the creation of corporations, and does not apply to the defendant board. It is not a corporate body, but a branch of the govern-

ment. The authority to refuse certificates to graduates of medical schools not in good standing does not extend special privileges or immunities to other schools that are determined to be in good standing. It is argued, on behalf of the plaintiff, that with the authority claimed by the defendant board it may determine "absolutely and unconditionally, without limitation or restraint, and without appeal, what rights the graduates of the different colleges of the state shall enjoy." It is said: "The power to determine what colleges are in good standing, and what are not, is simply an arbitrary power, that may be exercised at the will of the board, without restraint and without remedy by appeal." It is true no appeal is provided for, but the students of a school that has not been determined to be in good standing, in common with all other persons, have the right to go before the defendant board and be examined, without regard to diploma, and, if found to have the requisite qualifications, to receive a certificate. It is not correct to say that the defendant board may determine whether a medical school is in good standing, arbitrarily and without restraint. We have seen that the law does not authorize such action, and that it is illegal. The defendant board acts under the restraints of law that require proper inquiry into the matters to be determined, and we may not presume that the defendant board will act arbitrarily and without investigation, and upon that presumption hold the statute that confers the power to be unconstitutional. This statute is not unlike many others found in the Code of Iowa, conferring authority upon officers and boards to determine similar questions as to qualifications, notable among which is our statute for the examination of teachers, applicants for admission to the bar, and to practice pharmacy and dentistry. Our conclusion is that the defendant board exceeded its jurisdiction, and acted illegally, in the action taken May 7, 1890, and that a certificate should have been issued to C. P. Evans upon his diploma from the plaintiff college, and his application made thereon May 21, 1890. We are of the opinion that the action of the defendant board, November 21, 1890, was within its jurisdiction, and legal. As the purpose of the petition is to test the legality of this last action, the judgment of the district court dismissing the petition was correct, and is therefore affirmed.

KROENER v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Iowa. May 12, 1893.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE—DAMAGES.

1. In an action against a railroad company by an employe, for personal injuries, it appeared that plaintiff was working at night, as

a "car catcher," in defendant's yards. He was walking outside the tracks, which were ballasted to the top of the ties with cinders, towards a stationary car, to couple it to some slowly-moving cars coming from behind him. When about 25 feet from the stationary car, he stepped between the rails, and his foot was caught between the guard and main rails, and cut off. There was evidence from which the jury could have found that the accident was caused by the blocking between the rails being defective. Held, that the question of contributory negligence was for the jury.

2. Where plaintiff, at the time of the injury, was 20 years old, and earning \$60 a month, and was not injured beyond the loss of a foot, a verdict of \$12,000 was excessive.

Appeal from district court, Tama county; L. G. Kinne, Judge.

Action for personal injury. Judgment for plaintiff, and the defendant appealed.

Mills & Keeler, for appellant. Struble & Stiger, for appellee.

GRANGER, J. The plaintiff was a brakeman in the employ of the defendant company. On the 20th day of May, 1890, and for some time before, his work was on a freight car. On that day he ran into the station of Van Horn about noon, and in the evening he was set at work in the yard with a switching crew, which, besides the engineer and fireman, consisted of three men. It was the duty of one to pull the pins to cut the train or detach the cars to be shoved or "kicked" by the engine onto a track, as desired; another was to "throw the switches;" and the third, which was the plaintiff, on the night in question, acted as "car catcher,"—that is, when cars were shoved in onto a track, and were moving, detached from the engine, it was the duty of the car catcher to climb onto and stop them, or regulate their speed, when necessary. The duties of the car catcher and "pin puller" were to some extent interchangeable, as the situation of the work seemed to require. In the yard at Van Horn was a lead track, running east and west, from which branched several side tracks, and at the junction of each with the lead track was a switch. The switches were numbered consecutively from west to east, and the side track bore the number corresponding with its switch. Some cars had been cut off, and sent in onto track No. 7, and the plaintiff "rode" them to their place. In the mean time the remainder of the crew had cut off five more cars from the train, and "kicked" them back onto the lead track, intending them to be coupled to a car that was standing on track No. 5, but not so as to clear the lead track. The plaintiff passed over from track No. 7, where he had left the cars before mentioned, to the lead track, on which the five cars were moving to the west. The others of the crew, after detaching and sending the cars onto the lead track, went east to do other switching. The speed of these cars on the lead track was slow, and the plaintiff did not attempt to "ride" them, but walked in advance of

them towards the car at switch No. 5 to make the coupling when the cars should reach it. On his way he stepped onto the lead track, and it is a theory of the case that his foot became fast between a lead rail and a guard rail, and the moving cars cut off his foot. It is for damage occasioned thereby that this action is brought.

1. The assignment of error mainly relied upon by appellant is that involving contributory negligence on the part of the plaintiff. It is urged that the testimony of the plaintiff shows affirmatively such negligence. The night of the accident was somewhat stormy, and it occurred somewhere from 10 to 11 o'clock. It is undisputed that, before reaching the car where the coupling was to be made, there was no necessity for plaintiff to step onto the track on which the cars were moving, as beside the track, all the way to switch No. 5,—some 80 or 90 feet,—the walk was surfaced with cinders, hard and level. The plaintiff had a lantern, and by attention could see the condition of the walking both between and outside of the rails. It is clearly a case in which, with the thought of danger from stepping on the track in mind, the accident could have been avoided. Appellant, in its contention, for an affirmative showing of negligence on the part of the plaintiff, treats the case as if the facts were that he was walking along the track in front of moving cars, not to exceed two car lengths behind him, when his foot was caught between the guard and main rail, and he was injured. A number of authorities are cited in support of a rule that it is negligence for an employe to walk on the track in front of a moving train, in the discharge of a duty, when the duty can be as well performed by walking where it is safe; and the argument is in support of that, and quite similar rules, as applicable to this case. In this connection, let us look definitely to the particular act of plaintiff resulting in the injury. From 20 to 25 feet east of switch No. 5 is the guard rail where the accident occurred. To this point plaintiff had been walking outside of the track, where it was safe. The cars were moving slowly,—not to exceed $1\frac{1}{2}$ to 2 miles an hour,—and about 2 car lengths behind him. The general condition of the tracks and walks in the yard was good, as plaintiff must, in his work in the yard that evening, have observed. Aside from the movement of the cars, there was nothing to indicate danger from stepping or walking on the track.

The following is the plaintiff's testimony, immediately connected with the accident: "Question. When you were going west, as you arrived at the east end of the guard rail at switch No. 5, what happened? Answer. Well, I was walking along, and I got even with the guard rail, and I stepped in. My foot got caught fast between the end of the guard rail and the main lead rail. Q. This switch No. 5, and all the

switches, led off from what was known as the 'lead track'? A. Yes, sir. Q. When you arrived at the east end of the guard rail, you stepped your foot into the opening in the rail? A. Yes. Q. State whether or not your foot went in between the guard rail at the east of the main rail of the lead. A. Yes, sir. Q. State to what degree it was fastened there,—whether only very slightly, or very fast. A. Well, it was very fast in there, for I jerked a couple of times. I tried to get it out. Q. When you found your foot in that rail, and was very fast, what did you do? A. I made an outcry,—hallooed. Then I tried to jerk my foot out. I kind of jerked down, and I raised up. About the time I raised, the car hit me, and I went down. Q. How many times did you struggle to get out? A. Once or twice. Q. State what efforts you made, within your strength, to extricate yourself from the condition you found yourself in between those two rails. A. Well, I tried to jerk it out; tried to get it out, and stooped down,—kind of. Q. State whether the cars came on you,—these two cars that were kicked to the west. A. Yes, sir. Q. State whether or not you had extricated your foot entirely at the time the cars struck you. A. I don't know as to whether I did or not. It got loose about the time. Whether the car knocked it out of there, or how it just got out, I don't know. Q. State whether you had been able to remove your foot or the leg from the rail before the car struck you. A. No, I don't think I had. I was knocked down. Q. State how your limb lay when you were knocked down, with reference to the rail,—whether it was on or off the rail. A. It must have been knocked right with the rail. I crawled ahead of it,—tried to get outside of it,—and got ahead of it. Q. How far is the east line of that guard rail, proper, from switch No. 5? A. About twenty or twenty-five feet."

It appears from the cross-examination that plaintiff was quite familiar with switching at way stations along that and other lines of road; that he knew of the relative situations of the switches, frogs, and guard rails, and of his approach to switch No. 5. The following is from the cross-examination: "Q. In switching at night, you always carry a lantern, do you? A. Yes, sir. Q. And, with the aid of that lantern, you are enabled to determine when you come to a frog and switch and guard rail? A. Yes, if a fellow happens to notice. What I mean is, if he is careful, and looks where he is going, the lantern enables him to see that. Q. Mr. Kroener, you say that you were switching there this night of the accident,—in the yards at Van Horn? A. Yes. Q. Now, this work of switching is doing about the same things about the cars and guards as you do when on the road;

about the same when you come to switch across from one track to another. At the Van Horn yards, that night, you performed about the same movements that you do in switching your cars on your run? A. Yes. Q. You say, when those detached cars were coming down there, you started to walk down to where these standing cars were, in order to couple them? A. Yes, sir. Q. Then you started to walk west? A. Yes, sir. Q. As you stood there, I think you said you thought you were a little outside of the north rail of the lead track? A. Yes, sir. Q. As you turned then to walk west, you were on the north side of the lead track? A. Yes, sir. Q. Did you walk down there, towards the west? A. Yes, sir. Q. How far outside of the north rail of the lead track were you when you were walking down? A. Well, I couldn't say. Probably two or three feet. Q. The ground all along there between switches 5 and 6 is level and hard cinders, isn't it? A. Yes, sir. Q. And surfaced up to the top of the ties,—well up? A. Yes, sir. Q. As you walked down, then, your back was towards these moving cars? A. Yes, sir. Q. They were going west, and you were just ahead of them, walking west yourself? A. Yes, sir. Q. For the purpose of coupling them when they came clear down to switch No. 5? A. Yes, sir. Q. As you came down west for that purpose, did you step onto the lead track? A. Yes. Q. Tell the jury now, and point out from this photograph, (Exhibit 1,) about where it was that you stepped in between the rails of the lead track to walk down west. A. Well, I don't know whether I stepped right onto the guard rail, or whether it was a foot or two on the east side of it. Q. As you recollect it, then, you left the outside walk, and stepped into the track, either right at the guard rail, or a foot or so east of it? A. Yes, sir. Q. In other words, you left the outside walk, and stepped on the track just in front of the guard rail? A. Yes, sir. Q. Just ahead of the cars? A. Yes, sir. Q. At the time you say you struck your foot, were you partially over the north rail of the lead track, or wholly over? A. I was only partially over. Q. You were turning out from the path along the north side of the track in onto the track? A. Yes, sir. Q. In turning out at the moment you were caught, you think your right foot was outside—north—of the rail? A. Yes, sir. Q. And your left foot was south of the north rail? A. Yes, sir. Q. In other words, you were straddling the track? A. Yes, sir."

Are we, in view of the facts thus presented, to say that, as a matter of law, there was contributory negligence? The plaintiff says that at the time of the accident he was walking rapidly, and there is nothing in the record to indicate negligence

from that fact alone. The cars were approaching at not to exceed one half the speed of a rapid walk. He was within from 20 to 25 feet of the switch, just beyond which was the car to be coupled, when he stepped upon the track. The law does not define just how near to a car a brakeman may, without negligence per se, step upon a track to couple cars. Without the guard rail as an element of danger, could it well be said, as a rule of law, that it would have been negligent for the plaintiff to have stepped between the rails, with a smooth track, to walk 20 or 25 feet, when the speed of the moving cars was half, or at any rate much less than, his own? Without a purpose to relax any rule of law requiring caution in the performance of such duties, we think no such a rule has or should obtain. We attach much importance to the very low rate of speed of these moving cars, and the good condition of the walking, where the track was ballasted or surfaced to the top of the ties. If this view is correct, will the added condition of the guard rail operate to change it? The evidence is such that the jury could have found that the plaintiff's foot was caught because of the blocking between the guard and main rails becoming defective. After the accident it was demonstrated, by actual experiment, that a foot could be caught there, which a proper blocking would have avoided. Now, it has been held—so many times as to be the law, beyond a doubt—that an employee may assume that condition, in such respects, which ordinary diligence requires on the part of the company. It does not appear that the plaintiff knew of the defective blocking, or had a reason to apprehend it. We think, in view of the entire situation, that the question of contributory negligence was purely one for the jury. The facts are such, to say the least, as to present a question about which there might be a difference of opinion among persons of ordinarily good judgment. The question, in such a case, is one of fact. *Whitsett v. Railway Co.*, 67 Iowa, 150, 25 N. W. Rep. 104; *Mathews v. City of Cedar Rapids*, 80 Iowa, 459, 45 N. W. Rep. 894.

There is but one other question which we think it important to consider. Appellant, in argument, says: "The contributory negligence of Kroener constitutes the prominent, and, indeed, decisive, question upon this appeal." Concurring in that view, we need only add that we have considered all the points urged, and we think there is no reversible error.

2. The judgment is for \$12,000, and it is said to be excessive. The plaintiff at the time of the injury was 20 years of age, and had, under the evidence, an expectancy of life of 42.2 years. He was then earning \$60 per month. The verdict is far beyond the average in such cases. The condition of the plaintiff is much less than total disability. We know, from common observation, that

men with the loss of a foot engage in the pursuits of life, and their earnings are fairly proportionate to others. That this young man can, by ordinary diligence, earn one half of what he was receiving before the injury, or more, is not to be doubted. To him it is, of course, a life of inconvenience, and, because of his condition, one of regret or anguish. He has, besides, been a physical sufferer, and all these matters are to be considered. The amount of this verdict places this young man, almost in his boyhood days, in possession of a competency in excess of the average accumulation of a lifetime. At 6 per cent. interest, his receipts equal his former earnings, and, barring his suffering, make his misfortunes really a benefit. Few of his class, in their riper years, achieve so good a financial result. This court has sustained some large verdicts; but one, however, larger than this. In *Deppe v. Railway Co.*, 38 Iowa, 582, the plaintiff's thigh was crushed, and he received severe internal injuries. It is said: "His suffering was protracted, and most intense; having to endure for seven weeks the excruciating torture of machinery and appliances used by surgeons to prevent a shortening of the limb, which, however, was unavailable." It is said in the opinion that he was deprived of the ability to labor, upon which he was dependent for support. The judgment was for nine thousand dollars. *Belair v. Railway Co.*, 43 Iowa, 662, is a strong case,—also, of a brakeman,—and a verdict of \$11,000 was sustained. The opinion refers, in support of the holding, to the testimony of the physician that the plaintiff was "totally and permanently disabled." In *Funston v. Railway Co.*, 61 Iowa, 452, 16 N. W. Rep. 518, the verdict was for \$8,000, and sustained; but it appears that the leg was broken near the hip joint, and the fracture failed to unite, and the plaintiff would be a sufferer "as long as he may live." In *Collins v. City of Council Bluffs*, 32 Iowa, 324, a verdict for \$15,000 was at first sustained by a divided court, but the facts to sustain it are of the strongest kind. It is said the plaintiff, who had been an active, useful woman, had been "reduced to a helpless cripple for life,—a burden to herself and her friends." Upon a rehearing of the case the judgment was reduced to \$10,000, again by a divided court. In *Pence v. Railway Co.*, 79 Iowa, 339, 44 N. W. Rep. 686, a judgment for \$15,000 was sustained, but it was the case of almost total disability of a physician, with an annual income of from twelve to fifteen hundred dollars, and an expectancy of 23 years. He had, besides, incurred much expense. The amount is said to be large, but not the result of passion or prejudice. We have not attempted to notice all the different facts of these cases, pro and con, for they are many; but we reach the conclusion that the cases are very conclusive against the justice of the verdict in this case, and we are led to

the belief that prejudice or passion influenced its return by the jury. The plaintiff should be fairly compensated for the damage he has sustained, in view of all the elements to be considered in estimating them, but more than this has been granted. If the plaintiff shall within 60 days file in this court his remittitur of the judgment for damage in excess of \$8,000, the judgment will stand affirmed; if not, it will stand from that date reversed, and a new trial ordered.

KINNE, J., took no part in this case.

LONG v. VALLEAU.

(Supreme Court of Iowa. May 9, 1893.)

PLEADING—WAIVER OF OBJECTIONS—LIMITATION OF ACTIONS—TRUSTS—LACHES.

1. Where plaintiff, after filing an amended petition, proceeds to trial, treating its allegations as in issue, though no answer thereto was filed, he thereby waives the provisions of Code, § 2712, that every material allegation in a pleading, not controverted by a subsequent pleading, shall, for the purposes of the action, be deemed true.

2. In an action to discover assets of defendant's deceased father's estate, brought by the administrator, where it is alleged that decedent did business in defendant's name to defraud his creditors, it appeared that the property sought to be recovered came into defendant's possession after her father's failure in business, and he continued to use the property as his own until his death, but did business in her name. *Held*, that as it did not appear that defendant had repudiated the trust before her father's death, the action was not barred by the five-year limitation, when brought within five years after his death.

3. Where most of the property sought to be recovered came into defendant's possession in 1883, a delay of six years in bringing the action was not such laches as would defeat a recovery, when the cause of action was not barred by limitation.

Appeal from district court, O'Brien county; Scott M. Ladd, Judge.

This is an action in equity against the defendant to discover alleged assets of the estate of one Frank Teabout, deceased, and to have her decreed to hold certain real property in trust for his estate. The decree, in part, found for plaintiff, and, as to some of his claims, his petition was dismissed. Both parties appeal.

H. E. Long, for appellant. Milt. H. Allen and Levi Bullis, for appellee.

KINNE, J. 1. As the pleadings in this case are voluminous, a condensed statement of the matters in issue will be made: Plaintiff, as administrator of one F. Teabout, deceased, charges that for some time prior to his death he had been indebted to divers parties to the amount of many thousand dollars; that during said years he carried on business in the name of defendant, employing his own capital therein;

that this was done in order to keep his property from his creditors; that defendant is in possession of many thousand dollars' worth of personal property, which she has appropriated to her own use, and which was in fact Teabout's property; that defendant is the only child and daughter of F. Teabout and Emily Teabout, deceased, and that F. Teabout, prior to his death, made his home with said daughter; that in June, 1884, Emily Teabout, wife of F. Teabout, died, possessed of several thousand dollars worth of personal property, leaving her husband and daughter surviving her; that F. Teabout conspired with defendant for the purpose of cheating and defrauding his creditors, and failed and refused, prior to his death, to have set off to him his one-third share in his wife's estate, which share defendant has appropriated. Defendant admits that F. Teabout died intestate, and was, for some prior to his decease, indebted, in large sums, to divers persons; that he carried on business in defendant's name, for her and with her money, and says that, by reason of the fact that he had used and appropriated her money to his own use, he was largely indebted to her. Admits that Emily Teabout was the wife of F. Teabout, and mother of defendant, and that she died in June, 1884; that all the personal property she had she gave to the defendant prior to her death; that defendant is administratrix of her estate, which is unsettled; that said Emily executed a will, which has been lost, whereby she gave to defendant all her property, real and personal; that said Emily, in her lifetime, paid certain debts of F. Teabout, amounting to more than his share in her estate; that said F. Teabout knew of said will and gift, and approved the same, and waived any claim on said Emily's estate; that defendant has no assets in her hands belonging to the estate of F. Teabout. She denies all other allegations of the petition. Plaintiff afterwards filed an amendment to his petition, wherein he charged that all the real estate held by defendant, and its proceeds, were the property of F. Teabout, and that the title was placed in her name for the purpose of placing it beyond the reach of his creditors. He also sets out the names of several parties who have filed claims against the estate of F. Teabout, and which have been allowed, amounting, in the aggregate, to about \$55,000. It is averred that said indebtedness was contracted by him, or by the firm of Teabout & Valleau, of which he was a member, from February 1, 1879, to October 1, 1880; that said claimants were all creditors of F. Teabout when the defendant took title to said real estate. Defendant denies all the allegations in said amendment not otherwise admitted, modified, avoided, or explained; admits she holds title to real estate, but says she holds the same bona

fide, and in her own right; admits the filing and allowance of the claims against F. Teabout's estate, and that said indebtedness was incurred by the firm of Teabout & Valleau, of which firm F. Teabout was a member, from February 1, 1879, to April 1, 1881. In the fifth division of her answer, defendant says she is the sole heir of F. Teabout, and is his daughter. She then pleads that the title to all of the tracts of land mentioned in plaintiff's petition and amendment was on January 5, 1883, and during F. Teabout's lifetime, adjudicated to be in defendant's grantors, in a case wherein Charles Ray and others were plaintiffs, and Frank Teabout and others were defendants; that the plaintiffs in said case were the same parties as those for whose benefit this suit is prosecuted, and the claim made is the same; that all the rights of defendant to said real estate were acquired by her from F. Teabout and other defendants in said case. She also pleads the five-year statute of limitations, and avers that plaintiff had knowledge and notice of all the claims and causes of action herein for more than five years prior to the bringing of this action. In another division of her answer she pleads that plaintiff has been guilty of such laches as should prevent a recovery. Plaintiff, for a reply, says he denies that defendant holds said real estate bona fide, and in her own right; admits that Ray and others brought an action against Teabout and others, wherein a decree was entered against plaintiffs; denies all other allegations in said answer. Plaintiff afterwards filed a further amendment to his petition averring that on June 19, 1882, F. Teabout owned certain lands, (describing them;) that they were sold at sheriff's sale, and purchased by G. W. Pitts; that June 1, 1883, Pitts assigned the sheriff's certificate therefor to Levi Bullis for an alleged consideration of \$500.83, and afterwards the sheriff executed a deed to Bullis for said lands. It is averred that Bullis paid no part of the consideration for said lands; that Teabout paid therefor, and the title was taken in Bullis' name for the benefit of Teabout; that in August, 1883, said Bullis and wife deeded the lands to defendant; that defendant paid nothing therefor, and knew when she took title that F. Teabout had furnished the money to pay for the land. It is also alleged that in November, 1883, F. Teabout owned a mortgage and note for \$4,646, executed by Warren Walker and wife to Emily Teabout to secure the payment of that amount of money upon the purchase of certain lands, which were purchased by Walker, and the deed taken in the name of one Winterble from F. Teabout; that said mortgage was held in trust under the name of Emily Teabout; in payment thereof, Walker conveyed certain lands to defendant; that said conveyances

were made to defendant without consideration, and in fraud of creditors of F. Teabout. It is also claimed that, in 1882 and 1883, Walker purchased certain tax certificates on lands known as the "Wellington Lands," which certificates were paid for by F. Teabout, and assigned, and, by request of Teabout, deeds taken therefor by one Harker; that Harker had no interest therein, and in 1883 quitclaimed same to defendant, she knowing that F. Teabout was the actual owner of the lands. Another transaction, somewhat similar, is set out. The court below found that the Harker tax deeds were taken in trust for F. Teabout, and that he owned the land described therein, at his death; that Emily Teabout, at her death, owned certain real estate in which F. Teabout had a one-third interest in value; that defendant had collected rents of real estate belonging to F. Teabout, in the sum of \$225; that a mortgage given by one Lyons was the property of F. Teabout, and which defendant had collected, amounting to \$240.21. As to all the other claims of plaintiff, his bill was dismissed. Both parties appeal.

2. We have endeavored to carefully examine the very elaborate record presented in this case. The transactions appearing therein are so numerous that we cannot be expected to treat, in detail, all of them. To do so would extend this opinion to an unwarrantable length. Plaintiff's case is bottomed upon the claim that defendant has fraudulently obtained possession of, and now holds title to, a large amount of real and personal property, which in fact belonged to her father, F. Teabout, deceased; that she paid no consideration therefor, but the same was transferred to her, by her said father, either directly or through other persons, for the purpose of defrauding his creditors; that she has received large sums as the proceeds or rental of said property; that she should be held to account to the estate for such rents; and that the title to said real estate should be decreed to be held by her in trust for said estate. The large sum involved in this litigation,—variously estimated at from \$50,000 to \$125,000,—and the many questions of law and fact, have been as fully investigated as our limited time permitted. Some branches of plaintiff's case depend largely for support upon the testimony of the witnesses Warren Walker, W. T. Bowen, and Eva M. Bowen, his wife. As this record shows that Walker has been impeached, we shall give weight to his testimony in so far only as it is corroborated by other facts and circumstances appearing in the case. The testimony of both Bowen and his wife must be considered in the light of the fact that they seemed to have desired, for a consideration, to have testified favorably to the defendant. The consideration not having been paid to them, they now appear as willing witnesses for the plaintiff. We do

not wish to be understood as saying that they testified as they did by reason of any improper proposal or actor inducement given or held out to them by plaintiff or his counsel, but the Bowens' letters showed an anxiety on their part to dispose of the facts within their knowledge, to the defendant, for a large moneyed consideration,—a proposition, so far as this record shows, not made in response to any suggestions emanating from defendant or her counsel. In a general way, we may say that some of the evidence in this record is very unsatisfactory, in this: that it is general, indefinite, and often seems to be the mere opinion of the witness, resting upon facts not disclosed by him.

3. In 1881, Frank Teabout, who was the father of the defendant, was in partnership with one W. H. Valleau, under the firm name of Teabout & Valleau. In the spring of that year the firm failed, owing a large sum of money. Judgments were entered against them in favor of various creditors, some of whom have claims filed and proved against the estate of Frank Teabout, and to discover funds to pay which this action is prosecuted. Most of the creditors joined in bringing an action in equity in the Winnebago circuit court to set aside and cancel certain deeds and conveyances of property which had been made by Teabout prior to the failure, and to subject the property to the payment of their claims. Most of the property in controversy in this action was involved in that case. A decree was rendered therein against plaintiffs, which was afterwards affirmed on appeal to this court. Emily Teabout, the wife of Frank Teabout, and mother of defendant, died in 1884. Frank Teabout died in 1888. Defendant, about 1881, had quite an amount of property, which she turned over to her father to invest and manage for her. After 1881, Teabout did no business in his own name, and, if he carried on any business with his own funds, it was done in defendant's name. The business carried on for the defendant appears to have been prosperous. The defenses to plaintiff's action are: First, a denial that she had any property belonging to the estate of F. Teabout; second, prior adjudication; third, the statute of limitations; fourth, laches. We shall first consider questions arising on the special defenses pleaded, and the effect of defendant's failure to answer the amendment to the petition, after which we shall speak of the merits of the controversy.

4. Almost six weeks prior to the trial, plaintiff filed an amendment to his petition. No answer was made to this amendment. It is insisted that we must therefore treat the facts stated in the amendment as admitted. Defendant claims that, as plaintiff proceeded to trial without objection, he cannot now be heard to say that the allegations of the amendment were admitted. Our statute provides that "every material allegation

in a pleading, not controverted by a subsequent pleading, shall, for the purposes of the action, be deemed true." Code, § 2712. In *Clough v. Adams*, 71 Iowa, 17, 32 N. W. Rep. 10, after the evidence was in, plaintiff, with leave, filed an amendment to her petition. Defendant moved to strike it from the files, which motion being overruled, he elected to stand on the ruling, and refused to answer. It was held that the allegations in the amendment must be taken as true. In *Van Aken v. Welch*, 80 Iowa, 117, 45 N. W. Rep. 406, the defendant was in default for want of an answer, and it was held that the averments of the petition stood confessed. In *Eslich v. Railway Co.*, 75 Iowa, 443, 39 N. W. Rep. 700, an amendment was filed to the petition, against defendant's objection. No answer was made to it, and the court instructed the jury that the facts therein stated were admitted, which was held proper. In the case at bar, plaintiff proceeded to trial as if an answer had been filed. He did not seek to take the default of the defendant for want of an answer to his amendment. Both parties treated the amendment as having been denied. It does not appear that the fact that the amendment was not denied was ever called to the attention of the trial court. If plaintiff intended to take advantage of the fact that his amendment had not been answered, he should have done so in the lower court, by taking a default. Had he taken the proper steps there, his amendment, not being denied, would have been taken as admitted. He had the right to waive this provision of the statute, which he did by proceeding to trial, and in all respects treating the matters pleaded in the amendment as in issue. *Clay v. Alcock*, 23 Iowa, 591; *Hervey v. Savery*, 48 Iowa, 322; *Arbuckle v. Bowman*, 6 Iowa, 70.

5. The defendant has pleaded the five-year statute of limitations. It is said that the plea is insufficient, in that it fails to show that more than five years had elapsed since the discovery of the fraud by plaintiff, prior to the bringing of this action. The plea is not open to that objection. It is contended that the five-year statute does not apply in this case; that this is an action "brought for the recovery of real property," wherein the action must be brought within ten years after the cause of action accrued. Code, § 2529, subd. 5. We need not determine this question. If the ten-year statute applies, then the plaintiff's action is not barred, as the property sought to be recovered was all acquired by the defendant within ten years prior to the bringing of this suit. If it comes within the fourth subdivision of the section referred to, as being an action seeking relief on the ground of fraud, then we think the action is not barred. This action was commenced in 1889. Most of the property sought to be recovered came into the defendant's possession in

1883, or after. The property in controversy, if not owned by defendant, was held by her in trust. She was then, in law, a trustee holding property for the benefit of the real owner,—Frank Teabout,—and after his death she would hold it in trust for his estate. Now, the general rule is that the possession of property by the trustee, which is subject to the trust, is, in law, the possession of the cestui que trust. *Wilson v. Green*, 49 Iowa, 251; *Murphy v. Murphy*, 80 Iowa, 740, 45 N. W. Rep. 914; 2 *Perry, Trusts*, § 863. And in such a case the statute will not commence to run until the trustee repudiates his trust. In *Murphy v. Murphy*, supra, it is said: "If the property in controversy belonged to the estate of the decedent, and defendant took possession of, and used and disposed of, it, under such circumstances as to create a trust in him, the statute of limitations would not commence to run in his favor until he had, in some unmistakable manner, given plaintiffs notice, or sufficient reason to know, that he claimed the property adversely to them." The evidence on the part of the defendant is that from 1881 up to the time of his death, in 1888, her father, Frank Teabout, had the control and management of all this property. He operated a store for her, leased the lands, collected the rents, borrowed money, purchased real estate, and generally used all of the property, to all outward appearances, as if it was his own, except that he transacted the business generally in her name. He even used the rents and profits of the business, to a certain extent. Clearly, then, during F. Teabout's lifetime, the relation of defendant to him and his management of the property was not such as to show that she had repudiated the trust, if one existed. Five years had not elapsed since his death, and prior to the bringing of this action. We conclude, then, that the plea of the statute of limitations will not avail the defendant.

6. Another defense pleaded is laches. It is true that in many cases laches are held to be a defense, independent of the statute of limitations. 2 *Pom. Eq. Jur.* § 965; 12 *Amer. & Eng. Enc. Law*, p. 571; *Light v. West*, 42 Iowa, 138. Yet in such cases it must appear that the party relying upon such laches has been prejudiced by the delay in such a manner as that it would be inequitable to grant the relief sought. *Light v. West*, Id. We have held that a court of equity will not refuse to enforce a trust, clearly established, on the ground that the claim is stale, when the cause of action is not barred by the statute of limitations. *Cotton v. Wood*, 25 Iowa, 44. Each case in which laches is pleaded must be determined upon its own particular facts. In view of the alleged trust character of defendant's holding of the property, and the fact that the statute has not run against the action, we do not think that plaintiff should be

held guilty of such laches as to prevent his recovery.

7. It is insisted that plaintiff's petition should be dismissed because he has an adequate remedy at law. This question was not raised below, and we will not consider it.

8. It is contended that plaintiff is estopped from questioning the validity of defendant's title to the property in controversy, because in certain actions, wherein all of the creditors who have filed their claims against the estate of F. Teabout, and had them allowed, except Jaffrey & Co., were plaintiffs, and Frank Teabout, his wife, George Valleau, husband of defendant, Warren Walker, Milt H. Allen, and others, were defendants, the same matters were litigated as are now in controversy, as to the fraudulent disposition of his property by F. Teabout, and it was adjudged that the property belonged to the several defendants. We need not discuss the question as to whether this plea is available to the defendants, for the reason that it is undisputed that Jaffrey & Co., who are claimants against the estate of F. Teabout for \$36,000, and whose claim is filed and allowed, and for whose benefit, in part, this suit is prosecuted, were in no way parties to said suit, the judgment in which is pleaded as an adjudication in this action. Clearly, then, the plea was not good as a defense to plaintiff's action.

9. The court below held that the real estate known as the "Wellington Lands" was in fact the property of Frank Teabout, and held in trust by defendant for the benefit of his estate. This tract of land consisted of 400 acres, which was sold for taxes to Warren Walker. It appears that the consideration for the land was paid by Teabout, who also paid a commission for bidding it in. The tax certificates were afterwards assigned, at Teabout's request, to William Harker. When the time came to execute the tax deeds, Teabout told Harker to take the deeds in his (Harker's) name, which was done. Harker never paid any money for or on account of these lands. In 1888 he quit-claimed them, without consideration, to the defendant. In view of all of the testimony touching this land, we think the court below properly held it to be the property of Teabout's estate. There is no claim that defendant ever put a dollar in this land.

10. The "Frankville farm and lots" consisted of several tracts of land, and some town lots, situated in Winnebago county, Iowa. February 15, 1883, Emily Teabout—the wife of Frank Teabout, and mother of defendant—held the legal title to these lots and lands. On that day she conveyed them to the defendant. This deed was not signed by Frank Teabout until after his wife's death, in 1885. When Emily Teabout died, her husband had not parted with his dower interest in said lands and lots. The conveyance made to defendant by Frank Teabout

after his wife's death was without consideration, voluntary, and for the purpose of defrauding his creditors. The one third in value of this land and lots is held in trust for Frank Teabout.

11. The court below properly found that defendant should account for one third of the rents of the Frankville property, and we are satisfied with the amount of said finding.

12. It is claimed that the Lyons note and mortgage is the property of the estate, and the court below so held. The claim rests substantially upon the evidence of Warren Walker, alone. He has been impeached. The mere fact that, after the indebtedness was paid, defendant asked Walker to satisfy the mortgage, does not corroborate Walker's statement that the money for the loan was furnished by F. Teabout. We think the court erred in finding that this property belonged to the estate of Teabout.

13. Walker's testimony tends to show that in 1881 he purchased \$10,000 worth of United States bonds for Frank Teabout. His evidence is corroborated, to a certain extent, as to the purchase, and as to the fact that some bonds were afterwards seen in Teabout's possession. If, however, it be conceded that the purchase of the bonds with Teabout's money is established, there is no evidence which would warrant us in saying that defendant received the benefit of such purchase. We cannot charge defendant with this property on mere supposition.

14. Much other property is involved in this controversy, consisting of lands, notes, mortgages, etc. It is impossible for us to consider all of these claims in detail. We have carefully examined them all, and while it must be admitted that there are facts and circumstances that tend to show that Frank Teabout had property of his own, which he may have placed in the defendant's hands, yet the showing is not such as justifies us in saying that she received from him, or from others from him, any property belonging to him, which she should be held to account for to his estate, except as heretofore stated. To set forth our reasons for reaching this conclusion would require a lengthy review of a large volume of evidence. It is sufficient to say that the title of this property is in defendant. Her acquisition of it may have been honest. We should not be justified in setting aside her title to this real estate unless the evidence showed, clearly and satisfactorily, that it was improperly or fraudulently obtained by her. The most that can be said is that there is evidence that might constitute a link in the chain of fraud, but the other links are missing. We need not cite authorities in support of the proposition that fraud cannot be presumed, and that it will never be imputed when the facts upon which it is predicated are, or may be, consistent with honesty and purity of intention. The evidence falls short of satisfying us that plaintiff is entitled to the relief

asked, except in the particulars heretofore mentioned.

15. Proceedings were had in the court below, after the appeal was taken, to correct the record in this case. It was claimed that in several respects the reporter's transcript, after it had been duly certified, had been altered, and certain additions made thereto, and interpolations made therein. The trial court found that such was the case, and corrected the record accordingly. It also found that such alterations, additions, and interpolations were made by H. E. Long, counsel for the plaintiff herein, without authority from the court. This action and finding of the court are excepted to by the plaintiff. Plaintiff's counsel contends, in brief, that all the changes made by him in the transcript were by way of correcting errors of the reporter, and making the reporter's transcript correspond with the facts proven, as shown by the record. It matters not what counsel's motive was for thus tampering with the reporter's transcript. It is no justification for this act to say that the record shows that such correction, changes, additions, and interpolations were necessary to make the transcript conform to the facts shown by the documentary evidence introduced on the trial. We have not examined the papers introduced to ascertain if counsel's claim in that respect is well founded, for the reason that, if it be conceded, it would not warrant counsel in his action. If the reporter's transcript was not accurate, in any particular, there was a legal and proper way of correcting it, to which resort should have been had. The moment it is conceded that counsel in a case may, without authority from the court, alter, change, or add to the official transcript of the evidence, that moment such transcript becomes valueless. The only safety to litigants is in preserving inviolate the records of the court. We cannot, if we would, overlook such an act of counsel. It merits the severest condemnation, and evinces a lack of proper appreciation of the duties and responsibilities devolving upon one who practices an honorable profession.

16. Plaintiff excepts to the action of the court in overruling the first and sixth grounds of his motion to correct the record. As we do not find in the record anything showing what said grounds were, we must presume the action of the court in that respect was proper. The judgment of the district court, as modified with reference to the Lyons note and mortgage, is affirmed.

KEMP v. SMITH et al.

(Supreme Court of Iowa. May 11, 1893.)

PARTNERSHIP—ACCOUNTING—CONSTRUCTION OF ARTICLES.

1. Plaintiff bought a half interest in defendant's business. It was agreed that the partnership could be terminated by plaintiff

at the end of a year, on 30 days' notice, defendant to repay him the purchase price. Each partner was to enter in the firm books all moneys received by him. Held, that plaintiff did not forfeit his rights, in the absence of fraud, because of an omission to charge himself with a small amount received in the business.

2. An agreement that, if plaintiff withdrew, he should forfeit to defendant his undivided one-half share of the earnings of the partnership during the year, meant one half of the net earnings.

Appeal from district court, Plymouth county; F. R. Gaynor, Judge.

Action in equity for an accounting and settlement of a copartnership, and for judgment on a bond given by the defendant Smith, with defendants H. S. Payn and J. H. Hoffman as his sureties, to the plaintiff, to secure the performance of certain stipulations in the contract of copartnership. Judgment was entered in favor of the plaintiff for \$635. Defendants appeal.

T. M. Zink, for appellants. P. Farrell and Argo, McDuffie & Reichmann, for appellee.

GIVEN, J. 1. Plaintiff and defendant Smith entered into a written agreement of copartnership in the real estate, loan, and insurance business, which agreement contains the following: "The said copartnership to commence on the 17th day of September, 1888, and to continue until the 17th day of September, 1889, at which time the said Henry B. Kemp may withdraw from the said firm and copartnership, if he so elect, upon the following terms and conditions, to wit: He shall give the said Smith thirty days' notice of such intention to withdraw from the said firm; and, if he shall elect to withdraw from said firm at the said time, the said C. B. Smith is to pay him the sum of one thousand dollars, the sum paid by Henry B. Kemp to said C. B. Smith for an undivided one-half interest in his real estate, loan, and insurance business in Le Mars, Iowa, according to the terms and conditions of his certain bond, bearing even date herewith, and upon the compliance with the terms and conditions of these articles of copartnership on Kemp's part to be performed." At the same time the defendants executed the bond sued upon to the plaintiff, conditioned for the payment of said \$1,000, according to the terms of the written agreement. On September 21, 1888, the plaintiff and defendant Smith made a further agreement in writing, to the effect that, if plaintiff did not withdraw from the partnership at the expiration of one year, he was to become an equal owner of the office furniture, fixtures, and appliances, in consideration of the amount paid by him for an undivided interest in said business. On the 18th day of August, 1889, the plaintiff addressed and mailed to the defendant Smith the following: "C. B. Smith—Dear Sir: I hereby give you notice that I am going to withdraw from the copartnership at the

expiration of our contract, September 17, 1889. This being the thirtieth day, I take this means of giving you notice, as you are gone in the country, and I will be out tomorrow afternoon Yours respy., Henry B. Kemp." Defendant Smith admits in his answer that he received this notice through the mail on the 18th day of August, 1889. There is no question but that defendant Smith had 30 days' actual notice, as provided in the agreement of copartnership, on September 17, 1889. Appellants contend that, as August 18, 1889, was Sunday, the notice is void. It is a sufficient answer to this claim that the defendants do not plead such a defense. They admit the receipt of the notice, and join no issue with respect to it. They further claim that the plaintiff waived all rights under this notice, by continuing to transact business and hold himself out as a partner after September 17, 1889. There is some conflict in the evidence on this subject, but the preponderance is in favor of the conclusion that the partners understood the partnership as ending September 17th, and what plaintiff did thereafter was in closing up the affairs of the partnership.

2. The partnership having been thus terminated September 17, 1889, the plaintiff is entitled to recover the \$1,000 secured by the bond, if he has complied with the terms and conditions of the articles of copartnership on his part. It was provided in the articles that each partner should give his entire time, utmost skill, and best endeavors to the business of the firm. Appellants insist that appellee did not comply with this part of the contract, for that he only earned about \$25 during the year. The evidence does not sustain this claim, but, on the contrary, shows that the plaintiff devoted all his time to the business, and did all that was required of him. The articles also required each partner to enter in the firm books all money received by him. Appellants claim that appellee failed to charge himself with three small drafts aggregating \$24.90, and with commissions received from his father for loaning money for him. The drafts were evidently the property of the firm, and it is reasonably certain that plaintiff received the money on them, as he indorsed them. There is no evidence that he omitted to charge himself with them with any fraudulent intent. He had indorsed the drafts, two of which were paid but a short time before the termination of the partnership. It would be unjust to say that, because of this omission, the plaintiff should forfeit his rights under the bond. During the partnership the plaintiff negotiated several loans for his father. Some of this business was transacted at the office of the firm, and was aided, to some extent, by the defendant Smith. Plaintiff failed to charge any commissions as due from or paid by his father, and it is contended that, for this

reason, he is not entitled to recover on the bond. It fairly appears that, at the time, it was understood that this was not the business of the firm, but of the plaintiff and his father. We think the plaintiff fully and fairly performed his part of the articles of copartnership, and that he is entitled to be allowed the \$1,000 on his bond.

3. The articles of copartnership contain this further provision: "It is further agreed that, if the said Henry B. Kemp withdraws from the firm and copartnership, at the time above stated, he shall forfeit and pay to the said C. B. Smith a sum equal to the amount of what his undivided one-half share of the earnings of the copartnership business was during the year previous to such withdrawal, not to exceed the sum of one thousand dollars, however; time to be the essence of this contract." An agreed stipulation of facts is in evidence, from which it appears that the whole earnings were \$1,670.42; expenses, \$853.62,—leaving \$836.80; and that plaintiff drew out \$591.33. Plaintiff's undivided one-half share of the earnings is one-half of the net earnings, and not of the gross, as claimed by appellants. His share of the net earnings being less than \$1,000, he is entitled to recover the difference on the bond, with interest. This being the amount found by the district court, the judgment is affirmed.

LIVERMORE v. MAXWELL et al. QUINCY v. GINSBACH et al. SAME v. ALLINE et al. DAVIS v. WERLE et al. PERKINS v. BOEVER et al.

(Supreme Court of Iowa. May 10, 1893.)

DEED OF TRUST—UNRECORDED ASSIGNMENT—PRIORITY—BONA FIDE PURCHASERS—ATTORNEYS' FEES.

1. In a suit to set aside the satisfaction of a trust deed, it appeared that defendant M. borrowed money of defendant D., and gave notes payable to D.'s wife, secured by the deed to D., as trustee. D. sold the notes to plaintiff, a nonresident, of which M. had knowledge. Afterwards, and before maturity, M. paid D. the amount of the notes, who, with his wife, satisfied the deed on the margin of the record, and embezzled the money. *Held*, that as M. knew plaintiff was the owner of the notes, though his assignment thereof was unrecorded, M. was liable for their amount, since through his negligence D. was enabled to embezzle his payment.

2. It also appeared that after M. had paid D. the amount of plaintiff's notes, and the deed was satisfied, a mortgage company, without knowledge of plaintiff's assignment, made a loan to M. secured by mortgage on part of the land. *Held*, that plaintiff's deed was a junior lien on such land.

3. A purchaser of a portion of M.'s land, after the satisfaction of the deed, and without notice of plaintiff's assignment, held the land freed from the lien thereof.

4. As M. resisted the payment of such notes, which provided for a reasonable attorney's fee, plaintiff was entitled to recover such fee, though the notes were not payable at a particular place, and notice was not given on record of the assignment, nor demand made before suit.

Appeal from district court, Plymouth county; Scott M. Ladd, Judge.

Action in equity to cancel and set aside a release and satisfaction, entered on the record, of a certain trust deed, executed by defendant Maxwell to secure his certain promissory note, and for judgment and decree foreclosing said trust deed, and declaring plaintiff's lien superior to the interest or liens of the defendants. Decree was entered dismissing plaintiff's petition, from which he appeals. The issues and facts appear in the opinion.

Ira T. Martin and Haines & Lyman, for appellant. Pat. Farrell, Geo. C. Scott, and J. H. & C. M. Swan, for appellees.

GIVEN, J. 1. Four other cases, resting largely upon the same state of facts involved herein, were submitted herewith, namely: Josiah P. Quincy, Appellant, v. Nicholas Ginsbach et al.; Josiah P. Quincy, Appellant, v. Ernest A. Alline et al.; Ann Davis, Appellant, v. Mathias Werle et al.; A. T. Perkins v. Paul Boever et al., Appellants. The following facts applicable to all these cases appear without controversy, or are fully established by the evidence: For some years prior to and during the time of the transactions hereinafter mentioned, J. M. Dunn was engaged, at Le Mars, Iowa, in the business of loaning money on real estate security, and John Jeffries & Sons were engaged in business as real estate and mortgage brokers at Boston, Mass. J. M. Dunn employed Jeffries & Sons, as brokers, to sell for him on commission such securities as he might send them for that purpose. The course of business was as follows: In some instances, J. M. Dunn paid the money to the borrower on receiving the security; in others, he took an application for a loan, forwarded it to Jeffries & Sons, and, when notified that they had a purchaser for the securities, Dunn took and forwarded the note and trust deed of the borrower to Jeffries & Sons, who indorsed the same to the purchaser on payment of the purchase price, and forwarded the money, less commissions, to J. M. Dunn, and he delivered it to the borrower. In each instance, whether the loan was made in the one way or the other, J. M. Dunn took the promissory note of the borrower for the amount of the loan, with interest coupons attached, payable to the order of P. M. Dunn at Boston, Mass. He also took from the borrower a deed to himself, as trustee, conditioned for the payment of the debt, and providing for a reconveyance "on full payment of the indebtedness." The notes thus taken were forwarded to Jeffries & Sons, with indorsement thereon to them, without recourse, of the note and annexed coupons. In some instances the coupons were also indorsed, but in blank as to the indorsee. These indorsements purported to be signed by P. M. Dunn. J. M. Dunn also

sent to Jeffries & Sons the trust deed, duly recorded, without indorsement. On receipt of such securities, in case where application for a loan had been accepted, Jeffries & Sons indorsed them, without recourse, to the person accepting the loan, on payment of the amount, and forwarded the money, less the commissions, to J. M. Dunn, who paid it to the borrower. In cases where J. M. Dunn had made the loan from his own money, Jeffries & Sons sold and indorsed the notes, without recourse, to the purchaser, and remitted the amount, less commissions, to J. M. Dunn. Payment of matured coupons was made through J. M. Dunn, the person paying furnishing him the money, which he sent to Jeffries & Sons, who paid it to the holder of the note on surrender of the coupon, which was sent, through Dunn, to the person paying the same. P. M. Dunn, the payee in these notes and cestui que trust, was the wife of J. M. Dunn. We are satisfied from the evidence that she had no personal interest in these transactions, and that her name was used by her husband, in taking securities and indorsing notes, by her authority and with her knowledge and consent. The facts in the case against Maxwell et al. are that on December 1, 1885, the defendant John Maxwell, having borrowed \$1,100 from J. M. Dunn, executed his promissory note therefor, and his trust deed to secure the same, in the manner stated above. The deed being duly recorded, J. M. Dunn, on December 12, 1885, sent said note, coupons, and deed to Jeffries & Sons, indorsed as above stated, to be sold. On December 15, 1885, the plaintiff purchased said note and coupons, and Jeffries & Sons indorsed the note to him, without recourse, and delivered to him the coupons, which were indorsed in blank, the blank being filled with the name of the plaintiff as indorsee. The amount received by Jeffries & Sons from the plaintiff was sent to J. M. Dunn, less their commission. The coupons were paid at or before maturity, in the manner stated above. On March 27, 1887, John Maxwell sold and conveyed by warranty deed a part of the land to the defendant Daniel J. McNamara, who assumed to pay \$700 of the debt secured by the trust deed from defendant Maxwell. On September 26, 1887, Maxwell sold and conveyed to McNamara the balance of the land; McNamara assuming the remaining \$400 of the indebtedness secured by the trust deed. Prior to November 14, 1888, McNamara applied to the defendant the Farm Land Mortgage & Debiture Company, through its agent at Sioux City, for a loan of \$1,600 upon said land, and exhibited an abstract showing title in him, clear of all incumbrances except said trust deed. The loan was accepted on condition that said trust deed should be satisfied and canceled. A draft was drawn on the Farm Land Mortgage & Debiture Company, of Chicago, for the amount required to satisfy the trust deed in favor of J. M. Dunn,

trustee, which draft was sent to J. M. Dunn, to be presented and used when the trust deed was properly discharged of record, and an abstract showing that fact furnished to the agent at Sioux City. To secure this loan McNamara executed his mortgage to the company, November 14, which was duly recorded November 19, 1888. Upon receipt of the draft by J. M. Dunn, the following entry was made and signed in person by J. M. Dunn and P. M. Dunn, upon the margin of the record of said trust deed: "This trust deed paid in full, and the same is hereby released, satisfied, and discharged of record this twenty-sixth day of December, 1888. J. M. Dunn, Trustee. P. M. Dunn, cestui que trust." About the 1st of March, 1889, McNamara sold said N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 29 to the defendant Albert Hockenberry, and at the same time paid the Farm Land Mortgage & Debenture Company \$500 upon the \$1,600 loan, whereupon said company released the \$1,600 mortgage, and took a new mortgage, securing the remaining \$1,100, upon the same land, except that sold to Hockenberry. During all these years the plaintiff was a resident of Massachusetts, and had no actual knowledge of the transactions between the defendants, nor of the satisfaction entered upon the record of the trust deed, until shortly before the commencement of this action. The plaintiff failed to take an assignment of the trust deed, and failed to have the assignment of the Maxwell note to him entered of record.

2. We first inquire as to the liability of the defendants Maxwell and McNamara. They answer separately, each setting up the payment made to J. M. Dunn as a full satisfaction of the indebtedness, and claim the right to maintain that defense upon the ground that J. M. Dunn was agent for the holder of the notes, and authorized to receive the payment, and upon the further ground that Mrs. P. M. Dunn did not sign the indorsements, and therefore the plaintiff is not the holder of negotiable paper, for value, before due. There is no evidence that J. M. Dunn was agent for the holder of the notes, and authorized to receive payment thereof, unless such agency and authority are found in the trust deed. The only authority conferred by the deed is to reconvey upon the debt being fully paid. The authorities are uniform in holding that a trustee has no powers except those conferred by the instrument creating the trust; that persons dealing with the subject of the trust take notice of the extent and limitations of the powers conferred; and that those given must be strictly pursued. *Perry, Trusts*, § 831; *Jones, Mortg.* § 937; *Pom. Eq. Jur.* § 1062; *Newman v. Samuels*, 17 Iowa, 537; *Hill, Trustees*, 478. Even if Mr. Dunn did have authority to receive payment at the maturity of the note, that did not authorize him to receive it when he did. The note was payable "on

the 1st day of December, A. D. 1890," not on or before; yet Mr. Dunn assumed to receive payment nearly two years before it was due. It was argued that, as Mrs. P. M. Dunn joined in the release of the deed, the payment should be held good as to these defendants. These defendants knew that the note was negotiable by indorsement. They had each paid interest coupons that were returned to them, bearing the indorsement to the plaintiff, and they knew that neither J. M. nor P. M. Dunn had the note and coupons to surrender at the time the payment was made. *Kellogg v. Smith*, 26 N. Y. 18; *Bergen v. Urbahn*, 83 N. Y. 49. We are in no doubt but that these defendants knew that the note and coupons had been transferred, and made the payment upon the mistaken belief that J. M. Dunn had authority, as trustee, to receive it. It is certainly a hardship to require these defendants to pay this debt again, and equally so if the plaintiff must lose it. It is a familiar and just rule, "that, when one of the innocent parties must suffer by the wrongful act of a third person, he must suffer who left it in the power of such third person to do the wrong." *McClure v. Burris*, 16 Iowa, 591. It was these defendants who put it in the power of J. M. Dunn to embezzle this money. It is further argued that, as the notes were not negotiable without indorsement, and as Mrs. Dunn did not sign the indorsements, they are open to this defense of payment. As already stated, we are satisfied that Mrs. Dunn authorized these indorsements, if she did not make them herself. They were alike effectual, whether made by her or by her authority. Our conclusion is that the plaintiff is entitled to judgment against these defendants for the amount due upon the notes.

3. We next consider the contention between the plaintiff and the Farm Land Mortgage & Debenture Company, which is as to the priority of their respective liens upon the land covered by the company's mortgage last taken. The trust deed under which plaintiff claims is prior in point of date, and, as we have seen, is due and unsatisfied; the payment to J. M. Dunn, and the satisfaction entered of record by him and P. M. Dunn, being wholly unauthorized and void. It follows from these conclusions that the plaintiff's lien must be held to be the superior lien, unless by some act or omission he has lost the right to have it so declared. It is apparent from the evidence that the defendant company did not have any knowledge concerning the Maxwell notes and trust deed, other than that imparted by the record, until long after it took the mortgage for \$1,100. It knew from the record that Mr. Maxwell had executed that trust deed to J. M. Dunn, trustee, to secure the payment of his note and interest coupons to the order of P. M. Dunn,

and that, upon its furnishing the money to McNamara to pay that debt, J. M. Dunn, trustee, and P. M. Dunn, payee and cestui que trust, would release and satisfy the trust deed. It does not appear that this company had any knowledge whatever that the Maxwell notes had been transferred, or any knowledge that suggested that fact. In the absence of such knowledge, the company might well infer from the fact that Mrs. Dunn was payee, and that she joined with the trustee in releasing the trust deed, that she was the holder of the notes, and surrendered them on receipt of the payment. This defendant must have known, from the trust deed, that J. M. Dunn did not have authority to receive payment and release the deed; but it is not upon his authority or acts that it relied, but upon the release by Mrs. Dunn. Unlike the defendants Maxwell and McNamara, it did not know or have any reason to doubt the authority of Mrs. Dunn to receive payment and enter satisfaction. There can be no doubt but that this company loaned its money in good faith, and upon the warranted belief that it was receiving a first lien upon the land as security, while the plaintiff, in equal good faith, rested upon the trust deed as a first lien. Here, again, we have an instance where one of two innocent parties must suffer for the wrong of a third person. Under the law the assignment of the Maxwell notes operated as an equitable assignment of the trust deed securing them, and therefore the assignment of the notes is an instrument affecting the real estate. McClain's Code, § 3112, is as follows: "No instrument affecting real estate is of any validity, against subsequent purchasers, for a valuable consideration, without notice, unless recorded in the office of the recorder of the county in which the land lies." Plaintiff is claiming a first lien upon this land by virtue of the assignment of the notes to him, and yet he does not notify the world of his claim by placing it on record. If he wished to affect subsequent purchasers or mortgagees with notice of his rights, he should have secured an assignment of the trust deed, and placed it on record. Williams v. Jackson, 107 U. S. 482, 2 Sup. Ct. Rep. 814. In *Parmenter v. Oakley*, 69 Iowa, 389, 28 N. W. Rep. 653, this court "held that the transfer or assignment of a mortgage, like other instruments affecting real estate, is invalid against a subsequent purchaser or mortgagee without notice, unless it be recorded." See, also, *Bank v. Anderson*, 14 Iowa, 545; *Cornog v. Fuller*, 30 Iowa, 213. If the assignment of the notes did not operate as an equitable assignment of the trust deed, plaintiff would have no rights under it; but, having the equitable assignment, he must, under our recording acts, place his assignment on record to bind subsequent purchasers and mortgagees, who

act without other notice. Plaintiff, by his failure to have his assignment recorded, induced the defendant to make the loan it did, and put it into the power of J. M. Dunn to obtain and to embezzle the money, and, under the rule quoted above, he must bear the consequences. Some stress is laid upon the fact that the mortgage to the defendant company was executed and recorded before the release of the trust deed was entered. The completion of the loan to McNamara involved several steps, all of which constituted a single transaction, and each of which was upon the condition that the money was not to be paid until the trust deed was released. Without the payment of the money, the mortgage would have been of no effect. It was the payment of the money that concluded the transaction, and made it binding; and this was after the trust deed had been released.

4. We now inquire as to the contention between the plaintiff and the defendant Albert Hockenberry. Some months after the trust deed from Maxwell had been satisfied of record by J. M. and P. M. Dunn, this defendant purchased of Mr. McNamara 40 acres of the land covered by said trust deed. There is no evidence that Mr. Hockenberry had any notice or knowledge whatever concerning the Maxwell notes and trust deed, other than as shown by the record. His status in this respect is the same as the Farm Land Mortgage & Debenture Company. He is clearly a subsequent purchaser without notice of the assignment of the Maxwell notes and trust deed, and is therefore entitled to hold the land purchased freed therefrom.

5. The notes and trust deed sued upon provide for a reasonable attorney's fee, and the plaintiff asks that a reasonable fee be allowed. It is contended that as the notes were not payable at a particular place in Boston, Mass., no notice was given on the record of the assignment so that the defendants liable might know to whom to pay, and no demand made before suit, the plaintiff is not entitled to recover attorney's fees. This argument would have some force if the defendants whose duty it was to pay had not resisted payment. We think the plaintiff is entitled to recover a reasonable attorney's fee, as provided by law. It follows, from the conclusions announced, that the plaintiff is entitled to judgment against the defendants Maxwell and McNamara for the amount due upon the notes sued upon and an attorney's fee, as allowed by statute, and a decree foreclosing the trust deed as to all the lands described therein except the tract sold to the defendant Hockenberry; that the defendant Farm Land Mortgage & Debenture Company have a decree declaring its mortgage a prior lien upon the land described therein to the lien of the plaintiff; and that the plaintiff pay the costs accruing upon the issues between him and the defendant Hockenberry, and that the defendants Maxwell and McNamara pay

the remaining costs. The judgment of the district court is reversed, and the case remanded for judgment and decree in conformity with this opinion. Reversed.

6. We next consider the case of Josiah P. Quincy, Appellant, v. Nicholas Ginsbach, Francis J. Morton, et al. The material and controlling facts of this case are the same as in Livermore's Case; about the only difference being that in this case J. M. Dunn first forwarded the application of Ginsbach for a loan, and Ginsbach has not sold or conveyed any of the land, except as he mortgaged it to defendant Morton, to secure a loan with which he paid J. M. Dunn at the time J. M. Dunn and wife entered satisfaction of the trust deed. We conclude, for reasons already stated, that the plaintiff, Quincy, is entitled to a judgment against Nicholas Ginsbach for the amount due upon the note sued upon, and a reasonable attorney's fee, and foreclosure of the trust deed. As the only relief asked by the defendant Morton is that the plaintiff's petition be dismissed as to him, the judgment of the district court dismissing the plaintiff's petition as to him, is affirmed, and reversed in so far as it dismissed the plaintiff's petition as to the defendant Nicholas Ginsbach. The plaintiff will pay the costs arising upon the issues between him and the defendant Morton, and the defendant Ginsbach will pay all other costs. The judgment is reversed, and the case remanded for judgment in conformity with this opinion.

7. We next consider the case of Josiah P. Quincy, Appellant, v. Ernest A. Alline, C. W. Fred Steigert, M. P. Bogh, A. A. Alline, and the Aetna Life Insurance Company. In this case Ira T. Martin and Haines & Lyman appear for appellant, and Joy, Hudson, Call & Joy, A. A. Alline, and Pat. Farrell for appellees. The material facts in this case are identical with those in the case of Livermore. E. A. Alline executed his note for \$1,300 to P. M. Dunn, or order, with his trust deed to P. M. Dunn to secure it. They were transferred, in the manner already stated, to the plaintiff. Thereafter Alline sold part of the land to Steigert, who assumed and agreed in the deed to pay three fourths of said note. Alline sold the remainder of the land to defendant Bogh, who assumed in the deed to pay the remaining fourth of said debt. Steigert mortgaged his part of the land to the Aetna Life Insurance Company to secure a loan of \$1,400. He also mortgaged a part of the land to A. A. Alline to secure a loan of \$450. Steigert and Bogh paid the amount of E. A. Alline's note to J. M. Dunn, whereupon he and P. M. Dunn entered a release and satisfaction of the trust deed on the record. The loans made by the Aetna Life Insurance Company and A. A. Alline were upon the faith of that release, and without any knowledge that the notes sued upon had been transferred. Our conclusion in this case is that the plaintiff is entitled to judgment against

the defendants E. A. Alline, C. W. Fred Steigert, and M. P. Bogh for the amount due upon his notes and an attorney's fee, as per statute, and against defendant C. W. Fred Steigert for three fourths of that amount, and against defendant M. P. Bogh for one fourth of that amount; also, that he is entitled to a decree setting aside the satisfaction of said trust deed, and foreclosing the same. The defendant A. A. Alline is entitled to decree declaring his mortgage to be paramount and superior to the lien of the plaintiff; and the defendant the Aetna Life Insurance Company is entitled to the relief asked, namely, that the plaintiff's petition be dismissed as to it. The judgment of the district court is affirmed as to the Aetna Life Insurance Company, and reversed as to the other defendants. The case will be remanded for judgment and decree in harmony with this opinion, the plaintiff to be adjudged to pay the costs arising upon the issues joined with the Aetna Life Insurance Company and A. A. Alline, and the defendants E. A. Alline, C. W. Fred Steigert, and M. P. Bogh to pay the remaining costs. Reversed.

8. The suit of Ann Davis, Appellant, v. Mithias Werle, William Young, et al., is upon the promissory note of Werle, executed and transferred in the manner heretofore stated. Young made a loan to Werle, with which the amount of the note in suit was paid to J. M. Dunn, and the trust deed satisfied of record by J. M. and P. M. Dunn. Mr. Young made his loan, and took a mortgage upon the land in question as security, upon the faith of the release of the trust deed entered by J. M. and P. M. Dunn. The facts as to notice are the same as in Livermore's Case, and it follows that the plaintiff is entitled to judgment against Mithias Werle for the amount due upon his note, and a reasonable attorney's fee, and decree of foreclosure. The defendant Young is entitled to a decree declaring his mortgage paramount and superior to the lien of the plaintiff. The plaintiff will pay costs arising upon the suit between her and the defendant Young, and the defendant Werle will pay all other costs. The judgment of the district court is reversed, and the case will be remanded for judgment and decree in harmony with this opinion. Reversed.

9. The remaining case to be considered is A. T. Perkins v. Paul Boever, the Farm Land Mortgage & Debenture Company, et al., Appellants. The facts in this case, so far as they affect the questions presented between the parties thereto, are the same as in the Case of Livermore. Judgment was entered in favor of the plaintiff, and against the defendant Boever, for the amount of the debt and costs, and a decree made, canceling the satisfaction of the trust deed, and foreclosing the same. It follows from what we have said in the first case that this judgment and decree must be affirmed. The plaintiff complains that he was not allowed

attorneys' fees, but, as he has not appealed, that complaint cannot be considered. It was also decreed that the lien of the Farm Land Mortgage & Debenture Company was junior and inferior to the lien of the trust deed. As the facts and circumstances under which this defendant acquired that lien are the same as in the first case considered, we must hold, for the reasons therein stated, that the decree as to this defendant must be reversed and a decree entered, granting to this company the relief asked, namely, "that its lien be declared superior to that of the plaintiff, and that it have judgment for its costs and expenses." The plaintiff will be required to pay the costs arising upon the issue joined by this defendant company, and the defendant Boever to pay all other costs.

Affirmed in part, and reversed in part.

VAN SICKLE v. KEITH.

(Supreme Court of Iowa. May 12, 1893.)

ACTION TO RECOVER LAND—BOUNDARIES—EVIDENCE—AGENCY.

1. Where the action to recover a strip of land between adjoining premises, and for damages because of defendant's wrongful possession and use thereof, is based on the claim that the strip is embraced within the description in plaintiff's grant, evidence of a conventional boundary and adverse possession thereunder is inadmissible, though allegations of such facts are embraced in the count of the principal cause of action.

2. In an action to recover land, and damages for the wrongful possession and use thereof, defendant pleaded, in justification, title to the land in his wife and her mother. Held that, where the sufficiency of such plea was not challenged, evidence in support thereof is admissible.

3. An agent is competent to testify to the fact of his agency.

Appeal from district court, Cedar county; J. H. Preston, Judge.

The plaintiff is the owner of 80 acres of land in the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of section No. 10, township No. 82, range No. 1 west. One A. H. Beddow was the owner of land adjoining it on the south, being in the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of said section. A. H. Beddow is deceased, and his widow and daughter are the owners of the land. The daughter is the wife of the defendant. A controversy arose about the dividing line between the lands owned by the parties, and the possession of a strip of land along the line, 19 feet wide at one end, and 39 at the other, is the subject of contention in this suit. For 25 years this strip of land had been inclosed as that of the plaintiff. In 1890 the defendant took possession of this strip of land, and removed the fence to the north side of it; thus bringing it into the inclosure of the land belonging to his wife and her mother. This action is to recover possession of the strip of land, and for damages for the wrongful possession and use of the same. There was a verdict

and judgment for the defendant, and the plaintiff appealed.

J. W. Jamison and R. G. Cousins, for appellant. Wheeler & Moffatt, for appellee.

GRANGER, J. 1. The parties, in argument, are in contention as to the character of the action; that is, whether it is an action of right or for trespass. The petition contains but a single count, and the allegations of fact are of ownership and right of possession by plaintiff, of wrongful possession taken by defendant, and of damage sustained. The prayer is for judgment for the possession of the land, that a writ issue therefor, and also for the damages sustained because of the wrongful act of the defendant. No objection was made to the form of the pleading, and it is a case of two causes of action pleaded in one count. The particular character of the action is important in settling a disputed question of evidence. We think the controlling issue in the case is that for the possession of the land, and the right of possession depends upon ownership. The question resolves itself to this: Who holds the legal title? Such holder is entitled to possession, and, if the right of possession is with the plaintiff, he has been wrongfully deprived of it, and is entitled to damages. If the plaintiff is not the owner of the land, there was no trespass, and hence no damage. We may also, in this connection, settle another question of pleading or contention as to the issues. The petition contains allegations as to adverse possession of the strip of land for 25 years or more, and that the line on which the fence was, during that time, was the "recognized and accepted line between plaintiff's land and that of Beddow." Appellant's view is that, aside from the legal title, he would be entitled to recover because of such possession. The allegations as to adverse possession are mingled with those for a recovery because of the ownership of the land as a part of that purchased by plaintiff, and within the same congressional division. If such allegations were intended as an independent basis of recovery, as now contended, they should have been pleaded independently, as the rules of pleading contemplate. Besides, they are not sufficiently pleaded to be a separate basis for recovery. We notice this fact only in determining the original intent of the allegation. Being a part of a count sufficient because of other allegations, they are not demurrable, and this fact should lead us to resolve the doubts against the pleader. We think the allegations were designed only in aid of other allegations in support of the legal title, and should be treated as surplusage: This conclusion will be aided by the question now to be considered. The plaintiff, on his direct examination, gave testimony of conversations and acts of himself and A. H. Beddow, in his lifetime, in

regard to the line and the fence maintained thereon, such as that they traced the line and built the fence where it had been kept, and Beddow, when plaintiff bought his land, pointed out the corners to him, and helped build the fence with reference to the corners pointed out. On a redirect examination, the following testimony was given: "Question. Upon cross-examination you were asked a question by Mr. Wheeler as to whether you claimed any land in any other way except under your deed, and to that question you answered, 'No.' Now state what line, and to what extent, you claimed to under the deed. Answer. The original line. Q. What do you call the original line? A. The old line between Beddow and me." Defendant's counsel then moved the court to strike out all of plaintiff's testimony on the direct examination which referred to personal transactions or conversations between plaintiff and Beddow, which motion the court sustained. The ruling was based on the provisions of Code, § 3639, because Beddow was, at the commencement of the action, deceased. We need not inquire as to whether or not the reason was good. We think the ruling correct, because the testimony was incompetent to show title in the plaintiff. His statements of his claim are in harmony with our construction of the original purpose of his pleading, which is that he only intended to claim title to the "original line,"—what he owned under his deed. It is now urged that, if the evidence was competent, it was material and important, "because it showed an agreement between the parties that the division fence should constitute the boundary line, and ten years' possession made conclusive plaintiff's right." The pleadings, as we have said, presented no such issue, and the ruling was not erroneous. The district court seems to have had the same view entertained by us as to the effect of the pleading, and stated to the jury that plaintiff's claim was that he had been deprived of the use of the land, of which he had "had peaceable and uninterrupted possession and title for more than twenty-five years." He made no claim to a right of possession independent of his title. No question of a right of recovery, merely because of possession, was submitted to the jury.

2. The court permitted the defendant to give testimony, in justification of his acts in taking possession of the strip of land, that it belonged to his wife and her mother. It is said that "it was not competent for the defendant to justify his wrongful acts by reason of the title of another;" and reference is made to *Williams v. Swetland*, 10 Iowa, 51. Without comment upon the applicability of the case, we need only say the testimony was in direct support of the justification pleaded. If the pleading was insufficient as a defense, it should have

been challenged by demurrer, and not by objections to the testimony to support it. See *Brenneman v. Edwards*, 55 Iowa, 374, 7 N. W. Rep. 621; *Printing Co. v. Tucker*, 73 Iowa, 755, 34 N. W. Rep. 205; *Benjamin v. Vlieth*, 80 Iowa, 149, 45 N. W. Rep. 731.

3. The defendant was permitted to testify that he was the agent for his wife and her mother in taking possession of the land. It is urged that it was error to admit this evidence, on the ground that his testimony was incompetent to prove the fact of agency. This is a misapprehension of the rule. It is the rule that the declarations of the agent are not competent to establish the fact of his agency, and the authorities cited are to that effect. But the declarations of the agent, and his testimony to prove the fact, are quite different. We know of no rule against the agency being established by the testimony of the agent. The other assignments argued pertained to the action of the court in its instructions, whereby the inquiry was limited to what "was the true boundary line between the north and south halves of section 10," and thereby excluded the question of adverse possession. This action of the court accords with our view of the issues as before expressed, and the point needs no further consideration. The judgment is affirmed.

LITTLE et al. v. EDWARDS et al.

(Supreme Court of Wisconsin. April 11, 1893.)

EJECTMENT—TAX SALE—DEED BEFORE RIGHT OF REDEMPTION EXPIRES—CONVEYANCE TO PURCHASER BY LIFE TENANT—GRANTEES OF PURCHASER—POSSESSION—COLOR OF TITLE.

1. A tax deed to premises while they are in possession of a life tenant, the widow of the former owner, and before her right of redemption expires, gives the grantees therein no title, as against her.

2. Where such grantee, after procuring such tax deed, takes a conveyance by warranty deed from the widow, such deed operates as a redemption from the tax sale, since it conveys to him simply the widow's life estate, and imposes on him her duty of paying the taxes.

3. In ejectment by the remainder-men against the grantees of the widow's grantee, commenced 14 months after the death of the widow, it appeared that defendants and their grantor had been in possession nearly 20 years under such deed from the widow, and the tax deed. *Held*, that defendants held possession without any color of right, and plaintiffs were entitled to recover.

Appeal from circuit court, Ashland county; J. K. Parish, Judge.

Action in ejectment by Lissa M. Little and others against Thomas Edwards and others. From a judgment entered on the verdict of a jury in favor of defendants, plaintiffs appeal. Reversed.

The other facts fully appear in the following statement by CASSODAY, J.:

This is an action of ejectment, commenced in January, 1891. The complaint is in the statutory form. The defense is under a tax

title, and the statutes of limitation. It appears from the record, in effect, that the lands in question were entered by Albert A. Little, May 20, 1856; that June 10, 1858, he obtained a patent therefor; that September 12, 1866, Albert A. Little died intestate, leaving, him surviving, a widow, Margaret Little, and brothers and sisters, but no issue nor parents; that June 20, 1871, one Edward Ellis wrote the said Margaret, seeking to obtain from her, and the said sisters of said Albert A., a deed of said premises; that November 4, 1871, the said Ellis obtained a tax deed of said premises—and the same was recorded on that day—for the taxes of 1867 and the sale of 1868; that no notice of the taking of said deed, nor affidavit of the publication thereof, or of posting said notices, was on file in the office of the county clerk, for the said tax sale; that November 8, 1871, the said Margaret Little executed and delivered to said Ellis a warranty deed of said premises, and the same was recorded December 26, 1871; that January 2, 1888, the said Ellis and wife conveyed said premises, by warranty deed, to the defendants; that March 1, 1890, the said Margaret died, leaving no issue; that said land was vacant and unoccupied from November 4, 1871, until 1873; that from that year to 1886 the said Ellis cut and removed from said premises, from time to time, timber and cord wood; that no other acts of occupancy occurred until 1886, since which time the said premises have been in the actual occupancy of the defendants. At the close of the trial the jury returned a special verdict of the facts, substantially as stated above, and also that the plaintiffs in this action are the sole surviving heirs at law of the said Albert A. Little, deceased. Upon said verdict the court ordered judgment to the effect that the plaintiffs were not the owners of said premises, but that the defendants were, and entitled to continue in the possession thereof, and ordered judgment accordingly. From the judgment entered thereon accordingly, the plaintiffs bring this appeal.

Tomkins & Merrill, for appellants. Lamoureux, Gleason, Shea & Wright, for respondents.

CASSODAY, J., (after stating the facts.) As indicated in the foregoing statement, Albert A. Little died intestate, seised in fee of the lands in question, September 12, 1866. As he left no issue nor parent, and as the law then stood, the title to the premises thereupon descended to his widow during her natural lifetime, and, after her decease, to his brothers and sisters,—the plaintiffs in this action. Subdivisions 2, 3, § 1, c. 92, Rev. St. 1858. The widow thereupon became a tenant for life, of the premises. Being such tenant, it became her duty to such heirs at law to pay the taxes on the land. She failed

to pay the taxes for the year 1867, and hence the land was sold for taxes in 1868; and the tax deed under which the defendants claim title was executed and recorded November 4, 1871. As such "widowed woman," she had the right to redeem from such tax sale "at any time within five years after such sale." Chapter 89, Laws 1868; section 155, c. 18, Tayl. St.; sections 1181, 1191, 1208, Rev. St. Her right to redeem, therefore, had she not conveyed, would not have expired until the spring of 1873. The result was that the tax deed to Ellis, November 4, 1871, gave him no title, nor constructive possession, as against the widow. In legal effect, it was the same, as to her, as though he had taken no tax deed, but simply held the tax certificate, at the time she conveyed to him, by warranty deed, November 8, 1871. That deed simply conveyed to Ellis the widow's life estate in the land. He thereby became a tenant of the land during her life, charged with the duty to the plaintiffs of paying the taxes thereon during that period. The acceptance by Ellis of that deed from the widow necessarily operated as a redemption from, or extinguishment of, his tax lien. The widow did not die until March 1, 1890, and hence the conveyance from Ellis and wife to the defendants, January 2, 1888, was, in effect, a mere transfer from him to them of such tenancy during her life. Of course, such tenancy terminated upon her death; and hence, at the time of the commencement of this action, upon the undisputed evidence, the defendants held possession without any color of right. The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment upon the special verdict in favor of the plaintiffs, and against the defendants, and for further proceedings according to law.

MIES v. THOMPSON.

(Supreme Court of Minnesota. May 11, 1898.)

PRACTICE—SERVICE OF PAPERS AT ATTORNEY'S OFFICE.

Service upon an attorney at his office, he being absent, can be made by leaving the paper in a conspicuous place in the office only when there is in the office no clerk of his, or person having charge thereof.

(Syllabus by the Court.)

Appeal from municipal court of Duluth; Winje, Special Judge.

Action by William Mies against Walter M. Thompson. Plaintiff had judgment by default, and from an order denying a motion to vacate the same, and for leave to answer, defendant appeals. Affirmed.

Lord & Norton, for appellant. Geo. E. Arbury, (W. H. Stanford, of counsel,) for respondent.

GILFILLAN, C. J. After the time for answering in the court below expired, upon

an affidavit by the plaintiff's attorney that no answer or demurrer had been received, nor appearance in any manner made by defendant, judgment for plaintiff was duly entered by default. Twelve days after, defendant made an application to have the judgment vacated, and for leave to answer, on an affidavit by his attorney that, before the time to answer expired, he served an answer, "between the hours of 4 P. M. and 6 P. M., by leaving the same in the office of attorney for the plaintiff, in a conspicuous place, the attorney being absent therefrom, and this deponent not knowing the residence of said attorney." The court below denied the motion. The affidavit was not sufficient; for serving by leaving in a conspicuous place in the attorney's office, in his absence, can be made only when he has no clerk therein, and there is no person in charge thereof. Gen. St. 1878, c. 66, § 74. And, notwithstanding anything in the affidavit, there may at the time have been in the office a clerk of the attorney, or person having charge thereof, with whom the answer ought to have been left. Order affirmed.

VANDEBURGH, J., took no part in this decision.

BOYD v. MENDENHALL et al.

(Supreme Court of Minnesota. May 11, 1893.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE.

When information is given one upon which he institutes a criminal prosecution, and he at the time knows that upon inquiry of certain persons it may be ascertained that no offense has been committed, and there is no difficulty in making, nor other reasons for not making, such inquiry, he is to be charged, on the question of probable cause, with knowledge of such facts as he would have learned had he made the inquiry.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Stearns, Judge.

Action by Charles C. Boyd against Luther Mendenhall and others for malicious prosecution. Defendants had judgment, and plaintiff appeals. Reversed.

Lewis Brownell, for appellant. J. B. Douglas, for respondents.

GILFILLAN, C. J. Action for malicious prosecution. At the trial the action was withdrawn as to the Motor Line Improvement Company, originally a defendant, and the trial proceeded as to the defendants Mendenhall and Hartley, and after the evidence was all in the court dismissed the action as to them. The facts necessary to consider are brief. The Motor Line Improvement Company, a corporation doing business in Duluth, owned a section of land (36) lying within the corporate limits of that city, on which there was standing timber, including some cedar. Hartley was the president of the

company and Mendenhall & Hoopes its agents, with authority to sell the timber, and they, or subordinates in their office, having like authority, sold the cedar timber, or "stumpage," as it is called, on the east half of the two easterly quarters of the section to plaintiff's firm, Boyd & Wilbur, and thereupon plaintiff, with several men, went upon the land to cut the cedar timber, and was cutting and hauling it out, when arrested, as hereafter stated. While so cutting, a Mr. Howard met the defendant Hartley upon the street in Duluth, and told him there were some men cutting cedar on the section. As they stood talking together Mendenhall came up, and Howard repeated to him what he had told Hartley, and then, on the suggestion of Mendenhall, he (Hartley) started to make a criminal complaint against the men doing the cutting, not knowing who they were, nor what were their names. He went to the city attorney, whose business it was to conduct proceedings before the municipal court for punishment of crimes committed within the limits of the city, and requested him to draw a complaint, telling him what Howard had said, and also, as was the fact, that Mendenhall had told him no one had a permit to cut the cedar. The complaint was made out, sworn to by Hartley, a warrant issued, and plaintiff and the men working with him arrested, and taken to the police office, and after several hours' detention, it being ascertained upon inquiry that they had a permit to cut the cedar, they were released, and there was no further prosecution. It appears, or at least it was conceded on the argument, that the place where defendants stood in the conversation with Howard was not more than 100 feet from the office of the Improvement company and of Mendenhall & Hoopes, its agents, who, or whose subordinates, had sold the cedar timber to Boyd & Wilbur. It must be presumed that by going to that office and inquiring the defendants would have learned that a permit had been given. They knew there were those employed in the office who had authority to issue a permit, and no excuse is suggested for failure to make such inquiry. The circumstances of the cutting and hauling as stated to them by Howard, it being done openly and without any attempt at concealment, ought to have suggested to them to make such inquiry at least as lay right at their hands, before proceeding to the extreme measure of beginning a criminal prosecution.

There are in the books many definitions of probable cause to institute a criminal prosecution. A very concise one is given in *Munns v. Dupont*, 3 Wash. C. C. 31, and quoted and approved by this court in *Cole v. Curtis*, 16 Minn. 182, (Gil 161,) as follows: "A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty

of the offense with which he is charged." What facts and circumstances amount to probable cause is a question of law, whether they exist in the case is a question of fact. As to what facts and circumstances existed in this case there is no dispute, so that whether there was probable cause was to be determined by the court. The facts were the information given defendants by Howard that there were men cutting and hauling off the cedar, the fact that Mendenhall & Hoopes and subordinates in their office had authority to grant permits, which the defendants must be presumed to have known, and that without excuse for omitting it defendants made no inquiry there. To make inquiry at the office was so easy to do that no cautious man having any regard for the rights of others would have been warranted, without such inquiry, in jumping to the conclusion that the men mentioned by Howard were committing a criminal offense. There being no reason, of difficulty or otherwise, why they should not have made the inquiry, it was their duty to make it, and they are to be charged on the question of probable cause with what they would have learned had they made it,—presumably the fact that a permit had been issued. Advice of counsel will protect one in bringing a criminal prosecution only when given after a full statement of the facts and circumstances known to him, or of which he has been informed. Hartley made no such full statement to the city attorney. He did not inform that officer that there were others than himself and Mendenhall who had authority to issue permits, and that no inquiry had been made to ascertain if they had issued a permit. It is apparent from the testimony of the city attorney what effect that information would probably have had on the advice given, for he says: "When he said it was being hauled out, and in large quantities, I suggested to him that it seemed as if they must have some permit from somebody." The case ought to have been left to the jury. Order reversed.

VANDEBURGH, J., absent.

BEARDSLEY v. DAY et al.

(Supreme Court of Minnesota. March 13, 1893.)

RECORDS—CONSTRUCTIVE NOTICE—SEALED INSTRUMENTS—TAX CERTIFICATE.

1. Where an instrument which the law requires to be sealed is in all respects correctly recorded except that the record does not show a copy of the seal, or any device representing it, the record will nevertheless be valid and sufficient as notice, provided the record represents on its face, in any other way, as by recitals or otherwise, that the instrument was sealed, and it was in fact duly sealed.

2. Where a tax-sale certificate was taken by an agent in his own name, in order to protect the interest of his principal, a mortgagee of the land, and he afterwards delivered the same to the grantee of the mortgage with his blank indorsement, for the purpose of having

the same surrendered and canceled, and for no other purpose, and afterwards, without his knowledge or consent, an assignment was written over his signature, purporting to transfer the same to a third party, *held*, that the assignment was void, and passed no interest.

(Syllabus by the Court.)

Appeal from district court, Nobles county; Brown, Judge.

Action by W. C. Beardsley against George J. Day and others and Daniel Rohrer to determine adverse claims to real estate. There was a judgment for plaintiff, and defendant Daniel Rohrer appeals. Affirmed.

Daniel Rohrer, pro se. George W. Wilson, for respondents.

VANDEBURGH, J. 1. On the 1st day of May, 1885, the land in controversy here was mortgaged by the owner, one Baxter, to the plaintiff, to secure the sum of \$1,000. Baxter, on May 22, 1887, conveyed the same to one Day, who thereafter, on September 27, 1890, conveyed the same premises by deed of quitclaim to the defendant Rohrer. Prior to the last date plaintiff had foreclosed his mortgage by advertisement, pursuant to a power of sale therein contained, and bid off the premises in his own name at the foreclosure sale on the 1st day of February, 1890. A certificate of sale, executed in due form, under the hand and seal of the sheriff, was delivered to the plaintiff, and recorded in the office of the register of deeds of the proper county on the 8th day of February, 1890. The defendant, however, objects that the record of the instrument does not indicate the presence of the seal; that is to say, there was no attempt to copy the seal upon the record, or any device representing it. The statute provides that such certificate shall be executed under the hand and seal of the sheriff, and "such certificate, so proved, acknowledged, and recorded, shall, upon the expiration of the time of redemption, operate as a conveyance," etc. The defendant contends that the omission of the seal in the record is fatal; that the instrument has never been in fact recorded; and hence the time for redemption did not commence to run. Conceding, as we must, from the language of the statute that the certificate does not become operative as a conveyance until the instrument is recorded, the first question, then, is whether the certificate was recorded so as to satisfy the requirement of the statute. The authorities are not entirely uniform on the subject, but the more generally accepted doctrine is that the record is not vitiated or fatally defective by reason of the omission to record the seal or indicate its presence by some device or attempted description, and that it is enough that it appear from the record in any other way that the instrument is sealed. Thus, in Sugd. Powers, *283, it is said: "Where the instrument is a deed, and properly stamped, and it is stated in the attestation clause to have been sealed and de-

livered in the presence of witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed." *Todd v. Bank*, 20 Abb. N. C. 277; *Smith v. Dall*, 13 Cal. 510; *Geary v. Kansas City*, 61 Mo. 378; *Hammond v. Gordon*, 93 Mo. 223, 6 S. W. Rep. 93; *Aycock v. Railroad Co.*, 89 N. C. 323; 1 Devl. Deeds, §§ 253-700; *Webb, Record Titles*, §§ 74-150. The record shows that the certificate is attested as follows: "In witness whereof I have hereunto set my hand and seal this 1st day of Feby., 1892," and to have been "executed in presence of two witnesses;" and the original was in fact duly sealed. The statute (Gen. St. 1878, c. 8, § 184) forbids the register of deeds recording any instrument not executed according to law, and by the statute first referred to it is made the duty of the sheriff to execute the certificate "under his hand and seal." The presumption arising from the face of the record is further strengthened by the presumption in favor of the performance of their official duty by these officers. *Starkweather v. Martin*, 28 Mich. 471, 480. We are of the opinion, therefore, not only that the certificate was properly executed, but the record was sufficient.

2. The time of redemption had expired before the commencement of this action, and plaintiff is entitled to judgment, unless defendant has acquired title to the premises by virtue of the tax title under which he claims. The proceedings culminating in the tax title in question are regular on their face. The land was purchased by one Peter Thompson, and a tax certificate of sale duly executed to him by the county auditor May 2, 1887. It is found by the court that on the 31st day of July, 1889, while George J. Day, above mentioned, was the owner of the premises, Thompson, the holder of his tax certificate, delivered the same to him, with his name indorsed thereon, and that it was so delivered to Day to enable Day to cancel the tax therein described against the land, and for no other purpose. Subsequently there was written over Thompson's signature an instrument of assignment purporting to transfer and assign the certificate and land therein described to the defendant Rohrer. But it is found that this writing was made without the knowledge, consent, or authority of Thompson, and that the certificate was, therefore, never assigned to Rohrer. We think this finding is clearly supported by the evidence. The testimony shows that Thompson, who was the agent of the plaintiff mortgagee in making the loan, and the partner of Day, bid off the land at the tax sale, and took the certificate in his own name for the protection of the mortgagee, and not in hostility to his interest; and on the 31st day of July, 1889, before the time of redemption had expired, at Day's request, and upon his assurance that he wanted it for the purpose of canceling the tax

against the land, and with notice of the existence of plaintiff's mortgage, delivered the same to him, and Thompson had no notice of the failure to cancel the taxes, or of the existence of the assignment written over his indorsement, until after it was recorded, in November, 1890. The indorsement of Thompson's name gave no one any implied authority to assign and transfer the certificate to the defendant, and the certificate of acknowledgment annexed was false and without warrant. It was not the case of an ordinary commercial indorsement, or of a deed or other instrument duly executed with express authority to an agent to insert the name of the grantee or purchaser. And besides, Rohrer does not deny notice, or show any superior equity, as it was incumbent on him to do, upon the facts as found, if he claims to be in any better position than Day. We discover no error in the findings, decision, or rulings of the court in the trial. Judgment affirmed.

MILLER et al. v. CONDIT et al.

(Supreme Court of Minnesota. March 13, 1893.)

MECHANICS' LIENS—ENFORCEMENT—ACTION PENDING—INSOLVENT DEBTOR.

1. The lien law of 1880 contemplates one general action in which all the lien claims against specified property shall be consolidated and adjudicated.

2. The section providing that a second action shall not be brought where one is already pending to foreclose liens on the property affected by several lien claims, but further providing that, if such action shall be brought, it must be consolidated with the first action, is a mere regulation of practice, and does not make such second action a void proceeding.

3. Where an insolvent debtor is entitled to a lien for labor or materials, his assignee in insolvency may prosecute and enforce the same.

4. Where a mistake is made in the statement for a lien filed in respect to the date of the first item of the materials furnished, a lien may in any event be enforced for so much of the account as is embraced between the dates of the first and last items in the account as appearing in such statement. And where such mistake was made in respect to the first item of an account, but the statement in fact included all the items of the account for materials furnished by the lien claimant, and the account was in all other respects correctly stated, and no other parties were or could be prejudiced by the error, *held*, that the mistake was immaterial, and the lien valid for the whole account. *Gillilan, C. J.*, dissenting.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Pond, Judge.

Action by George H. Miller, as receiver, etc., and others, against A. J. Condit and others and Anthony J. Drexel, to foreclose a mechanic's lien. There was judgment for plaintiffs, and defendant Anthony J. Drexel appeals. Affirmed.

Daniel Fish, for appellant. Cross, Carleton & Cross, Ell Torrance, Fletcher & Dawson, and Gray & Pulliam, for respondents.

VANDEBURGH, J. This action was brought to foreclose and enforce a mechanic's lien in favor of Bixby & Co. against certain real property in the city of Minneapolis, belonging to the defendants Condit, Mayhew, and Daynes, and on which the defendant Drexel holds certain mortgages, executed June 1, 1889. In the same action numerous other lien claimants have been brought in and made parties. The only questions for consideration upon this appeal arise between the mortgagee, Drexel, and the defendants Johnson & Hurd, Loring T. Ross, receiver of Mayhew Bros., and Peter Mayhew. It is expressly found by the trial court that "the defendant Drexel received and accepted each of the mortgages aforesaid as security for the moneys loaned by him with full notice that each and all the lien claimants had been and were furnishing material and labor for the construction of the building on the real estate in question."

1. In respect to the claim of Johnson & Hurd, it appears that they filed separate lien statements, arising under separate contracts, in one of which the last item of materials is shown to have been furnished October 16, 1889, and in the other November 22, 1889. Separate actions had been brought by them to enforce these liens on July 18, 1890. But prior to that date this action in favor of Bixby & Co. had been commenced and was then pending, and on the trial of this action an order was made by the court, of the date of February 20, 1891, consolidating therewith the actions above mentioned of Johnson & Hurd, and their liens were accordingly adjudicated herein. The objection urged against the claims of Johnson & Hurd is, in form, that no valid proceeding was begun for the enforcement thereof within one year from the date of the last item of the account. The ground of this objection is that the statute allows but one action in such cases, and that by its terms all the lien claimants must be joined or come in and be made parties therein; and hence, since the action in favor of Bixby & Co. had already been commenced, and the complaint and *lis pendens* filed therein, before Johnson & Hurd commenced their actions, the latter were inhibited by the statute, and invalid and ineffectual. The provision of the statute relied on is as follows: "After commencement of and before final judgment in any such action to foreclose any such lien as aforesaid upon any certain property, no other such action to foreclose any other such lien upon the same property, or any part thereof, shall be commenced; but the claimant of any other such lien, not a party to such action firstly commenced, shall apply to be made, and shall be admitted, a defendant in the action last mentioned." It is claimed that in the case of Johnson & Hurd there was a clear violation of an express prohibition of the statute. But a further

clause provides: "And if he shall nevertheless commence such other action, the same shall be consolidated with and merged in the action firstly commenced upon motion of any party to the earlier action, or by the court upon its own motion." We think the court below rightly construed the statute. The object of it is to regulate the practice merely, and the provision first cited must be construed with the further clause cited, and the general purpose of the provisions on the subject. The provision in question involves no penalty or forfeiture of legal rights. The object aimed at is to have an adjudication of all the lien claims in one suit, and one sale to satisfy the same through an equitable division of the proceeds. Hence the statute contemplates but one general action, in which all the claims shall finally be consolidated and disposed of; but, if such consolidation is seasonably made, a departure from the strict letter of the statute in a matter of practice is not jurisdictional or matter of substance. *McCoun v. Railroad Co.*, 50 N. Y. 177. If, therefore, a claimant neglects to comply with the direction of the statute, and brings a second action, instead of joining in a prior action, the statute points out the disposition of such action, and provides for its consolidation with the prior action, but does not make the proceeding void or a nullity. Until the order of consolidation, it is nevertheless an action pending.

2. The defendant Drexel also objects to the allowance of the claim of Mayhew Bros., represented by Loring T. Ross, receiver of their insolvent estate. It is found that between the 17th day of May, 1889, and the 26th day of October, 1889, they furnished certain building materials used in and about the erection of the buildings in question, but before the account was filed they became insolvent, and the defendant Loring T. Ross was appointed receiver of the property and effects of the insolvents, and he thereupon, as such receiver, seasonably filed the account and statement of their claim in due form. But by mistake and inadvertence, as the court finds, it is stated therein that the first item in their claim was furnished on the 10th day of July, 1889, instead of May 17, 1889, as the fact is. It is contended by the defendant Drexel that the lien on the property did not pass to the receiver as incident to the debt, and that he had no authority to file the lien statement, and prosecute the claim. In our opinion, however, the transfer of the debt to an assignee or receiver in insolvency carries with it all the securities of whatever nature owned by the insolvent, or to which he is entitled, and that he is clothed with all the requisite authority to enforce such liens. It could never have been contemplated that there should be a severance of the debt and lien in such cases, which would result in a very serious loss to the estate of the debtor. The purpose

of the insolvency statute is to invest the assignee with all the nonexempt property of the debtor. This must necessarily include credits and choses in action, and should be held to include lien claims securing debts due him. The statute is a remedial one, and must have a liberal construction to advance the remedy; and we have no doubt that it was fairly within the intention of the legislature to include claims of this character, and that the assignee or receiver is authorized to take all necessary proceedings to enforce the same.

3. A further objection relates to the mistake in the account filed as respects the date of furnishing the first item, which is by mistake stated to have been on July 10th, instead of May 17th. This would not avoid the lien in this case, for, if a strict construction were insisted on, the claim would in any event still be good for all the materials embraced in the account between the dates specified; nor should the lien in question be postponed and made subordinate to the mortgages of Drexel, of an earlier date than the first item specified, because—First, it is found, as before stated, that Drexel had actual notice of the claim; and, second, he had constructive notice from the fact that the building of which plaintiffs' material became an inseparable and component part as one entire improvement was actually in process of construction, to his knowledge, when the loan was made. The statement for a lien, notwithstanding the error, embraces a claim for the whole account claimed, including the materials furnished after May 17th and before July 10th, as well as those delivered after this last date. The error in this case, therefore, was not in any manner prejudicial, and was immaterial. Cases may arise, as may readily be supposed, in which the claimant would be estopped to allege an earlier date than stated in the account filed, but for the reasons stated this is not such a case, and the court ought not to give the statute a construction so strict and technical as that claimed by the appellant. The lien statement, as we may assume, on its face purports in all things to be in compliance with the statute. There is no mistake as to the amount of the claim, property, ownership, or other essentials. It was seasonably filed, and it was entirely immaterial, as we have seen, as to the rights of these parties, whether the delivery of the materials commenced on the one date or the other. The variance was therefore immaterial in this case. The ruling of the court was right, and the evidence was properly received. The case of *Peter Mayhew* depends upon the same questions, and must be decided in the same way. Judgment affirmed.

GILFILLAN, C. J. I dissent from the proposition that a lien claimant may prove for his first item a date earlier than that stated in his lien statement.

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SCHRADI et al. v. DORNFELD et al.
(Supreme Court of Minnesota. March 13, 1893.)
RELIGIOUS SOCIETIES—PROPERTY RIGHTS—
CHANGE OF DOCTRINE.

1. Where the conditions under which a religious society is formed and its property acquired require adherence to a particular creed or system of doctrine and church polity, a minority of the membership may insist upon carrying out the purposes for which the society was organized, and a majority will not be permitted to divert the common property to other uses, or to use it for the support and maintenance of doctrines, or a polity essentially at variance with its original constitution. The trust must be administered substantially in accordance with the intention of the original founders.

2. But changes in matters of form in the conduct of the worship, or in the administration of the ordinances, not affecting the substance of doctrine or discipline, may be made by congregations, and determined by a majority of the members entitled to vote, in the absence of any other lawfully established rule.

3. The constitution of the religious society to which the parties to this action belong, and over whose property the controversy arises, requires adherence to the creed of the Evangelical Lutheran Church, and the Augsburg Confession, and that the church should be connected with an orthodox synod, and recognized the synod of Buffalo, with which it became connected, to be an orthodox synod. *Held*, upon the evidence and facts as found in this case, that a determination by a majority vote of the congregation to change its synodical connection to another orthodox synod, and the mode of making and receiving the confession of private members, in anticipation of the communion, was not in violation of the constitution of the society, or contrary to the Lutheran standards or established usages, as interpreted and practiced by the great majority of orthodox Lutheran Churches in the United States.

4. In such cases, where the property is lawfully applied to the common purpose to which it was devoted, and none of the members are prevented from participation in its use and enjoyment for such purpose, the court will not, at the instance of a seceding faction of the congregation, order a partition and division of the property.

(Syllabus by the Court.)

Appeal from district court, Washington county; Williston, Judge.

Action by Christ Schradi and others against Ferdinand Dornfeld and others to enjoin defendants, as trustees of the German Lutheran St. John's Church, from using the church property in violation of the trust, and for a sale and division of the church property among the members of the church. From an order refusing to order a sale and division of the property, plaintiffs appeal. Affirmed.

John D. O'Brien and Stevens, O'Brien & Glenn, for appellants. Clapp & Macartney, for respondents.

VANDERBURGH, J. It appears from the record that a religious society, unincorporated, known as the German Lutheran St. John's Church, was in existence and held religious services and worship upon the premises in controversy here from the 23d day of November, 1862, until June 2, 1890, and the persons named in the complaint were mem-

bers of such society or congregation on the day last named. In 1874 one Lohmann executed and delivered a conveyance of the land in question to Ferdinand Dornfeld and others, therein named, and their successors in office, as trustees of the German Lutheran St. John's Church, above referred to, for the uses expressed in the deed as follows: "For the Lutheran Church, according to the symbolical books of the Lutheran Church, especially the Unaltered Augsburg Confession and the Smaller Catechism of Dr. Martin Luther; and also for a graveyard, parsonage, etc., or what buildings said church should find necessary to erect upon." The society entered upon the premises, and the same year erected thereon a valuable church building, and a schoolhouse for the use of the children of the congregation, and have since erected a parsonage for the use of the pastor of the church. The funds necessary to purchase and improve the property were derived from the contributions made by the members of the society, and the property is now of the value of \$5,000, and has continuously been appropriated and used by the members of the society for the purposes indicated in the deed of conveyance above mentioned. At the time of the organization of the society the members thereof adopted certain rules and regulations and a system of doctrine designated a "constitution" in the complaint, in which it was declared and agreed that the creed of the congregation was Lutheran, as contained in the symbolical books of the Evangelical Lutheran Church, subject to the Unaltered Augsburg Confession, and to the Smaller Catechism, and that the pastor of the church should belong to an orthodox synod; and, further, that the congregation and society did recognize the synod of Buffalo, N. Y., as an orthodox synod. The society accordingly placed itself under the jurisdiction of the Buffalo synod, and so continued to the 2d day of June, 1890, with pastors belonging to that synod. Both parties hereto recognize that synod as orthodox. It is further found that at the time of the formation of the society, and ever since, it has been, and is, the faith, doctrine, and creed of the Lutheran Church, as contained in the books, confession, and catechism above referred to, as the same is interpreted by the great majority of theological writers, teachers, and pastors of that church, and as held and believed and practiced by the great majority of the membership of the church, that in the matter of confession as a condition precedent to the participation by members in the sacrament of the Lord's supper, such confession may be made by the members of the church in the manner which is termed "private confession," or in that which is termed "open confession;" such private confession being made by each individual privately to the pastor, and such open confession publicly by all members in church,

immediately preceding the reception by them of such sacrament. The court further finds that the only Lutheran synod in the United States teaching as a doctrine that such "private confession" is the only form of confession permissible as a condition precedent to the reception of such sacrament is the Buffalo synod, but that it permits open confession in some of its mission stations; that, out of about 4,000 Lutheran ministers in the United States, only about 25 are connected with or subject to the jurisdiction of the Buffalo synod; but at all times prior to June 2, 1890, this particular society and congregation practiced private confession. On June 2, 1890, at a regularly called meeting of the congregation and society, a number of both plaintiffs and defendants being present and taking part in the proceedings, it was then and there voted by a majority of the members present and voting that the society should withdraw from the Buffalo synod, and join the Ohio synod, and said congregation did thereby then withdraw from the Buffalo synod. It is also found that by the laws, usages, and practice of the Lutheran Church any congregation under the jurisdiction of any of the synods thereof may at any time, by vote of a majority of the members of such congregation, and without the consent of the synod under whose jurisdiction it may then be, withdraw from the synod with which such congregation is so connected, and place itself under the jurisdiction of any other such synod that will receive such congregation. This society, soon after the meeting last above referred to, made due application to be admitted to the synod of Ohio, which is found to be an orthodox Lutheran synod. After the vote to connect the society with the Ohio synod, four of the plaintiffs then present publicly withdrew from the congregation, and asked that their names might be stricken from the membership thereof; and subsequently the rest of the persons named as plaintiffs gave notice of their withdrawal, and expressed their determination to remain with the Buffalo synod. The pastor of the congregation is a member of the Ohio synod. Since the 2d day of June, 1890, the pastor has granted the sacrament to members of the congregation without requiring them to make private confession, and the practice now is to make open confession; but the privilege of private confession has been and is extended to any member of the congregation who may desire it, and it is the duty of the pastor, upon request, to receive such private confession, which duty the pastor of this congregation has at all times been ready and willing to perform. There has been no attempt to exclude the plaintiffs, or any of them, from the use and enjoyment of the benefits of the church or school privileges enjoyed by other members of the congregation, or from participation in the management of its business; and there has been no

departure from the Lutheran standards of faith or doctrine in the instruction or worship as conducted under the direction of the members who are left in control and possession of the property, or their pastor and officers, unless the change in the method of confession above mentioned is a departure therefrom.

But it is also found by the court that any Lutheran congregation may at any time, by a majority vote of its members, change the previously established mode of making such confession; that is to say, the method of church confession is not of divine appointment, but either form may be practiced, according to the judgment of each particular congregation, leaving the minister to deal with individual cases as he may deem best in the discharge of his duty as pastor. We have carefully reviewed all the evidence in the case, and are of the opinion that the above statement of facts, drawn from the findings of the court, are supported by the evidence, and that the change in its synodical relations or in its mode of confession, made by vote of a majority of the congregation, as above found, is not contrary to the discipline, usages, or standards of the Lutheran Church. What jurisdiction, if any, the synods or other superior ecclesiastical bodies of the Lutheran Church in the United States may have to review the decision or proceedings of separate congregations, does not appear in this case. If the action and proceedings of this congregation are subject to review and correction by superior ecclesiastical authority, it would seem that in the first instance the aggrieved parties should seek that method of relief, and the civil courts would accept as binding, as respects matters of doctrine and discipline, the decision of such superior ecclesiastical authority. In the absence thereof, the civil courts, in determining the right of factions in a congregation to the use or enjoyment of its property, or who are lawfully entitled to hold and control the same, must inquire, upon other competent evidence, whether there has been any substantial departure from the doctrine and discipline of the particular church or denomination constituting the basis of its organization. The majority of the members of the church in question would have no right to change the law of its organization, or the conditions and implied agreement under which the church property was acquired. It must remain an orthodox Lutheran Church, and its doctrine and discipline must conform to the constitution under which its property has been acquired and the support and contributions of its members have been given and received. The only grounds of complaint on the part of the plaintiffs are the changes voted by the majority of the congregation in favor of a change in their synodical connection, and as to the mode of making confession by

the members; but as touching these things the court has found that they did not violate the constitution of the church or the Lutheran standards or usages.

It is alleged in the complaint that at the time of the original organization of the society it was agreed and declared that no matter of doctrine could be changed except by unanimous consent, and that no change whatever could be made in the constitution except by two thirds majority at a lawful meeting. This is expressly denied in the answer, and the court does not so find. It was sufficient, in the absence of some other established rule obligatory on this congregation, that the changes made and complained of here were by the votes of a majority. The defendants have done nothing to work a forfeiture of their right to participate in the privileges of the church and school established and maintained by the congregation, and they concede the same rights and privileges to the plaintiffs, and the right and privilege of any individual member to practice either mode of confession, as may be deemed best, under the general discretion of the minister, to be exercised in special cases. Undoubtedly a minority have the right to insist upon carrying out the purposes for which the church or society was organized, and a majority will not be permitted to divert the common property to other uses, or to use it for the support and maintenance of doctrines or a polity essentially at variance with its original constitution. The trust must be administered substantially in accordance with the intention of the original founders. But here there has been no violation of the agreement under which the property was acquired. The court cannot, therefore, interfere to restrain the defendants from the enjoyment of the property for the uses to which it has been and is now applied, nor to order a sale and division thereof between the parties to this action. The members of this society are not to be treated as partners entitled to a division of the property as upon a dissolution of the partnership, because of the dissatisfaction or withdrawal of a minority, but they are jointly associated for the common purposes; and as long as the property is appropriated to such purposes, and none are prevented from participating in such use thereof, there is no good reason why the voice of the majority should not control in the management thereof, in the absence of a different rule, lawfully established or existing. Individual members have no interest in such case that they can take with them if they withdrew from the society, nor can they compel a sale and partition to enable them to do so. In case of a dissolution or amicable or other lawful separation of the membership, the court might interfere to make an equitable division of the property. But no such case is here presented, and there is nothing dis-

closed by the record in this case to call for the exercise of the equitable powers of the court. Order affirmed.

WATERS v. PIONEER FUEL CO.

(Supreme Court of Minnesota. March 13, 1893.)

MASTER AND SERVANT—PROOF OF RELATION.

1. *Held*, under the evidence, as appearing upon the record, that an employe of the defendant, a fuel company, engaged in delivering coal for the company at a stipulated price per load, was a servant of the company, and not an independent contractor, merely.

2. And where such employe delivered a load of coal through an opening in a sidewalk, uncovered for the purpose, and, after the coal had been so delivered, replaced the cover over the opening so imperfectly and insecurely as to render the same dangerous to persons passing along the sidewalk, *held*, that the jury were justified in finding that it was part of the teamster's business to replace the cover, and that the submission of that question to the jury was not ground of exception by the defendant.

(Syllabus by the Court.)

Appeal from municipal court of Minneapolis; Mahoney, Judge.

Action by John E. Waters against the Pioneer Fuel Company to recover for personal injuries sustained by falling through a coal hole in the sidewalk, the lid of which had been improperly replaced by an employe of defendant. Judgment for plaintiff. From an order refusing a new trial, defendant appeals. Affirmed.

Kitchel, Cohen & Shaw, for appellant. John E. Waters and A. H. Noyes, for respondent.

VANDERBURGH, J. The defendant's employe, engaged in hauling coal, delivered by its order a ton of coal to one of its customers in the city of Minneapolis. He delivered the coal through a hole in the sidewalk in front of the premises of the purchaser, into a vault or bin under the sidewalk, connected with the premises. After the coal was unloaded, he took out the chute through which it was delivered, and put the cover over the hole, but, as is alleged, failed to replace it properly; and the plaintiff, who soon after passed along, stepped upon it, and was precipitated into the hole, and injured. He brings this action against the defendant, and insists that it is a case where respondeat superior applies. The defendant, however, resists this claim on the ground that the person delivering the coal was not its servant, but an independent contractor.

The evidence of the nature of his employment, which is undisputed, is that he had applied to the defendant for work, and had worked for the fuel company about three months; had worked almost every day for them, delivering coal; and was paid 35 cents per ton for delivering it, and got his pay every week. He owned the team, and the running gear of the wagon. The defendant

furnished him the wagon box. He was not sure of business every day, and could quit when he wanted to, though the fact that he was paid every Saturday night shows that the employment was continuous until suspended. He had not, however, quit, or been discharged, when this coal was delivered. When the order for this ton of coal came in, it was delivered to him to execute, and the amount, quality, and price specified. He loaded the coal, and took it to the specified place, got the money for it, and, after the coal was delivered, procured the receipt, acknowledging its delivery, and returned it, and the money, to the defendant. We think this evidence shows that the person who delivered the coal was in the service of the defendant, though the term of service was precarious; and we do not see that it is material that he was paid by the load, by the hour, or by the day for his work. He represented the master in all the details of the work enumerated, and, while he remained in defendant's employment, he was subject to its control. If he had been at work by the day or by the month, and had been furnished with a team and wagon by the defendant, would the circumstances of the delivery have been any different? Or would the control of the defendant over the acts of the employe have been otherwise or greater than it was? His orders were to collect the pay for the coal in advance. If it had not been so paid for, he would have been obliged to have brought the coal back to the yard. The testimony shows that he had worked for the company about three months, hauling coal daily. He had in the mean time rendered service for no one else, and appeared to be subject to its orders, and was treated as one of its teamsters or drivers. It is not easy to frame a definition of the terms "independent contractor" that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts. One text writer declares such contractor to be one who undertakes to do specific pieces of work for other persons, without submitting himself to their control in the details of the work, or one who renders the service in the course of an independent employment, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. 1 Shear & R. Neg. §§ 164, 165. So it is said that an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of the work. Powell v. Construction Co., 88 Tenn. 692, 13 S. W. Rep. 691. The plaintiff is not concluded by these definitions. But, without attempting to discuss abstract definitions, we feel satisfied that, upon the undisputed facts in the case, the court was right in holding that the re-

lation existing between the plaintiff and defendant was that of master and servant.

2. Assuming, then, that such relation existed between the teamster and the defendant in hauling and handling the coal, was he its servant in the particular matter of closing the opening in the sidewalk? Upon this matter the court instructed the jury, in substance, that it was for them to determine whether it was a part of the driver's business to replace the cover, and, if it was not, then the plaintiff could not recover; but if they found that it was, and that he replaced it in a careless and improper manner, resulting in the injury complained of, plaintiff should recover. Whether this proposition was or was not strictly accurate, we think it sufficiently favorable to the defendant. It was left to the jury to determine, as a question of fact, whether it was his duty, as the servant of the defendant, to replace the cover; and the evidence certainly tended to show this, and will support such a finding by the jury. The evidence shows that the teamster brought the coal to the store, and at his request the opening was uncovered. It had to be opened from the inside. He then placed the chute into the opening, shoveled the coal into it, took out the chute, which was a sufficient protection while there, replaced the cover, and went into the store for the receipt. He represented the defendant in removing the chute and getting the receipt, and the court will not assume that his agency was temporarily suspended while he was in the act of replacing the cover. It seems to us the jury were justified in finding—if, indeed, the evidence did not require them to find—that when the defendant removed the chute, and thus left an opening in the sidewalk eminently dangerous, it was its duty to cover it properly, or otherwise protect it till the occupant of the premises could attend to it. Whether an independent action might be sustained against the occupant of the store on account of the dangerous condition in which the sidewalk was left, we need not inquire. If the instruction, as given on this subject, was not as clear or specific as defendant desired, it should have asked more specific instructions. No other matters need be considered. Order affirmed.

HENDERSON v. ST. PAUL & D. RY. CO. (Supreme Court of Minnesota. March 13, 1893.)

ACCIDENT AT RAILROAD CROSSING.

1. The plaintiff was injured while attempting to pass between railway cars in a train standing on a street crossing. *Held*, upon the evidence in the case, that the jury was justified in finding that the defendant's engineer in charge of the train saw the plaintiff, and negligently backed up the train while he was between the cars, and without giving him sufficient time to pass through safely. *Held*, also, in view of the circumstances referred to in the opinion, the question of the plaintiff's contributory negligence was for the jury.

2. A verdict in the plaintiff's favor, clearly inadequate, under the evidence, as respects the amount of damages, may be set aside on that ground.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Egan, Judge.

Action by Robert Henderson, an infant, etc., against the St. Paul & Duluth Railway Company, to recover for personal injuries caused by the negligence of defendant. There was a verdict for plaintiff for \$250. From an order refusing to set aside the verdict as inadequate, plaintiff appeals. Reversed.

Butts & Jaques, for appellant. Lusk, Bunn & Hadley, for respondent.

VANDERBURGH, J. The defendant's railway runs through the village of White Bear, and, among others, crosses First street, which is a public and popular thoroughfare, over which citizens in great numbers have been accustomed to pass each day to and from their residences or places of business. This crossing is near the yard of the defendant in that village, and is much occupied in switching cars and making up trains, so that the street is frequently blocked so long as to subject persons desiring to cross to tedious delays unless they shall take the risk of crawling under or climbing over or between the cars, or should travel several blocks out of their way, to cross the track elsewhere. This custom or practice of passing over or between cars had been so general as to have become well known to the engineer and fireman in charge of the train upon which the plaintiff was injured. On the morning of the accident, the plaintiff, a boy 11 years of age, was sent by his parents on an errand, which obliged him to cross the track of defendant on the street in question. He found it obstructed by a freight train. The men in charge of it had been engaged in switching, and, when it stopped on the crossing, plaintiff observed the engineer on the engine looking back towards him, and thereupon he undertook to cross by climbing over the bumpers between two freight cars, and jumping off upon the other side. The evidence shows that he had frequently seen others pass over in that way safely, and he had done so himself in sight of the same engineer; yet he admits that he had been warned by his parents and others, and knew that it was dangerous to cross in that way. His testimony, however, tends to show that he relied upon the fact that the engineer saw him in the act of crossing, and on that account did not expect the train would be moved while he was between the cars. It also shows that he was in full view of the engineer when he attempted to climb upon the car, and that there were no intervening obstructions to prevent him from seeing the plaintiff, and that, while the latter was in the act of passing between the cars, and was placing

one of his feet upon the connecting link between the bumpers, the train was suddenly backed up, and his foot crushed between them.

Upon the evidence in the case we are of the opinion that the jury might find that the engineer saw the plaintiff, and knew that he was trying to pass over between the cars, and that he negligently backed the train down without giving the plaintiff sufficient time to get through safely, particularly in view of the fact that he was in the habit of allowing persons to cross in that way; and, if the jury so found the facts in the case, it was negligence on the part of the engineer which would subject the defendant to an action for damages, unless the plaintiff's own negligence should preclude a recovery in the case. But we think, in view of all the circumstances above enumerated, and taking into consideration the plaintiff's age, that the court was right in submitting the question of plaintiff's contributory negligence also to the jury. Assuming, then, that these questions were for the jury, we are next to consider the further question raised by the appellant in respect to the alleged inadequacy of the verdict. The general power of the court to set aside a verdict for the reason that it is grossly inadequate and disproportionate to the injury suffered in a case of this kind does not appear to be questioned by the defendant's counsel. The ground on which the courts under statutes similar to our own usually base such relief is that such verdicts should be treated as not supported or justified by the evidence, and hence new trials have not unfrequently been granted on this ground. *Emmons v. Sheldon*, 26 Wis. 650; *Bennett v. Hobro*, 72 Cal. 178, 13 Pac. Rep. 473; *Benjamin v. Stewart*, 61 Cal. 608; *Platz v. Cohoes*, 8 Abb. N. C. 396. The evidence in this case shows that the boy had placed his left foot upon the link between the bumpers, when they came together, and crushed his toes and the inside of his foot. The great toe had to be amputated, and two others were badly lacerated, and one of them permanently injured. The foot was pressed out of shape, and has never fully resumed its normal condition, and probably never will. He was under surgical treatment for four or five weeks, and experienced considerable pain and suffering. The injury to the foot, together with the loss of the great toe, causes a lameness which is likely to be permanent. The question of the negligence of the respective parties was, as we have seen, one for the jury to decide, and their verdict on that question could not be disturbed; certainly not by this court. But a verdict for plaintiff established the defendant's liability, and the jury was thereupon bound to give adequate and reasonable compensatory damages. Without intimating at all what the damages should be, the court is of the opinion that the amount allowed is inadequate and disproportionate to the

nature of the injury, and that the verdict ought not to stand, and the case should therefore be submitted to another jury. The jury may have had so much doubt upon the first question that they were induced to compromise on the second. Order reversed.

BROWN v. JONES et al.

(Supreme Court of Minnesota. March 13, 1893.)
MECHANICS' LIENS—SALE OF PREMISES—LIABILITY OF VENDOR.

1. Action by plaintiff, vendor of real estate, against the vendee and certain lien claimants, to determine adverse claims.

2. Lien claims which attach to the vendee's interest in real property will extend to the entire estate upon the completion of the contract, and acquisition thereof by him.

3. *Held*, also, that the equitable rights of the defendants, lienholders, accruing under a building clause in the contract of purchase, could not be destroyed by the subsequent acts or omissions of the purchaser, notwithstanding a forfeiture by him.

4. The vendee's interest will be treated as still outstanding, for the purpose of enforcing the liens established against it.

5. An order for judgment, directing the partition and apportionment of the property upon which liens are claimed between the plaintiff, a vendor holding the legal title, and certain lienholders, defendants, according to their respective interests, as found and estimated by the court, upon equitable terms imposed by such order, *held* unauthorized.

6. Rules of practice to be followed in such cases considered and applied.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Canty, Judge.

Action by Edward D. Brown against Charles J. Burns and others and Timothy Jones and others to determine adverse claims to real estate. There was judgment in favor of Timothy Jones and others, and an order refusing a new trial. Plaintiff appeals. Order affirmed, and judgment modified.

Gliffan, Belden & Willard, for appellant. Byers & Augir and A. B. Darelus, for respondents.

VANDERBURGH, J. The contract which gives rise to the controversy in this action is the same one which is referred to and construed in *Nolander v. Burns*, (Minn.) 50 N. W. Rep. 1016. Pending that suit, Belden, one of the plaintiffs therein, transferred his interest in the real estate in question to the plaintiff, Brown, who has brought this action under the statute to determine the adverse claims of the several parties named as defendants. The judgment in the former suit was modified, in conformity with the directions of this court, so as to make it a lien upon the vendee's interest in the land, only; and accordingly judgment was entered therein on the 11th day of March, 1891, establishing the liens of the several defendants who have appeared in this action, and adjudging the several amounts due to each to be a specific lien upon all the right, title, and interest of

Charles J. Burns, who is the vendee in the contract referred to, on the 7th day of March, 1890. The contract was dated January 18, 1890, and the owners of the lots therein agreed to be sold (Belden and Brown) covenanted to convey the same to Charles J. Burns on the performance by him of his part of the agreement. The latter agreed to build and complete the three houses on the premises therein described within four months, and to pay \$2,600 on or before that time, and the vendors also agreed, on the completion of the houses, to negotiate a loan of \$5,850 upon the property. Burns made default, and failed to comply with the terms of the contract, and the contract was declared forfeited, as to him, March 2, 1891, after notice duly served on him; and the plaintiff then resumed possession of the premises.

We may, assume from these facts that Burns' interest had not been previously "forfeited or surrendered." The lien claims were duly filed and established before the forfeiture, and were held to be a charge only upon the separate interest of the vendee, for that reason; but by section 4 of the lien law of 1889, as construed in our former opinion, if the lien claimants, these defendants, had been permitted to reopen their case, and show that a forfeiture of the contract by the vendee had occurred when the judgment was finally rendered, it would necessarily have been made a lien upon the interest of the vendors, under the section referred to. Since, in either case, the liens must depend upon the contract, the statute practically regulates the procedure, and cannot be construed to mean that liens so created by the authority of vendors shall lapse because of the subsequent forfeiture or surrender of his interest in the contract by the vendee. In all that class of cases in which the vendees finally fulfill their contracts, and there is no forfeiture, there is no difficulty in applying the rule prescribed by this section; for the lien, if not sooner foreclosed, will attach to the entire estate as soon as acquired by the vendee, (Colman v. Goodnow, 38 Minn. 10, 29 N. W. Rep. 338,) and his separate interest may, in itself, be ample security. The equitable rights of these defendants, lienholders, accruing under the building clause in this contract, could not be destroyed by the subsequent acts or omissions of the vendee. And the vendee's interest will be treated as still outstanding, for the purpose of enforcing the lien against it established by the judgment. King v. Smith, 42 Minn. 286, 44 N. W. Rep. 65.

2. The next question relates to the procedure for foreclosing the liens in such cases. In this case the court below undertook to ascertain the equities of the vendors and vendee, and then ordered the real estate to be apportioned or partitioned between the plaintiff and answering defendants according to the respective interests so ascertained; and the plaintiff is ordered to make deeds of con-

vveyance to each party who shall pay the proportion assessed upon him of the amount remaining due under the contract. This was error, unless consented to by all parties. But the plaintiff does not consent, and hence the only proper course to pursue was to proceed to foreclose the liens, pursuant to the directions of the statute, by a sale of the equitable interest of the vendee. He is, for the purposes of this action, to be deemed the equitable owner, subject to the conditions of the contract, and the adjustment and payment of the amount due the vendors. Townshend v. Goodfellow, 40 Minn. 315, 41 N. W. Rep. 1056. Such sale is to be without redemption, and the proceeds should be ratably distributed in proportion to the amount due each of the lien claimants. Section 12. As the only condition to be fulfilled is the payment of the amount of plaintiff's claim for purchase money and advances, less the amount realized upon the mortgages, it is proper that the judgment should adjust the balance due plaintiff. The contract required that the vendee should erect three houses, and contemplated the raising by mortgage of the sum of \$5,850, which was undoubtedly intended to create a fund to enable the vendee to complete the contract. But only two houses were built, and the sum of \$4,000 raised by mortgage January 5, 1891. This sum the court allowed the plaintiff on account of the amount due for purchase money, being \$2,600 and interest, and advances by him made to complete the houses, amounting to \$2,007.88, and interest thereon, about which there is no dispute, leaving a balance still to be paid plaintiff on these claims, and an unsettled claim of \$2,106.86 for moneys admitted to have been paid by the vendors to cancel indebtedness incurred by the vendee, in the erection of the building, for work and materials furnished by divers persons, and for which they were severally entitled to liens. This claim the court found the plaintiff equitably entitled to have placed on the same footing with the claims of the defendants, and to be paid ratably out of the proceeds of the sale. The defendants do not complain of this disposition of the claim, and we think it is fair and just to the plaintiff. There is no reason for giving it a preference over the claims of the defendants of a like nature. The sale of the vendee's equitable interest will be a sale of the property subject to the mortgages, and the payment of the balance due plaintiff for purchase money, and the amount expended in completing the building, as above stated; and the proceeds of the sale will be brought into court and distributed ratably on payment of the claims of the defendants, and the plaintiff's claim of \$2,106.86, and interest. Should there be a surplus, the plaintiff will be entitled to it, since, as between him and the vendee, the interest of the latter is merged in the estate of the former; and the purchaser, upon bringing

into court the amount due plaintiff, in addition to the amount of the purchase price paid for the interest bound by the liens, will be entitled to a deed from plaintiff. The proper provisions for the protection of all parties will be inserted in the decree.

There are numerous other errors assigned, which we do not deem necessary to consider, as they can in no way affect the disposition of the case. There is no occasion for a new trial. The order denying it will therefore be affirmed, and the case will be remanded, with directions to modify the judgment in accordance with this opinion.

SINGER MANUF'G CO. v. MILLER.

(Supreme Court of Minnesota. March 13, 1893.)

INNKEEPER'S LIEN.

1. An innkeeper's lien attaches to goods in the possession of his guest though they belong to a stranger, provided the innkeeper has no notice of that fact.

2. But no such lien attaches to goods in possession of one who is received as a boarder, and not as a guest or traveler.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Oanty, Judge.

Action by the Singer Manufacturing Company against Christopher O. Miller to recover the possession of a sewing machine on which defendant claimed an innkeeper's lien. There was judgment for plaintiff, and defendant appeals. Affirmed.

Fred C. Cook, for appellant. Wm. H. Donahue, for respondent.

VANDEBURGH, J. The court below found the facts as stipulated by the parties in the agreed statement of facts, as submitted, and, as a legal conclusion, that the plaintiff was entitled to judgment. The defendant claimed an innkeeper's lien upon the chattel in controversy, a sewing machine, on the ground that it was brought to his hotel by a guest, who, it now appears, had contracted to purchase the same of plaintiff, but the title had not passed, though the possession had been delivered. The defendant, however, had no notice of the plaintiff's claim, and insists upon his lien thereon, with other goods of the guest, for the amount of his bill. The plaintiff's counsel does not seriously contest the proposition that an innkeeper may have such lien on goods in the possession of his guest *infra hospitium*, though they belong to a third person, provided the innkeeper has no notice of that fact. If the innkeeper's liability would attach in case the sewing machine were lost or stolen, it would seem but just to hold that his lien attaches whenever there is a corresponding liability. *Schouler, Ballm. § 292; Manning v. Hollenbeck, 27 Wis. 202; Threfall v. Borwick, L. R. 7 Q. B. 711.*

The respondent, however, claims that the

judgment may be supported on the ground that the findings of fact show that the party who brought the machine to defendant's hotel was received as a boarder, and remained there as such, and not as a traveler or guest. The evidence is not here, and so the question is not whether it would support a finding either way, but whether it appears from the stipulated facts, which are adopted as the findings in the case, that he was a guest. To entitle the defendant to assert his innkeeper's lien, he must have received the property as the goods of a guest, but this does not appear, and there is no such finding. It appears from the agreed statement that he received the party, his wife, and two children as boarders and lodgers, and that they continued to board and lodge with him for about six months at the rate of \$15 per week, and that is all. This does not affirmatively establish the relation of guest and innkeeper, so as to subject him to the liability, or give him the rights incident thereto. Error must appear. Judgment affirmed.

PARKER v. JEWETT.

(Supreme Court of Minnesota. March 13, 1893.)

ACTION ON NOTE—FRAUD AS A DEFENSE—WANT OF CONSIDERATION—PLEADING.

1. An answer setting up fraud or deceit as a defense to a promissory note should show damage and the extent thereof.

2. Where a party assumes to set forth specifically the facts constituting a defense of want of consideration, and the facts so pleaded are insufficient to establish such defense, the pleading is not aided by a general averment of want of consideration or benefit.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Brill, Judge.

Action by Charles A. Parker against W. P. Jewett on a promissory note. From an order holding the answer insufficient to warrant the admission of evidence, defendant appeals. Affirmed.

Henry & R. L. Johns and M. L. Countryman, for appellant. S. C. Biggs and C. N. Bell, for respondent.

VANDEBURGH, J. The only assignment of error requiring attention is the third,—the alleged error of the court in holding the answer insufficient to warrant the admission of evidence. The action is upon a promissory note. The answer sets up as a defense that the note was given for mining stock, and that the defendant purchased the same, relying upon certain representations which he alleges were false and fraudulent, and made with the intent to deceive him. The answer winds up by stating generally that the defendant had derived no benefit in any way, and had received no consideration whatever, for the note. But the statements in respect to the representations as to

the property improvements and proceedings of the mining company alleged to be untrue were such that it was necessary, in order to make out a total or partial defense to the note, to show wherein and how much the defendant was damaged by reason of the alleged fraud. He states that the note was without consideration, but from the nature of the defense set up this is not made to appear. It does not appear that the mine in question has not some value, or that the stock is worthless, or of how much less value it was than the amount paid for it; in other words, it does not show what, or how much, damages defendant has suffered. When the basis of the defense to a promissory note given upon the purchase of property—as, in this case, stock—is fraud and deceit, through which the defendant was induced to purchase that which proves to be of no value, or of less value than contracted to be paid therefor, it is obvious that the facts should be pleaded, whether the defense attempted to be made is complete or partial. And where a party undertakes to set forth the facts specifically, a defective statement cannot be helped out by a general averment that he has secured no benefit. It seems to us, therefore, as it did to the court below, that the answer is fatally defective.

Order affirmed.

BRUSCH v. ST. PAUL CITY RY. CO:

(Supreme Court of Minnesota: March 13, 1893.)
PERSONAL INJURIES—EVIDENCE — STATEMENTS TO
PHYSICIAN.

1. Evidence held sufficient to justify the verdict, and damages allowed held not excessive.

2. Statements made to an attending physician by an injured party in respect to his injuries and pain suffered by him, held competent evidence in connection with his examination and observation of the patient.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Cornish, Judge.

Action by Frederick Bruschi against the St. Paul City Railway Company to recover for personal injuries caused by the negligence of defendant. There was a verdict for plaintiff. From an order refusing to set aside the verdict and grant a new trial, defendant appeals. Affirmed.

McCafferty & Noyes, for appellant. James E. Markham, for respondent.

VANDEBURGH, J. 1. Plaintiff took passage on one of defendant's street cars in the city of St. Paul on the morning of March 12, 1892, to be transported to his place of business. The evidence tended to show that the car was so crowded that he could not find a seat inside of the car, and therefore he remained standing upon the platform with several other passengers, with the knowledge of the conductor, and, as the car

proceeded, other passengers crowded onto the platform; that the servants of the defendant in charge of the car so managed and operated the same as to cause or permit it to run at an unreasonable and dangerous rate of speed as it approached a curve in the track, and neglected to check or slacken the same in season, so that in turning the curve the shock of the car against the track caused the crowd on the platform to sway towards the gate on the outside thereof, breaking off the hinges, and causing plaintiff to fall off through the opening, upon the ground, upon his head and back, resulting in the injuries complained of. The evidence also tended to show that it was usual to slacken the speed of the car on approaching the curve, and that it was negligence not to do so, especially when the platform was occupied with passengers, and that in this instance also it was negligent management not to do so. And, if there was any evidence showing contributory negligence on plaintiff's part, it certainly was not conclusive, but that question also was for the jury.

2. In the course of the trial the physician who attended plaintiff, and who was well acquainted with the character, extent, and effect of the injuries suffered by him, was called and examined as a witness in his behalf. After having testified fully as to the result of his examination and observation of the plaintiff subsequent to the time of the injury, he was asked the following question by the plaintiff's counsel: "State whether or not, at the time you commenced to treat him, he was suffering any pain from these injuries." This question the plaintiff was permitted to answer against the objection of the defendant, and in response thereto he stated, "He said he was." The refusal of the court to strike out this answer is assigned as error. This answer was not responsive to the question put to the witness, and was not strictly proper. But the error was clearly not prejudicial. The question was a proper one at that stage of the examination. It called for the opinion of the witness, not the statements of the patient; but the statement was clearly connected with his examination of the plaintiff's injury, and may be taken as a part of it. The subject was carefully considered in *Johnson v. Railroad Co.*, 47 Minn. 430, 50 N. W. Rep. 473, and the rule there stated is supported by the weight of authority; that is to say, it is competent for physicians to give to the jury their opinions, based on a personal examination of the patient, and on statements made by him at the time, touching his present bodily condition, and such statements are admissible as a part of his evidence. *Rog. Exp. Test.* 115, and cases.

3. The court did not err in refusing to set aside the verdict as excessive. The evidence tended to show that the injury was serious, and it was uncertain when, if at all, the

plaintiff would fully recover. We see no good reason for directing a new trial, and the order denying it is accordingly affirmed.

GERDTZEN v. COCKRELL.

(Supreme Court of Minnesota. March 13, 1893.)

DECISION ON APPEAL—EFFECT OF REVERSAL—INAPPROPRIATE RELIEF—SET-OFF AGAINST DECEDENT.

1. A decision of this court reversing an order of the district court, on the ground that the form of relief granted was not warranted, does not preclude a renewal of the application, upon the same facts and record, for the appropriate relief. The decision in this court is not necessarily final in respect to other relief. It may expressly provide for a renewal of the motion, or the authority to do so may be implied from the nature of the case and the grounds of the decision, where the appeal does not finally dispose of the whole matter on the merits; and in such cases the fact that, pending the proceedings upon the appeal, more than one year has elapsed, will not bar the second motion. The original motion, the appeal, and renewal should, as respects the application of the statute, (Gen. St. c. 66, § 125,) be regarded as one proceeding.

2. And where the relief sought on the renewal of the motion might have been given upon the original application, under the general prayer for relief, (as held upon the facts in this case,) it may be granted on the second or renewed application.

3. Where the parties to an action pending in the district court, by a formal agreement under seal, stipulated the terms of a compromise and settlement of the mutual claims of the parties involved in the action, and authorized judgment to be entered in pursuance of such stipulation, which was accordingly done, *held*, that it was within the power of the court, upon a proper showing, to set aside such agreement, and place the parties in statu quo upon motion. The form of the agreement is not material. It was a proceeding in the cause, and the effect of the order setting it aside was to leave the parties free to proceed to a trial of the merits of the controversy.

4. Evidence upon such an application in this case *held* sufficient to justify the decision and order of the trial court.

5. Under Laws 1889, c. 46, § 113, the defendant in an action brought against him, by an administrator, may set off any claim he has against the deceased; and it is not necessarily error to allow such set-off or counterclaim to be interposed in such an action after a final order of distribution has been made in the probate court.

(Syllabus by the Court.)

Appeal from district court, Winona county; Start, Judge.

Action by Ernst A. Gerdtzen, as administrator of the estate of Lena Weinberg, deceased, against Frank M. Cockrell, to recover \$25,000 as upon an account stated between defendant and deceased. There was judgment for plaintiff for a certain sum, by stipulation. On motion of defendant, the stipulation was modified, and on appeal the order allowing it was reversed. 52 N. W. Rep. 930. Defendant procured an order of the district court to show cause why the original stipulation should not be vacated, and the judgment opened, and for leave to file an amended answer. On a hearing, his motion

was allowed, and plaintiff appeals. Affirmed.

Gould & Snow, (Brown & Schroeder, of counsel,) for appellant Wm. H. Yale and Wilson & Bowers, for respondent.

VANDERBURGH, J. This action is brought by plaintiff, as administrator of the estate of Lena Weinberg, deceased, to recover the sum of \$25,000, as upon an account stated between the defendant and the deceased. The defendant in his answer denied making any account stated, and sets up, by way of counterclaim, the receipt and misappropriation by the deceased of large sums of money belonging to the defendant, which he claims to be entitled to recover. While the action was pending, and on the 22d day of January, 1891, the parties entered into a stipulation, in the form of an agreement under seal, for a compromise and settlement of the mutual claims of the parties involved in the action, and stipulating the nature of the judgment to be entered therein, which was accordingly duly entered January 24, 1891. Afterwards, on or about July 10, 1891, as defendant alleges, he discovered the fact that deceased had received, and appropriated to her own use, other moneys belonging to the defendant, amounting to a large sum, viz. \$12,900, and he thereupon applied to the court for a modification of the stipulation, so that he should not be thereby concluded from setting up or establishing his claim to the last-named sum. This application was granted, and the order made therein appealed to this court, where it was held that it was error to so change or reform the instrument in behalf of one of the parties as to relieve him from its strict obligations, while the other party thereto remained bound, and that, if either were released, both should be. 52 N. W. Rep. 930. The order of the district court was accordingly reversed; and, after the case was remanded to the district court, (which was on August 8, 1892,) the defendant procured an order to show cause why the original stipulation should not be vacated altogether, and the judgment entered in pursuance thereof opened, and for leave to serve an amended answer, which order was duly served, and afterwards brought on for hearing, on August 22, 1892. The order was based upon affidavits showing the facts upon which the defendant's additional claim against the deceased was founded, and tending to show that the settlement and stipulation had been made in ignorance thereof by the parties thereto, and therefore under a mistake, which materially affected the basis and nature of the settlement.

1. Upon the hearing of the renewed application, the defendant was met with the objection that it was made too late, on the ground that in the mean time more than one year had passed since the entry of the judgment, and more than one year since the dis-

covery of the facts upon which the original application to reform the stipulation was based. The court overruled this objection, and entertained and granted the motion, for the reason that the reversal of the former order, on the grounds stated in the opinion in this court, left the matter open for reconsideration in the district court, and that, upon being again brought up before the court upon the order to show cause, by which the district court gave leave to make the motion, that court should treat the matter as a continuation of the original application, and render such decision thereon as it appears it might then lawfully have made. In this we think the court did not err. The effect of the decision upon the appeal was to point out the error into which the trial court had fallen, and therefore, when the case was sent back for further proceedings, the court was at liberty to take it up and proceed in conformity with the opinion of the appellate court, and the authority to do so may be gathered from the opinion, though it omit to make an express direction or order allowing a renewal of the motion. *Jordan v. Humphrey*, 32 Minn. 522, 21 N. W. Rep. 713. The appeal did not finally dispose of the matter. *Smith v. Adams*, 130 U. S. 177, 9 Sup. Ct. Rep. 563. Where in such cases the appellate court reverses an order, and gives express permission to renew the motion, the second application will be treated as a part of the original proceeding, if necessary to save the rights of the respondent in the appeal. *Butler v. Mitchell*, 17 Wis. 52. The original motion, the appeal, and the renewal should, as respects the application of the statute, (Gen. St. c. 58, § 125,) be regarded as one proceeding; and the court will look at the substance, and will not be controlled by the mere form, of the proceedings, (*Howell v. Harrell*, 71 N. C. 161;) that is to say, the mere omission by the appellate court to give formal leave to renew the motion is not fatal to the right, when the case is remanded for further proceedings, and the court indicates that other or different relief was proper in the case, upon the facts disclosed by the record.

2. It is true that the relief now asked was not specifically prayed for in the original application; but the principal objection to the relief then sought was that it was not broad enough, in that the compromise agreement or stipulation, if modified at all, should be modified as to both parties, and, if either was relieved from its obligations, both should be. The change suggested in the form of the relief was for the benefit of the plaintiff, and in his interest. We think, upon the case made, the court might, under the general prayer for relief, have granted the relief now sought on the original motion, except that portion of it relating to the service of the amended answer, which we will refer to again. *Landis v. Olds*, 9 Minn. 90, (Gil. 79;) *People v. Supervisors*, 45 N. Y. 204.

3. It is contended that the agreement referred to was a solemn contract of the parties under seal, and beyond the authority of the court to set aside summarily upon motion, but that the matter should have been determined by suit in equity, upon issues formally framed. The mere form of the instrument sought to be set aside is not, however, controlling. It was a step or proceeding in the cause, and determined the form and amount of the judgment and the final disposition of the case. The effect of the order in question here, as finally made, was to put the parties in statu quo, with leave to serve the amended answer. It left the parties free to proceed to a trial upon the merits of the controversy between them, but the proceeding was not a trial of the merits upon motion. It was in principle no different from the vacation or setting aside of any order or stipulation in the action on the ground of mistake or other equitable ground. We think the court did not transcend its power or discretion in the premises. *Barry v. Insurance Co.*, 53 N. Y. 540; *Ferris v. Crawford*, 2 Denio, 595.

4. Leave to serve the proposed amended answer was not applied for on the original motion, but it necessarily followed as a part of the relief upon the last motion, in order to make the relief sought available. Such amendments may be made at any time, in the sound discretion of the court, while the action is pending. The one-year limitation has no application in such cases, but the application to serve an amended pleading must be disposed of under the circumstances existing when made.

5. Upon the merits of the motion to vacate the agreement, stipulation, and judgment now under consideration, we think the case made by the defendant sufficient to support the decision and order made. The agreement was made, as the evidence shows, in ignorance of the fact that the deceased had taken and concealed from defendant the additional sums since discovered and now claimed by him, or that he had any such claim against her estate when it was executed. It was therefore so far made under a mistake of fact. It did not contemplate the existence of any claims of that kind. We think the action of the court may be sustained upon equitable grounds.

6. It is, however, further suggested that this application should not have been granted because, since the execution of the agreement and entry of judgment, the decree for the final distribution and settlement of the estate of Lena Weinberg has been duly made and entered in the probate court. This decree was entered the next day after the discovery by the plaintiff of the sum of \$12,900 in question, in bank bills, concealed in a piano stool. Three days later the defendant brought an action against the plaintiff to recover the possession of the same, claiming it as his prop-

erty. By section 113, c. 46, Laws 1889, (Probate Code,) the defendant, in an action brought against him by an administrator, may set off any claim he has against the deceased. And we think it was a proper exercise of its discretion by the district court to open the judgment upon good cause shown, and to relieve the defendant from the effect of it as an estoppel, and, secondly, to allow defendant to amend his answer as proposed, in order that he might protect his rights fully in the defense of the action; and we need not consider here what remedy would be available to him for the enforcement of an affirmative judgment against the plaintiff as administrator, in case one should be recovered; and the plaintiff could hardly be held responsible on his bond for not distributing assets to which the defendant establishes a valid claim, or which are applied, as the law permits, in satisfaction of a counterclaim in an action brought by plaintiff. Order affirmed.

ST. PAUL TITLE INSURANCE & TRUST CO. v. BERKEY.

(Supreme Court of Minnesota. March 13, 1893.)

BILL OF SALE—CHATTEL MORTGAGE—RECORDING—NOTICE TO CREDITORS.

1. The record of a bill of sale, which is intended merely as security for a debt, and filed as a chattel mortgage, but not duly acknowledged, is not constructive notice to creditors and subsequent mortgagees or purchasers.

2. But since the object of the record is to give such notice to creditors dealing with a mortgagor left in possession of goods, as well as mortgagees and purchasers, if such creditors have actual notice of the existence of the mortgage, the purpose of the record is served, and the rights and equities of such creditors will be subordinated to those of a bona fide mortgagee.

3. Where it is made to appear on the trial that a mortgage of chattels is bona fide, it devolves upon a creditor to establish his superior equity by showing that he belongs to the class of creditors who are entitled to challenge the validity of the mortgage as against them, because not duly or seasonably recorded.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Otis, Judge.

Action by the St. Paul Title Insurance & Trust Company, as assignee of the insolvent estate of one Ferris, against Peter Berkey, to recover the possession of certain personal property. There was judgment for plaintiff. From an order overruling a motion for a new trial, defendant appeals. Reversed.

William G. White, for appellant. B. H. Schriber, for respondent.

VANDERBURGH, J. One Ferris, now insolvent, executed a bill of sale to Berkey of the personal property in controversy, intended as security for a debt. It is admitted to be in the nature of a mortgage, though absolute in form, and the conditions are not expressed in it. It was dated July 10, 1890,

and filed as a mortgage in the city clerk's office on the same day, but was never acknowledged. Without deciding the question whether such an instrument should be treated as a chattel mortgage under the statute, so as to make the record constructive notice if duly acknowledged as required, it is enough that it was not acknowledged, and for that reason the filing and record thereof were unavailing. It would be singular if the holder of such an instrument should be held to be in any better position than a mortgagee in an ordinary chattel mortgage. On the 19th day of July, 1891, the defendant obtained possession of the property, which had previously been left in Ferris' possession, and this plaintiff, who had previously been appointed assignee in insolvency of the mortgagor, Ferris, brought this action to recover possession of the property as part of the assets of the insolvent estate. It becomes necessary to consider the relation of the creditors to the holder of this bill of sale, and the effect of the want of constructive notice provided for by statute in the case of chattel mortgages. The first section of chapter 39, Gen. St., makes the mortgage void where possession is retained by the mortgagor, and the mortgage is not filed, (though the transaction is bona fide,) as against the creditors of the mortgagor and subsequent bona fide purchasers or mortgagees in good faith. It is suggested by plaintiff's counsel that the words "in good faith" limit the preceding words "mortgagees and purchasers," only, and do not apply to "creditors," and, if the mortgage is not filed, it is absolutely void as to them without respect to the question of notice, that is to say, whether they have actual notice that would, during the life of the mortgage, afford them the same information which the record would disclose or not. The record, because it is notice, is intended to stand in the place of the delivery of the possession, and thus protect parties dealing with the mortgagor in possession of the property from being misled and defrauded by the existence of liens which they can know nothing of. But suppose a creditor deals with and trusts the mortgagor with actual notice of such liens, so that he has all or better knowledge than the record could afford, it is clear that as to him such notice should be held to take the place of the record, and that the statute has no application to such a case. The question of notice becomes material in determining the rights of creditors in such cases. See *Brown v. Brabb*, 67 Mich. 17, 18, 34 N. W. Rep. 403.

It is true that creditors must become attachment or execution creditors, and their demands established by judgment, in order to enforce them as against mortgagees in such cases, but this is unimportant as respects the question of their previous actual notice. If the bill of sale in this instance was executed in good faith to secure an honest debt, then

It is valid, at least as to all such creditors as had seasonable notice of the same. And it was enough, in the first instance, for the defendant to prove that the bill of sale was given and accepted in good faith, and not for the purpose of defrauding any creditor of Ferris, as defendant offered to do. And it was error to reject the evidence so offered. If such evidence had been introduced in defendant's behalf, it would then have devolved upon the plaintiff to show that the creditors represented by him, or some of them, belong to that class who are entitled to challenge the validity of the mortgage because of its not having been properly recorded. *Brown v. Brabb*, 67 Mich. 32, 34 N. W. Rep. 403; *Newton v. Newton*, 46 Minn. 33, 48 N. W. Rep. 450. For the error in rejecting defendant's offered testimony, there must be a new trial.

It is hardly necessary to add that notice, or want of notice, to the assignee is immaterial, as the rights of creditors, as respects mortgages previously executed, must be deemed to be fixed when the assignment is made; but he represents the body of creditors, and by virtue of the authority vested in him under the statute he may assert the same remedies which the creditors are entitled to, and without reducing their demands to judgment. *Chamberlain v. O'Brien*, 46 Minn. 80, 48 N. W. Rep. 447; *Brown v. Brabb*, 67 Mich. 24, 34 N. W. Rep. 403. Order reversed.

BEEBE et al. v. CANNEY et al.

(Supreme Court of Minnesota. March 13, 1893.)

LIABILITY OF SURETY--EXHAUSTING MORTGAGE SECURITY.

By the terms of an indemnity bond signed by a surety, the measure and limit of his liability was the deficiency, if any, after a foreclosure and sale of the mortgaged premises under a second mortgage. *Held*, under the facts alleged, that such foreclosure sale was a condition precedent to a right of recovery against the surety, notwithstanding the fact of a subsequent sale under the first mortgage for a sum equal to the market value of the property. *Mitchell, J.*, dissenting.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Hicks, Judge.

Action by Gaylord W. Beebe and others against Thomas J. Canney and others on a bond. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Ripley, Brennan & Booth, for appellants. Welch, Botkin & Welch, for respondents.

VANDEBURGH, J. The bond in suit was under consideration by this court in the case of *Sprague v. Wells*, 47 Minn. 504, 50 N. W. Rep. 535. *Sprague* foreclosed his mortgage on the property described in the bond,

by a sale thereof, December 30, 1890. His mortgage was the first lien. Plaintiffs held a second mortgage for \$1,300, which was in fact a purchase-money mortgage; but the complaint shows that by the mutual agreement of the parties, and in consideration of the security of the bond referred to, *Sprague's* mortgage was antedated, and was made the first mortgage. It was dated April 30, 1890, was payable three years after date, and was given nominally for \$4,000; but, of this sum, \$1,900 only was actually advanced, which, with interest, was all there was due thereon. Plaintiffs' mortgage was payable in six months after date, and became due November 22, 1890. By the terms of the bond, which was dated May 26, 1890, one *Mary A. Wells*, who was the principal in the bond, and the mortgagor in each mortgage, undertook to erect expensive buildings on the property in question within four months, for which purpose the loan secured by *Sprague's* mortgage was made, and which would, if properly expended, as intended, have made the property sufficient security for both mortgages. She, however, made default in the conditions of the bond, and no improvements were placed upon the property, or expenditure made by her upon it. The same was sold upon *Sprague's* mortgage for \$2,700, which is alleged to have been its full value. By the terms of the bond, the limit of the liability of the obligors to plaintiffs, including the defendant *Canney* as surety, is "the deficiency, if any, after a foreclosure and sale of the premises under said second mortgage, of \$1,900." It does not appear, however, that any effort was ever made by the plaintiff to foreclose the same, or to assert any claim thereunder. It was not impossible to foreclose. The title was in the mortgagor, and had not been divested when this mortgage became due. The sureties had a right to insist upon a foreclosure, unless waived by them. The land was purchased by *Wells* of plaintiffs in May, 1890, at the price of \$3,200, alleged to be its true value then, and, as above stated, was bid in by *Sprague* December 30, 1890, at the price of \$2,700, alleged to have been its value at that date.

It is true the defendant might take issue upon the question of value, and have had the fact judicially determined, whether it was worth more, or how much more, than that sum, or it might be ascertained, also, upon the proper investigation, whether or not the plaintiffs were not bound to have surplus moneys on the first foreclosure applied on the second mortgage, and charge defendant with the difference only. But the answer to all this is that the parties have agreed upon another method of ascertaining the deficiency, and the defendant may insist upon it. He was entitled to bid at the foreclosure, and to the benefit of the redemption statute, and an opportunity to contest, if need be,

the first foreclosure. It cannot be said that the right to foreclose was utterly valueless in this case. The contract was made in contemplation of both mortgages, and there may have been special reasons, operating upon the minds of the parties, which led them to require a foreclosure, and consequent diligence in exhausting the mortgage security, before proceeding against defendant. *Moakley v. Riggs*, 19 Johns. 69, is disapproved by this court in *Brackett v. Rich*, 23 Minn. 485, as respects the main proposition therein decided. Nevertheless, what the court says in respect to the laches of the holder of the note in suit is applicable here. The excuse set up for not having proceeded against the maker was that he had been discharged from his debts under the statute, but the opinion states that "this was no excuse; for seventeen months had elapsed after the note became due, before his discharge, and that was negligence which absolved the defendant from his guaranty." We think the special circumstances of this case take it out of the rule laid down in *Brackett v. Rich*, and that the trial court was right in sustaining the demurrer. Order affirmed.

MITCHELL, J., (dissenting.) Whether plaintiffs were guilty of laches in not foreclosing their mortgage before the Sprague foreclosure, which resulted in prejudice to the defendants, and whether a surplus was realized on the Sprague foreclosure, for which defendants are entitled to credit, are questions which are not presented by this record. As I view the case, the only question is whether the plaintiffs were required, as a condition precedent to a right of action on the bond to foreclose their mortgage, notwithstanding that the mortgaged premises had been sold on a prior mortgage for their full value, and the time for redemption had expired. The defendants' counsel plant themselves squarely upon the affirmative, contending that it is wholly immaterial whether the failure of plaintiffs to foreclose resulted in benefit or loss to the sureties on the bond, or whether a foreclosure would have realized something, or nothing; that plaintiffs were required, as a condition to a right of action, absolutely, and under any circumstances, to first foreclose, because such were the terms of the bond. And, in my judgment, this is the only possible ground upon which the decision of the court below can be sustained. But it seems to me that to give such a construction to the provisions of the bond is to stick in the bark, and to entirely overlook the good sense and manifest purpose of the instrument. The evident object of the parties in inserting in the bond the provision referred to was to require the plaintiffs to first exhaust their mortgage security before resorting to an action against the sureties on the bond. The foreclosure was merely a means to this end, not the end itself. But if

there is nothing to exhaust, and a foreclosure would result in nothing but expense, it cannot be reasonably supposed that the parties had in mind the doing of a worse than useless thing. I therefore dissent.

ERICKSON v. BRANDT et al.

(Supreme Court of Minnesota. April 7, 1893.)
SURETIES ON BUILDING CONTRACT—RELEASE BY CHANGE OF PLAN—PAYMENT OF CONTRACTOR.

1. The sureties in a bond of indemnity against liens arising in the course of the construction of a building, under a contract between the owner and contractor, *held* released by a departure from the terms of the contract in respect to plan and materials.

2. Where, by the terms of such contract, the owner of a building agreed with the contractor to convey to him certain real property on the final completion thereof, but such contractor made default in the payment for materials used therein, so that the building became incumbered with liens, *held*, that the owner was not bound to make such conveyance until the liens were discharged, but was entitled to hold the property for his security.

3. A covenant under seal imports a valid consideration.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

Action by Iver L. Erickson against John Brandt and others on an indemnity bond. Judgment for defendants. Plaintiff appeals. Affirmed as to defendant Brandt, and reversed as to defendants Peterson and Bergstrom.

Hahn & Hawley, for appellant. O. C. Joslyn, for respondents.

VANDERBURGH, J. The plaintiff entered into a contract with defendant Brandt, August 30, 1890, for building, repairing, and finishing a house for plaintiff in the city of Minneapolis, according to plans and specifications therein referred to, to be completed November 1, 1890, and for which the plaintiff agreed to pay as follows: \$275 when foundation is completed; \$375 when house is finished outside; and \$400 at final completion of the work,—together with a conveyance of two certain village lots therein described. On October 29, 1890, before the job was completed, the defendant Brandt, as principal, and defendants Peterson and Bergstrom, as sureties, entered into the indemnity bond set forth in the complaint, by them duly sealed, and conditioned as follows: "Whereas the said John Brandt, principal, has entered into a contract with said Iver Erickson for the alteration, construction, and remodeling of said Erickson's house on 16th avenue, in the city of Minneapolis: Now, if the said John Brandt pay all bills for labor and materials performed and furnished in the alteration and construction of said house, and hold said Erickson and the lot on which said house is situated

harmless from said bills, and said lot free from liens for labor and material, or for either or both, then this obligation to be void; otherwise, to remain in full force and effect." At that date the first two installments mentioned in the contract had been paid to Brandt. The job was substantially completed about February 1, 1891, but, by reason of the failure of the defendant Brandt to pay for work done and material used in the building, the premises were incumbered with liens aggregating upwards of \$1,500. Suit was brought for the foreclosure of one of these lien claims, to which the other lienholders became parties, of which suit the defendants herein were duly and seasonably notified by the plaintiff to defend, but they failed so to do, and, the lien having finally been established by the judgment of the court, plaintiff was obliged to settle and pay the same, and he now brings this action to recover the amount so paid, together with costs and counsel fees incurred and paid in the foreclosure action mentioned.

1. The defendants Peterson and Bergstrom raise the objection, in limine, that the bond of indemnity shows on its face that it was executed after the contract was made, and is without consideration to support it. It is a sufficient answer to this that the instrument is a covenant by which they have bound themselves under seal, which conclusively imports a consideration. *McMillan v. Ames*, 33 Minn. 257, 22 N. W. Rep. 612.

2. It is further urged on behalf of the sureties that they are released by reason of alterations in the execution of the work under the contract, made at the instance of plaintiff by defendant Brandt, and without the consent of the sureties after the execution of the indemnity bond. It also appears that the last installment of \$400 was paid before it became due, while there were claims to a large amount outstanding against the building for which liens were filed. While it is perhaps doubtful whether, as respects this last point, the sureties can claim a release except pro tanto to the amount of the installment so improperly advanced, yet we think the charge of the court directing a verdict for the defendants, sureties on the bond, may be sustained on the ground of the departure from the plans and specifications referred to. The contract of the surety is stricti juris, and, if a departure from the contract to the extent made in the execution of this one can be disregarded or tolerated, where shall we set the limit? There were changes made in the construction, not extensive, it is true, but involving different materials and additional labor, which are included in the lien claims established against the building. And in some instances the amount of the increased cost is not clearly defined. We think the changes were correctly held to affect the obligation of the sureties. Of course, changes

affecting the nature of the original contract are to be distinguished from new and independent agreements for extra work, or additions which are entirely separate and independent from the contract for which the sureties are bound; and this distinction has not been overlooked in our consideration of this case.

3. After the work was completed, the defendant Brandt demanded a conveyance of the lots which plaintiff agreed to convey to him as a part of the consideration therefor, which the plaintiff refused to give, upon the ground that the liens were not settled. The court was of the opinion, and so charged the jury, that it was the duty of the plaintiff to convey these lots to the defendant when the work was done, and his refusal to do so upon demand rendered him liable for the value thereof, which the defendant Brandt was entitled to set off against the claim of the plaintiff in this action. This we think was error. Plaintiff was entitled to hold on to these lots for his indemnity, and the defendant could only recover the same or damages for a refusal to convey after full performance on his part, and he had actually indemnified plaintiff for the amount of the liens. As plaintiff alleges his readiness and willingness to make such conveyance, and is not in default while he is entitled to hold the same as security for his advances, he could not be made liable for the value thereof in this action.

4. It was Brandt's duty to defend the action brought to enforce the liens. He was the party primarily liable. The plaintiff should therefore be allowed to recover his expenses actually and reasonably incurred in making such defense. Order denying new trial affirmed as to the defendants Peterson and Bergstrom, and reversed as to the defendant Brandt.

KILGORE v. FRISBEE.

(Supreme Court of Minnesota. March 13, 1893.)

ADVERSE CLAIM TO LAND—EVIDENCE.

Evidence considered, and held sufficient to sustain the findings of the trial court in respect to the ownership and location of the land in controversy.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Ensign, Judge.

Action by Annis M. Kilgore against Finley H. Frisbee to determine the adverse claim of defendant to certain real estate. There was judgment for defendant, and plaintiff appeals. Affirmed.

J. B. Richards, for appellant. White, Reynolds & Schmidt, for respondent.

VANDERBURGH, J. The plat of that portion of the town of Duluth known as

"Portland" included certain portions of sections 22, 23, 26, and 27, in township 50, range 14. This plat was, upon the proper application and hearing, vacated by decree of the district court of St. Louis county, on the 6th day of August, 1869. It is recited therein as follows: "And it further appearing that the object and purpose of procuring such vacation is to resurvey and replat the same, so as to make the same conform to the plat of the balance of Duluth, * * * it is therefore ordered, adjudged, and decreed that that portion of the territory herein described, except that portion of Superior street west of Markell avenue, and also all south of said excepted portion of Superior street, be, and the same is hereby, vacated." And thereupon the owners and proprietors of the same lands caused the same to be resurveyed and replatted so as to cause the streets therein to run parallel with and the avenues at right angles to Superior street, which is reproduced on the new plat, and remains unchanged. So, also, block 5 in Portland, lying south of Superior street, was not vacated, and remains unchanged in the new plat, which is styled "Portland Division of Duluth," and was completed and certified on December 10, 1869. The boundaries of the two plats are the same, and the westerly avenue, called "Third Avenue" on the new plat, is laid out through the land platted to the north line of Superior street, and has been extended by public user through the southwesterly portion of block 5, and is now open and occupied as a street to the lake, and the public easement is not disputed. The title to the property in the street or avenue so extended is not in dispute. The only question is whether any portion of lot 28, in block 5, lies east of the avenue, or whether that lot lies wholly in the street. The common source of title is one Sidney Luce, who, in contemplation of the new plat, conveyed the land covered by block 5, with other lands, in 1869, except that portion thereof included in the avenue so extended. Third avenue, as indicated by the plat, is 60 feet in width, and it is evident that Luce intended to make the intersection of the east line thereof with the south line of Superior street the initial point of the description in his deed, and that avenue so extended the westerly boundary of the land conveyed. The deed under which plaintiff immediately claims purports to release and quitclaim to him, in consideration of one dollar, "lot No. 28, in block 5, of that part of Duluth formerly known as 'Portland,' being the same numbered lot and block in Portland division of Duluth, as now platted." It is not material that block 5 and Superior street were not formally vacated when "Portland" was vacated. The deed under which the plaintiff claims refers the description to the new plat, which indicates the location of Third avenue, the west boundary in Luce's deed, so that if no part of lot 28, in controversy, lies east of the east line of

that avenue laid out in Portland division, and extended through block 5, the plaintiff acquired nothing by his deed, and should take nothing by this action. There were, as laid out, 29 lots in block 5, numbered from east to west, and lots 28 and 29 are fractional lots. The court finds that lot 28 lies wholly west of the east line of Third avenue, and the plaintiff owns nothing east of that line. This finding is supported by the plat of the Portland division upon which Third avenue is delineated; but, as the survey and actual location of the boundaries must control, we have examined the record fully in order to ascertain whether there is evidence in the case sufficient to sustain the conclusions of fact of the trial court. It is conceded that all the lots in the block were laid out with a frontage of 80 feet each, except lot 29, the size of which is in dispute. It is a triangular fraction, including the surplus over the 28 lots included in the block. The evidence in the case does not require a finding that lot 29 is 30 feet front or any particular size, so as to crowd the west line of lot 28 beyond the east line of the avenue. On the contrary, there was evidence introduced in defendant's behalf tending to show the location of the northeast corner of the block as originally established, and that all the ground or space in the block east of that avenue and the west boundary line of the description in the Luce deed is included in the lots therein numbered from 1 to 27, inclusive. There is evidence, then, sufficient to sustain the finding of the court. Judgment affirmed.

GRAHAM v. BURCH et al.

(Supreme Court of Minnesota. April 7, 1893.)

FRAUDULENTLY PREVENTING REVOCATION OF WILL—LIABILITY TO DISTRIBUTORS.

Where an attempted revocation of a will is thwarted by the fraudulent act of a beneficiary, and the testator is subsequently and seasonably informed of the fact, and acquiesces in the preservation of the will, no action will lie for the alleged fraud.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Kelly, Judge.

Action by Mary Graham against Bridget Frances Burch and others to declare defendant Burch trustee ex maleficio of plaintiff for a certain portion of an estate devised to defendant. Judgment for defendants. Plaintiff appeals. Affirmed.

Stevens, O'Brien & Glenn, for appellant. Cyrus J. Thompson and Thompson, Gates & Thompson, for respondents.

VANDEBURGH, J. The contest grows out of the attempted revocation of a will which was under consideration in *Graham v. Burch*, 47 Minn. 171, 49 N. W. Rep. 697. It is sought by this action to charge defendant

as trustee *ex maleficio* of the plaintiff for that portion of the estate received by defendant under the will attempted to be destroyed by the testator which plaintiff would have been entitled to had he died intestate, on the ground that the revocation of the will was prevented by the fraudulent conduct of the defendant. The case must turn upon the effect to be given to certain findings of fact in this case in reference to the subsequent discovery by the testator that the will had not been destroyed, and his acquiescence in the preservation of the will. The attempt to destroy the will was made in 1837. It is found that he at that time believed that his will had been burned and destroyed, and that the defendant Burch fraudulently induced him so to believe by concealing from him the fact that she had removed the will from the envelope containing it, and replaced the envelope in the stove in which he had placed it to be burned; "that the testator continued thereafter to live in the same house with defendant, who was his daughter, until December 23, 1838, when he died; and that after the time said James Burns, the testator, so attempted to destroy his will, and before the time of his death,—but exactly at what date does not appear,—said James Burns learned and knew that his said will had not been destroyed, but that the same was still in existence, and that he died with that knowledge, and without manifesting any further desire of making any further attempt to destroy the will." The plaintiff admits that there is evidence in the case sufficient to support those findings. The defendant testifies that his attention was particularly called to it, and that he saw the will many times afterwards, and during the last summer of his life he assured her she would have no trouble about the property, because she had got "the deed and the will." It appeared that a deed which he had given her of the property in controversy was afterwards set aside, on the ground that it was procured by undue influence. The court below properly ordered judgment for the defendant upon the facts found. The testator, intending to destroy the will, placed it in an envelope in a stove, expecting it would be destroyed when the fire was lighted therein, which was not done for several hours. In the mean time it was abstracted by the defendant. There was clearly a *locus penitentiae*; so that if it was subsequently taken out, and with his knowledge and consent thereafter remained intact, he must be deemed to have ratified her act, and to have abandoned his purpose to destroy it. He might change his mind before it was destroyed, and, if he became cognizant of the facts, it would make no difference whether he took it out of the stove himself or if it was done by another person, and afterwards reported to him,—"*non fit volenti injuria*." The conclusion of the trial court in the case is therefore supported by the facts found. Order affirmed.

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MORGAN *et al.* *v.* ROUNTREE, (KNIGHT, Garnishee.)

(Supreme Court of Iowa. May 18, 1893.)

LEASE OF HOMESTEAD—EXEMPTION OF RENT.

Where a judgment debtor, who is the head of a family, and temporarily absent from her homestead for a year for the purpose of educating her daughter, executes a lease of the homestead during such absence, the money due her for rent under the lease is exempt from execution issued on a judgment against her.

Appeal from district court, Jasper county; A. R. Dewey, Judge.

Appeal by the plaintiffs upon a certificate of the trial judge as follows: "Where the judgment debtor, who is a resident of this state, and the head of a family, is temporarily absent from her homestead for the period of one year for the purpose of educating her daughter, and voluntarily executes a lease of the homestead to a tenant during and for the period of said absence, are moneys which are due and owing to the judgment debtor from the tenant for the rent of said homestead accrued under said lease exempt from execution issued upon a judgment in favor of the plaintiff and against the judgment debtor?"

W. O. McElroy, for appellants.

GIVEN, J. 1. It is the question certified, and that alone, which we are to decide. Though plain and pointed, the result is important, because of its effects, and demands careful consideration. We regret not to have the benefit of full arguments, but, as appellee has submitted without argument, we must forego the aid that would have come from a full discussion of the question. It will be observed that there is no question of homestead nor of abandonment, or the right to follow the proceeds of the lease into other property, involved. The leased premises were and continued to be a homestead, and the question is simply whether the money due from the garnishee to the defendant is exempt to her. The only ground upon which such an exemption can be claimed is that it is the proceeds of the use of the homestead. Exemptions of property from the payment of debts is purely statutory, and courts may not enlarge the exemption; but, as said in *Kaiser v. Seaton*, 62 Iowa, 466, 17 N. W. Rep. 664: "Exemption laws are to be maintained in their spirit as well as letter, and even liberally construed in favor of those claiming their benefit." See, also, *Bevan v. Hayden*, 13 Iowa, 125; *Huskins v. Hanlon*, 72 Iowa, 40, 33 N. W. Rep. 352. Looking to the spirit of the law, this court held in *Kaiser v. Seaton*, *supra*, that money due as damages for right of way over a homestead was not destroyed as such by the easement. In *Mudge v. Lanning*, 68 Iowa, 641, 27 N. W. Rep. 793, it is held that a judgment for damages against

a railway company for setting out fire by which fences, vines, and trees on a homestead were destroyed was exempt. Appellants cite and rely upon *Huskins v. Hanlon*, supra, wherein it is said: "But homestead rights do not presumptively attach to money or choses in action. They are prima facie liable for debts, and are only exempt when sold with the intention to use such proceeds in the purchase of another homestead." The question in that case was whether the execution debtor intended to invest the proceeds derived from the sale of his homestead in another homestead, and hence the language of the opinion is limited to that kind of proceeds. Had proceeds derived as damages for right of way or setting out fire been involved, they would have been included. That case does not hold that homestead rights may not attach to other money than that derived from the sale of a homestead for the purpose of purchasing another. In that case Hanlon failed to prove an intention to purchase another homestead with the proceeds derived from the sale; it was therefore held that the proceeds were not exempt. *Harkness v. Burton*, 39 Iowa, 101, also cited, is not in point. That case holds that a license to remove minerals from the homestead, when its enjoyment does not impair the use of the homestead, may be given by the husband without the assent of his wife. Appellants have not cited nor have we found any case involving the precise question certified. In *Cox v. Cook*, 46 Ga. 301, it is held that the crop raised on the homestead was exempt. In *Wade v. Weslow*, 62 Ga. 563, it is not only held that crops grown upon the homestead are exempt, but that sheep purchased with the proceeds of the crop, and put on the homestead, are also exempt. The correctness of this ruling is questioned in *Coates v. Caldwell*, 71 Tex. 19, 8 S. W. Rep. 922. As that question is not involved in this case, we do not consider it. In the latter case it is held that "cotton grown upon the homestead and unpicked is exempt from execution. After it has been picked the exemption ceases, and it is subject to execution." In *Alexander v. Holt*, 59 Tex. 205, it is said: "We are of opinion, also, that the crops of corn and cotton growing on the homestead were also exempt, as necessary to its beneficial enjoyment." Chief Justice Hemphill, in *Cobbs v. Coleman*, 14 Tex. 598, said that it was "very clear that by these reservations the legislature intended a real, substantial benefit; that by fair construction the grants in the statute must include not only the subject itself, but everything absolutely essential to its beneficial enjoyment. The same doctrine is also deducible from *Anderson v. McKay*, 30 Tex. 186." *Horgan v. Amick*, 62 Cal. 401, holds that grain harvested from lands constituting a homestead are not exempt. The reasoning in this case and in *Coates v. Caldwell*, supra, seems to be that

to exempt the gathered crop would be to add to it the exemptions of personal property provided in the statute without its being specified therein. It is clear that such crops are not exempt under statutes exempting personal property unless specified therein. Such crops, if exempt, must, in the absence of such specifications, be so under the law exempting the homestead. The reasoning in these cases seems to us to lose sight of the spirit and purpose of the law exempting homesteads. The conflict in the cases is explained, in part at least, by the differences in the statutes of these states. It will be observed, however, that in none of them is it held that crops, while growing upon the homestead, are not exempt.

2. To answer the question certified we must ascertain the letter and spirit of our statute exempting homesteads. It is certainly the spirit and purpose to exempt not only the homestead, but also the use thereof, for without the use the exemption would be valueless. It is not simply as a place of shelter—a place in which to live—that homesteads are exempt, but also as a means of making a living, as is shown by the exemption of one half an acre in town, 40 acres in the country, and the shop or building, when situated on the exempt premises, in which the head of the family carries on his business. The use of the homestead, as well as the homestead itself, is unquestionably exempt so long as the homestead character is maintained. When the homestead is terminated by abandonment or otherwise the exemption ceases, but in this case it was not terminated. We think it is in harmony with the evident spirit and purpose of our statute to hold that the head of a family owning a homestead has a right to hold as exempt not only the homestead and its use, but also crops or money which he may derive from its use while the property continues to be his homestead. If the homestead is terminated by abandonment or otherwise the exemption ceased. To hold that the owner of a homestead can only hold as exempt such proceeds of its use as the industry of himself or family has produced would be in many cases to deny the benefits of such exemption entirely. Take the case of an owner who cannot, from any cause, cultivate the homestead garden or 40 acres, there is no good reason why he may not rent them to another, and hold the proceeds exempt for the use of his family. This case furnishes another apt illustration; also the case of one having spare room in the homestead, who takes lodgers, or one who, having no use for a stable on the homestead premises, rents it to another. We are clearly of the opinion that proceeds derived from the use of the homestead while it remains such are exempt to the head of a family. Whether property purchased with such proceeds, not otherwise exempt, would be subject to execution, we do not deter-

mine. The question certified must be answered in the affirmative, and the judgment of the district court is affirmed.

DES MOINES SAV. BANK v. COLFAX HOTEL CO., (CLARK, Garnishee.)

(Supreme Court of Iowa. May 12, 1893.)

GARNISHMENT—PROPERTY SUBJECT TO—ACCOUNT—JURISDICTION AT LAW—EVIDENCE—DISCRETION OF COURT.

1. Where the trustee and the beneficiaries under a deed of trust made by defendant filed pleadings in which they unite in demanding judgment for plaintiff for whatever amount may be found due defendant from the garnishee, the garnishee cannot defend on the ground that he is bound to pay his debt to the trustee.

2. Where the only question involved in garnishment proceedings is whether the garnishee subscribed a certain amount to the capital stock of defendant company, the court of law has jurisdiction of the subject-matter.

3. In garnishment proceedings, where it appears that the garnishee presided at a meeting of defendant company's board, at which a report was read showing the amount of the garnishee's indebtedness to defendant, which the garnishee did not deny, such report is admissible as evidence against the garnishee.

4. It is within the discretion of the trial court to allow the introduction of additional evidence after the evidence in the case has been closed.

Appeal from district court, Polk county; C. P. Holmes, Judge.

The issue tried in this case in the court below was whether the garnishee, Clark, was indebted to the defendant, the Colfax Hotel Company. There was a trial by jury, and a verdict that Clark was so indebted in the sum of \$1,365.05, and interest. From a judgment on the verdict, Clark, the garnishee, appeals.

C. C. Nourse and C. L. Nourse, for appellant. Cummins & Wright, for appellee.

ROTHROCK, J. 1. The case has once before been in this court upon an appeal by the plaintiff. See 79 Iowa, 497, 44 N. W. Rep. 718. On the first trial it was held by the district court that no action could be maintained by the appellee, because the judgment upon which the garnishment process was based was satisfied. It was held by this court that the judgment was not satisfied, and that "the plaintiff was entitled to a finding as to the indebtedness of the garnishee, * * *" and the cause was remanded to the district court for such a finding. It is unnecessary to set out the facts upon which that ruling was based. They will be found in the opinion on the former appeal, and the only question left for determination was the amount of the garnishee's indebtedness, if any. The garnishee was served with process in August, 1887. Before that date, and in 1885, the Colfax Hotel Company executed a deed of trust to Thomas S. Wright upon all its hotel property and all sums of money owing to the

hotel company. It is claimed by appellant that this deed of trust operated as an assignment of any debt due by him to the company, and that there was therefore no ground for the garnishment. A point is made whether the trust deed was valid as against an attaching creditor. In view of the undisputed facts of the case, it is not necessary to determine that question. It appears that before the appellant made this question in the district court, the trustee in the trust deed, the hotel company, and the beneficiaries under the trust deed, filed pleadings in which they all united in the demand that judgment should be rendered for the plaintiff for whatever amount should be found due to the hotel company from the garnishee. Under this waiver of any right which the trustee may have had to collect the debt, the debtor is in no position to urge that he is bound to pay his debt to the trustee, or to any one other than the plaintiff in this action.

2. It is next urged that the garnishee should have been discharged, because the investigation involved an adjustment of a matter of account between the Colfax Hotel Company and the garnishee, which could not be adjudicated in an action at law, and, being of equitable jurisdiction, the garnishee cannot be required to try the issue in a garnishment proceeding. It is not to be denied that there are cases where an accounting between parties may be a subject of equitable jurisdiction. The facts in this case, however, show plainly that the matters in controversy were not such as required their determination by a court of equity. We need not set out the facts. It is enough to say that, if an action had been brought against the garnishee by the hotel company, it could not have been maintained as a suit in equity. It was a plain matter of account, in no way involved, and it would have been the right of plaintiff to have demanded a trial by jury. There was but really one controlling question in the case, and that was whether the garnishee was a subscriber to the capital stock of the hotel company in the sum of \$3,000. There were no such complicated transactions as were held to be proper subjects of equitable jurisdiction in the cases of *Land Co. v. Walker*, 50 Iowa, 376; *Burt v. Harrah*, 65 Iowa, 644, 22 N. W. Rep. 910.

3. It appears that one Norfolk was at one time employed to make an investigation of the account between the garnishee and the Colfax Hotel Company. He made up this account with the assistance of one Staynor, who was secretary of the hotel company. Norfolk made his report to a meeting of the directors of the company, at which the garnishee was present, and the garnishee presided at the meeting as president of the board. The report of Norfolk was read at the meeting, and it showed that Clark, the garnishee, was indebted to the company in the sum of about \$2,600. Complaint is made

because the court allowed this report to be introduced in evidence. The evidence shows quite conclusively that the garnishee heard the report read and that he did not deny that he was indebted to the company. The statement of account, and Clark's reply thereto, was competent evidence, the same as if the account had been in the form of a conversation with Clark. Staynor, the secretary of the hotel company, was examined as a witness, and was asked this question: "As far as you know or have been able to ascertain, had Mr. Clark paid any sums of money on account of the Colfax Hotel Company, other than those that are credited to him in this account?" The question was objected to, the objection was overruled, and the garnishee excepted, and the witness answered: "He has paid none that I have been able to ascertain, aside from those." In view of the relation of the witness to the affairs of the company, we do not think that this evidence was erroneously admitted. The business of the company was presumably kept in proper books, and it was competent for the secretary of the company to state whether he paid any sums of money on account of the company other than those stated in the account.

4. There can be no doubt that the jury was fully warranted in finding from the evidence that Clark subscribed for \$3,000 of the capital stock of the company. The stock was not subscribed in a stock book, and the names of the stockholders were not signed to any written agreement to take stock. The manner in which the contract to take stock was entered into is fully set forth in the case of *Hotel Co. v. Lyon*, 69 Iowa, 683, 29 N. W. Rep. 780, in which it was held that a parol agreement to take stock in this same corporation was valid. If the garnishee is liable as a stockholder, it is under the same facts as under the cited case, and there was no error in any part of the charge to the jury in relation to the garnishee's liability. Indeed, the instructions to the jury appear to us to be very fair to the appellant.

5. Further complaint is made because the appellant was not allowed to offer additional evidence some three days after the evidence in the case was closed. This was a matter within the discretion of the court, and the record does not disclose any abuse of discretion. The case demands no further consideration. The judgment of the district court is affirmed.

SMITH et al. v. WATSON et al.

(Supreme Court of Iowa. May 13, 1893.)

APPEAL—DEFECTIVE RECORD—REFORMATION OF CONTRACT—FORFEITURE—WAIVER OF DEFECTS.

1. Defects in the record, which are not such as to prevent a full consideration of the case on its merits, afford no ground for refusing a trial de novo in the supreme court.

2. A contract recited that whereas defendant S. had conveyed land to plaintiffs, the deed to be held in escrow until the contract was performed, "it was agreed between S. and plaintiffs" that, in consideration of such conveyance, plaintiffs should furnish defendant W. a certain quantity of cigars, to be shipped, in equal monthly shipments, on W.'s order; one-third of each shipment cash; money to accompany order; first shipment to be made on a specified date, and others monthly thereafter. *Held*, that where S. had title to the land solely as trustee for W., and signed the contract only to secure W.'s performance of the agreement to convey the land, that portion of the contract reading, "it was agreed between S. and plaintiffs," should be reformed by inserting therein W. for S., as being a mutual mistake.

3. Such contract further recited an agreement between all the parties thereto that, if either should not perform his or their part of the agreement, plaintiffs should pay W. \$5,000 liquidated damages, and, if W. should not perform his part, he should forfeit the deed. *Held*, that where the attorney who drew the contract testified positively that plaintiffs were to pay W. \$5,000 only in case "they" failed to perform the contract on their part, and that the original draft of the contract was changed by agreement of the parties; that by mistake he failed to make the contract, as changed, express the intent of the parties,—the contract should be reformed so as to read, "if plaintiffs fail to perform their part of the agreement, they shall pay W. \$5,000 liquidated damages," etc.

4. After the execution of the contract, and deposit of the deed, plaintiffs agreed to send W. samples; the evidence as to the time they were to be sent being in dispute. Owing to wet weather, they were unable to send them until a few days before the date agreed on for the first shipment. *Held* that, the agreement to send samples being unconnected with the contract, a failure of plaintiffs to send them when expected gave defendant no right to delay sending in his order, nor to demand a forfeiture on plaintiffs sending in a shipment at the date specified in the contract, but without defendant's order.

5. Where the deed deposited in escrow was inspected by plaintiffs before so deposited, and no objection made to it, they must be deemed to have waived the right of insisting on a warranty deed, as provided by contract.

Appeal from district court, Benton county; L. G. Kinne, Judge.

Action in equity for the reformation of an agreement in writing, to recover damages for an alleged breach thereof, and for other relief. The defendant S. H. Watson demands judgment on a counter-claim for an alleged breach of the same agreement. There was a hearing on the merits, and a decree reforming the agreement in part, and in favor of Watson for damages. From that decree the plaintiffs appealed. After their appeal was perfected, the defendants appealed from so much of the decree as reformed the agreement.

E. C. Preston, J. D. Nichols, and C. Nichols, for appellants. Chas. A. Clark and Geo. W. Burnham, for appellees.

ROBINSON, C. J. 1. Appellees claim that this cause cannot be tried anew in this court for the reason that some of the documentary evidence is not properly shown by the abstracts. The claim that the evidence is not

fully presented by the abstracts is made for the first time at the close of appellees' argument. The abstract of appellants purports to be full and complete. It was followed by two additional abstracts, filed by appellees, each of which set out evidence, and neither of which claimed that the evidence was not fully presented by the abstract, and additional abstracts taken together. In an amendment to their abstract, the appellants allege that the evidence is fully presented by the various abstracts and amendments filed. It is said that, notwithstanding the facts recited, the record shows that some of the exhibits are not identified, or are not before us. We are satisfied, however, that, although there are some formal defects in the manner in which some of the exhibits are identified and presented, yet that such defects are not of such a character as to prevent a full consideration of the case on its merits, and therefore that they are not material. Defects in the record, which cannot affect the final result, afford no ground for refusing a trial de novo in this court.

2. In October, 1889, the plaintiffs were engaged in the business of manufacturing and selling cigars in Philadelphia. The defendant Watson was engaged in the banking business at Vinton, in this state, and claimed to own several thousands of acres of pine lands in the state of Georgia, the title to which was vested in defendant C. J. Santmyer. After some preliminary negotiations the parties named signed an agreement in writing, as follows: "Whereas, C. J. Santmyer, in Benton county, state of Iowa, has this day sold and conveyed, by warranty deed, to T. T. and R. E. Smith, of the city of Philadelphia, in the state of Pennsylvania, eleven thousand (11,000) acres of pine land, situated in Camden county, in the state of Georgia, which said deed is deposited with Alexander Runyon, county treasurer of Benton county, state of Iowa, to be held by him until the terms and conditions of this contract, as hereinafter specified, shall be fully complied with by the said grantees, it is therefore agreed by and between the said C. J. Santmyer and the said T. T. and R. E. Smith that in consideration of the conveyance of said lands, as above specified, the said T. T. and R. E. Smith are to furnish to S. H. Watson, f. o. b. at Philadelphia, cigars of the brands hereafter named, to the amount, in value, of fifty-seven thousand seven hundred and fifty dollars, (\$57,750.00.) Said cigars to be shipped, upon the order of the said S. H. Watson, in eight (8) equal monthly shipments, or as near in equal shipments as can be conveniently done, the one-third of each shipment to be cash, money to accompany order, the first shipment to be made on or about the 1st day of December, 1889, and then in monthly shipments until the whole amount shall have been shipped as above specified. Said cigars are to be of the following brands, to wit: First brands,

Captain Cook and Chrysanthemums, at forty-five dollars (\$45.00) per thousand; second brands, The Latest and Harvest Moon, at thirty-six dollars (\$36.00) per thousand. It is further mutually agreed, by and between each and all of said parties, that, if either of said parties shall fail to keep and perform his or their part of the agreement, said T. T. and R. E. Smith shall forfeit and pay to the said S. H. Watson the sum of five thousand dollars, (\$5,000.00,) as liquidated damages; and, if said S. H. Watson shall fail to perform on his part, he shall forfeit the deed, and all right thereto. And it is further mutually agreed by and between each and all of said parties that, when said S. H. Watson shall have received the full amount due him under this contract, then he will cause the deed above mentioned to be delivered to said grantees therein named. In witness whereof, we have hereunto subscribed our names in duplicate this 15th day of October, 1889. [Signed] C. T. Santmyer, S. H. Watson, and T. T. & R. E. Smith."

The plaintiff claims that in drawing the agreement the name of C. J. Santmyer was inserted by mistake, in the first paragraph, in lieu of that of S. H. Watson, and that the paragraph should read: "Whereas, S. H. Watson, in Benton county, state of Iowa, has this day sold and conveyed, by warranty deed, to T. T. and R. E. Smith," etc. Also, that Santmyer's name was inserted by mistake, in lieu of that of Watson, in the first part of the second paragraph, which should have been made to read: "It is therefore agreed by and between the said S. H. Watson and the said T. T. and R. E. Smith," etc. The plaintiffs further claim that a mistake occurred in the third paragraph, and that the first part of it should have been made to read as follows: "That, if T. T. and R. E. Smith shall fail to keep and perform their part of this agreement, said T. T. and R. E. Smith shall forfeit and pay to the said S. H. Watson the sum of five thousand dollars, (\$5,000,) as liquidated damages," etc. It is also claimed that the mistakes were mutual. The district court found that there was a mutual mistake in the last paragraph, and reformed it to read as follows: "It is further mutually agreed by and between each and all of said parties that, if the said T. T. and R. E. Smith shall fail to keep and perform their part of this agreement, the said T. T. and R. E. Smith shall forfeit and pay to said S. H. Watson the sum of five thousand dollars, as liquidated damages; and, if the said S. H. Watson shall fail to perform on his part, he shall forfeit the deed, and all rights thereto." The evidence shows, without conflict, that Santmyer held the naked legal title to the land, and that he had no part in the negotiations which led to the signing of the written agreement. He held the title for the exclusive benefit of Watson, and appears to have signed the agreement only to secure

the performance of the agreement on Watson's part for the conveyance of the land. The plaintiffs were informed while the negotiations were pending that the conveyance of the land would be made by Santmyer, and the first paragraph of the agreement was drawn with a full understanding of the facts, after a preliminary draft, in which Watson's name had been inserted where Santmyer's now appears, had been read and destroyed. No mistake in regard to that paragraph is shown, and the district court rightly refused to reform it. But we are of the opinion that Santmyer's name appears in the first part of the second paragraph by a mutual mistake of the parties. It is true that they may have known it was there, but, if so, they were misled by the error in the original draft of the first paragraph, which had been corrected. Nothing in the negotiations had between the parties suggests any intent to obligate Santmyer further than was necessary to secure a conveyance of the land according to the agreement of Watson. That a mistake of that kind may be corrected by a court of equity is well settled. See *Lee v. Percival*, (Iowa,) 52 N. W. Rep. 543, and authorities therein cited. We conclude that the second paragraph should be corrected by striking out the words, "the said C. J. Santmyer," and inserting in lieu thereof the name, "S. H. Watson." The evidence in regard to the third paragraph shows, beyond question, that it contains the mistake alleged by plaintiffs. It is true Watson states the agreement to be that if he failed to perform his agreement he was to surrender the deed to plaintiffs, and receive from them the sum of \$5,000, and that if they failed on their part they were to pay him the sum of \$5,000. But an agent, named Bates, who brought the parties together, and heard the negotiations; R. E. Smith, who acted for the plaintiffs; and W. C. Connell, the attorney who drew the agreement,—all testify positively that plaintiffs were to pay Watson \$5,000 only in case they failed to perform on their part. It is shown that the agreement, as first drawn, provided for a forfeiture of \$5,000 by plaintiffs if they failed to perform the agreement on their part, and for a like forfeiture by Watson in case of failure on his part, but, when it was read as thus drawn, Watson objected, and said he would forfeit nothing but the land in case he failed to perform the agreement. A change was then made in the draft, but by mistake Mr. Connell failed to make the agreement, as changed, express the intent of the parties, and they did not discover the mistake at that time. It is true the land was included in the agreement at \$3.50 per acre, but the evidence shows that it was not worth more than from 50 cents to \$1 per acre, and it is doubtful if the title held by Santmyer was of any value. We conclude that the third paragraph of the agreement

should be reformed as demanded by appellants.

3. The district court found that plaintiffs had violated their agreement, and decreed that Watson recover of them, on account of such violation, the sum of \$5,000, as liquidated damages. It appears that after the agreement was signed, and the deed it referred to had been deposited with Runyon, Watson and R. E. Smith had some conversation in regard to furnishing samples to Watson for use in selling the cigars which he was to receive. Smith agreed to send such samples, but there is some dispute as to the time when they should have been sent. Watson insists that they should have been sent before or during the first week of the next month. Smith admits that Watson asked him to have them sent within a week or two, but says he refused to agree to do so, for the reason that he wished to superintend their preparation, and would not be home for two or three weeks. He arrived at home about the 12th of November, but was delayed, in preparing the samples, by wet weather, and they were not sent until the 27th of that month. On the 5th day of December, plaintiffs shipped 50,000 cigars of each of the four brands specified in the agreement, amounting, at the agreed price, to \$8,100. The cigars were sent to Vinton, consigned to plaintiffs, with a sight draft on Watson for one-third the contract price of that shipment and the samples. He refused to honor the draft, and on the 17th day of December notified plaintiffs that he would not do anything further under the agreement. He claims that he was induced not to order the first shipment of cigars provided for in the agreement by the promise of plaintiffs to send him samples from which he could determine what proportion of each brand to order; that, by delaying to send the samples, plaintiffs waived an order until defendant could make the selections from the samples sent; that plaintiffs waived an order for the first shipment, and made it larger than the agreement contemplated, and did so to compel defendant to receive and pay for the cigars sooner, and more rapidly, than the agreement provided; and that in consequence of these alleged violations of the agreement he elected to terminate it. He also claims that by reason of such violations he is entitled to recover the forfeiture of \$5,000. A careful examination of the evidence fails to disclose any waiver by plaintiffs of their right to insist upon an order until Watson should have an opportunity to examine the samples, and make selections from them. The agreement to send samples was independent of the agreement in suit. It appears to have been made solely for the benefit of Watson, and, if sustained by a valid consideration,—a matter which we do not determine,—did not, in terms, and was not intended to, affect the liability of either party under the other agreement. Watson said of the

agreement to send samples: "There was nothing said at that time in reference to the shipments, or the deferring of the shipments. There was nothing said about that afterwards in conversation with Smith." The failure of plaintiffs to send the samples when expected gave Watson no right to delay sending in his order, and demand a forfeiture.

On the 1st day of November, plaintiffs wrote to Watson a letter as follows: "In regard to your transaction with our Mr. R. E. Smith for cigars, we had some days ago from him a general outline of the business, but are not advised as to the proportion of each brand for the first shipment; and as he is absent, and not expected home for some days, we write to ask you if one-half of each grade will be suitable. We are preparing the first shipment on that basis, as our experience teaches us that to be the most desirable, and we wish to give you the goods in such proportions of each grade as will be to your best advantage. Please advise us if we are correct, and oblige, yours, truly, T. T. Smith & Bro." Watson knew that plaintiffs were entitled to an order for shipment on or about the 1st day of December, and, if he wished to delay it until the samples were received, ordinary business usage and good faith demanded of him a prompt answer to that letter, but he failed to answer, or acknowledge it in any manner.

On the 27th day of November, plaintiffs notified Watson of the shipment of the samples by a letter, of which the following is a copy: "By express to-day we forward to your above address the following tray 1/40 samples: Capt. Cook, 350; Chrysanthemum, 350; Latest, 350; Harvest Moon, 200,—1,200 cigars, which we will bill next week, with the first shipment on your order, as per agreement. Owing to the extreme wet weather, we have been delayed somewhat in our calculations. Unless we have instructions from you to the contrary by return mail, we shall proceed with the second shipment as with this, i. e. equal quantities of each of your brands."

On the 6th day of December, plaintiffs notified Watson of the shipment made the day before by a letter, of which the following is a copy: "Inclosed, we hand you two bills,—one for shipment of lot by ex. Nov. 27th, and the other for 20 cases (200 M.) cigars forwarded P. R. E. yesterday, as per bill attached to draft at sight for \$2,717.10, being 1/2 cash, consideration of both shipments, as per inclosed, and according to terms of contract, which we hope you will find entirely satisfactory. We wish the goods to land in good condition, and without delays in transit. We are proceeding with cigars for your second shipment, which will be about January 1st next, and which will be in equal quantities of each of your four brands, same as shipment first made, unless we are advised by return mail of any change

you may desire in the proportions of said brands. Goods consigned Smith Bros."

Those letters were acknowledged by Watson in a letter written on the 10th day of December, of which the following is a copy: "Yours of the 27th and Dec. 5th recd. and noted. The samples did not come according to agreement. They were to have been here the last of October or November 1st, while they did not get here until a few days ago. We expected the samples to have been sent promptly, in order to give time for their disposition,—at least, a part of them. No sale could be made unless we had the samples from which to sell. A provision of our agreement was that they were to be shipped upon the order of the writer. No such order has been given. This provision was made in order to give time and opportunity to sell them,—at least, a portion of them. We do not wish any shipment made until, say, January 10th. This will give us the time lost while waiting for the samples. Yours, &c., S. H. Watson. P. S. While writing, your draft for some \$2,700 has been presented, which I ordered returned, and for the reason above stated. Had we been furnished the samples as per agreement, we would have had shipment made direct from there, in all probability." It will be noticed that no objection is made in this letter to the amount of the shipment. On December 14th plaintiffs notified Watson that they considered his refusal to receive the goods as a direct violation of the agreement, and that they would make a second shipment at the time provided in the agreement.

On the 17th day of December, Watson wrote to plaintiffs a letter as follows: "In reply to yours of the 14th inst., I would say that your failure to furnish samples of the cigars at the time agreed upon has seriously embarrassed us in the matter of handling so large an invoice of cigars as you say you have shipped, and the contract provides that they were to be shipped upon my order. I gave no order for the shipment of cigars, hence cannot receive the cigars under the contract, and you need make no further calculations or arrangements on your part to ship same. I have, however, this proposition to make in settlement of this matter: I will receive the invoice of cigars you have shipped, and direct Alex. Runyon, county treasurer, who holds the deed to the land, to deliver same to you. This adjustment is to be in full settlement of all matters between us. In case you refuse this offer, I decline to have anything further to do with the contract, and will not receive the cigars already shipped by you, as the same were not made upon my order." No claim was made in this letter that there had been a waiver of any of the provisions of the agreement, nor that the shipment is larger than was authorized; but the refusal of Watson to proceed further is based upon the

failure of plaintiffs to furnish the samples at the time he claims they should have been furnished, and upon the fact that he had not given an order as provided by the agreement. Neither of the reasons assigned was sufficient to relieve him from his obligation to carry out the agreement on his part. Plaintiffs had the right to make a shipment on or about the 1st day of December, and their letter of November 1st notified Watson that the shipment was being prepared, and, if it was not satisfactory as proposed, he should have made his wishes known at once. Had he answered the letter of November 27th promptly, he could have prevented the shipment of December 5th; but he did nothing to prevent it, and cannot now be permitted to take advantage of his failure to make the order. Moreover, the shipment made was not excessive, in the absence of timely objection. The cigars were to be sent in eight equal monthly shipments, "or as nearly in equal shipments as can be done." It was explained to Watson, when the agreement was made, that it would be difficult to make the shipments equal, for the reason that the cigars were shipped in cases containing 10,000 each, and that it was difficult to secure men to work during the holidays, and, therefore, that the first shipment might be larger than the others. The samples were to be sent as soon as they were prepared, without reference to the first regular shipment, and the portion of the price of that shipment to be paid in money was but little more than \$300 in excess of what it would have been had the shipment been exactly one-eighth of the entire amount. If Watson objected to the amount of the shipment and draft, he should have made his objection known as soon as he was advised of the amount, and thus have given plaintiffs an opportunity to correct the error, if one had been made. The agreement provided that the cigars should be delivered free on the cars in Philadelphia, on the order of Watson accompanied by the money required for the cash payment. The plaintiffs deviated from that provision, apparently, for the convenience and benefit of Watson. Whether it was in fact for his benefit is immaterial, as the deviation would not excuse the nonperformance on his part. The plaintiffs entered upon the discharge of their part of the agreement in good faith, and manufactured nearly 300,000 cigars under it before they were stopped by Watson. They were at all times able, ready, and willing to perform their undertaking, and were only prevented from doing so by his refusal to accept the cigars. On the 20th day of December they offered to give him the time asked in his letter of December 10th,—that is, until January 10, 1890,—in which to comply with his agreement, but the offer was not accepted. If he recovers in this action it must be by reason of his own wrong, and to permit that would be

most inequitable. It is true the claim is made in argument that the agreement required plaintiffs to deliver cigars of the value of \$57,750; that the evidence shows that the value of all those specified in the agreement was but \$20,000; and, therefore, that plaintiffs have not performed their obligations under this agreement. No claim of nonperformance on that ground is made in the pleadings. The defense as to the amount of cigars furnished in the first shipment is that it was too large, and no claim has at any time been made, excepting in argument, that the shipment was too small. But the claim would not have been well founded, had it been pleaded. The value of the cigars of the different brands was fixed in the agreement after an inspection of samples shown to Watson by R. E. Smith, and, as so fixed, is controlling. We conclude that defendants have forfeited the deed to the land, which was placed in the hands of Runyon, and that it should be delivered to plaintiffs.

4. The agreement provided for the delivery of a warranty deed. The one delivered does not contain general covenants of warranty, but warrants only against the acts of Santmyer. The plaintiffs ask that Watson be required to execute and deliver to plaintiffs such a deed as the agreement requires. The evidence shows that the deed, as deposited with Runyon, was inspected by R. E. Smith before it was so deposited, and that he then made no objection to it, but accepted it. We think his conduct should be given the effect of a waiver of the right of plaintiffs to insist upon a warranty deed.

What we have said disposes of all material questions in this case. A decree will be entered in this court in harmony with the conclusions announced. So much of the decree of the district court as is involved in the appeal of defendant is affirmed, and so much of it as is involved in the appeal of plaintiffs is reversed.

KINNE, J., took no part in the decision of this cause.

ROBB v. DOUGLASS et al.

(Supreme Court of Iowa. May 15, 1893.)

CANCELLATION OF MORTGAGE.

Certain joint owners sold their land, and took back a mortgage for the price. As the owners were then insolvent, the land was subjected to the payments of their joint debts, and it was agreed by the parties thereto that the mortgage debt should be canceled, and the contract of sale rescinded. The purchaser subsequently bought the land under the decree of sale. *Held*, that there was no foundation for an action by the administrator of one of the joint owners on the original mortgage.

Appeal from district court, Monroe county; E. L. Burton, Judge.

Action in equity to foreclose a mortgage upon certain real estate. There was a de-

cree for the defendants, and plaintiff appeals.

Henry L. Dashiell and W. A. Nichol, for appellant. T. B. Perry, for appellees.

ROTHROCK, J. 1. The mortgage in question was executed by the defendant Douglass to Aaron Hicks and William Hicks to secure the purchase money of certain land. It appears that said William Hicks and Aaron Hicks were owners in common of said real estate, each having title to one undivided half thereof. On the 17th day of February, 1883, they conveyed said land to the defendant Douglass for the sum of \$38,500. The sale was wholly on credit, and a mortgage for the whole amount of the purchase money was given by Douglass, payable in annual installments. At the time this transaction took place, Aaron and William Hicks were insolvent. They were indebted to various creditors in large amounts, and the sale of the land to Douglass left them without property or money to pay their debts. These debts were joint obligations. Soon after the conveyance of the land some of the creditors commenced actions upon their demands, and afterwards filed creditors' bills to subject the land to the payment of their claims, which resulted in decrees in favor of the creditors, and the land was sold, and the proceeds were applied in the payment of the debts. The creditors were quite numerous, and the record discloses that there were many redemptions by creditors from each other, so that the transactions in the matter of redemptions are quite complicated. It is not necessary to set out or explain these redemptions. It is sufficient to say that all of the said real estate was appropriated to the claims of the creditors. There is no question made as to the validity of the decrees declaring the sale of the land to the defendant to be in fraud of the creditors. The fact that the sale of the land was wholly on credit, and that the debtors had no other property or money with which to pay their debts, together with other considerations not necessary to name, leaves no room for controversy on that question. Aaron Hicks died within a year after the conveyance was made, and the defendant Douglass was appointed and qualified as administrator of his estate, and he continued to act in that capacity until February, 1890, when he was removed by order of court, and the plaintiff Robb was appointed administrator of said estate. During the time defendant Douglass was acting as administrator he reported to the court that the said estate was without assets of any kind with which to pay debts. It is conceded that the mortgage upon the land, and the

notes secured thereby, were destroyed by reason of an agreement to that effect, made between the mortgagor and the mortgagees. We have said that this is an action by the plaintiff, as administrator of Aaron Hicks, to foreclose the mortgage. William Hicks, the joint mortgagee, does not join in the suit. He is made a defendant, and he joins with Douglass in the claim that the mortgage was destroyed by agreement made by all the parties thereto, and that by reason of the decrees and sales of the land in satisfaction of the claims of the creditors the consideration for the mortgage has wholly failed.

The plaintiff claims that there are a large number of creditors' claims which are unsatisfied, and he seeks to foreclose the mortgage to pay these debts. These creditors did not seek to subject the land to the payment of their claims by petition in equity, or by redemptions, or in any other manner. It should not be a matter of dispute that when it was discovered that the conveyance was subject to the debts it was agreed by all the parties thereto that the mortgage debt should be canceled. It was in pursuance of this agreement that it was destroyed. The plaintiff filed a motion to suppress a deposition of Douglass in which he testified that Aaron Hicks joined in said agreement. The ground of the motion was that it was a personal transaction between Hicks and Douglass, and was not competent evidence, under section 3639 of the Code. It may be the motion is well taken, but it is not necessary to decide the question, because, if the motion should be sustained, there is other evidence in the case which establishes the same facts. As we have said, the whole of the real estate in controversy was sold on the decrees in favor of the creditors, and the proceeds of the sales were applied in payment of the debts of Aaron Hicks and William Hicks.

2. It having been found that the contract of sale was rescinded by the mutual acts of the parties, and that the mortgage was surrendered and destroyed, the consideration therefor wholly failed, and there is no ground, legal or equitable, upon which to found an action against the defendant, based on the original transaction. It is true that the defendant Douglass became the purchaser of the land under the decrees, and now claims to own the same. So far as appears from the record, Douglass had the undoubted right to purchase the land. As the mortgage was lawfully canceled, and the consideration had thereby failed, he had the same right to become an owner of the land under the decrees that he would have had if the mortgage had never been made. The case demands no further consideration.

The decree of the district court is affirmed.

**HOCKSTEDLER et al. v. DUBUQUE & S.
C. RY. CO. et al.**

(Supreme Court of Iowa. May 18, 1893.)

FIRES SET BY LOCOMOTIVES—EVIDENCES.

1. In an action against a railroad company for damages by fire caused by sparks from a locomotive, it appeared that the fire was set outside the right of way, while a strong wind was blowing, and while the locomotive was working at its full capacity to get a train over a grade. *Held*, that a verdict for plaintiff was justified, since the jury could either find that the locomotive was defective, or that it was negligently operated.

2. It was proper to charge that, in determining defendant's negligence, the jury should consider the condition of the locomotive at the time of the fire "and other times, in so far as established by the evidence," where there was evidence that it was in perfect condition for some time before and after the fire.

Appeal from district court, Lyon county; Scott M. Ladd, Judge.

The plaintiffs brought separate actions against the defendants to recover damages for negligently setting out a fire while operating a railroad train, by which certain property of the plaintiffs was destroyed. The actions were consolidated, and were thus tried to a jury. There was a verdict and judgments for plaintiffs. Defendants appeal.

John F. Duncombe and J. M. Parsons, for appellants. H. G. McMillan, for appellees

ROTHROCK, J. 1. There is no real controversy as to the fact that a fire was set out by sparks which escaped from one of the defendants' engines while drawing a freight train over the road. The question for the jury to determine was whether the defendants by the evidence in the case established the fact that they were free from negligence. It is confidently claimed by counsel for the defendants that the evidence in rebuttal of the presumption of negligence is so conclusive as that the court should have set aside the verdict as without support in the evidence. It has been determined by this court that it is for the jury to weigh the presumption of negligence in the balance against the evidence rebutting the presumption, and determine the case as they may think it should be determined. *Babcock v. Railway Co.*, 62 Iowa, 593, 13 N. W. Rep. 740, and 17 N. W. Rep. 909; *Id.*, 72 Iowa, 197, 28 N. W. Rep. 644, and 33 N. W. Rep. 628. There is evidence in the case that the fire was set out about 75 feet from the railroad track, and outside the right of way. There was a strong wind blowing, and the train was made up of so many cars that it required the full capacity of the engine to draw it over the grades. The fire was set out just over the summit of a heavy grade, and when the engine was expending all its power. It further appears that when an engine is working at its full capacity it is liable to set out fires. In view of all the evidence,

we think the jury was authorized in finding that the engine was either defective, or that there was negligence in the manner in which it was operated.

2. It is claimed that the verdict should be set aside because of alleged misconduct of plaintiffs' counsel in certain language used in his address to the jury. We do not regard the remarks as so objectionable as to require a reversal of the case. We need not set out the alleged objectionable language. It nowhere appears in the record, except in the motion for a new trial. It is not embraced in the bill of exceptions.

3. An exception was taken to one of the paragraphs of the charge to the jury, because the jury was therein directed that in determining whether defendants were negligent it was proper to take into consideration the condition of the engine at the time of the fire "and other times, in so far as established by the evidence." It is claimed that this was erroneous, because the inquiry should have been limited to the time when the fire was set out. But evidence was introduced by the defendants to the effect that for some time before and after the fire the engine was in perfect order. It was proper for the jury to consider this evidence as bearing upon the condition of the engine at the time the fire was set out. The judgment of the district court is affirmed.

PARISH v. WILLIAMS.

(Supreme Court of Iowa. May 13, 1893.)

NEGLIGENCE—QUESTION FOR JURY.

In an action against a blacksmith for personal injuries caused by a "spawl" from defendant's hammer striking plaintiff's eye, where it is alleged that defendant was negligent in working at an anvil opposite his shop door, and six feet away from the sidewalk, it is error to direct a verdict for defendant, where there is evidence, by experienced blacksmiths, that spawls frequently fly from their hammers, and sometimes go a long distance, and inflict serious wounds, and that they cannot control their direction.

Appeal from district court, Guthrie county; J. H. Henderson, Judge.

Defendant is the owner of a blacksmith shop in the town of Stuart, in Guthrie county. The shop is located close to the sidewalk, on the south side of Nassau street. An anvil used by the defendant stands six feet from the sidewalk in the shop, with the horn of the anvil towards the door. The door leading from the sidewalk into the shop is about six feet wide, and the anvil stands nearly opposite to the west side of the door. On the 13th day of August, 1890, the defendant was working at the anvil, with the door of the shop open. The plaintiff, who appears by his next friend, was passing along the walk, and when opposite to the door of the shop he was struck in the eye by a spawl from the defendant's hammer, because of which, after much suffering, and

considerable treatment to preserve it, the eye was removed. This action is for resulting damage, under a plea of negligence. The answer is a denial. At the close of plaintiff's testimony the court, on motion of the defendant, directed a verdict in his favor, and from a judgment thereon the plaintiff appealed.

J. A. McCall and Sayles & Hinkson, for appellant. Sever & Neal, for appellee.

GRANGER, J. This case, on appeal, presents but the single proposition of the correctness of the court's action in refusing to submit the case to the jury. To our minds, the court erred in sustaining the motion. Quite a number of witnesses were called by the plaintiff, and examined with reference to spawls from hammers, and danger because of them, in view of the location of the anvil. A spawl is a scale or piece from the face of a hammer breaking off when a blow is given, and it sometimes goes a long distance, and with considerable force. We cannot well present our conclusions without quoting somewhat from the evidence: Mr. Warrington, a blacksmith of over 50 years' experience, testified: "Spawls fly from hammers, and it is a very frequent thing. Sometimes I have had spawls fly, and the little pieces stick in my arm. Sometimes I have had quite a flesh cut. I knew of one piece flying in a man's eye, and putting his eye out. The way these spawls break off the hammer,—it is done on the anvil edge; the hammer touching the edge of the anvil when the hammer is hit too hard. It will break off very often when it strikes the anvil, and the small pieces will fly, and of course it goes in all directions. We have no power over them. It just depends on which way they happen to strike. I have a window now broken from the effects of one, in my shop. Sometimes they go the whole length of the shop with pretty good force. I have known them to go with force enough to go into the ceiling. Spawls are apt to fly out of doors, or any way. It depends a great deal with what force we are using the hammer. It is a common occurrence for spawls to fly from the hammers with which we are working. In my opinion an anvil that close [six feet] to the sidewalk would be dangerous. It is more dangerous to work with that hammer upon an anvil close to the sidewalk, when people are passing, than it would be at the other end of the shop." Mr. Young, of 30 years' experience as a blacksmith, testified: "While you are engaged pounding metals, it is nothing unusual for spawls to fly from the hammer. There would be danger of people being struck by spawls flying from the use of an anvil located within six feet of the sidewalk, on a traveled street running past the open door of the shop. The closer the anvil is to the traveling public and sidewalk, the

greater the danger would be with reference to persons passing by on the sidewalk." Mr. Poling, a blacksmith of about 24 years' experience, testified: "Spawls will fly fifty feet, if they are struck in the right shape. It depends upon the blow. They might go swift enough to penetrate or lodge themselves in wood. There was a man working in my shop that struck the anvil so that a piece went through my leather apron and pants, and lodged in my leg. I have had scales fly in my eyes, and burn them. It has not been more than two weeks since my wife came into the shop,—she must have been twenty feet away,—and I was taking a heat out, and a scale flew, and struck her in the corner of the eye and burned it. Spawls fly swifter than scales. * * * It would be a great deal less dangerous with the side of the anvil facing south, and the horn to the east, with the helper to the south, and the blacksmith with his back to the door, than it would be with an anvil placed as this one is said to have been." Mr. Ely, with more than 30 years' experience as a blacksmith, testified: "Persons passing by a blacksmith shop located immediately up close to the sidewalk, where the anvil is placed within five or six feet of the open door, abutting on the sidewalk, sometimes might get burned from flying spawls from hammers in working on the anvil. There is danger to persons passing on the sidewalk, with the anvil so located. The danger would be greater with the anvil located close to the door than if located in the rear of the shop, or further back. * * * It is generally understood and believed among blacksmiths that spawls flying from the hammers, and sparks and pieces of steel flying from the anvil, sometimes cause injuries to persons standing or passing by. The nearer the sidewalk you locate the anvil, the hotter the pieces."

There is always a delicacy, if not danger, in discussing the effect of evidence, by an appellate court, where a new trial is to follow. We must, however, say that if, upon a question of negligent location of the anvil as to passers-by, under the evidence we have quoted, the jury had found for the plaintiff, the finding would have had ample support. We should then look further to the record, to see if, because of other facts or evidence, a different rule should apply.

Appellee has quoted evidence upon which he relies for that purpose, which is short, and we give it, in the order of its presentation in argument. William Warrington, (Spawls:) "We have no power over them." "I think the question of being five feet from the door has nothing to do with it." "I don't protect from the side." "Hammers that have not been tempered for 12 years, get soft, and then they break, but they are not so liable to break." T. B. Young: "Been a blacksmith 30 years. I have no knowledge when they will fly. * * * Cannot say that ever

saw a spawl fly from a hammer and strike the shop. In the ordinary line of business, I would not think there was any particular danger in hammering over an anvil six feet from the sidewalk, on a common wagon tire, getting ready to weld it. Question. Do you say there is no particular danger in scarifying with it six feet away, or five feet? Answer. Not in the usual way." "There is more danger with the helper's side of the anvil turned towards the street. If the anvil set back with the face towards the street, it would be more dangerous than it would be with the horn towards the street. The anvil with the horn pointing towards the street, and the helper's side towards the east, is less dangerous than if he was further away, with the helper's side towards the sidewalk. It is not as dangerous with the horn towards the street as it is with the horn the other way." T. Poling: "Spawls do not frequently fly from hammer, in common use, except from some hammer that would be too hard." Cross-examination: "I would not think the anvil dangerous, if I were working there. As a general thing, a hammer that has been used four or five years is liable to be soft, and the spawls would not be as likely to fly when you strike the anvil, as if it were tempered every year. * * * I would think, if this anvil were placed the other way, * * * it would be more dangerous than it is with the horn facing the street." S. J. Ely: "Been blacksmithing 32 years. It is more careful to place the anvil with the horn towards the door than to place it around the other way. Most all the spawls go away from the man. I consider that a careful way of placing an anvil." Witness Poling: "I would not think the anvil dangerous if I were working there." Witness Young: "In the ordinary line of business, I would not think there was any particular danger in hammering over an anvil six feet from the sidewalk." Witness Ely: "I would consider that a careful way of placing an anvil."

There is nothing, to our minds, in these additional quotations from the evidence, to change the rule. The most that can, consistently, be claimed for them, is that they create doubts as to a conclusion of fact. Their principal effect is, not as to danger because of location of the anvil too near the sidewalk with the open door, but as to the comparative danger of placing the anvil with the horn, instead of the face, towards the door; that is, they deal with the question as to which is the most dangerous. Admitting that the placing of the horn of the anvil, instead of the side, towards the door, would be safer, and the point is by no means conclusive of the case. An equally if not more important consideration is as to the location of the anvil with reference to the door and sidewalk. That danger is to be apprehended from scales and spawls is not only manifest from the facts of this case,

but from evidence of other instances of injury, and the manner and rapidity of their flight. In this case this plaintiff, in passing along the sidewalk, is struck by a spawl with such force as to penetrate the lid of the eye, the injury resulting in its destruction. If we are to sustain the action of the court, the effect of our holding will be to say that the anvil may be kept there, as a matter of law, and that passers-by are to take the chances against other like occurrences. We are not aware of any case where such a rule has been sustained. We notice a single case, cited by appellee, to indicate the line of authorities relied upon to sustain the ruling of the court. It is that of *Loosee v. Buchanan*, 51 N. Y. 470. By the explosion of a boiler the pieces were thrown onto the premises, and into the buildings of plaintiff. Plaintiff claimed a right of recovery, even without negligence, on the ground that the casting of the pieces onto his premises was in the nature of a trespass, and that a right of recovery should be the same as in case of wrongful entry. The court refused to sanction such a rule, and rightly so, holding that negligence must be shown, to justify a recovery. The court used this language: "We must have factories, machinery, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of our civilization. If I have any of these upon my lands, and they are not a nuisance, and are not so managed as to become such, I am not responsible for any damages they accidentally and unavoidably do my neighbor. * * * I hold my property subject to the risk that it may be unavoidably and accidentally injured by those who live near me; and as I move about upon the public highways, and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part." It is further said in the opinion: "I have so far found no authorities and no principles which fairly sustain the broad claims made by plaintiff, [stated supra,] that the defendants are liable in this action, without fault or negligence on their part to which the explosion of the boiler could be attributed." The gravamen of the complaint in this case is negligence, and there is no attempt at a recovery upon any other ground. It is said in argument—with a view, evidently, to bring it within that case—that there is no claim that the blacksmith shop is a nuisance. Not, perhaps, in specific terms, but the averments, if true, making the manner of its operation dangerous to the public safety, render it a nuisance, and the distinction between the cases is to be maintained throughout. We hold it to be purely a question of a right of recovery on the ground of negligence, and we are clearly of the opinion that the state of the evidence is such that the case should have been submitted to the jury. The judgment is reversed.

HINKLE v. AVERY.

(Supreme Court of Iowa. May 13, 1893.)

WATER COURSE—WHAT CONSTITUTES—CHANGE IN COURSE OF STREAM—EVIDENCE.

1. In an action to enjoin the diversion of the water of a stream, it appeared that it came from springs, one of which was on defendant's land; that for many years it flowed across the road running between defendant's and plaintiff's land, and over the latter into a river; and that, if there was ever any change in its course, it was so gradual that the fact could not be easily shown. *Held*, that the course of the water was over plaintiff's premises, though it may have been changed by deposits from adjacent hills.

2. It appeared that the water from the springs ran for a few rods in a ravine to low land, where the stream widened; that where it left defendant's land it passed through a culvert across a road, and then on plaintiff's land, where a pond was formed in part thereby; that below the pond it was in some places several rods in width, and at other places quite narrow, and ran into a small branch; and that at all times it had the characteristics of a flowing stream with a visible current. *Held*, that this constituted a water course which defendant had no right to divert.

Appeal from district court, Van Buren county; Charles D. Leggett, Judge.

Action to enjoin the obstruction or diversion of a stream of water. Decree for plaintiff, and the defendant appealed.

Sloan & Brown and Work & Blake, for appellant. Wherry & Walker, for appellee.

GRANGER, J. The plaintiff and defendant are owners of adjacent farms, that of the plaintiff being directly west of the defendant's. On the dividing line, for a part of the distance, is what is known as the "Batavia Road." North of the lands owned by the parties is land belonging to one Stoop. On the land of the defendant are two springs, from each of which is a flowing stream. On the land of Stoop, directly north of defendant's land, is a like spring, the stream from which runs south, and unites with those from the spring on defendant's land, and the stream thus formed runs through the barn lot of defendant to the Batavia road on the line between the parties. It is the course of this stream, from this point, over which the contention in the case is. The plaintiff's farm consist of 263 acres; the 63 acres being situated just across the Batavia road at the point where the stream reaches it. Averments of the petition show: "That from time immemorial a natural water course or stream of water, supplied in part by a never-falling spring, has flowed in a natural and well-defined channel from the premises of defendant, in a westerly direction, over and across the aforesaid 63 acres of plaintiff's land, and from thence finding its way into the Des Moines river, thus furnishing, where it flowed over plaintiff's premises, a perpetual and bountiful supply of living water for plaintiff's stock kept in said pasture, and being the only natural and continual supply of

water above ground available for stock therein, and without which the value of such premises and pasture would be greatly and irreparably impaired." It is also averred that plaintiff's land was used as a stock farm, on which is kept from one to two hundred head of cattle and horses, depending for water on the aforesaid stream. It is further averred that within the last few years the defendant has, by different methods, diverted the stream from its natural channel, so as to deprive plaintiff of its legitimate use. The answer is, in its legal effect, a denial. It contains other averments, but, in view of the positions taken in argument, our statement of it is sufficient. Appellant presents the questions for our consideration as follows: "(1) Does the water from the spring form a stream with a well-defined course, confined by banks, so that the defendant did not have any right to divert it, even if its course was over and across the plaintiff's premises? (2) Was the course of the water over and across the plaintiff's premises as claimed by him, or wholly on the defendant's premises?" We will adopt the inverse order in considering the propositions, the latter being exclusively one of facts.

1. As bearing on this question, much testimony has been taken, and among the witnesses are those who have resided in the neighborhood of the stream for 50 years or more, and were among the first settlers of the state. Much of the testimony is directed to the flow of the water from the spring onto defendant's farm at that early period; the spring on Stoop's place not then being in existence. By the aid of surveys and excavations it is made to appear that quite a material change has been made in the natural curvature of the earth because of deposits and on account of the wash from the adjacent hills, and it is a matter of considerable doubt, at least, if the natural course of these waters has not been, to some extent, changed thereby. But, however this may be, and if it be conceded that originally these waters naturally flowed along on the west side of the Batavia road, and across the land of the defendant to the river, it is a well-established fact that for many years, and as a result of natural causes, they have flowed across the road, onto and over the land of the plaintiff. This fact has existed for so long a time, and, if the change in the course of the waters ever came, it was so gradual and so remote from the present, that the fact is not easily traceable from its history as disclosed by the evidence. From the history of this case we are led to believe that the question of the flow of this water being otherwise than as it naturally would be at the present time was not thought of or relied upon as a significant fact in the case until near the conclusion of the trial of the case in the district court. This would not, of course, lessen the importance of the fact, if true, but it has a value in finding the fact where it is

one of doubt. We are of the opinion that the flow of the water was across the land of the plaintiff, so as to justify the action, if the other proposition is resolved in the plaintiff's favor.

2. It may be well to restate the proposition in this connection: "Does the water from the spring form a stream with a well-defined course, confined to banks, so that the defendant did not have the right to divert it, even if its course was over and across his premises?" The proposition presents two inquiries: First, the particular facts as to the character of the stream, and, second, their legal effect upon the rights of the parties. The water from these springs runs a little more than a mile to the Des Moines river. It starts and runs for a few rods in what may be called a ravine, when it reaches low, level land, and the stream widens. Further on, because of the construction of the public highway, it is brought into such a compass as to pass through a culvert, and then onto plaintiff's land, on which is formed, in part, at least, by this water, a pond. Beyond this pond the water flows, not in a channel with banks, but along a depression in the earth, and over the grass or sod. It seems to be irregular in width, owing to the character of the ground,—at some places quite narrow, and at others several rods in width. It has had, however, at all times the characteristics of a flowing stream,—it may be said, a current that is visible and distinctly traceable. Before reaching the river, the water comes again into a channel or small branch called "Crooked Creek," and thence into the river. The legal contention arises over the definition of a "stream or water course," so as to come within the rule whereby one riparian owner cannot divert it from its natural course to the damage of another such owner. The doubts as to the definition are induced by the language of the adjudicated cases. Appellant's theory is that, to constitute such a water course, there "must be a distinct channel or bed of a stream with well-defined banks cut through the turf and into the soil by the flowing of the water, presenting on a casual glance to every eye unmistakable evidence of frequent action of running water, and not a mere depression; and such a flow must be necessary to prevent the flooding of a considerable tract of land." Definitions somewhat similar have been many times given. Kerr's *Injunctions in Equity* (page 251) uses this language: "As distinguished from water of a casual and temporary character, a water course is a flow of water usually flowing in a certain direction, and by a regular channel, having a bed, banks, and sides, and possessing that unity of character by which the flow on one man's land can be identified with that on the land of his neighbor." If we now look to the adjudicated cases to see the application of

the general rule to the facts of particular cases, we may be aided to a proper application of the law to the case in hand.

Appellant cites us to *Gibbs v. Williams*, 25 Kan. 214, as a very conclusive case, and it would appear that his definition, as we have quoted it, is taken therefrom. The case deals with surface water, and aims to indicate the distinction between a water course and surface water from rains and melting snows collected into streams in ravines and depressions causing a temporary flow, but not of a character to be known as a water course. To this end the opinion employs language that, if literally applied, and given application to cases involving the flowage of water from springs and other streams, would override many well-considered cases, and operate as a denial of what has long been considered established rights of riparian owners of land. The particular language, "with well-defined banks cut through the turf into the soil by the flowage of the water," is mainly relied upon in this case. Reading that case with care, and in connection with *Palmer v. Waddell*, 22 Kan. 352, it will be seen that both cases deal with the exceptional question of when surface water caused by rain-falls constitutes a water course so as to take it out of the general rule as to surface water, and bring it within the rule as to water courses. In such a connection the language is apt, and its correctness would not be doubted. *Bloodgood v. Ayers*, 108 N. Y. 400, is another case cited by appellant, but the facts are widely different from this case. That was a case of percolating water. There was no flowing stream from the spring, and the case was determined upon an uncertainty as to facts, and not upon the rule of appellant's contention. *Barkley v. Wilcox*, 86 N. Y. 140, is another case of surface water, and the court defines a "natural water course" as "a natural stream flowing in a defined bed or channel, with banks and sides, having permanent sources of supply." This definition closely approximates the facts of this case. Some parts of the way the stream in question has no banks, and, in a literal sense, there may be no channel in places, but in the ordinary acceptance of the term there was a channel. The case of *Hoyt v. City of Hudson*, 27 Wis. 656, contains a definition not met, in a literal sense, by the facts of this case, but the language there used is as to surface water from rains and melting snow.

We now notice a few cases more closely allied to the facts of this case. In *Pyle v. Richards*, (Neb.) 22 N. W. Rep. 370, it is said: "When water has a definite source, as a spring, and takes a definite channel, it is a water course." The case quotes from *Shields v. Arndt*, 4 N. J. Eq. 234, as fol-

lows: "There must be water as well as land, and it must be a stream usually flowing in a particular direction. It need not flow continually, as many streams in this country are, at times, dry." In *Gould on Waters* it is said: "Surface water may be said to form a water course at the point where it begins to form a well-defined channel with bed, banks or sides, and current." See section 263. It is in such a connection that much of the language relied upon by appellant is used. The case of *Macomber v. Godfrey*, 108 Mass. 219, is a case in its material facts parallel to this. It was a brook running from the land of defendant to that of the plaintiff. It was a well-defined stream for a part of the way on defendant's land. Before reaching the plaintiff's land the water spread out over the surface of the ground a few rods in width, and so ran upon and across the plaintiff's land, which was a level meadow, covering it several rods in width and irrigating it, and in this shape passed on to the land of others. From the point where the water spread out on the defendant's land to a point beyond the plaintiff's land there was no "defined channel." A short distance beyond the plaintiff's land the water again formed a small brook, and ran to the river. In that case it was said: "If the whole of the stream had sunk into the defendant's soil, and no water remained to pass to the plaintiff's land except under the surface, it would have ceased to be a water course, and the plaintiffs would have had no right to it." It was held to be a water course with well-defined bed and banks, with its usual course in a channel. The rule of the case is a salutary one. This case is not different in principle. In this case the water was spread out over a longer line, but it was not lost in the earth, nor was the identity of the stream lost. A case closely in point sustaining the rule is *Gillett v. Johnson*, 30 Conn. 180. Our conclusion is that the stream in question is such a one that the plaintiff has the right to its enjoyment, and that because of its diversion the plaintiff's action was, by the district court, properly sustained. We are not aware of any adjudicated case against this conclusion when properly considered. The district court, by its decree, gave to each party one-half of the water in the stream, and of that defendant should not complain.

The judgment is affirmed.

STATE v. DE BORD.

(Supreme Court of Iowa. May 15, 1893.)

GRAND JURY—MODE OF DRAWING.

On a motion to quash an indictment because of irregularity in drawing the jury returning the same, it appeared that the ballots, written by the auditor, containing the names of jurors, were placed in a box; that the sheriff would draw a name from the box, and he or

the auditor would state from what township the person drawn was, and if one had already been drawn from that township the ballot would be laid aside; if not, the name would be written by the auditor in the jury book, and by the clerk in the venire. The clerk testified that the auditor or sheriff looked at the poll book showing the township from which the several names were drawn. *Held*, that the drawing was a substantial compliance with Code, § 240, providing that the auditor shall write out the names on the jury list, which have not been previously drawn as jurors during the year, on separate ballots, and the clerk of the district court and the sheriff, "having compared said ballots with the list, and corrected them, if necessary, shall place the ballots in a box provided for that purpose."

Appeal from district court, Union county; H. M. Towner, Judge.

The defendant was indicted, tried, and convicted of the crime of nuisance; and, his motion for a new trial being overruled, judgment was entered against him, from which he appeals.

R. H. Hanna, for appellant. John Y. Stone, Atty. Gen., and P. C. Winter, Co. Atty., for the State.

GIVEN, J. 1. The defendant moved to set aside the indictment "for the reason that the grand jury presenting or returning said indictment against the defendant, Thomas De Bord, were not selected, drawn, summoned, and sworn as prescribed by law." A number of particulars are specified wherein it is claimed the grand jury was not selected as required by law. The only irregularity urged by argument is that the clerk and sheriff did not compare the ballots written out by the auditor with the lists returned by the judges of election, as required by section 240 of the Code. Said section is as follows: "At least twenty days previous to the first day of any term at which a jury is to be selected, the auditor, or his deputy, must write out the names on the lists aforesaid, which have not been previously drawn as jurors during the year, on separate ballots; and the clerk of the district court, or his deputy, and sheriff, or his deputy, having compared said ballots with the list, and corrected the same, if necessary, shall place the ballots in a box provided for that purpose." The clerk was the only witness examined as to the manner in which the grand jury was selected. His statements are somewhat confused and conflicting, and indicate a want of clearness of recollection. His statements, however, warrant the conclusion that the selection was made as follows: That the ballots written out by the auditor were placed in a box; that the sheriff would draw a name from the box, and the sheriff or auditor would state from what township the person drawn was, and if one had already been drawn from that township the ballot was laid aside. When not laid aside, the name was written by the auditor in the jury book, and by the clerk in the venire. The clerk states that he did not have the poll books beside him, or make any comparison

therewith; that the auditor or sheriff looked at the book showing the township from which the several names were drawn.

The presumption is, in the absence of proof, that each of these officers performed the duty required of him. *Dutell v. State*, 4 G. Greene, 125. Said section 240 required the auditor to write out the names on the lists returned by the judges of election, that had not been previously drawn, on separate ballots. There is no evidence that he did otherwise. Therefore we must presume that the ballots from which the drawing was made contained only names taken from the lists. While it is true all the ballots placed in the box were not compared with the lists, it fairly appears that the names drawn were so compared. The purpose of the comparison required is to see that none are drawn whose names were not returned on the lists. That those drawn in this instance did so appear is shown by the presumption that the auditor prepared the ballots as required, and by the comparison that was made. We may add that it also appears by the absence of evidence that the names of any of those composing the panel were not upon the lists. These provisions are but directory, and we must examine the record, "and without regard to technical errors or defects, which do not affect the substantial rights of the parties, render such judgment as the law demands." *State v. Gillick*, 7 Iowa, 287; *State v. Carney*, 20 Iowa, 82; *State v. Brandt*, 41 Iowa, 593; *State v. Knight*, 19 Iowa, 94; *State v. Beckey*, 79 Iowa, 368, 44 N. W. Rep. 479. We think there was a substantial compliance with the provisions of section 240, and that the defendant was not prejudiced in any of his substantial rights by overruling his motion to set aside the indictment. The judgment of the district court is affirmed.

GRIER v. JOHNSON, Judge.

(Supreme Court of Iowa. May 15, 1893.)

CRIMINAL LAW—APPEAL—REMARKS OF COUNSEL
—INJUNCTION—VIOLATION.

1. A judgment in a criminal case will not be reversed on appeal because of improper remarks of counsel, unless the trial court has, on application, refused a new trial.

2. Contempt proceedings for the violation of an injunction to restrain a liquor nuisance are criminal in character, though the injunction issued in an equity action.

Certiorari to the defendant as judge of the district court. The plaintiff was enjoined from maintaining a nuisance in the keeping and sale of intoxicating liquors, and upon complaint made he was attached for contempt. Upon the hearing he was adjudged guilty, and a fine of \$500 was imposed, with a judgment for imprisonment until the fine was paid. Certain complaints are made as to the legality of the proceedings, to test which this action was instituted.

Liston McMillen, for plaintiff. Byron W. Preston, for defendant.

GRANGER, J. 1. After the trial before the district judge, in arguing the case, the county attorney alluded to the fact that the defendant in that proceeding was not a witness in his own behalf, by saying, as it is expressed in the return to the writ in this case: "That this was a contempt case, and that there was evidence against the said defendant, Dave Grier, that he had violated the injunction; and that, under such circumstances, in any other kind of a contempt case, it was the duty of the person charged to purge himself of the contempt." The return further shows that the judge, in rendering the decision, made something of a similar reference, but did not give it as a reason for finding the defendant guilty. These matters are urged as illegalities that should reverse the judgment, the argument being that the mistake of the county attorney, supplemented by the court's adoption of the theory, is an illegality, even if there is evidence to sustain the finding of guilt. With reference to the court's adopting the mistake of the county attorney,—if it was a mistake,—the language of the return is as follows: "I stated, in substance, that the defendant should purge himself of contempt; and that I did not think that the statute, which prohibits the attorney from referring to the fact that the person accused did not testify, applied to this kind of a case." To our minds, the record, as it indicates the acts and purposes of the court, is somewhat misapprehended. The argument is upon the theory that the court sought, before there was a finding of guilt, to require the defendant to "purge his contempt" in some way. We do not so understand the record. This remark by the court was made when announcing its decision, after the testimony was in and arguments of counsel were heard, when, in its judgment, the defendant was guilty; and the correct inference from the court's remark is that punishment must follow, unless the contempt was purged, which expression corresponds with our statutory language "to show cause against the punishment." In this respect, in our judgment, there was no illegality, but, on the other hand, a substantial observance of the requirements of law. As to the allusion of the county attorney, we need only say that, conceding it to be a case where the statute has application, the effect of such an allusion is not to reverse the case in this court because of it, unless the court below has, upon application, refused a new trial; for it is the express provision of the statute forbidding such an allusion that the consequence shall be to entitle the defendant to a new trial. There could have been no illegality, in this respect, until the court, upon application, had denied the right, which the record entirely fails to show.

2. The court, in its imposition of a fine,

regarded \$500 as the minimum allowed by law, and it is urged that, conceding this, the statute is unconstitutional, "for the reason that it is essentially penal in its character." The argument attempts to preserve a distinction between criminal and equity jurisprudence, under constitutional provisions, and regards the law imposing the penalties as an infraction of the constitutional rule. The difficulty with the contention is, if otherwise sound, that the judgment of contempt was not in an equitable proceeding, but it was, in a sense, a criminal proceeding for the violation of an order of court made in an equity action. In none of its bearings is it an infringement upon any rule of equitable cognizance, nor does it have relation thereto, any more than it would if the violated order had been made in an ordinary action. The constitutionality of the law imposing such a fine was determined in *Jordan v. Circuit Court*, 69 Iowa, 177, 28 N. W. Rep. 548.

3. It is further said that the judgment is "entirely without evidence to support it." We have carefully examined the evidence, and, while it is largely, if not entirely, circumstantial, we think the showing quite conclusive of the guilt of the prisoner. It is sufficient to satisfy any unprejudiced person that the order of the court was violated. There is no illegality for which the judgment should be reversed, and it is affirmed.

BLANDING et al. v. DAVENPORT, I. & D. R. CO. et al.

(Supreme Court of Iowa. May 18, 1893.)

MECHANIC'S LIEN—CONSTRUCTION OF ROAD—SUB-CONTRACTORS—POWER OF RAILROAD OFFICER.

1. Plaintiffs, who contracted with W. & F. to perform certain work in the construction of defendant company's railroad, were bound to know the relation between W. & F. and defendant; and, where W. & F. were only contractors, plaintiffs cannot hold defendant liable on their contract with W. & F., on the theory that the latter were agents of defendant.

2. The fact that the secretary of a railroad company, while acting as clerk of the contractors in the construction of the road, issued to the subcontractors statements of their account with the contractors, on the company's blanks, purporting to bind the company to pay the same, does not render the company liable to the subcontractors, so as to give the latter a mechanic's lien on the company's property, as contractors.

Appeal from district court, Scott county; Andrew Howat, Judge.

Action to enforce a mechanic's lien. Decree for the defendants. Plaintiffs appeal.

Wm. K. White and J. T. Kenworthy, for appellants. Cook & Dodge and Davison & Lane, for appellees Davenport, I. & D. R. Co. and Burlington, C. R. & N. Ry. Co. A. E. Swisher, for appellee Farmers' L. & T. Co.

KINNE, J. 1. Plaintiffs claim a mechanic's lien for \$7,309.92 on the property of v.55N.W.no.2—6

the Davenport, Iowa & Dakota Railroad Company. They aver that on October 1, 1888, they made a verbal contract with said railroad company, to grade a certain part of its line of road, at an agreed price per yard. That under said contract they performed work and labor amounting to over \$15,000. That on December 30, 1888, plaintiffs and said railroad company had an accounting for the work done, and there was found due plaintiffs \$7,309.92, which said company agreed to pay on demand. That said company has refused to pay said sum. At the time said accounting was made, said company executed and delivered to plaintiffs a certificate of indebtedness, showing the amount of work done, the payment thereon, and the balance due. That on March 2, 1889, plaintiffs filed a statement for a lien with the clerk of the district court of Scott county, Iowa. In a second count, plaintiffs claim a lien for the same indebtedness by virtue of a written contract made by said company with the defendants D. R. W. Williams and Patrick Flynn, under the firm name of Williams & Flynn, for the construction of said road, which was dated October 28, 1887. That on October 1, 1888, Williams & Flynn, while performing work on said road, applied to plaintiffs to work thereon as subcontractors, but plaintiffs refused so to do; and it was then agreed between plaintiffs, the railroad company, by one Fulton, as its secretary, and D. R. W. Williams, —who, plaintiffs claim, were the officers and agents of the company,—that plaintiffs should do the work at a price then agreed upon, and that said company would pay plaintiffs said price, and deduct the amount so paid from the sum due and to be paid Williams & Flynn under their said written contract. It is said the plaintiffs did work to the amount of over \$15,000, and after its completion, on December 30, 1888, they had an accounting with the railroad company. When there was found due plaintiffs the sum of \$7,309.92, which said company agreed to pay on demand. That at the time of such accounting the company executed and delivered to plaintiffs a certificate of indebtedness, the same as is set out in the first count, and that the company refuses to pay the sum due. That a statement for a lien was filed at the time heretofore mentioned. The defendant the Davenport, Iowa & Dakota Railroad Company claims it is not, and never has been, indebted to plaintiffs, and that plaintiffs have no claim for a lien upon its property. The defendants the Davenport, Iowa & Dakota Railroad Company and the Burlington, Cedar Rapids & Northern Railway Company say that Fulton and D. R. W. Williams never made, or assumed to make, a contract for the Davenport, Iowa & Dakota Railroad Company with plaintiffs, for the construction of any part of its road. That said Williams was never an officer or agent of the company. That Fulton never

had any authority to make such contract with plaintiffs, or any contract in relation to the construction of that portion of the road upon which plaintiffs claim to have done work and labor. That said Davenport, Iowa & Dakota Railroad Company never had a settlement with plaintiffs for any work done on its road. That said company never had a contract with plaintiffs to perform work for it. That the work done by plaintiffs was done as subcontractors under the firm of Williams & Flynn. That the settlement had by the plaintiffs with Fulton was for said firm, and that he had no authority to settle for the railroad company, or to execute any statement of account for it. That the company had no knowledge of the settlement claimed by the plaintiffs until after plaintiffs filed their statement for a lien. The Farmers' Loan & Trust Company filed a separate answer, setting out many of the matters heretofore referred to, and also denied generally the averments of the petition. They also say that on May 28, 1888, the railroad company executed to them, as trustees, a mortgage securing the sum of \$496,000 in bonds, which were issued. That said mortgage was a first lien upon the road. That these bonds were delivered to Williams & Flynn. It pleads that plaintiffs are estopped from claiming a lien; also, that they did not file their lien within 30 days after the work was completed, and at the time the same was in fact filed the railroad company had paid the original contractors in full. Defendants Williams & Flynn made default, and the case was tried as to the other parties.

2. The following facts are either admitted by the pleadings, or established upon the trial: That on October 27, 1887, the Davenport, Iowa & Dakota Railroad Company entered into a written contract with Williams & Flynn to construct and equip its road from the Amizon Vinegar Works, in the city of Davenport, to the crossing of the Chicago & Northwestern Railway, and was to pay said contractors one-half of the tax voted by the city of Davenport when the first 10 miles of the road were graded, bridged, and tied, and the balance when 30 miles of the road were completed. It was also to pay said contractors \$10,000 of its first mortgage bonds for each mile, as graded, bridged, and tied, and \$6,000 additional per mile, in said bonds, for every full mile ironed. That Williams & Flynn entered upon the work October 1, 1888, and the work done by plaintiffs was on a part of the line of the road thus contracted to be constructed by Williams & Flynn. That, at the time plaintiffs took the first contract, Mr. Flynn told them he would prepare a written contract with them. That such a contract was prepared and entered into between plaintiffs and Williams & Flynn in August, 1888, and said contract covered a large part of the work now in controversy. That Flynn

showed plaintiffs the work they were to do. That neither of the firm, then or at any other time, represented to the plaintiffs that in the letting of said contract they were acting as agents for the railroad company. October, 1888, Williams & Flynn made an oral contract with plaintiffs to do more grading upon the road. At this time it was not represented to the plaintiffs that Williams & Flynn or Fulton were acting for the railroad company. When plaintiffs entered into the second contract, they knew that the first contract, which was in writing, purported to be made by Williams & Flynn, acting on their own behalf. Yet, knowing this fact, they made no objection to entering into another contract with them, and did not even express a desire that the railroad company should be made a party to the contract. H. C. Fulton was during all this time the secretary of the railroad company. It does not appear that the railroad company ever held Williams & Flynn out to the plaintiffs as its agents or officers empowered to make contracts on its behalf. There is no claim that they had any express authority to do so. H. C. Fulton, while secretary of the railroad company, was also in the employ of Williams & Flynn, as their secretary or clerk. He kept their books, audited the claims which were presented against them, and issued vouchers for work done for them by plaintiffs and others. Fulton never had any express authority to act for the railroad company in making contracts for it, or to issue statements or vouchers which might be evidence of any indebtedness from it to the plaintiffs or to others, at any time during plaintiffs' connection with the railroad work. It does appear that at first the railroad company undertook to build two miles of the road, long prior to the time they entered into the contract with Williams & Flynn. At that time they had permitted Fulton to act quite generally for them. At that time, also, the company, for its use in dealing with those who furnished it with supplies, had printed some blank vouchers. These blanks were not all used at the time plaintiffs' work was going on; and as Williams & Flynn had furnished no blank vouchers to Fulton, to use in the transaction of their business, he used some of these old blanks, which, in form, purported to bind the railroad company, in making statements of the condition of plaintiffs' account with Williams & Flynn. These statements he also signed as "secretary." The railroad company had no knowledge that he was using these blanks until after plaintiffs filed their lien. There never was any settlement or accounting between plaintiffs and the railroad company, unless the filing of these blanks, and signing them, as before stated, constituted one. There is no controversy as to the fact that plaintiffs performed the labor claimed, and filed their lien as claimed, and that they have not been paid.

3. Plaintiffs' first contention is that they are principal contractors; that their contract was made directly with the railroad company. In view of the facts above found, and others which might be stated, it is clear that there is no foundation for such a claim. Plaintiffs made this first contract with Williams & Flynn. They had all their negotiations with them. It was they who fixed the price. Plaintiffs knew, or were bound to know, that Williams & Flynn had for a long time prior thereto had a written contract with the railroad company to construct the entire line of road, including the work they (plaintiffs) undertook to do. They had actual knowledge that Williams & Flynn were then engaged upon the work, and it was their business to acquaint themselves with the facts touching the relationship existing between the railroad company and Williams & Flynn. They cannot blame others for results which proper inquiry would have protected them against. There is no pretense that the railroad company, or any one else, ever informed plaintiffs that Williams & Flynn were agents for the company, and that they contracted with them as such. It affirmatively appears that plaintiffs took no steps whatever to acquaint themselves with the real situation. They never asked with whom they were contracting. Had they used any care, they would have known that they were not dealing with any one having a shadow of authority to bind the railroad company.

But there is another and all-sufficient reason why it cannot be held that plaintiffs thought they were contracting with the railroad company, or in fact did so. It is an undisputed fact that plaintiffs entered into a written contract with Williams & Flynn, as contractors, to do a large part of this very work for which they are now seeking to recover. By that contract they must be bound. There is no claim that it was abandoned or superseded. The firm name was signed to this contract by one of its members. There is no evidence in this case that would justify us in relieving plaintiffs from all the obligations attaching to this contract. It fixed their relationship to Williams & Flynn as subcontractors.

4. Recovery is sought under the second count of the petition on the theory that Williams & Flynn had a contract with the railroad company to construct the road, and that these contractors solicited plaintiffs to do work upon the road under them as subcontractors, and that the plaintiffs refused so to do, when it was agreed between the railroad company, Williams & Flynn, and the plaintiffs that the latter should do certain work, and the company would pay them therefor, and deduct the amount so paid from the sum that would be due to Williams & Flynn on their contract. That Williams & Flynn had a contract for the construction of the road is conceded, but we

do not find that the parties entered into the agreement claimed. The last contract was made early in October, 1888, and the negotiations which led up to it were carried on principally with Flynn; but nothing was said by him, or any one else, which can be said to have carried the idea to plaintiffs that, in making this contract, Flynn, or Williams & Flynn, were acting in behalf of the railroad company. Plaintiffs entered into this second contract, having knowledge that the former contract was made with Williams & Flynn. Plaintiffs said nothing to any one as to whom they were making this second contract with, and so far there is nothing to show that the railroad company had anything to do with it. It is of no avail to say that plaintiffs did not know that Williams & Flynn were principal contractors, as they were bound, at their peril, to know the capacity in which Williams & Flynn were acting. We have often held that a subcontractor is bound by the terms of the contract between his principal and the owner, and there is no reason why that doctrine should not apply in a case like this. *Kilbourne v. Jennings*, 38 Iowa, 533; *Jones & M. L. Co. v. Murphy*, 64 Iowa, 165, 19 N. W. Rep. 898; *Martin v. Morgan*, 64 Iowa, 270, 20 N. W. Rep. 184; *Stewart v. Wright*, 52 Iowa, 335, 3 N. W. Rep. 144. It matters not what plaintiffs believed or supposed. The facts established are that Williams & Flynn were not agents for the railroad company in making this contract; that they had no authority from it to act for it; that they did not even assume to act as such agents, nor had the company held them out as such to the plaintiffs or others. Plaintiffs had no right to indulge in suppositions, which were not supported, as a basis for their claim that they were dealing with the company in making this contract. The right to a lien arises only when a contract has been made with the owner. While it is true that under certain circumstances a contract will be implied, as where the owner agrees to pay for material furnished, yet no facts appear in this case which would warrant us in saying that a contract might be implied. A contract cannot, in such a case, be established by the belief of the plaintiffs; but it must be shown that an actual contract existed with the railroad company, or the facts must be established from which it can fairly be said that a contract may be implied therefrom. Plaintiffs' recovery is sought on the ground that they are principal contractors, and they must recover as such, or not at all. To be principal contractors, their contract must have been made with the railroad company. *Templin v. Railway Co.*, 73 Iowa, 548, 35 N. W. Rep. 634.

Plaintiffs' claim that they are principal contractors, and that a contract should be implied, is also based on the fact that Fulton, while he was secretary of the company, filled out a blank in the form of a voucher,

and delivered it to plaintiffs, as evidence of the amount of money still due them after they had completed the work. In another division of this opinion, we have shown how Fulton came to use this old blank, which, in form, was the obligation of the company. Fulton, when he filled this blank, was, and for a long time prior thereto had been, in the employ of Williams & Flynn, as a secretary or clerk. Now the claim is that the railroad company is estopped by this act of Fulton from impeaching this voucher. It is said that, although it is shown that Fulton had no express authority to thus bind the railroad company, still it is bound by the act, because, by virtue of his office, he had the power to bind the company. Now, the company had not, during plaintiffs' connection with the work, held Fulton out as having any such authority. It did not even know that he had used these blanks. So that the only way that they can be chargeable with his act, if at all, is that he possessed such power by virtue of his office. We are satisfied that Fulton, in filling the voucher, acted for Williams & Flynn; that he never intended to issue a paper which should bind the railroad company. But, whatever his intention may have been, it is clear he could not, under the circumstances disclosed in this case, bind them. We do not think that the secretary of a railroad company, by virtue of his office, simply, is clothed with authority to bind his company by signing and attesting a paper which may on its face evidence a liability on the part of the company to a third person. We need not review the many cases cited. Many of them are not applicable to the facts, as they exist in the case at bar. Thus, the case of *St. Louis, I. M. & S. Ry. Co. v. Camden Bank*, 47 Ark. 541, 1 S. W. Rep. 704, was where the officer was authorized to bind the company, while in the case at bar no authority was shown. The rule seems to be as stated by Cook in his work on Stockholders, etc., (section 718,) viz.: "The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds, or management. This is a rule which prevails everywhere, excepting, possibly, in the state of Illinois." But the law in this respect is settled in this state, in a case where the facts were substantially as in the case at bar. It is said that "the president of a railroad company has no power, by virtue of his office, simply, to let a contract on behalf of the company for the construction of its road, when the same is already under contract by the board of directors." *Templin v. Railway Co.*, 73 Iowa, 548, 35 N. W. Rep. 634. That case is decisive of this question, and we have no desire to depart from the holding there made. *Griffith v. Railroad Co.*, 74 Iowa, 85, 36 N. W. Rep. 901. The company had a contract with Williams & Flynn to do the very work covered by the voucher which

plaintiffs claim under, and have paid, or arranged to pay, Williams & Flynn for the same work. On the whole case, we reach the conclusion that plaintiffs never had either an express or implied contract with the railroad company, and are not entitled to a lien.

5. The conclusion we have reached renders it unnecessary for us to consider specially the claim of the Farmers' Loan & Trust Company, or the motions submitted with the case. The judgment and decree of the district court are affirmed.

PAINTER v. GIBSON et al.

(Supreme Court of Iowa. May 15, 1893.)

LANDLORD AND TENANT—ATTACHMENT FOR RENT
—ACTION ON BOND—ASSIGNMENT OF BOND.

1. A landlord brought attachment for rent against J. and E. J. was personally liable as lessee, and E.'s goods, which had been purchased from J., were seized. To release his goods, E. executed a bond conditioned to deliver the property or its value "to satisfy any judgment that may be rendered against said defendant in said suit." On the trial E.'s goods were found to be liable for the rent, but personal judgment was entered against J. alone, directing that a "special execution issue therefor." *Held*, that the bond was valid as a common-law bond, and E. was liable thereon for the amount of the judgment, as, so far as it directed special execution to issue, it is a judgment against E. within the meaning of the bond.

2. In an action by a sheriff on a bond given to release goods taken under attachment for rent it appeared that the bond was assigned to plaintiff by the attorney for the plaintiff in attachment, who claimed the bond to be insufficient, and that the sheriff was liable for releasing the attached property; that the sheriff paid the landlord's attorney the amount of his claim, receiving the assignment of the judgment in return. *Held* that, in the absence of proof to the contrary, Y.'s attorney is presumed to have had authority to make the assignment.

Appeal from district court, Polk county;
O. P. Holmes, Judge.

Action on a delivery bond given to release attached property. A verdict for plaintiff was returned by direction of the court. From the judgment rendered thereon, defendants appeal.

E. H. Addison and Phillips & Harvison, for appellants. Cummins & Wright, for appellee.

ROBINSON, C. J. At a time prior to August, 1887, one Gump leased to Trier & Trier a store building on Center street, in Des Moines, at the monthly rent of \$25. The lessees took possession of the leased premises, but afterwards sold the stock of boots and shoes kept therein to Joseph Gibson. He occupied the premises for a time, and agreed in writing to pay the rent required by the lease. About the 1st of July, 1887, defendant E. Gibson purchased of Joseph Gibson the goods which were then in a room on East Grand avenue. J. H. York had become the owner of the rights con-

ferred upon Gump by the lease, and in August, 1887, commenced an action against Joseph Gibson and E. Gibson to recover rent due under the lease. York alleged in his petition that E. Gibson purchased the goods of Joseph Gibson while they were in the leased premises, and removed them to a room on East Grand avenue, where he was then selling them. A landlord's attachment was issued and levied upon the goods then in possession of E. Gibson. Thereupon he served a notice of ownership of the attached property upon York, and, the property not having been surrendered, executed to plaintiff, who was then sheriff of Polk county, a bond, a copy of which is as follows: "Know all men by these presents, that we, E. Gibson, as principal, and John Gibson, as surety, are held and firmly bound unto J. C. Painter, sheriff, in the penal sum of seven hundred dollars, for the payment of which sum, well and truly to be made unto the said J. C. Painter, we hereby severally and jointly bind ourselves," etc. "The conditions of the above obligation is such that whereas, said J. H. York, as plaintiff, did on the 13th day of August, 1887, sue out of the office of the clerk of the district court a writ of attachment against the property of E. Gibson, as defendant; and whereas, J. C. Painter, sheriff of Polk county, Iowa, by virtue of said writ, has attached and levied upon the following property: All the boots and shoes situated in the store room known as No. 1,000 on Grand avenue, in Des Moines, Iowa, property of E. Gibson, defendant, and of the estimated value of three hundred and fifty dollars; and whereas, E. Gibson has made an affidavit that he has an interest in said property, and desires to have said property discharged from said attachment and levy: Now, therefore, if the said E. Gibson shall deliver said property, or its estimated value, aforesaid, to said sheriff, to satisfy any judgment that may be rendered against said defendant in said suit within twenty days after rendition thereof, then this obligation to be void; otherwise to remain in full force and virtue. Witness our hand this 15th day of August, 1887. E. Gibson. John Gibson." The bond was signed by John Gibson, defendant, as surety. It was accepted by plaintiff, and the attached property was released. E. Gibson appeared in the action, and filed a demurrer to the petition therein. It was sustained "so far as the petition asks personal judgment against E. Gibson." No other pleading was filed by him, and no personal judgment was rendered against him. The cause was tried to a jury, which rendered a general verdict against Joseph Gibson and in favor of York, and found specially that the goods upon which the attachment had been levied, to the amount of \$114, had been removed from the leased premises on Center street. Judgment was rendered on the verdict as follows: "It is

therefore ordered and adjudged by the court that the plaintiff, J. H. York, do have and recover of the said defendant, Joseph Gibson, judgment for the sum of \$146.25, with interest thereon at six per cent. per annum from this date, together with the costs taxed herein at ——— dollars, and that a special execution issue therefor." The attached property, which was released upon the giving of the bond, was never returned to the plaintiff, and the judgment against Joseph Gibson is unpaid.

1. The plaintiff claims to have purchased the judgment of York, and demands judgment in this action for the value of the goods which the jury found had been removed from Center street. The defendants admit that E. Gibson has sold the attached property, which was returned to him, but deny all liability on the bond. They insist that the law in regard to landlords' attachments does not provide for a delivery bond; therefore that plaintiff was not authorized to take the one in suit; that it provides for the return of the attached property, or its value, only to satisfy any judgment which may be rendered against E. Gibson; and that, as no judgment has been rendered against him, the condition of the bond is not broken. The defendants further claim that plaintiff has not shown by competent evidence that he is the owner of the judgment in favor of York. The statute in regard to landlords' attachments does not provide for the release of attached property by the giving of a delivery bond. It is the well-settled law in this state, however, that a bond not provided for by statute may be valid as a common-law obligation, if not in violation of a statute, nor contrary to public policy. That was the rule announced in *Garretson v. Reeder*, 23 Iowa, 22, which was a case involving a bond given to secure the release of property upon which a landlord's attachment had been levied, and the bond was held to be valid. See, also, *Sheppard v. Collins*, 12 Iowa, 570. The parties to this action, in giving the bond in controversy, accepting it, and releasing the attached property, probably acted under the belief that section 2996 of the Code, in regard to general attachments, was applicable to their case. However that may be, the defendants secured the release of the attached property by giving the bond. They substituted their personal obligation to return the property, or pay its estimated value to the sheriff, to secure its release. They knew that it was held as security for the payment of rent alleged to be due, and that, if the allegations of the petition were true, the property was liable for the payment of the rent which should be found to be due. It is true the bond did not contain the name of Joseph Gibson, but it was given in an action to which he was a party, to release property which was liable for the payment of the rent which he owed. The defendants must

be held to have known the claims made by York in his petition, and to have given the bond with knowledge of his interest in the property if his claim was well founded. The special finding of the jury, and the judgment which was rendered, show that the property released, to the value of \$114, was liable for the payment of the judgment. So far as it related to the attached property, the judgment was not so full and complete as it might well have been, but it directed that a special execution issue for the payment of the amount of York's recovery. That direction could only refer to the property attached in that action. The record before us justifies the conclusion that all the property attached was released on the giving of the bond in suit. It is true that conclusion is denied by appellants, but the denial is based upon a recital contained in the written assignment of the judgment to plaintiff. That recital is to the effect that judgment was rendered against a portion of the property released, not that only a portion of the goods attached were released. No judgment was rendered in favor of E. Gibson for any of the property in controversy, the ruling on the demurrer only going to the extent of holding him discharged from personal liability for the payment of the rent. The averments of the petition to the effect that the property attached was subject to a lien for the rent due York were not denied by E. Gibson, and a judgment, as against him, holding such property to be subject to the attachment, was authorized. We are of the opinion that the judgment rendered, so far as it directed a special execution to issue, should be construed to be a judgment against E. Gibson, within the meaning and intent of the bond in suit. Our conclusion is sustained by the opinion in *Garretson v. Reeder*, supra. See, also, *Ripley v. Gear*, 58 Iowa, 460, 12 N. W. Rep. 490.

2. The assignment of the judgment under which plaintiff claims was executed in the name of York, by his attorney. It is claimed that authority for the attorney to execute the assignment was not shown. There is no direct proof of such authority, but it sufficiently appears that York claimed that plaintiff was liable to him for having released the attached property on an insufficient bond without authority of law, and that he proposed to bring suit to enforce his claim. Plaintiff was advised by his attorneys that he was liable to York, and in settlement he paid to the attorney to whom the matter had been intrusted by York for adjustment the sum of \$131.20, and received the assignment in return. We think that, under these circumstances, the attorney must be presumed to have had authority to execute the assignment, in the absence of proof to the contrary. It is not shown that the amount paid was not the full amount of the claim made by York against plaintiff. The transfer of the judgment appears to have

been a legitimate and proper means of accomplishing the settlement demanded by York, and therefore within the scope of the apparent power of his attorney. We find no cause for disturbing the judgment of the district court. It is therefore affirmed.

PETERSON v. BREITAG et al.

(Supreme Court of Iowa. May 22, 1893.)

STATUTE OF LIMITATIONS—ACTION FOR TORT—REVIVAL BY WRITTEN PROMISE—MORTGAGE GIVEN IN SETTLEMENT—CONSIDERATION—SETTLEMENT OF CLAIM TO AVOID LITIGATION.

1. McClain's St. § 3744, provides that "causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same," when made in writing, and signed by the party charged. *Held*, that a cause of action for a tort barred by the statute is not revived by a promise, in writing, to pay the damages claimed therefor.

2. A note and mortgage given in settlement of a claim for damages made by the payee on account of the adultery of the maker with the former's wife, and executed after the cause of action for the tort was barred by the statute, are without consideration, and void.

3. The facts that the claim for damages was made by an attorney on behalf of the payee; that if suit had been brought, and the maker had failed to plead the statute, plaintiff would have been entitled to recover; and that the note and mortgage were given to avoid such litigation,—are insufficient to constitute a consideration.

Appeal from district court, Crawford county; George W. Paine, Judge.

This is an action in equity to foreclose a mortgage of \$1,000 and interest. The mortgage is upon 120 acres of land in Crawford county. The cause was submitted to the district court upon the pleadings and an agreed statement of facts, and there was a decree for the plaintiff. Defendants appeal.

T. J. Garrison and P. E. C. Lally, for appellants. Shaw & Kuehnle and J. P. Connor, for appellee.

ROTHROCK, J. 1. The petition is in the usual form. The answer is to the effect that the consideration for the note and mortgage was founded upon certain acts of adultery committed by the defendant Sigismund Breitag with the plaintiff's wife in the year 1877. The note and mortgage were executed and delivered on the 18th day of December, 1889, and at that time all claim of the plaintiff for damages was barred by the statute of limitations, and said claim was not revived by the execution of the note and mortgage. The agreed statement of facts is as follows: "Come now the parties hereto, and stipulate and agree to try and submit the above-entitled cause upon the following agreed statement of facts, together with the note and mortgage hereto attached, and, for the purpose of this trial, said facts, and all of them, are admitted to be true: (1) That heretofore, and during the year 1877, the plaintiff in this action was a married man, and re-

sided in Crawford county, Iowa, together with his wife, Christina Peterson. (2) That during said year the defendant Sigismund Breitag became criminally intimate with the said Christina Peterson, the wife of the plaintiff, and with her repeatedly committed the crime of adultery. (3) That the plaintiff in this action did not know of said illicit intimacy and criminal conversation until afterwards, and during the year 1889. (4) That in December, 1889, the plaintiff in this action employed Shaw & Kuehnle, a firm of attorneys residing at Denison, Iowa, to prosecute a suit for damages against the defendant Sigismund Breitag unless a settlement could be effected without suit; that, in fact, no suit had ever been commenced against said defendant. (5) That in pursuance of said engagement, and as the attorney for said plaintiff, C. F. Kuehnle went to the residence of the defendant Sigismund Breitag on or about the 13th of December, 1889, explained the nature and extent of his employment, asserted a claim for damages on the part of plaintiff because of the wrongful and illicit acts hereinbefore referred to, and because of the criminal conversation aforesaid, and demanded a settlement; and that the note and mortgage in controversy were thereupon executed by the defendants herein in full settlement and satisfaction of the damages arising from and growing out of the criminal conversations and illicit intimacy aforesaid, and that there was no other or further consideration for the giving and execution of said note and mortgage. (6) That defendant has been a resident of Crawford county, Iowa, from 1877 to and including 1889. (7) That no part of said note has been paid."

It will be observed that the cause of action accrued in the year 1877, and this action was commenced in the year 1890. It is conceded that the action is barred, if it were not for the note and mortgage. There is no claim made that the cause of action was taken out of the operation of the statute by reason of the plaintiff having no knowledge thereof, or by reason of its concealment. The claim of the defendant is that the note and mortgage are without consideration because the cause of action for the criminal intimacy was fully barred by the statute of limitations long before the note and mortgage were executed. The plaintiff claims that this is not an action for the original tort, but is an action upon a contract founded upon the note, and that, although an action for the tort could not have been maintained, yet, because there was once a right of action, there was a moral consideration for the note and mortgage. The statute of limitations upon which the question arises is as follows: "The following actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared: (1) Actions founded on

injuries to the person or reputation, whether based on contract or tort, or for a statute penalty, within two years." McClain's St. § 3734. "Causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same. But such admission or new promise must be in writing, signed by the person to be charged thereby." Id. § 3744. The plain meaning of these provisions of the statute is that an action for a tort cannot be revived by a new promise. Such an action is not within the exception contained in the last section above quoted. The rights governing the parties are controlled by section 3734. It is an absolute provision that no action shall be brought except within the time therein limited, and it has uniformly been held that no promise to pay will revive an action of tort after the action is barred by lapse of time. 2 Greenl. Ev. 446; Oothout v. Thompson, 20 Johns. 277; Goodwyn v. Goodwyn, 16 Ga. 114; Ott v. Whitworth, 8 Humph. 404; 13 Amer. & Eng. Enc. Law, 748; Ang. Lim. 219. As we understand counsel for appellee, they do not dispute the correctness of the rule that an action of tort cannot be revived by a promise to pay for the tort. We quote the following language from their argument filed in this court: "Instead of giving a note in settlement and liquidation of the claim of plaintiff, if the appellant had simply given a writing, admitting his guilt, and promising therein to discharge the damages occasioned thereby, it would have compelled a suit upon the original tort, and this admission and promise would not remove the bar of the statute. This is appellants' contention. This we concede." It appears to us that the above concession must be regarded as correct. It is in line with about all that is to be found in the authorities on the subject. It is true, as claimed by counsel for appellee, that this is not an action for tort, but is founded upon a note and mortgage. But it must be conceded that it is always permissible for the defendant in such an action to show by pleading and proof what the consideration for the note and mortgage was. When this is done the transaction is just the same as if the defendant had inserted in the note and mortgage an admission of guilt, and that the note and mortgage were given to pay the damages occasioned thereby. Any other holding would sacrifice the substance of the transaction to the mere form. In whatever way the question is viewed, in connection with the pleadings and agreed statement of facts, there is no escape from the conclusion that the rights of the parties are the same as if the defendants had signed a writing acknowledging liability, and promising to pay for the wrong.

2. It is further stated that a claim for damages is a sufficient consideration to support a promissory note, and even though executed after the claim is barred. The ar-

gument in support of this proposition is founded upon the thought that the defendants would have been compelled, either by demurrer or answer, to raise the question of a statute of limitations, and that if they waived this right a recovery could be had on the tort, and that the giving of the note and mortgage operated as a waiver. This is, in effect, the same as the last proposition. When it is found that the note and mortgage are, in substance, an admission and promise to pay for an outlawed tort, there is no question of waiver in the case. As we have seen, the authorities are uniform that no action can be maintained upon a promise, the consideration of which is the original tort.

3. It is further claimed that the action can be maintained because the note and mortgage were given in settlement to avoid litigation. But we have found that the claim was unfounded, because it was barred by the statute of limitations. It is said in argument that the statute of limitations is a defense that must be specially pleaded, and that a party is under no legal or moral obligation to invoke it. The same may be said of any other defense. A defendant has the legal right to make default, and allow judgment to go against him, however unfounded the claim may be. It is well settled that there must be at least some appearance of a valid claim to support a settlement to avoid litigation. In *Sullivan v. Collins*, 18 Iowa, 228, it is said: "A note given before a suit brought to settle an illegal or wholly unfounded claim has not sufficient consideration to support it, and cannot be enforced at law. It is essential that the claim be maintainable at law or in equity, or at least that it be doubtful either in its right or amount." See, also, *Keefe v. Vogle*, 36 Iowa, 88; *Tucker v. Ronk*, 43 Iowa, 80. The decree of the district court is reversed.

SMITH v. KING.

(Supreme Court of Iowa. May 15, 1893.)

ACTION ON NOTE OF DECEDENT—DENIAL OF SIGNATURE.

1. Under Code, § 2730, providing that the signature to a written instrument on which suit is brought shall be deemed genuine and admitted unless the person whose signature it purports to be shall deny its genuineness under oath, a denial of the execution of a note, in an action against the executor of the person alleged to have executed it, includes a denial of the genuineness of the signature.

2. Under Code, § 2410, providing that claims filed against an estate, and not expressly admitted in writing signed by the executor, with the approbation of the court, shall be considered as denied, without any pleading in behalf of the estate, a note alleged to have been executed by a decedent is not admissible in evidence, in an action thereon against her executor, in the absence of evidence to prove the genuineness of decedent's signature.

Appeal from district court, Madison county; J. H. Applegate, Judge.

Proceeding to establish a claim against an estate. Judgment against plaintiff for costs, and he appeals.

Steele & Robbins, for appellant. John Leonard & Son and A. R. Dabney, for appellee.

KINNE, J. 1. July 15, 1891, plaintiff filed, as a claim against the estate of decedent, Jane King, a promissory note on which there was then due, including interest, \$208.80. He also claimed \$20.45 as attorney's fee on said note. Due notice, and a copy of the claim, were properly served on the defendant. Defendant filed an answer denying all allegations of the plaintiff's petition, except those that are expressly admitted, or that are otherwise responded to. He expressly denied that the deceased ever made, executed, or delivered to plaintiff, or to any one, the note sued on, or that she was ever indebted to plaintiff. He avers that deceased never had any dealings with plaintiff; that she never made her mark to said note, and never authorized any one to do so for her; that she never assented or consented to the execution of said note; and that the signature thereto, if intended for her signature, is a forgery. He prayed judgment for costs. The answer is verified by the executor. The note is in the usual form, payable to S. J. Smith, guardian, and is signed: "A. R. King.

her
Jane X King." The cause was tried to the mark.

court. Plaintiff offered in evidence the note, which was objected to as irrelevant, immaterial, and incompetent. The court admitted the note, without requiring plaintiff first to prove the genuineness of the signature of said Jane King, but reserved the right to change its ruling, and reject the note as evidence without such proof, if so advised in the further progress of the trial. Counsel for plaintiff at the time advised the court that they were unable to make such proof. Thereupon plaintiff rested. Defendant then introduced evidence for the purpose of showing that the signature was not genuine. The judge having, by consent, taken the case under advisement, on January 7, 1892, filed his findings, wherein he changed his former ruling, and excluded the note as evidence, and rendered judgment for the defendant for costs.

2. The only question presented is, did the court err in holding that the note was not admissible, in the absence of any evidence as to the genuineness of the signature of Jane King? The question presented involves the construction of sections 2410 and 2730 of the Code. Section 2410 provides that all claims filed against an estate, and not expressly admitted in writing, signed by the executor, with the approbation of the court, shall be considered as denied, without any pleading on behalf of the estate. Section 2730 provides that, when a written instrument is the

basis of the action, the signature thereto shall be deemed genuine and admitted, unless the person whose signature the same purports to be shall deny the genuineness of such signature under oath. Under section 2410 it has been held that the denial made by the law puts in issue all matters upon which a defense to the claim could be based, usually set forth in a general denial, (*Scovill v. Fisher*, 77 Iowa, 97, 41 N. W. Rep. 583,) and that such denial casts the burden on the plaintiff to establish every material allegation of his petition, (*Lamm v. Sooy*, 79 Iowa, 597, 44 N. W. Rep. 893.) In *Ashworth v. Grubbs*, 47 Iowa, 354, it was expressly held that a denial of the execution of the note included a denial of the genuineness of the signature, in cases of this character. It seems to us that that case is decisive of this one. Plaintiff claims that while the case last cited holds that the genuineness of the signature of deceased may be put in issue by a denial of the execution of the note, only, still the presumption remains that the signature is genuine, and the burden rests upon the defendant to overcome it. We do not so understand it. We think that the law, in such cases, is that a denial of the execution of the note, made by a pleading filed, or a denial made by the statute, (Code, § 2410,) puts in issue the genuineness of the signature to the note, and the burden is on the plaintiff to show the genuine character of the signature before he is entitled to bring his note in evidence. As is held in *Ashworth v. Grubbs*, supra, from the very nature of the circumstances surrounding such cases, the statute cannot apply. The one who it is claimed signed the instrument is dead. He is prevented from denying the genuineness of the signature; and it is a most salutary rule that requires, in such cases, that the plaintiff establish the genuine character of the signature before he shall be permitted to put the paper in evidence. We need not, however, rest the decision of this question on the case of *Ashworth v. Grubbs*, supra, alone. As we have indicated, section 2730 of the Code clearly imposes on plaintiff the burden of showing the genuineness of the signature of the decedent. The claim is denied without any pleading on part of the estate. As no pleading is required on behalf of the executor, the denial which the law makes continues to exist in his favor, even if he file a pleading, except in so far as he may, by such pleading or otherwise, waive the provisions of the statute. The law puts in issue the truth of every allegation and claim which is essential to the plaintiff's recovery. It dispenses of the presumptions which ordinarily obtain in favor of the genuineness of the signature to a written instrument when the statutory denial is not made, and says to the claimant, "The burden is on you to show that the decedent executed this note, before you can make it evidence against his representative." Even if plaintiff's contention was

correct as to the effect of section 2410, still he would be required, under section 2730, to introduce evidence to show the genuineness of the signature to his note before he could put it in evidence. In any view of the case, the holding of the district court was right, and its judgment is affirmed.

DAVIS v. MILLER.

(Supreme Court of Iowa. May 15, 1893.)

NOTE—INDORSEMENT—WAIVER OF NOTICE AND PROTEST—VENUE.

1. A promise to pay a note in case the maker does not, made by an indorser after maturity of the note, and when he has received no notice of nonpayment, is waiver of notice and protest.

2. Code, § 2586, provides that, with certain exceptions, personal actions must be brought in a county wherein some of the defendants actually reside. Section 2581 provides that, when a written contract is to be performed in any particular place, action for a breach thereof may be brought in the county wherein such place is situated. *Held*, that the blank indorsement of a note payable at a particular place does not require the indorser to pay at that place, and unless, therefore, he is a resident of the county, no action can be brought against him therein.

Appeal from district court, Jones county; J. H. Preston, Judge.

Action to recover the amount due on a promissory note indorsed by defendant Miller. He filed a motion for a change of the place of trial, which was sustained, and an allowance was made in his favor for expense incurred in attending court in Jones county. The plaintiff appeals.

Sheean & McCarn, for appellant. Smith & Oullison, for appellee.

ROBINSON, C. J. The petition in this case was filed in July, 1891, and alleges the following facts: On the 1st day of March, 1881, O. L. Taylor made his negotiable promissory note for the sum of \$179, payable four years after its date, to the order of Belle Taylor, at Anamosa, Iowa. The payee indorsed the note in blank to defendant, and he indorsed it in like manner to plaintiff. The amount due on the note, and unpaid, is \$165. On the 17th day of December, 1889, defendant wrote to plaintiff in regard to the note as follows: "I thought that note paid last summer, as per agreement. Have written to O. L. Taylor concerning that matter. If he don't see to the settlement of it, I will, without additional costs. T. J. Miller." Subsequently he wrote another letter, in which he said he would pay plaintiff the remainder due on the note in case the maker did not. It does not appear that the note was ever protested, but the petition alleges that, by means of the letters referred to, defendant waived presentation, demand, notice of nonpayment, and protest of the note, and became absolutely liable thereon as indorser. The maker and payee of the

note were named in the petition as parties defendant with Miller, and judgment was demanded against all of the defendants for the amount due on the note, with an attorney's fee and costs. The original notice was personally served on Miller in Shelby county, but no service was made upon the other defendants, and they did not enter an appearance in the case. At the next term of court, Miller filed an application for a change of the place of trial to Shelby county, and for a judgment for expenses incurred in attending court in Jones county. The application was accompanied by an affidavit of Miller, which showed that he was then, and had been for 14 years, a resident of Shelby county, and that his codefendants were, when the application was made, and also when the action was commenced, non-residents of this state. The change demanded was granted, and judgment was rendered in favor of defendant for his expenses.

The appellant insists that the action was properly brought in Jones county, for the reason that the note was, by its terms, payable there, and appellee was responsible for its payment. The appellee contends that although the undertaking implied by his indorsement bound him, conditionally, to pay the note, yet it did not require him, in any event, to pay it at Anamosa; that the obligation of the maker to pay it there was not assumed by the indorsement; and that the letters did not extend his liability in that respect. The letters contained an absolute promise to pay the note if the maker did not. Appellee knew when he wrote them that he had not received due notice of the non-payment of the note, if such notice had not been given; and, in the absence of showing to the contrary, his promise will be presumed to have been made with knowledge of the fact that the note had not been protested for nonpayment. The effect of such a promise, so made, is to waive demand and notice of nonpayment. *Lomax v. Smyth*, 50 Iowa, 228, and authorities therein cited. It follows that on the showing made by the petition, if defendant is liable for the payment of the note, his liability is that of an indorser.

We are next required to determine whether the blank indorsement of a negotiable promissory note, payable, by its terms, at a designated place, requires the indorser, when his liability becomes fixed, to pay the note at such place, when he resides outside the county where it is situated. Section 2586 of the Code is as follows: "Except where otherwise provided herein, personal actions must be brought in a county wherein some of the defendants actually reside. But, if none of them have any residence within the state, they may be sued in any county wherein either of them may be found. But in all actions upon negotiable paper, except when made payable at a particular place, in which any maker of such paper, being a resident of

this state, is made defendant, the place of trial shall be limited to a county wherein some one of the makers of such paper resides." It is contended by appellee that the first clause of that section is applicable to this action. It is clear that the remainder is not, for the reason that the note in suit is made payable at a particular place; the makers are nonresidents of the state, and are not actual parties to the action. The appellant claims that section 2581 of the Code authorized the bringing of the action in Jones county. That section is as follows: "When, by its terms, a written contract is to be performed in any particular place, action for a breach thereof may be brought in the county wherein such place is situated." Whether the claim of appellant is well founded depends upon the nature and extent of the obligation created by the indorsement. An indorsement constitutes a new agreement with the indorsee, by which the indorser agrees that the instrument will be paid at maturity, and, if it is not so paid upon proper demand, that he will pay it, if duly notified of the default. 2 Pars. Notes & B. 23; Tied. Com. Paper, § 259; 2 Amer. & Eng. Enc. Law, 284. The liability of the maker of a negotiable instrument is determined by the law of the place where it is to be performed, but the liability created by an indorsement is to be fixed and construed according to the law of the place where it was made. *Bank v. Green*, 33 Iowa, 141; *Huse v. Hamblin*, 29 Iowa, 502; *Thorp v. Craig*, 10 Iowa, 461; Tied. Com. Paper, § 508; *Lee v. Selleck*, 33 N. Y. 615; *Freese v. Brownell*, 35 N. J. Law, 285; *Hunt v. Standart*, 15 Ind. 33; *Williams v. Wade*, 1 Metc. (Mass.) 82. Some of the authorities cited refer to bills of exchange, but when negotiable promissory notes are transferred by indorsement, in the same manner as are bills of exchange, the same rule is applicable to the indorsement of both classes of instruments. That is the case in this state, under section 2082 of the Code, which provides for the transfer of such notes "by indorsement or delivery, in the same manner as inland bills of exchange, according to the custom of merchants." Indorsements are governed by the law of the place where they are made, for the reason that the obligations which they create are to be performed there, or generally, and not at a place specified. The case of *Hunt v. Standart*, *supra*, was founded upon a promissory note payable in New York, but made and indorsed in Indiana. The court held that the liability of the indorser was to be determined by the laws of Indiana. In considering the undertaking of an indorser, it uses language as follows: "The maker binds himself to pay at the place named in the note for payment, and there his contract is to be performed. The indorser promises, upon certain conditions, which are not expressed in the contract of indorsement, but which are implied by law,

that he will pay the note, but not that he will pay it at the place named in the note for payment. This promise is general, for the payment of the note upon the implied conditions, and such general promise, not specially to be performed elsewhere, is governed by the *lex loci contractus*, which must determine the condition upon which he is held liable." We are of the opinion that the rule of law, as thus stated, is correct, and supported by the authorities. Applying it to the facts in this case, we must hold that the contract of the appellee does not require him to pay the note at Anamosa. The contract of the maker required him to pay it at that place; but the contract of the indorser, upon which appellee is sought to be held, does not specify the place of performance. The maker of the note, although named in the petition as a defendant, was not made a party to the action by the service of notice, and the same is true of the first indorser, and neither was a resident of this state. The action must, therefore, be treated as against Miller alone, and no question of the acquiring of jurisdiction of a nonresident of the county where the action was brought by a joinder of parties defendant is involved in the case. We conclude that the action was improperly brought in Jones county, and that the order of the district court in changing the place of trial was correct. Affirmed.

WOLFE v. JAFFRAY et al.

(Supreme Court of Iowa. May 20, 1893.)

MORTGAGES—FUNDS CONVERTED BY TRUSTEE—VALIDITY AS AGAINST PERSONAL CREDITORS—ACTION TO FORECLOSE—APPEAL BY JUNIOR LIENHOLDERS—NOTICE TO CODEFENDANTS.

1. By agreement between L. and M., certain money in their hands, as trustees, was loaned to the former, for which he executed his note to M., as trustee, and agreed to give security. Soon thereafter, M. died, and L., who was insolvent, on demand of some of the beneficiaries of the trust, executed a trust deed to plaintiff to secure the note, which had previously been delivered to the latter. Held, that such deed was not given by L. to secure a debt due to himself, but to secure a debt due from him to the beneficiaries of the fund which he had converted, and was valid against his personal junior judgment creditors.

2. Where the note which such trust deed was given to secure is past due, the grantee may maintain an action to foreclose the deed, though there has been no default in the trust, and nothing is due the beneficiaries.

3. In an action to foreclose a trust deed, to which junior judgment creditors are made defendants, a notice of appeal by them from a decree adjudging plaintiff's lien to be valid, and superior to theirs, need not be served on their codefendants, since the determination of the question involved will not affect the interests of the latter.

Appeal from district court, Crawford county; George W. Paine, Judge.

Plaintiff, as trustee, prosecutes this action in equity to recover judgment against Fanton R. Lawlor, on his promissory note, and

for a decree foreclosing a trust deed on certain land in Crawford county, executed by F. R. Lawlor to plaintiff, as trustee, to secure the payment of said note. Default, for want of answer, and decree of foreclosure, was entered against the defendants Fanton R. Lawlor and Lillie C. Lawlor, and judgment on the default against Fanton R. Lawlor. The defendants E. S. Jaffray & Co. and E. S. Jaffray, being made defendants, as claiming some interest in the land, answered, denying, for reasons stated, plaintiff's right to maintain this action, the validity of the trust deed, and setting up an alleged superior title to the land. The case was tried to the court, and decree entered in favor of the plaintiff, from which defendants E. S. Jaffray & Co. and E. S. Jaffray appeal.

T. J. Garrison and Weigley, Bulkley & Gray, for appellants. Shaw & Kuehnle and P. B. Wolfe, for appellee.

GIVEN, J. 1. Plaintiff moves to dismiss this appeal upon several grounds, one of which is that the defendants F. R. Lawlor and Lillie C. Lawlor do not join in the appeal, and were not served with notice thereof. In *Moore v. Held*, 73 Iowa, 540, 35 N. W. Rep. 623, it is held that, when the appeal is taken by a part of several coparties, service of notice on the other coparties is not jurisdictional; that when notice is served on the adverse party and clerk, and the clerk is secured his fees, this court has jurisdiction upon such questions in the case as affect only the rights of the parties before it, but, if the judgment appealed from cannot be modified or reversed without injuriously affecting the interests of the absent coparties, the appeal cannot be considered. See, also, *Payne v. Raubinek*, 82 Iowa, 588, 48 N. W. Rep. 995. The controlling question presented on this appeal is whether the trust deed sought to be foreclosed is valid as against the appellants, as creditors of F. R. Lawlor. This question is made between the parties before us, and may be decided, as between them, without injuriously affecting the interests of F. R. Lawlor or Lillie C. Lawlor. The other grounds of the motion have been fully answered by an amended abstract. The motion is overruled.

2. There is no material controversy as to the facts in this case, and those necessary to be mentioned are, in substance, as follows: On February 17, 1881, Patrick Lawlor and Margaret, his wife, conveyed to Fanton R. Lawlor, their son, and John J. McGarry, their son-in-law, a large amount of real and personal property, in trust for the following purposes: Said trustees were to pay all debts owing by said Patrick Lawlor; to pay him and his wife, annually, \$600, so long as they both should live, and, to the survivor of them, \$300, during life; and, upon the death of both, to divide what remained equally between the heirs of Patrick

Lawlor. The trustees accepted the trust, Mr. McGarry taking management. He sold the property, paid the debts and annuities, and loaned, collected, and managed the trust fund in his own name, as trustee, under the advice and assistance of the plaintiff, Patrick B. Wolfe, as attorney for the trustees. Fanton R. Lawlor took but little, if any, part in executing the trust, beyond joining in conveyances of the real estate. Patrick Lawlor died in October, 1889, leaving his wife and a number of children, including said Fanton R. Lawlor and Mrs. McGarry, surviving him, all of whom are now living. Some time prior to the execution of the note in suit, Fanton R. Lawlor desired to borrow a part of said trust fund to use in his business, but, said fund being then loaned, Mr. McGarry indorsed for him in bank; and when the trust securities were converted into money, the money was applied upon the note in bank to the amount of \$5,134, F. R. Lawlor agreeing to give security therefor. Some time after, Fanton R. Lawlor, at the instance of Mr. McGarry, executed the note in suit for \$5,134, payable to "the order of John J. McGarry, as trustee," two years after date, with 8 per cent. interest, and delivered the same to the plaintiff, Wolfe, as attorney for the trustees, with the consent and approval of Mr. McGarry. The note was dated April 28, 1888, to correspond with the time the trust money was paid to the bank. Mr. McGarry died in December, 1889, and on the 6th day of January, 1890, at the instance of the plaintiff, Fanton R. Lawlor and his wife, Lillie C., executed and delivered to him, as trustee, the deed sought to be foreclosed upon lands in Crawford county, Iowa, to secure the payment of said note, which deed was duly recorded January 9, 1890. Said deed was subject to a prior mortgage to A. J. Clark for \$4,000. On the same day (January 6, 1890) F. R. Lawlor assigned to the plaintiff, as trustee, an existing lease of said land; the rents to be applied in payment of taxes, and interest on said mortgage and trust deed indebtedness. F. R. Lawlor was at that time insolvent. So far as appears, no default had been made in the payment of annuities, or in otherwise executing the trust, unless it be in loaning this money to F. R. Lawlor January 17, 1890, E. S. Jaffray & Co. commenced an action, aided by attachment, in the district court of Crawford county, Iowa, against Fanton R. Lawlor, to recover \$2,081.25 on account. The attachment was levied upon the land described in said trust deed, and thereafter, March 20, 1890, judgment was entered against Fanton R. Lawlor, and an order for special execution to sell the attached property. The land was sold under the special execution to E. S. Jaffray, and, no redemption being made, a sheriff's deed was duly executed to him, May 14, 1891. Upon these facts the plaintiff asks judgment

against F. R. Lawlor, and a decree foreclosing said trust deed, and establishing it as a lien prior to any lien of the appellants. Appellants ask that plaintiff's petition be dismissed; that it be adjudged that this interest, if any, is junior to defendants'; and that he be required to turn over to E. S. Jaffray the rent notes.

3. As already said, the controlling question is whether said trust deed is valid as against the personal creditors of F. R. Lawlor. That the money in the hands of F. R. Lawlor is of the trust fund, and that he is liable therefor at the proper time, and to the proper person, there is not, and cannot be, any question. It is trust funds in his hands as trustee, and he is liable for it as trustee, whether he received it as borrower or otherwise. Holding him liable as trustee, we do not now determine whether or not he is liable as borrower, but proceed to inquire whether, being liable as trustee, he might legally give the security that he did, as against his personal creditors. Appellants contend that the deed is a security to himself for a debt which he owes to himself, and that by it advantages are reserved to him in fraud of his creditors. While it is true that, as between a trustee and third persons, the trust estate may be said to belong to the trustee, as between him and the cestui que trust, his ownership is only for the purposes of the trust. He is at all times liable to the cestui que trust, and the liability may mature at any time upon an order of court in a proper case, or upon the termination of the trust. F. R. Lawlor was clearly liable to account to these beneficiaries at some time in the future, and the question is, might he legally pledge his property to secure the beneficiaries? It would not be questioned but that he might legally have given this security to E. S. Jaffray & Co., to the prejudice of his other creditors, because he was liable to Jaffray & Co. There is certainly no good reason why he might not give security for a liability for trust funds as readily as for merchandise purchased. The trust deed is not to secure a debt due to him as trustee, but a debt from him to the beneficiaries. The security is to them, and, as has been repeatedly said, "a court of chancery will prefer to see a trust protected, and funds saved to those for whom it is guardian, rather than divert the debtor's property to the payment of the general debts of the trustees." The evidence shows that this trust deed was executed, not only in pursuance of F. R. Lawlor's agreement with Mr. McGarry, but on the demand of Mrs. Margaret Lawlor, who was prepared to proceed by an action in court to secure her annuity, if the security had been refused. The deed was taken with the consent of at least two of the heirs. Surely, Mrs. Lawlor and these heirs had a right to demand and receive this security from the

insolvent trustee, who had converted the trust fund to his own use. Authorities are cited to the effect that an alienation by a debtor, containing a provision for the debtor which impairs the rights of his creditors, is fraudulent as to such creditors. It is argued that F. R. Lawlor is left to enjoy this land during the life of Mrs. Margaret Lawlor, to the prejudice of his general creditors, and therefore the deed is fraudulent and void as to them. Had this security been given in good faith to a general creditor, to secure a bona fide debt to become due, the fact that Mr. Lawlor might enjoy the benefits of the land until the debt became due would not vitiate the security, and such is this case. There is no evidence of fraudulent intent or purpose. The deed was given and received, in good faith, to secure a bona fide liability. Our conclusion is that this trust deed is valid as against the general creditors of F. R. Lawlor.

4. Appellants question the right of appellee to maintain this action. It is said there has been no default in the execution of the trust; the annuities have been paid, and nothing is due to the heirs so long as Mrs. Margaret Lawlor lives. Plaintiff sues in equity as trustee, not for F. R. Lawlor, trustee, but for the beneficiaries for whom he stands. He asks to recover this money, not only because the note is overdue, but because the trustee has converted the money to his own use, and is insolvent. The right of the beneficiaries to ask protection, under these facts, and of a court of equity to grant it, is certainly very plain. That appellee has not asked all the relief that he might or should, as against F. R. Lawlor, is no reason why, upon proper showing, he should not have that which he does ask. It is not for us to determine what shall be done with this money, when paid to the plaintiff, as trustee under the deed. That is a matter to be determined by the proper court on proper application. Our conclusion is that the judgment and decree of the district court should be affirmed.

BENNETT v. HIBBERT et al.

(Supreme Court of Iowa. May 16, 1893.)

WILLS — TESTAMENTARY CAPACITY — EVIDENCE — DEVISE TO ALIEN — VALIDITY — "PURCHASE" OF REAL PROPERTY.

1. In a proceeding to contest a will the evidence showed that testator made it during his last sickness, when about 70 years old; that he was a man of filthy and profane habits, and of many eccentricities, most of which were accounted for from his inclinations and education. *Held* insufficient to show want of testamentary capacity.

2. There was evidence that at the time the will was made testator was very sick and weak. He gave \$1,200 to an illegitimate daughter, and \$7,000 to a lifelong friend in England, to the exclusion of his brothers and sisters, giving at the time as a reason therefor that his friend had offered to care for his wife during her sickness in England, which seemed

to increase his former attachment to him. *Held*, that testator's disposition of his property should not be disturbed on account of incapacity induced by sickness.

3. Acts 22d Gen. Assem. c. 85, §§ 1, 2, provide that nonresident aliens are prohibited from "acquiring title or taking or holding" real estate "by descent, devise, purchase, or otherwise," except that any nonresident alien may "acquire and hold" real property to the amount of \$10,000, providing that within five years from the date of "purchase" of said property the same is placed in the actual possession of a person related to such "purchaser" within the third degree, etc. Code, § 45, provides that "words and phrases shall be construed according to the context and the approved usage of the language." *Held*, that the word "purchase" includes the acquisition of real property by devise as well as by a sale for a consideration.

Appeal from district court, Louisa county; D. Ryan, Judge.

Proceeding to contest the validity of a last will and testament. Decree for defendants, and the plaintiff appealed.

Jayne & Hoffman, for appellant. Newman & Blake, E. B. Tucker, L. A. Reiley, and R. Caldwell, for appellees.

GRANGER, J. John S. Towndrow, deceased, in his lifetime made his will, which was, after his death, admitted to probate. The plaintiff, Elizabeth S. Bennett, who brings this suit, by her next friend, alleges that she is the illegitimate child of John S. Towndrow, and that she was so recognized by him in his lifetime generally, notoriously, and in writing. By the will of Towndrow the plaintiff was a devisee of certain real estate in Muscatine county, in this state. The remainder of his estate, real and personal, was devised and bequeathed to the defendant Newton West Hibbard. This action is—First, to set aside the will entire, because the testator had not testamentary capacity; and, second, to vacate it in so far as it devised real estate to Hibbard, because he was and is an alien, and disqualified to accept such provisions of the will in his favor. The important questions in the case are the recognition of the plaintiff so as to entitle her to inherit, the testamentary capacity of Towndrow, and the legal effect of the alienage of Hibbard. With our view of the case, it is only necessary to consider the last two questions.

1. It is conceded that Towndrow was a remarkably eccentric man during his entire manhood. He died at the age of about 70 years. If we are to discuss the effect of the evidence to any extent, it seems quite necessary to set out some parts of it, as in no other way can its character be understood. The following is the direct testimony of some of the witnesses for the contestants of the will: Charles Estle: "Am thirty-three. Lived three-quarters of a mile from Towndrow, and know him ever since I can recollect. Was not often in his company. Didn't see much of him the later part of his life. Was there the Monday before he died.

Was at the funeral of his wife. Had a conversation with him about where he was to be buried in Muscatine county. I have heard him say that he was going to be buried under a big oak that he had up there; and then again I heard him say that he had four trees,—four oaks,—all together, and he said that he was going to be planted in there. He was not buried there. Have been at his house and seen him eat. Once, just as I got there, he had dinner almost ready. He set the chairs around his table, and turned to his stove to get up some of his victuals, and while he was doing that the cats goes on his table and goes to eating the victuals, and he turned around and takes them down, and got everything on the table, and sets up, and the cats gets up on each knee, and one beside him, and when he was eating he takes a piece for himself, and gives a piece to the cats and dogs. That's the way they would eat. At the time the old lady was lying sick up stairs. She had a little bell up there that she would ring when she wanted anything, and the old lady rang the bell for something, and Jack paid no attention to it, and he spoke about her ringing the bell, and he paid no attention to it, but let it go, and didn't go up until he got through eating. Have heard him say that it would be better if he would take and knock his wife in the head."

Also Ernest Lee: "Am twenty, and have known Mr. Towndrow ever since I can remember. Lived three-quarters of a mile from him the later part of his life. Saw him often, and conversed with him, and observed his talk. Our farms joined. Was at his house one night after the death of his wife, and before the burial. William Wilson was there. Remained all night. Towndrow was there. He remained up with us until eight or nine o'clock, and then he laid down and slept on the rough box all night. He didn't go to bed at all after his wife's death and before her funeral. He laid down in his clothing that night. I observed his conduct as very queer and curious; different from any other man I ever knew. One time I was sitting in the door, and he was planting corn. He had a red handkerchief on his head. He jumped off, and ran about twenty rods, and hollered very loud. Another time one of his horses got out and broke into our yard. I got on the pony and run him back, and he threatened to kill me for it. He would take dry dirt from our field and carry it home. His dog came across the field when my sister was sick and had died, and father killed the dog. He came over and into the house as a gentleman, and was all right until he seen the dog, and then he was wild. He said the dog tried to talk with him. He took it home and buried it by his front door. Then, at the funeral, he raised up and screwed the coffin lid, and when they called on the choir to sing, he raised up too. At

the grave he threw a clod across the grave to draw my attention, and I went to him, and he said there was no use in wasting ground. It was dug too far from the child's grave. He said he would put a bottle in the coffin, and a letter stating the price of corn, and that they were farmers, and her name and age. I have heard him pray and swear as near at the same time as any one could. That was on his death bed. He says: 'See the Mrs. and angels around the Lord's throne. That is all right, my lad;' and then he began the Lord's prayer, and said that through, and almost in the same breath he swore an oath. I think this was on the Friday night before his death. I sat up with him some time during his last illness. He was often wandering and flighty, and rambling in his conversation. I didn't understand all the sentences and words which he spoke. This continued all the while during his last sickness. I was there Saturday. Observed that he was no better. Was there on Sunday before the will was made, and observed that he was weaker, and no better. The only change from Friday evening in his physical appearance was that he was weaker. I heard him say that he had not drank a drink of water for three months. He drank wine, and had it about the house. He kept a male hog about the house, and kued it, and burnt the hair off, and afterwards ate part of it. I know of his roofing his stable in very severe winter weather. I have heard him say about limiting himself in various kinds of work. Heard him say about building so much fence, and that, if he didn't, the Lord Almighty would strike him dead. That, if God would let him live a hundred years, he would put a hill into his hollow. He was at work on that hollow. He used to say that if a man would tar his arms that he would live longer. I heard him tell—he told me—that one time Squire Brown was threshing for him, and he said it rained while they were there, and the lightning killed some sheep for him, and that he was swearing about the sheep or something, and that Squire Brown reproved him, and said he ought to be thankful that it didn't kill something more valuable. He said that he didn't thank God Almighty for killing his sheep, and if he killed his stock he might as well kill him. He was a man given to that kind of expressions. From what I observed of his conduct and have told, and from the conversations I have told, and what I observed as to his sickness, I would say that I don't think he was of sound mind."

It is not important that we should set out verbatim any of the testimony of the respondents. To some extent it is corroborative of the testimony for the contestants. About 60 witnesses were examined, nearly all of whom gave testimony as to the peculiarities, habits of life, and conduct of Towndrow; and, together, covering the period

of his manhood. The testimony, taken together, does not show an insane mind, or one wanting in testamentary capacity. If the testimony is stripped of that which shows peculiarities common to a large class of men, of whose capacity to make a will there is no doubt, such as profanity, irreverence, expressions of disbelief in the existence of a God, filthy habits, a poor farmer, who sows, reaps, and threshes his grain later than others, and of a taste for gathering different stones and grasses, we have left some very unusual habits or actions, such as that his dogs at one time ate at the table with him; that he played the violin when his wife was dead in the house; that he lay on the rough box in which was to be placed her coffin; that in her sickness he seemed regardless of her comfort, and made heartless expressions as to her; that he carried dirt in a basket from the highway to fill post holes and places on his land; that he said he knew a man in England who could tell by necromancy where to find a stolen mare; that at one time he planted corn with a red handkerchief on his head, and without any apparent reason he jumped and ran some 20 rods, and hallooed very loud, with other facts that we need not enumerate. With the testimony in the case, these singular facts are stripped of much of their strange significance, and nearly all are accounted for upon the theory of his natural inclinations, beliefs, and education. The testimony is largely a culling from his many years of life of particular incidents arising in jokes or outbursts of passion, such as it is the general experience of persons now and then to witness. The instances are comparatively few in which a person lives to a similar age from whose experiences might not be gathered a chapter of incidents which, standing alone, would portray the reverse side of their lives, as seen when the sunshine and shadows are blended, and the truth made manifest from a full and impartial showing. It is said that Towndrow, at the funeral of his wife, turned the screws in the coffin lid, and stood with the others during the singing. The act of turning the screws in the coffin is unusual, but not strange for such a man; and many a sane person, with the burdens of such a trial, has done things equally strange. The standing while singing may have been a result of a choice or his judgment of propriety. It is said that at the grave, to attract the attention of a neighbor, he tossed a clod of earth across it, and then spoke to him of the graves being too far apart, and taking too much room. Conceding the act to be out of the usual order, it is not an insane act, nor do we think it indicative of insanity, or a want of business capacity. There is scarcely a community without persons who, from carelessness, indifference to or disregard for conventional observances, would or might not be equally guilty of what is here urged as evi-

dence of insanity. M. J. Mee, who is next friend in this case, and a husband of the plaintiff's mother, is a witness, and has known Towndrow for 18 years, and, after relating his observations, says he rode with Towndrow to the grave, at the burial of his wife, and sat in his lap; that on the way they had a conversation about renting land, but did not come to an agreement. He says that in his estimation Towndrow was very much of a joker. That fact is very manifest from the evidence. Mee further said: "Judging from the conversations and actions to which I have testified, and confining myself to that, I did not notice any change in him whatever. He was sound, so far as I know." He then states that he is not an expert, and that he thought, when Towndrow rose at the funeral to turn the screws in the coffin, he looked wild. There is also testimony that when the will was made Towndrow was very sick and weak, because of which he was incapacitated to make his will. The testimony of the attorney who wrote the will, and of the physician who attended him during the last sickness, with others, satisfies us that he was then of a disposing mind, under the rule given to determine such a question. He gave to the plaintiff what the petition shows to be worth \$1,200, and the remainder, some \$7,000, to Hibbard. To the writer of the will he gave his reasons for so doing. They had been lifelong friends, and Hibbard had made to him offers to care for his wife in England during her sickness that seemed to seal his former attachment to him, and he said he wanted him to have his property in America. The reasonableness of the will, however, is only to be considered in determining testamentary capacity. What claims the brothers and sisters of Towndrow may have had as objects of his bounty, other than the relationship, does not appear; but he gave reasons for preferring his friend in disposing of his property. In view of the record, with such a disposition, we should not interfere.

2. We are now to inquire as to the effect of Hibbard's alienage. This question involves the construction of chapter 85, Acts 22d Gen. Assen. The necessary parts of the act are as follows: "Section 1. Nonresident aliens * * * are prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise, only as hereinafter provided," etc. "Sec. 2. Any nonresident alien may acquire and hold real property to the extent of three hundred and twenty acres, or city property to the amount of \$10,000 in value: providing, that within five years from the date of purchase of said property the same is placed in the actual possession of a relative of such purchaser, the occupant being related to such owner within the third degree of kindred, or the husband or wife of such relative: and, further provided, that such occu-

pant becomes a naturalized citizen within ten years of the purchase of said property as aforesaid." The controversy arises over the construction that should be placed on the proviso to the second section, and particularly as to the words "purchase" and "purchaser" as they occur therein. If the word "purchase" is to be held as meaning the acquisition of land in pursuance of a sale for a consideration, the will, as to Hibbard, in so far as the real estate is concerned, is void. If, on the other hand, it is to be held that, within the legislative intent, a devise is a purchase, the will, in this particular, may be sustained. By Code, § 45, it is provided: "Words and phrases shall be construed according to the context, and the approved usage of the language." It is certain that the word "acquire" will bear no such limited definition as "obtaining property under sale." We are not aware that the word has ever received such a construction, although it might easily have, under the rules for statutory and other interpretation, to meet the intent or purpose for which it was used; but in such a case the construction would be a limitation on its general legal acceptance. The act under consideration indicates to quite an extent the scope of the word "acquire" by prohibiting persons from "acquiring title * * * by descent, devise, purchase, or otherwise." The word "purchase," in its legal acceptance, has repeatedly received judicial construction. In 19 Amer. & Eng. Enc. Law, p. 571, it is said: "A purchase, in the ordinary and popular acceptance, is the transmission of property from one person to another by their voluntary act and agreement, founded on a valuable consideration. In its strictly technical sense it is the acquisition of land by any lawful act of the party in contradistinction to operation of law, and it includes title by deed, title by matter of record, and title by devise." In *Kohl v. U. S.*, 91 U. S. 367, it is said that, "technically, purchase includes all modes of acquisition other than that of descent." In *Burt v. Insurance Co.*, 106 Mass. 356, the word "purchase" was held, in its legal acceptance, to include "every lawful method of coming to an estate by the act of the party as opposed to the act of the law." Mr. Bouvier says, in defining "descent:" "This manner of acquiring property is directly opposed to that of purchase." The property of another, when taken by descent, is taken "as his heir at law." In 2 Bl. Comm. p. 287, is the following: "The most usual and universal method of acquiring a title to real estate is that of alienation, conveyance, or purchase in its limited sense, under which may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another, whether that be effected by sale, gift, marriage, settlement, devise, or other transmission of property by the mutual consent of the parties." Chancellor Kent, in his Commentaries, (volume 4, p. 509,) speaking of "a

purchase," says that, "in the judgment of the law it is the acquisition of land by any lawful act of the party, in contradistinction to operation of law, and it includes title by deed, title by matter of record, and title by devise." The cases and authors seem to have used the word "technical" in the same sense as "legal," or "the judgment of the law," in its application to the word "purchase." In *Re Gill's Estate*, 79 Iowa, 296, 44 N. W. Rep. 553, in construing the word "purchaser," as used in Code, § 2442, it is said: "The law recognizes but two ways of acquiring property, by descent and by purchase."

It only remains for us to determine whether the word "purchase" in the act shall receive its popular or its legal significance. It is very conclusive that if we give to it its popular meaning, and hold that the act only authorizes nonresident aliens to hold real estate by purchase for an actual consideration, then we must bring the word "acquire" into harmony with it, by placing upon it the necessary limitation for such a purpose. The act itself seems to forbid such a construction. The use of the word in the first section is in harmony with its ordinary and legal signification, and nothing in the purpose of the act indicates that it is employed thereafter in a restricted sense. Nothing in the public history of the legislation, to our knowledge, warrants a conclusion that the evil or wrong sought to be remedied lay in a particular manner of acquisition by aliens, but in the fact of their becoming, to too great an extent, owners of land within the state. Is there even an imaginable reason why the legislature would provide that a landowner of the state might sell, for a consideration, his land in Iowa to a nonresident alien, upon the prescribed conditions of the law as to occupancy and future citizenship, and would not permit him to devise it upon the same conditions? The law fixes the conditions upon either the sale or devise, and the effects in the two cases are alike, so far as we are able to discover. The context of the law supports our conclusion as to the use of the word "purchase," and it is in accord with approved usage. Counsel for appellant, in support of their contention, quote from *Sutherland on Statutory Construction*, (section 286,) as follows: "When two words or expressions are coupled together, one of which generally includes the other, it is obvious that the more general term is used in a meaning excluding the specific one." If the rule has application it is certainly not favorable to appellant. "Acquire" would be the generic word or "more general term," and the rule would operate to exclude the word "purchase," which is the sole reliance of appellant in her contention. It is also said by appellant that "a proviso will generally be considered not to enlarge, but rather to restrain, qualify, or explain the clause to which it refers. Our conclusion is an application of the rule. We limit the word "acquire," by the

proviso, to what is in law a purchase, without which it would embrace the whole range of acquisitions, which includes all methods. The arguments refer us to *Purcell v. Smidt*, 21 Iowa, 540, and also to *Greenheld v. Stanforth*, Id. 595. The later case was affirmed by operation of law because of a divided court, and the former case was, in effect, the same. The court was evenly divided, and an affirmance would have followed, but for an agreement to dismiss without prejudice. The cases are of no force as authority. See Code, § 140. Our conclusion is that the devise in the will is valid, subject to the conditions of the law imposed in such cases.

3. When the will was offered for probate, the brothers and sisters of Towndrow appeared, and objected on the ground of a want of testamentary capacity. The issues were tried to a jury that returned a finding, which the court, for reasons not apparent, set aside, and granted a new trial. Thereafter the issues were submitted to the court without a jury, upon the testimony taken at the former trial. The conclusions of the court accord with our conclusions as to the testamentary capacity of Towndrow, and it sustained the will. The plaintiff in this suit was in no way a party to that proceeding. After the new trial was granted, the parties attempted a settlement which could not be entirely effected, and it was agreed to submit the question of testamentary capacity to the court, as was done, and that, if it sustained the will, then Hibbard was to convey the property of the estate to a brother of Towndrow, and receive therefor \$1,840, clear of all expenses on the trial. By the agreement the costs and attorneys' fees were to be taxed to the estate. After the will was admitted to probate, each party claimed \$1,000 as attorney's fees. Contestants resisted the claim of proponents, and the question of the amount of such fees was submitted to the court, and \$700 was allowed. The aggregate of \$1,700 as attorneys' fees, and upwards of \$300 of other costs, were taxed to the estate. It should be stated that it does not appear that the court knew of the terms of the stipulation. The petition asks, in substance, that the interest of the plaintiff in the estate, whatever that interest may be, be freed from the effect of said judgment. With our holding as to the capacity of the testator, the plaintiff takes as a devisee under the terms of the will, and the contestants acknowledged, in the former proceeding, her rights to that extent by a direct pleading as follows: "In the Matter of the Will and Testament of John S. Towndrow, deceased. Now come contestants, and say that it is not now, and never has been, their purpose or intention to deprive Elizabeth Stanley Bennett of the equivalent of the legacy named in the instrument offered as the last will of the decedent. And, recognizing the laborious care of her mother, the niece of Mr. and Mrs. Towndrow, during the

last and declining years of their lives, and the affection of Mr. Towndrow for Elizabeth Stanley Bennett, they tender here, and now confirm, the title to the west 3 acres and the east 10 acres of the southeast quarter of section 26, township 76, range 4, Muscatine county, Iowa, in and to Elizabeth Stanley Bennett, and ask the court to make and enter any proper record to this effect. Newman & Blake. L. A. Relley. Attorneys for Contestants." The decree of the district court in this case, dismissing the petition as without equity, denies to the plaintiff relief from such taxation of costs in the former case. It is not, as seems to be the view of appellee in argument, a question of costs in this case. The relief was plainly sought by averments in the petition put in issue by the answer. It is now too late to consider questions that should have been settled by objections to the pleading before answer, if there are such. The personal property of the estate is not sufficient to pay the charges against it, and hence the excess must be borne by the real estate, of which the plaintiff is, by the terms of the will, a part owner. We are not able to understand why this plaintiff should be burdened with any part of the costs or expenses of that proceeding. She was not there asking for any benefits, and the pleadings of the contestants preserved to her all that the will intended for her. She was not a party to the stipulation upon which the costs were taxed. With such a situation the stipulation upon which the costs were taxed should affect only the parties to it, and the record would not justify a judgment burdening her interest in the estate with costs, to the making of which she was in no way a party, nor in any sense responsible. The judgment of the district court should be modified to conform to this view. This particular branch of the case has induced a very inconsiderable part of the record and argument. But one witness was examined as to such facts, and some documentary evidence was introduced. Because of this modification, \$25 of the costs in this case will be taxed to appellee.

The judgment is modified and affirmed.

STATE v. BALDOSER.

(Supreme Court of Iowa. May 13, 1893.)

CRIMINAL LAW—ARGUMENT OF STATE'S ATTORNEY—EVIDENCE.

1. Code, § 3636, provides that if a defendant in a criminal case does not testify the state's attorney shall not refer to such fact, but, should he do so, defendant shall be entitled to a new trial. *Held*, that a statement that "they have the same right we have to put the defendant upon the stand, and let him tell his story, the same as we have," made in argument, in the presence of the jury, by the state's attorney, was in violation of the statute.

2. On a trial for seduction the prosecutrix was sufficiently corroborated where there was testimony by several witnesses that the parties kept company, and acted as lovers usually

do, and that defendant had said that they were to be married.

3. It was error to exclude evidence that the prosecutrix had visited the witness with another man, who introduced the prosecutrix as his wife, during the time defendant was going with her.

Appeal from district court, Keokuk county; David Ryan, Judge.

The defendant was indicted, convicted, and sentenced for the crime of seduction, and appeals.

O. H. Mackey, for appellant. John Y. Stone, Atty. Gen., and Thos. A. Cheshire, for the State.

KINNE, J. 1. An exception was taken by the defendant to the following statement made by one of the counsel for the state to the court, during the trial, and in the presence and hearing of the jury, and while he was arguing the question as to the admissibility of certain testimony, viz.: "They have the same right we have to put the defendant upon the stand, and let him tell his story, the same as we have." When this statement was made the state had not yet closed its case in chief, and the defendant had not then been afforded an opportunity to elect whether or not he would testify. Our statute, (Code, § 3636,) among other things, provides that defendants in criminal cases shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state, and, "should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state, during the trial, refer to the fact that the defendant did not testify in his own behalf; and, should he do so, such attorney or attorneys will be guilty of misdemeanor, and defendant shall, for that cause alone, be entitled to a new trial." The attorney general contends that the statement made was not within the inhibition of the statute; that no reference was made to the fact that the defendant did not testify in his own behalf; that it was simply the statement of a legal proposition. We are called upon to determine whether such a statement, made prior to the time when defendant could be called as a witness, comes within the statute referred to. In this case the defendant did not testify.

In *State v. Moxley*, 14 S. W. Rep. 969, 15 S. W. Rep. 556, and 102 Mo. 374, counsel for the state, in his opening argument to the jury, said: "They have offered not a word to show how she came to her death. Not a neighbor is put on the stand to show what he said caused her death. There they are, alone. She is in perfect health, and in the nighttime she comes to her death suddenly. We say that common honesty, common decency, requires at the hands of that man, when he sees his neighbors, to tell how she came to her death." It will be ob-

served that there was no reference here directly to the fact that the defendant had not testified, and yet the court held that the language used "was an adroit and insinuating attempt indirectly to accomplish what could not have been accomplished by a direct statement." The Missouri statute provides that the failure of defendant to testify "shall not be referred to by any attorney in the case." The statement was held to be a plain violation of the statute. See *Jordan v. State*, 16 S. W. Rep. 543, 29 Tex. App. 595. The Texas statute provides that the fact that the defendant has failed to testify shall not "be alluded to or commented on by counsel in the cause," and under it it is held a new trial must be awarded when allusion is made to the fact, and the district attorney reads part of the legislative act prohibiting such allusions and comments. *Hunt v. State*, (Tex. App.) 12 S. W. Rep. 737. In Indiana, under a statute similar to that in force in Texas, it is held that allusions by counsel for the state to the fact that the witness has not testified cannot be cured by the court's admonishing counsel, or instructing the jury, to pay no attention to what he said. *Long v. State*, 56 Ind. 182. In Massachusetts it is held that the protection of the statute is not waived by any language used by the defendant's counsel in the heat of argument; that it could only be waived by defendant's going upon the stand as a witness. *Com. v. Scott*, 123 Mass. 239; *Com. v. Nichols*, 114 Mass. 285. The statute of Illinois provides that the court shall not "permit any reference or comment to be made to or upon such neglect" to testify. In that state it is held that the subject must not be referred to at all, and that the fact that when objection was made the court stopped counsel, and admonished the jury, was of no avail. *Quinn v. People*, 15 N. E. Rep. 46, 123 Ill. 333. See, also, *Baker v. People*, 105 Ill. 452; *Austin v. People*, 102 Ill. 261; *Angelo v. People*, 96 Ill. 209. In West Virginia, under a statute providing, "nor shall any reference be made to, nor comment upon, such failure, by any one during the progress of the trial, in the hearing of the jury," and when, prior to the state's closing a case, the attorney for the state suggested to the attorneys for the prisoner, in the hearing of the jury, "that the attorneys for the prisoner could prove this fact,"—that is, that a certain matter had been communicated to the defendant,—"by their own parties, when they were put upon the stand," which was objected to, and the court announced that it disapproved of the remark, whereupon counsel said he referred to the witnesses for the defense, not to the parties, it was held that, the time not having arrived when the defendant could testify, the language used was not objectionable. *State v. Ice*, 12 S. E. Rep. 695, 34 W. Va. 244. In *Coleman v. State*, 13 N. E. Rep. 100, 111 Ind. 563, the prosecutor, in making his opening statement

of the case to the jury, said: "You should watch the evidence closely. We do not know that the defendant will go upon the stand. He has not been sworn. I noticed that. If he should go upon the stand, you should watch." At this point the statement was objected to, and the objection sustained, whereupon counsel for the state said, "I withdraw the statement from the jury." Afterwards the defendant did testify as a witness in his own behalf. The statute of that state provides, if the defendant "do not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered, by the jury trying the same." The law also makes it the duty of the court, in such case, in its charge, to instruct the jury as to their duties under this statute. In that case the same claim seems to have been made as in the case at bar,—that the remarks are not within the literal prohibition of the statute. Touching this, the court said that the remarks, "although not within the literal prohibition of the statute, were nevertheless in palpable violation of its spirit and purpose; * * * that the prosecutor may not evade the statute by ingeniously injecting into his opening statement remarks which do all the mischief which the prohibitory part of the statute was intended to prevent. The effect of the remarks must have been either to coerce the defendant to testify, as has been said, "with a halter about his neck, or to induce him to remain silent." Our own statute is more rigid in its provisions than any we have been able to find; for ours provides, not only that the fact of the defendant's failing to testify shall not be referred to during the trial, but a violation of the statute is made a misdemeanor, and such reference, alone, entitled defendant to a new trial. In *State v. Graham*, 62 Iowa, 111, 17 N. W. Rep. 192, it is said: "The statute is explicit that the district attorney shall not refer to the fact that the defendant did not testify in his own behalf. There is nothing which he can say about the fact that will justify a reference to it, and courts should hold district attorneys to a strict observance of their duty in this respect." In *State v. Ryan*, 70 Iowa, 156, 30 N. W. Rep. 397, the language objected to was used, as in the case at bar, in an argument as to the admissibility of testimony. The court said: "If reference can be made to the fact that the defendant has not testified in his own behalf, in arguments to the court, then such a reference may be made in every case, and thereby the statute will be nullified."

No question arises, upon the record in the case at bar, as to whether or not the language objected to was used. No admonition was given to the jury touching the use of this language. Now, it may be conceded that the reference by counsel in the words used could not have been to the fact that

defendant had not testified in the case, because up to that time he had no opportunity so to do. The state's case had not been closed. So, while the case is technically not within the statutory inhibition, it seems to us it is clearly contrary to the spirit and object of the statute. If the contention of the attorney general is correct, then counsel for the state may at all times during a trial, prior to the time the defendant has an opportunity to go upon the stand, comment upon the fact that the law permits him to testify in his own behalf; and draw inferences as to the effect of his failing to do so. Such a construction of the statute would deprive the defendant of every benefit which the legislature, by its enactment, intended to confer upon him. The lawmakers certainly never intended that counsel for the state might comment on and refer to the fact that defendant might testify in his own behalf at all times prior to the closing of the state's case in chief, but must not afterwards refer to the fact that he had failed to take advantage of his privilege to testify. The mischief is done by directing the minds of the jurors to the fact that a defendant may testify, in advance of the time when he may be called as a witness, as well as if the comment be made after he has elected not to testify. The language, being within the spirit of the prohibition of the statute, was properly objected to, and its use was a violation of the statute. In *State v. Ryan*, 70 Iowa, 156, 30 N. W. Rep. 397, it is said: "Under the statute we are not permitted to inquire whether the defendant was prejudiced. This must be conclusively presumed." The provisions of the statute are absolute that in case of its violation a new trial shall be granted.

2. The indictment charged that the defendant seduced the prosecutrix on December 13, 1890. Prosecutrix testified that the act was accomplished on July 9, 1890, and her child was born on October 16, 1891. Lettie Akerman, the prosecutrix, testified that she first became acquainted with the defendant in March, 1889; that he went home with her from protracted meeting, and sat up with her; that afterwards he took her to church, and visited her after they arrived home; that from time to time he continued such attentions; that he wrote her letters when she was away from home. She went away shortly after July 4, 1889, and was absent five or six weeks. She had nothing to do with the defendant then until February, 1890. From that time on, defendant kept company with prosecutrix. On July 4, 1890, he took her home from a celebration. At that time he told her that, if she would do as he wanted, he would marry her. He then solicited connection with her, which she refused. On the 6th of the same month they met again, and on the 9th she says she submitted, and had sexual intercourse with him, because he promised to marry

her. After this he continued his visits until March, 1891. In February, 1891, she told him of her condition, and he refused to marry her, and said he was engaged to another. Defendant claims that the prosecutrix is not corroborated in her statements. Witness Shaw testifies that the defendant began paying attentions to the prosecutrix two years before the trial; that he came to his place to see her, brought her from church, and sat up with her,—fixing several times. Flora McKinney says they kept company in July, 1890; that afterwards he told her that he and prosecutrix were to be married Christmas. Several other witnesses testified to the fact that these parties kept company together, and to other facts showing that they acted as lovers usually do. It is clearly established by the testimony (other than that of the prosecutrix) that the parties were suitors, and under repeated decisions of this court the facts established are sufficient in corroboration. *State v. Curran*, 51 Iowa, 112, 49 N. W. Rep. 1006; *State v. Bell*, 79 Iowa, 117, 44 N. W. Rep. 244; *State v. McClintic*, 73 Iowa, 663, 35 N. W. Rep. 696; *State v. Smith*, (Iowa,) 51 N. W. Rep. 24.

3. It is said that the verdict is not supported by the evidence. In view of a new trial, we cannot discuss the weight and sufficiency of the evidence.

4. Defendant sought to show by one Alice Lowe, a witness, that in January, 1891, the prosecutrix visited her house in company with a man who introduced prosecutrix to the witness as his wife. This evidence was excluded. The evidence should have been admitted. If the prosecutrix was, during the time the defendant was going with her, and even after she claims her child was begotten, keeping company with another man, and permitting him to introduce her as his wife, it would certainly tend to weaken her claim that the defendant had promised to marry her. *State v. Brown*, (Iowa,) 53 N. W. Rep. 92.

We discover no error in giving and refusing instructions. For the errors heretofore stated, the judgment must be reversed.

CITY OF MUSCATINE v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa. May 19, 1893.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—VALIDITY OF ASSESSMENT—EVIDENCE.

1. Under a charter conferring on a city power to pave its streets, and to require owners of adjacent lots to pave one-half in width of the street contiguous to their respective lots, the owners of lots on each side of the street are required to pay for one-half of the paving, whether the paving covers a part only or the full width of the street, and whether the paving is in the center of the street or on one side only; and, where the paving is on one side only, the adjacent owner on that side is only liable for one-half the expense.

2. Under a city charter, authorizing it to require the abutting lot owners to pave a

street, a railroad company having a right to lay its track on a lot, but to which it did not have title, is not liable for paving the street.

3. In an action to recover a special assessment for a street improvement direct proof of the assessment is required, and the county tax list is incompetent for that purpose.

Appeal from district court, Muscatine county; A. Howat, Judge.

Action at law to recover for paving done by plaintiff for which defendant is alleged to be liable. There was a trial by the court, which resulted in a judgment in favor of plaintiff for a part of the amount it claims to be due. Both parties appeal, the appeal of defendant having first been taken.

J. Carskaddan, for plaintiff. Richman & Burk, for defendant.

ROBINSON, C. J. On the 11th day of September, 1885, the city council of plaintiff ordered that First street (known in the record as "Water street") be paved from Linn street to a point 120 feet west of Ash street. The street ordered to be paved was 100 feet in width. On the 17th day of September a notice was served upon defendant to proceed to do the paving required by the order the width of 50 feet in front of its property which abutted on the line of the street, and to have the work completed on or before the 17th day of October. The defendant failed to do the work required by the order and notice, and plaintiff thereupon paved a strip of the street about 30 feet in width on the side next to property owned by the defendant opposite blocks 5, 6, 7, and 8, which were on the other side of the street, and also extending westward opposite the track of defendant, beginning 120 feet west of Broadway. This action was commenced in September, 1886, to recover the cost of certain grading, and also to recover \$5,842.30 as money expended in doing the paving, with interest. At the January term, in the year 1888, of the district court of Muscatine county, a judgment was rendered in favor of defendant, which was reversed by this court on appeal. See 79 Iowa, 645, 44 N. W. Rep. 909. After the cause was remanded, another trial was had, which resulted in a judgment in favor of plaintiff for the entire cost of paving done opposite blocks 5, 6, 7, and 8. That portion of the paving is adjacent to the land concerning which it was held on the former appeal that assessments on account thereof should be paid by defendant. The amount for which judgment was rendered is \$4,096, with interest thereon from December 21, 1885, at the rate of 6 per cent. per annum, and of that defendant complains. The cost of paving done west of a point 126 feet west of Broadway was \$1,746.30, and plaintiff complains because that amount was not included in the judgment, and for the further reason that interest on the amount of the judgment at the rate of 10 per cent. per annum, and a penalty of 5 per cent., were not allowed. No

question in regard to the grading is involved in this appeal.

1. On the former appeal it was held that the plaintiff was entitled to recover for paving it had done on Water street, in front of the property of defendant, which was on the south side of the street, and which is described with sufficient accuracy for the purposes of this opinion as opposite blocks 5, 6, 7, and 8. After the case was remanded for a second trial, amendments to the pleadings were filed, but, when amended, the answer contained no defense to the right of plaintiff to recover for paving done in front of the property of defendant described, which was not involved in the first appeal. The facts established by the evidence in regard to that property were so nearly identical in the two trials that the decision of this court on the first appeal must be regarded as an adjudication establishing the right of plaintiff to recover, which is binding, and to be followed by us on this appeal. The important question left for determination is, what amount is plaintiff entitled to recover? This action is brought under the provisions of sections 478 and 479 of the Code. The burden is upon plaintiff to show the cost of paving for which defendant is liable, and the property against which it is chargeable. The paving done was wholly south of the center of Water street, and defendant contends that it can be compelled to pay the cost of but one-half of that portion in front of its property, while plaintiff contends that the entire cost of such portion is chargeable to the property, and therefore that defendant is liable for its payment. In *Morrison v. Hershire*, 32 Iowa, 276, it was decided that a city has power to pave less than the full width of a street, and assessments for a roadway 18 feet in width were held to be valid. In that case it was said that the power of a city to do the work does not depend upon the benefits to be derived by property owners; that the work is done for the public, and assessments for its payment are levied upon the abutting lots, not because of special benefits their owners derive from the improvement, but because the public good demands it, and the law authorizes such assessments to pay for it. In *Robinson v. City of Burlington*, 50 Iowa, 241, it was said that a special assessment is allowable on the theory that the improvement for which it is made is of special value to the property owner. It is undoubtedly true that the law contemplates a special benefit from the paving of the street to the owner of property which is adjacent to it; but it cannot be said that paving on one side of a street is not of special benefit to the owner of property on the other side. Such paving encourages the public to use the street, makes the property on both sides more accessible and more desirable, and enhances its value. Ordinarily, justice to owners of contiguous property and considera-

tions of public utility would demand that paving of less than the full width of the street be placed at equal distances from each side, but cases may arise where a departure from that rule is admissible. Whether this is a case of that kind the record before us does not show. It does not appear, however, that defendant has derived any special advantage from the paving in front of its property not shared by owners of the property on the other side of the street. There is no paving in front of its property, excepting that for which plaintiff seeks to recover. We are not required to determine whether facts may exist which would authorize a city or town to tax the cost of paving a part of the street to the owners of property on one side. The special charter of Muscatine confers upon the city power to cause its streets to be paved, and to require owners of adjacent lots to pave one-half in width of the street contiguous to their respective lots. Section 466 of the Code, which section 479 makes applicable to cities acting under special charters, gives to cities and towns power to pave streets and make assessments therefor on lots fronting on such streets. But a construction of this statute, or of the charter under which plaintiff is acting, which would give to plaintiff power to pave one side of a street, and tax the cost thereof to the owner of lots contiguous to that side only, where the paving is as beneficial to the owners of lots on the opposite side, is so manifestly contrary to the legislative intent, and so oppressive and unjust, that it should not be adopted. We are of the opinion that the power given to plaintiff by its charter and by the general statute is to require owners of lots on each side of a street to do or pay for one-half of the paving for the portion of the street contiguous to their lots, whether the paving covers a part only or the full width of the street, and whether the paving is in the center of the street or on one side. If the paving is of such a character that it should be regarded as a paving of the street, within the meaning of the statute, the general rule is that the cost, when apportioned, should be divided between the owners of lots on the two sides of the street. The only theory upon which defendant can be held liable for the paving in question is that it was a paving of the street within the meaning of the charter of plaintiff or the general statute, and, since that liability was established on the former appeal, it follows that defendant is liable but for a part of the entire cost of the paving in front of its property. Appellee contends that defendant is estopped to deny liability for the entire cost of the paving in controversy by reason of its failure to object to the order for paving and notice, and subsequent acts on the part of the city to fix such liability. The defendant has not at any time admitted liability for the entire cost of the paving, and is not

chargeable with notice that the city intended to establish against it a liability for more than its just share of such cost. The evidence submitted does not show that such share was more than one-half the cost of the paving on account of which it is liable, and the court erred in rendering judgment against it for more than that amount.

2. Of the amount plaintiff seeks to recover \$1,746.30 are for paving west of that in front of its property already considered, beginning on Water street, 126 feet west of Broadway, and extending thence westward. That portion of the paving to which we now refer was done adjacent to land over which defendant had the right to lay its track, but to which it did not have title. The district court refused to allow plaintiff for that portion of the paving, and we are of the opinion that its action in that respect was correct. The charter of plaintiff authorizes it to require the owner of lots adjacent to a street to pave it, and not the owner of a mere easement in the lots. The general statute is to the same effect. See *Koons v. Lucas*, 52 Iowa, 181, 3 N. W. Rep. 84.

3. Section 479 of the Code provides that, where property is liable to assessment for such improvements as paving, and an assessment has been regularly made, and payment has been neglected or refused, the municipal corporation may recover, in addition to the amount assessed, and interest thereon at 10 per cent. from the time of the assessment, 5 per cent. to defray the expenses of collection. The district court refused to allow interest on the amount due from defendant at a greater rate than 6 per cent. per annum, and refused to allow a percentage to defray the expenses of collection. The only evidence offered which may be regarded as tending to show an assessment was the county tax list, to which objection was made by defendant, on the ground that it was incompetent. The county tax list is undoubtedly competent evidence for some purposes, but when a right of recovery is sought to be based upon an assessment regularly made, and not upon the tax list, direct proof of the assessment is required. The tax list was not in fact introduced to prove an assessment, but for another purpose. Its admission to prove an assessment would have been erroneous, and if, as we understand the record, it was not intended to be considered for that purpose, there was no evidence upon which to base an allowance for interest and expenses asked by plaintiff.

4. The conclusions we have announced dispose of all questions which we are required to determine at this time. The defendant consents that judgment be entered against it for one-half of the cost of paving in front of its property. If plaintiff shall, within 60 days from the date of filing of this opinion, remit one-half of the amount of its recovery, judgment will be entered in this court for the remainder, which is \$2,048,

with interest thereon at 6 per cent. per annum from the 21st day of December, 1885, and the judgment of the district court will stand affirmed as so modified. If such a remittitur is not entered, the judgment of the district court will stand, on the appeal of plaintiff, affirmed, and on appeal of defendant, reversed.

McDONALD v. ILLINOIS CENT. R. CO. (Supreme Court of Iowa. May 20, 1893.)

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—ALIGHTING FROM REAR PLATFORM—INSTRUCTIONS—LEADING QUESTIONS—HYPOTHETICAL QUESTIONS.

1. It is not negligence for a passenger to leave a railroad car at the rear platform.

2. Where the rear platform of a car is not at a safe place for passengers to alight, failure on the part of the carrier to warn passengers of that fact is negligence, though it was safe to alight at the front platform.

3. Special instructions, though correct as principles of law, are properly refused when they are inappropriate to the facts in the case.

4. Plaintiff was injured in alighting from defendant railroad company's car, and in an action therefor was asked: "You may state whether you were directed by defendant, or any one of its employes or its agents, to get off of the opposite end of this coach from the end that you did get off." *Held*, that the question was not leading.

5. In an action for personal injuries, where a medical witness has testified as to plaintiff's injury in December, and as to his condition in April following, it was proper to ask the witness whether plaintiff's condition in April was the result of his injuries in December, without embodying in the question the fact of the injury.

Appeal from district court, O'Brien county; F. R. Gaynor, Judge.

Action for personal injuries. The following, with certain omissions, are the facts as stated by the district court to the jury: "That on or about the evening of the 2d day of December, 1890, while the defendant was so operating its passenger train, the plaintiff became a passenger thereon; that is, on a train run and operated by the defendant, by its agents and employes, from the town of Primghar to the town of Gaza, in this county, both of said places being stations on defendant's railroad. That plaintiff purchased a first-class ticket at the station of Primghar, of defendant's agent, to the station of Gaza. That just before reaching the station of Gaza the conductor or brakeman in charge of said train announced the station of Gaza, and notified plaintiff that said train was about to stop at said station. That immediately thereafter said train came to a full stop. That the plaintiff, acting upon the announcement, and under the directions, of said conductor or brakeman, and believing that said train had arrived at said station of Gaza, proceeded to alight from said train, and was in the act of stepping from the platform of said car, or the steps thereof, when the defendant's agents, servants, or employes who were running or operating said train, neg-

illegently and without any warning started said train suddenly and quickly, throwing the plaintiff to the ground with great force, and causing him to strike, upon his head and shoulders, upon the ties of said railroad and upon the ground, and against the car, thereby breaking his right shoulder, tearing, straining, and lacerating the cords and muscles of his arm, bruising and wounding him badly in the head and face, and other parts of the body, thereby rendering him unconscious for a long time, causing him severe pain and suffering in body and mind; and causing a permanent injury to his shoulder and arm, and severe and permanent shock to his nervous system. That by reason thereof he was, and still is, unable to do any kind of work or labor, and has been confined to his house for a long time. * * * That on the night the injuries occurred it was very dark, stormy, and cold, and that none of the employees of the defendant were at or near the point where the injury complained of happened. That there was no light near said point. That the car from which plaintiff alighted was not stopped at the platform of the station, but several feet therefrom, which fact was not at the time known to the plaintiff. That the defendant and its employees were negligent in not stopping said train long enough for plaintiff to alight, and in not drawing said car opposite the depot platform, and in not having lights at the place where plaintiff alighted, and in starting said train before plaintiff alighted, and in not giving plaintiff a reasonable time in which to alight. The plaintiff's injuries were directly caused by defendant's said negligence. And that plaintiff was free from negligence himself." The answer was a denial, and the issues were presented to a jury that returned a general verdict for plaintiff, with the following special findings: "Interrogatory No. 1. Did the train in question stop at Gaza, at the usual and customary place for passengers to alight? Answer. Don't know. Int. No. 2. Was the train in question stopped the usual and customary length of time on the night of December 2, 1890? A. Yes. Int. No. 3. Was the platform light burning at the time the train in question arrived at Gaza station? A. Yes. Int. No. 4. Was the front end of the car from which plaintiff fell at the platform provided by the company for passengers to get on and off the train when the train in question stopped? A. No. Int. No. 5. Did plaintiff go out on the rear platform of the car in question before the train came to a stop? A. Yes." From a judgment on the verdict, the defendant appealed.

J. F. Duncombe and T. F. Ward, for appellant. W. D. Boles and George F. Colcord, for appellee.

GRANGER, J. 1. There is an assignment of error based upon the refusal of the court,

at the close of the testimony, to direct a verdict for the defendant; but the same considerations are involved in another assignment,—that the verdict is not sustained by the evidence,—and they need not be considered separately. It is especially contended that the fourth special finding,—that the front end of the ladies' car was not at the depot platform when the train was stopped—is without support in the evidence. As we view the record, the fact very conclusively appears that the end of the car was, when the train stopped, at the platform, and we shall regard that as a fact in the consideration of the case. The favorable facts for the defendant, then, are that the train stopped at the usual place for passengers to alight; that it stopped the usual length of time; that the platform light was burning; that the front end of the car in which the plaintiff rode was at the platform; and that he went out on the rear platform before the car had stopped, and, in alighting, fell, and was injured. We are to consider these facts, with the evidence as to other facts, to know if, because of the plaintiff's own negligence, or a want of negligence on the part of defendant, there can be no recovery. Much importance is attached by appellant to the fact that plaintiff went to the rear, instead of the front, end of the car, to alight. As a matter of law, such an act was neither negligent nor improper. It is a matter of very common observation for passengers to leave cars from both platforms. This is a custom so general that it must be known to all railroad employees engaged on passenger trains. The different ways of going out are generally matters of choice or convenience to the passenger, more than of any regulation by the railway companies. Because of this custom, passengers may rightfully presume, until in some way the contrary appears, that either platform of a car is accessible for egress. If for any reason this right is to be restricted in particular cases, it is certainly the duty of the persons in charge of the train to use precautions against it, as by locking the door where egress is not intended, or placing some person there to give directions, or in some manner making known to the passengers the situation. The case of *Cartwright v. Chicago & G. T. Ry. Co.*, (Mich.), reported in 18 N. W. Rep. 380, is quite significant in several particulars regarding this case, and the cases, in principle, are quite parallel. In that case a passenger also left the car at the rear end, and it is said by Cooley, C. J.: "Passengers not only do leave the cars from the rear and front, indifferently, but they are suffered to do so without objection. * * * Under such circumstances it cannot be said that it is negligence per se for a passenger to leave a car at the rear." It is further said in the opinion: "We also think that passengers, where not notified to the contrary, may rightfully assume that it is safe to alight from the

car wherever it is stopped for passengers to leave it; and, if no light is given them to leave the car by, they are not to be charged with fault for leaving in the darkness." In the same case it is further said: "If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance, or give warning, or to move the car to a more suitable place." These propositions have support in authorities cited in that case, and accord with our understanding of the law. In that case neither end of the car was at the platform, but that fact was known to the passenger, and access could have been had from the car to the platform by passing through a front car. In this case the front end of the car was at the platform, but the rear end, where plaintiff went out, was not, nor was it light enough at that end for passengers to see to alight with safety. From the plaintiff's statements in evidence,—and he is the only one who knows the facts,—he was, when he fell, trying to alight onto the platform, which he supposed to be there, and the car was "jerked," and he fell upon the ends of the ties, and was injured. Under the rules of law, as we have given them, the jury could well find that it was negligence on the part of the company to leave the end of the car as it was, without warning to passengers, or proper precautions against their attempt to alight in such a place. By the same rules the jury could find that it was not negligence for plaintiff to attempt to alight there. The fact that plaintiff went out onto the platform before the car stopped does not change the situation. There is no evidence that he attempted to leave the platform while the train was in motion, and the evidence was such that the jury could reasonably have found that he did not. In addition to the special findings the jury must have found that the company was negligent, and the plaintiff not negligent, and we think the findings fully warranted, under the evidence. The foregoing considerations are conclusive of a number of questions presented in the case.

2. It is urged that the verdict is contrary to the seventh instruction given to the jury. We will not set out the instruction. It was given to meet a phase of the case, under the evidence, of the car not being up to the platform of the depot. We are now considering the case with it a conceded fact that the car was there. It is conclusive from the record that the plaintiff left the car from the rear end, without any knowledge or thought of whether the front of the car was at the platform, or not, and it is equally conclusive that the rear end of the car was not at the platform. These conclusive showings lead us to a conviction that the instruction, even if technically erroneous, could not have been prejudicial.

3. Some 17 instructions were asked by de-

fendant that were refused. Many of them are limited in their scope to the law applicable to a single fact, and in most of them the rule stated is correct; but they are so framed as to be inappropriate to a proper and fair presentation of the case to the jury. We illustrate by quoting the sixth: "It is not negligence for an engineer, after a train has stopped at a station, to let on the necessary amount of steam to overcome the friction of the track, even if thereby this did create a jerking motion of the train in question when it was started." Conceding the correctness of the instruction, as an abstract rule, it is so disconnected from the other facts with which it must be associated, when applied to the case, that its refusal was proper. There is no claim of negligence because of the "jerking motion" in starting the train, but the negligence consisted in the want of suitable conditions for alighting; and when he was attempting to reach what he supposed to be the depot platform, from the lower step of the car platform, the jerking motion came, and he fell. If it be admitted that the train was started in a proper manner the negligence is still the same. A careful reading of the instructions given and refused leads us to the conclusion that they involve no reversible error.

4. The court said to the jury that the plaintiff was entitled to recover, if at all, for "medicine and medical attendance, as shown by the evidence." It is urged that there is no evidence of any expenditure for medicine. Dr. Louthan testified that "his charges for the injury were \$25." Independent of that testimony, it does not appear that any medicines were bought. But certainly no prejudice resulted from such a statement in the instruction. It doubtless had reference to the cost of medical treatment, which might include medicine, and was so understood.

5. The plaintiff, as a witness, was asked the following question: "You may state whether you were directed by the defendant, or any one of its employees, or by its agents, to get off of the opposite end of this coach from the end that you did get off?" It is urged that the question is leading. We think not. It does not indicate the answer desired, and, in view of the information sought, it is not objectionable in form.

Dr. Louthan was called to see the plaintiff on the 3d day of December,—the day after the injury. He was again called the fore part of the next April, and said he found the plaintiff "suffering from erysipelas in his face and on his thigh." The following question was then asked: "Question. You may state whether or not his condition, as you have described it, in which you found him in April, was due to, or the result of, the injuries sustained by him on or about the 2d of last December, as you discovered them upon your visit to him upon the 3d of that month." It is contended that the question should show the facts upon which the expert testi-

mony is to be based, or the opinion is founded. The doctor had just stated the facts as to the plaintiff in December, and again in April, and the question was based on such facts. It was not necessary that the facts should appear again in the question. Both the witness and the jury understood the facts upon which the opinion was based.

6. Defendant offered in evidence certain time tables of the Dubuque & Sioux City Railroad and of the Illinois Central Railroad which were excluded as immaterial, and complaint is made of the ruling. The tables are not in the record, and of their contents we know nothing. The object of the evidence was to show that it was the Dubuque & Sioux City Company that was operating the road, instead of the defendant company, and hence the one liable. We cannot judge of the materiality of the evidence for that purpose, in the absence of the tables, or some means of knowing their contents.

There are some points that we have not particularly considered in the opinion, but a careful examination discloses no reversible error, and the judgment is affirmed.

STATE v. BLACK.

(Supreme Court of Iowa. May 15, 1893.)

BASTARDY—EVIDENCE—INSTRUCTIONS—PLEADING.

1. On a trial of bastardy, where it is alleged that the child was born May 12th, and complainant testifies without objection that she had intercourse with defendant in October preceding, which is not denied except by plea of not guilty, the admission of other testimony to the same effect, if erroneous, is without prejudice.

2. A charge that, if about the time complainant became pregnant she had sexual intercourse with other men, such fact should be considered, and if the evidence failed to satisfy their minds that defendant was the bastard's father, they should find for defendant, is not objectionable as requiring defendant to establish his innocence by a preponderance of evidence, when read in connection with the whole charge, by which the jury were plainly told the burden of proof was on the state.

3. Where the complaint is sent to the jury without objection, its sufficiency will not be reviewed where objection is raised for the first time on appeal.

4. Where the trial court reads the same charge twice, exception must be taken and preserved by bill of exceptions, and will not be considered on appeal on affidavit of counsel.

5. Where the evidence is conflicting, the verdict will not be disturbed on appeal.

Appeal from district court, Webster county; D. R. Hindman, Judge.

Proceeding under the statute to charge the defendant with the maintenance of a bastard child. Verdict and judgment for the state. Defendant appeals.

Botsford, Healy & Healy, for appellant. W. S. Kenyon, Co. Atty., and M. D. O'Connell, for the State.

KINNE, J. 1. This is a proceeding instituted in the name of the state at the in-

stance of Alice Roy, who charges that defendant is the father of her bastard child, born May 12, 1889. Alice Roy, it appears, had been acquainted with the defendant about eight years prior to the time the connection took place which she alleges resulted in the conception of her child. Her more intimate acquaintance with defendant began in 1888. She testifies to various acts of intercourse between her and the defendant in July, August, and October, 1888, and claims the child was the fruit of the intercourse had with him in August, 1888. Error is assigned in the admission of testimony of Alice Roy, Fred Hazelbrink, and William Quad as to acts of intercourse had between Alice Roy and defendant in October, 1888. In case of the last two witnesses the evidence was objected to as being incompetent, immaterial, and irrelevant; and in one case a motion was made to strike out the testimony so given. The objection and motion were overruled, to which timely exceptions were taken. It is urged that such evidence was not admissible, as connection had in October—two months after the alleged conception of the child—did not tend to establish the paternity of the child born May 12, 1889. Whether, in such a case, it is competent to show intercourse between the complainant and the defendant at a period so remote from the time the child must have been conceived, in the absence of evidence showing that the usual and ordinary period of gestation had not elapsed, we need not determine. The complainant testified without objection that she had intercourse with the defendant in October, 1888. It was not denied except by the plea of not guilty. The defendant did not go upon the stand. It follows, then, if the admission of other testimony to the same effect was error, it was without prejudice.

2. Exception is taken to the sixth instruction given by the court, and it is claimed that under it the defendant was required to establish his plea of not guilty by a preponderance of the evidence. The instruction reads: "Evidence has been introduced on the part of the defendant tending to show that at or about the time the complaining witness, Alice Roy, became pregnant, she had sexual intercourse with other men, and if you shall find from the evidence in this case that at, or about, the time the said Alice Roy became pregnant she had sexual intercourse with any other man or men, such fact should be duly considered by you, and given such weight as, in your judgment, it is entitled to; and if such evidence, when considered with all the other evidence introduced on this trial, fails to satisfy your minds that the defendant is the father of the child born unto the said Alice Roy, then your verdict shall be for the defendant." The instruction should be read in connection with the one which follows it, wherein the jury are plainly told that, even if they

and that the complainant did have connection with other men at or near the time the child was begotten, yet if they are fully satisfied from all the evidence that she became pregnant with and gave birth to a bastard child, that the mother and child are residents of that county, and that defendant was the father of the child, they would be justified in finding him guilty. While the latter part of the instruction under consideration is objectionable as to its phraseology, yet, when read in connection with the other paragraphs of the charge, it is not open to the objection urged. The jury could not fail to understand from the whole charge that the burden was on the state to establish the fact that the defendant was the father of Alice Roy's child.

3. It is said the court erred in sending the complaint to the jury. We do not find that any objection was made to the court's action in this respect. The first time the matter appears in the record is in the motion for a new trial. Even if it was error, (a point we do not decide,) defendant could not take advantage of it, having, so far as the record shows, permitted the complaint to be sent to the jury without any objection on his part.

4. It appears that for some reason, which is not disclosed in the record, the court read the seventh paragraph of the charge twice to the jury. It is claimed this prejudiced the defendant. No exception was taken at the time to this act of the court, and it is brought to our attention by affidavit of counsel. Whether the second reading was error would depend on the manner of the reading, and the reason for it. The record is silent as to these matters. Moreover, the matter presented should have been preserved by bill of exceptions. The record cannot be thus enlarged by affidavits. *Blanchard v. Devoe*, 80 Iowa, 521, 45 N. W. Rep. 911; *McArthur v. Schultz*, 78 Iowa, 364, 43 N. W. Rep. 223.

5. Counsel insist that the evidence did not justify the verdict, and, as usual in such cases, the evidence is conflicting. There is evidence showing intercourse between complainant and other parties about the time the child must have been conceived. It is denied by complainant, as also by some of the persons who are said to have been parties to the acts. Two or three young men, one of them a brother of defendant, testified to having had intercourse with the complainant about the time conception would ordinarily have taken place. It is evident the jury did not believe these witnesses. They had the witnesses before them. They could observe their manner and conduct upon the stand. It may have been such as to satisfy the court and jury of the falsity of their statements. If the jury did not believe them, and did believe the testimony of the state's witnesses, there was ample evidence upon which to base their verdict.

The defendant did not go upon the stand and deny the charge. We cannot disturb the verdict. We have noticed all the errors argued by counsel.

The judgment must be affirmed.

VAN METER v. CHICAGO & V. M. COAL-MIN. CO. et al.

(Supreme Court of Iowa. May 15, 1893.)

COAL LEASE—ABANDONMENT.

1. A lease, after giving a company the exclusive right to test, open, mine, and remove coal from certain lands, and to abandon the same if the coal should become unprofitable to work, continued as follows: "It is not the intention or expectation" of the company "to enter on the surface of any of the lands covered by this lease, but to work the coal through the now existing shafts;" the company "reserving the right to use any part of said surface only in case of unforeseen contingencies which may arise, rendering it necessary and profitable to do so." *Held*, that there was no obligation to open new shafts before exercising its judgment to abandon, but an obligation only to work out the existing shafts.

2. The provision allowing the company to "abandon the property, and be relieved from obligation," did not require the cancellation of the lease of record, or the cancellation of certain mortgages executed by the company on its interest, before the relief should become effective.

Appeal from district court, Dallas county; J. H. Applegate, Judge.

J. L. Platt is one of the defendants. On the 20th of July, 1891, the plaintiff made to Platt a written lease of certain described lands in Dallas county for the purpose of mining coal therein. After describing the lands, and the manner of working the mines, the lease contains the following: "It is further agreed and understood by and between the parties that, from and after the expiration of one year from the date hereof, said second party shall insure to said first party not less than \$500 per annum as revenue from royalty from coal to be mined from the lands covered by this lease. It is further agreed and understood that said second party may, in case the coal which may underlie said lands should prove unworkable, by reason of its being too thin, bad roof, or for any reason sufficient, in the judgment of said second party, to render it unprofitable to work the same, he may abandon the property, and be relieved from obligation on so much thereof as he may so abandon. Said first party also grants said second party exclusive right to test, open, mine, and remove said coal, and further grants the right to construct railroads, underground entries, and all necessary buildings and fixtures to facilitate the mining of said coal, for the term of 30 years from the date hereof, and the party of the second part agrees to pay to the party of the first part, as an annual rental, five dollars per acre for all lands, the surface of which said second party may desire to use for the construction of shafts, buildings, railroads, or other facilities for

the successful and convenient mining and removal of coal therefrom. It is, however, understood by and between the parties hereto that it is not the intention or expectation of said second party to enter upon the surface of any of the lands covered by this lease, but to work the coal therefrom through the now existing shafts and openings of the Chicago & Van Meter Coal Company; the said second party reserving the right to use any part of said surface only in case of unforeseen contingencies which may arise, rendering it necessary and profitable to do so. Said second party also agrees to pay to said first party, or to his legal representatives, as royalty, 8 $\frac{3}{4}$ cents per ton of merchantable coal taken from under said lands. Payments of royalty to be made monthly, and the amount of coal taken from said land to be reported monthly, in writing. It is also agreed that all coal mined from said lands is to be accurately weighed, and the weight to be kept in a book, which shall at all reasonable times be open for inspection of said first party; and it is further agreed that the party of the second part is to have the privilege of using said railroads, underground entries, buildings, and fixtures for the purpose of mining and removing coal from the lands, and after said mine becomes exhausted, or unworkable, said second party may continue the use of said railroads, underground entries, buildings, and fixtures by paying the said first party the rate hereinbefore specified and agreed upon as compensation for the use of surface." Platt made the lease, really, in the interest of the Chicago & Van Meter Coal Company, and by assignment the Chicago & Van Meter Coal-Mining Company became the lessee in lieu of Platt. This action is to recover \$500, with interest; it being for the royalty under the contract for the year 1890. The answer, by way of affirmative defense, shows that, prior to 1890, the defendant abandoned the property, and ceased to operate the mine, as was the defendant's right under the terms of the lease, because, in its judgment, the same was unworkable; the coal being "thin, uneven, and irregular." The issue was upon the affirmative defense in the answer, denied by operation of law. A jury returned a verdict for the defendants, and from a judgment thereon the plaintiff appealed.

White & Clarke, for appellant. Kauffman & Guernsey, for appellees.

GRANGER, J. The contentions in the case arise upon a construction of the written lease.

1. It is an undisputed fact that on the premises there were two veins of coal, designated as the "upper" and "lower" veins, and that at the time the lease was made the lower vein was being worked by the Chicago & Van Meter Coal Company by

means of shafts and openings therein, and are those mentioned in the lease. No other shafts nor openings were made for the purpose of working or discovering workable mines on the land leased. Upon the question of the defendant's right of abandonment, the court gave the following instructions, which constitute a ground of appellant's complaint: "(6) If you find from the evidence in this case that, at the time of the execution of the lease between the plaintiff and the defendant James L. Platt, the Chicago & Van Meter Coal Company was mining coal from what was known as the 'lower vein,' and that the shaft and openings then used by the said company was so built and constructed as that coal could be mined and taken from what was known as the 'upper vein,' then the defendant had no right to abandon said leased premises, unless the coal under said leased premises, in both the upper and lower veins, were or had become unworkable, by reason of being too thin, bad roof, or for some other reason which, in the judgment of the defendants, honestly and fairly exercised, rendered it unprofitable to work either of said veins. In determining whether the upper vein was unworkable by reason of being too thin, or bad roof, or whether any other reason, in the fair and honest judgment of the defendants, rendered it unprofitable to work said upper vein, you should take into consideration all of the testimony in the case, and all the facts and circumstances developed by the proof; and if you find that the defendants, upon the facts and under the circumstances developed by the proof, honestly and fairly concluded that said upper vein could not be profitably worked, by reason of being too thin, bad roof, or for any other reason in the fair and honest exercise of judgment, then the defendants had the right to abandon said premises without testing said vein immediately under the surface of the lands covered by the lease between the plaintiff and the defendant James L. Platt. (7) The defendants were under no obligations to prospect for coal at different points or places on said leased premises, and ascertain that there was no workable coal under any part of said premises. They had the right, under and by virtue of the lease of said premises, to abandon said property if the vein or veins being worked, or that could have been worked, from the shafts and openings of the Chicago & Van Meter Coal Company, existing at the time of the execution of said lease between the plaintiff and defendant James L. Platt, became or were unworkable by reason of the coal being too thin, bad roof, or for any reason which, in the judgment of the defendants, honestly and fairly exercised, rendered it unprofitable to work said mine." Appellant asked several instructions, but the following will indicate the rule of law as claimed, and quite clearly present the legal proposition to

be considered: "(2) The defendants were not, in the working and mining coal from plaintiff's lands, confined to the use of the shafts and openings of the Chicago & Van Meter Coal Company, in existence at the date of the lease in controversy, in case the coal became unworkable therefrom, but might employ any part of the surface of plaintiff's lands for such shafts and openings as were necessary and profitable for such working; and it was their duty to do so, if thereby they might reasonably find and work workable coal on plaintiff's lands." "(5) Before the defendants would have a right to abandon the whole of the plaintiff's lands upon the ground that, in the exercise of a fair and reasonable judgment, the coal thereunder had proved unworkable, they must either determine that fact by actually mining coal therefrom, or by such tests as are ordinarily employed by persons conducting such operations for the purpose of ascertaining whether there is workable coal thereon." It will thus be seen that the point of difference arises upon the obligation of the defendant to do more than to work and prospect from the shafts and openings of the Chicago & Van Meter Coal Company, in order to properly exercise its judgment as to there being "workable coal," so as to require it to continue operations under the lease. It seems to us that the language of the lease gives full support to the rule adopted by the district court. We quote: "It is, however, understood by and between the parties hereto that it is not the intention or expectation of said second party to enter upon the surface of any of the lands covered by this lease, but to work the coal therefrom through the now existing shafts and openings of the Chicago & Van Meter Coal Company." Thus far the language is not open to construction. It seems conclusive in its support of the action of the court. But the following is to be added as a part of the sentence, which, it is urged, so modifies it as to sustain appellant's view: "The said second party reserving the right to use any part of said surface only in case of unforeseen contingencies which may arise, rendering it necessary and profitable to do so." The latter language is but the reservation of a right to be exercised if a contingency then unforeseen should arise. There could be no contingency to justify the exercise of the reserved right until it was seen or known. Before such a contingency arose, defendant would have no right "to enter upon the surface of any of the lands" covered by the lease "to work coal therefrom." It seems to us this language is unmistakably plain. Without the reservative clause of the lease, defendant would have no right whatever to mine coal, except from the shafts or openings specified. The reservation is in the nature of a privilege. It does not impose an obligation. It is said by appellant: "Such unforeseen contingency would

be the existence of a workable vein on plaintiff's land, not necessarily by way of the existing shaft." But, if there is such a vein, it is still "unforeseen." It has not arisen,—that is, "come into notice" or "become visible," which is the evident meaning of the word "arise," as used in the lease. But, if it had arisen, it is then, as we have said, but the privilege, and not the obligation, of the defendant, to work it, by the terms of the lease. The court did not err in the instructions given, and hence not in refusing those asked.

2. The defendant, after the lease was made, executed certain mortgages upon its interest in the leased premises; and its acts of abandonment were, merely, to cease operating the mine, and the removal of machinery and the appurtenances. It is urged that there could be no abandonment without the cancellation of record, and a surrender, of the leases, and also a cancellation of the mortgages. The language of the lease in regard to abandonment is as follows: "It is further agreed and understood that the second party may, in case the coal which may underlie said lands should prove unworkable, by reason of its being too thin, bad roof, or for any reason sufficient, in the judgment of the said second party, to render it unprofitable to work the same, he may abandon the property, and be relieved from obligation on so much thereof as he may so abandon." We can see no relation whatever between these instruments of record and the obligation to pay a royalty upon coal that should be mined. Concede that the instruments of record might in some way cast a cloud upon the title to the land, and the conclusion is the same. When the lease was made it is not probable, if even possible, that the parties contemplated that the act of abandoning the property should in any degree consist of such an act as canceling instruments of record. It is, however, highly probable that they contemplated just what was done in this case,—that is, to quit; to stop the work entirely. The instruments of record will not continue the operation of the lease so as to entitle plaintiff to royalty. If he is damaged thereby, it is a question independent of this proceeding.

The judgment is affirmed.

MERCHANTS' & MECHANICS' SAV. BANK v. HOLDREDGE, (LOVEJOY, Intervener.)

(Supreme Court of Wisconsin. April 11, 1893.)

CHattel Mortgages—Crops Afterwards Planted.

1. A person conveyed land for a nominal sum, subject to several mortgages, in which the grantee was interested. By an agreement made at the time, the grantee was to sell the grantor the same land on semiannual payments; the grantor to pay taxes, insurance, and costs of foreclosure, if necessary. Possession was to remain in the grantee until part of

the debt should be paid, and until then all crops, except, etc., were to belong to the grantee, who was to apply the proceeds on the debt. In case of default the agreement was to be void, and the grantor to deliver up the premises to the grantee. Held an attempted mortgage of crops afterwards to be planted, and therefore inoperative as to creditors.

2. There having been no change of possession, the agreement was inoperative, also, as to creditors, under Rev. St. § 2313, whether their rights accrued before or after its date, or the time when the crop was raised.

3. A stipulation allowing the mortgagor to retain such portion of the crops raised from year to year, for at least 10 years, as might be necessary to feed the stock, and furnish food for the family, was inoperative.

Appeal from circuit court, Rock county; John R. Bennett, Judge.

Action by the Merchants' & Mechanics' Savings Bank against S. Holdredge, garnishee of J. L. Robinson, Sebastian S. Lovejoy, intervening claimant, and J. L. Robinson. Judgment, from which plaintiff appeals. Reversed.

The other facts fully appear in the following statement by PINNEY, J.:

The appellant commenced an action against the defendant Robinson to recover the amount of three promissory notes, and at the same time summoned the defendant Holdredge, as garnishee of Robinson, to reach the proceeds of the sale of some tobacco from Robinson to Holdredge. The answer of the garnishee disclosed that the sum of \$247.60 was due from him to Robinson for the tobacco, or whoever owned it; that he had been notified by S. S. Lovejoy that he claimed to own Robinson's interest in the tobacco under some contract or agreement; that he was ready and willing to pay the amount to whoever might be entitled to it, and he desired that question should be determined by the court. Under proper orders, the garnishee paid the money into court, and Lovejoy was made a party defendant in respect to his claim, and he appeared and litigated his right to the money with the plaintiff, when it appeared that the farm upon which the tobacco was raised had been conveyed November 7, 1887, by Robinson and wife, to the defendant S. S. Lovejoy, for the nominal sum of one dollar, subject to three mortgages thereon, one of which was to the said Lovejoy and A. P. Lovejoy, and on the same date a certain agreement was executed between the defendant Lovejoy and the defendant Robinson, by which it is stated that the former, in consideration of the payment of the money and the performance of the covenants therein specified as conditions precedent, agreed to sell to the latter the same lands for \$3,685, in semiannual payments of \$50 each, with interest at 8 per cent., payable annually. This agreement contained covenants by Robinson to pay all taxes thereafter assessed on the premises, and, in case of foreclosure, all the taxable costs and expenses thereof, and to keep the buildings on the premises insured for not less than \$1,800,

—policies to be made payable or assigned to Lovejoy as his interest might appear; and it was agreed "that the possession of, all and singular, the said premises agreed to be conveyed, shall be and remain in said party of the first part [Lovejoy] until the sum of \$1,000 of the aforementioned principal sum of \$3,685 shall be paid, together with all interest then due upon said principal sum, and until such time all crops raised upon said premises, or any part thereof, except such portion thereof as may be necessary to feed the stock on said premises belonging to the said party of the second part, [said Robinson,] and such as he may use for food in his family, which is to be apportioned and set apart by the parties acting mutually, when each crop, respectively, is in readiness therefor, shall belong to, and be the sole property of, the party of the first part; but said party of the first part is to apply the net proceeds arising from the sale thereof in part payment of said principal and interest payable to him as aforesaid, applying the same first to the payment of interest, and any excess of such proceeds above what shall be necessary to pay interest to be applied upon the principal; and said party of the second part agrees to farm said land in a husband-like manner for the party of the first part, and store all crops raised thereon for the party of the first part, on said premises, in due season." It was further agreed that upon faithful performance by the party of the second part of his undertaking, and payment of principal, interest, and taxes, the party of the first part should and would execute to him a good and sufficient deed of said premises; that the payment of said purchase money when due was a material part of the agreement, and in case of any default therein the agreement was to be void, and all payments made thereon forfeited, and in case of any default in making payments of the principal sum, interest, or taxes, the party of the second part should forthwith deliver up the premises to the party of the first part. It was proved by Robinson that he had lived on the farm 15 years, and ever since he moved on it, and lived there when he deeded it to Lovejoy, and had worked the land under the contract, and raised the tobacco under it, and signed the contracts for its sale, and acted for him, with his sanction, in doing so. Lovejoy testified that Robinson had paid him nothing on the contract, aside from what he had received from the crops; that he had not received as much as \$200 to apply on the principal; that he had a running account with Robinson, for things he had let him have, to come out of what he might pay, and he did not think the interest was hardly paid up to January 16, 1891, and that there had been no settlement between them since the making of the contract; that he had never personally sold anything raised on the farm; that the first object in taking the contract was to

get their pay. Robinson did all the work, and furnished all the seed and tools. Being asked why the clause was put in the contract in relation to the title to the crops remaining in him, he answered, "So they would be mine, and so nobody could touch them but me." Question: "Did you do it to secure you for the payment of this \$1,000 principal?" Answer: "Perhaps it was security. I don't know. It was so that no one else could take hold of them, if he had any other debts. They might think they were his crops, and make some costs, without reason. I allowed him to take, out of the crops he raised, a sufficient amount to feed his stock he had on the premises, and a sufficient amount each year to take care of his family, and to pay his expenses. He has used all of the crops that I did not get. I have no account whatever of what he has used. All the account I have is what he has brought me, but he has not brought it all to me. I have allowed him to sell out of the crops, and buy other things with it. All I want or expect to get is \$3,685, together with the interest. Of the several mortgages mentioned in the deed of Robinson to me, put in evidence, I was only interested in the last one,—the one to A. P. and S. S. Lovejoy." Testimony was given to the effect that the land was worth from \$20 to \$30 an acre; Lovejoy testifying that he did not consider it worth any more than the amount stated in the contract; that he was unwilling longer to hold the mortgage; "thought we had got about as far as the land would hold; that it was about as much as we wanted to carry on it." The said agreement was duly witnessed and acknowledged by both parties, but had not been recorded in the office of the register of deeds for Rock county, nor filed in the office of the proper town clerk. It appeared that the deed and agreement were given to secure a previous indebtedness against Robinson, the entire amount of which is stated in the agreement, and was included, it seems, in a former mortgage given by him on the farm. The plaintiff recovered in the action against Robinson, April 25, 1892, \$194.79, damages and costs. The amount paid into court by the garnishee was \$247.60. The court found that the tobacco was planted, cultivated, grown, harvested, stored, and kept upon said land for said Lovejoy under the contract, and that he was at all times, from the planting of said tobacco until the sale and delivery thereof to the garnishee, the owner of the tobacco; that Lovejoy authorized Robinson to sell it for his account, but not as the property of, or for the account of, Robinson; and that the indebtedness was due from the garnishee to Lovejoy, and not to Robinson; and that the defendant Lovejoy was entitled to have the money paid over by the clerk to him, (said Lovejoy;) and judgment was rendered accordingly, and for costs against the plaintiff, and discharging said Holdredge from liability for the money

paid into court. The plaintiff took proper exceptions to the findings, and appealed from the judgment.

Dinwiddie, Goldin & Wheeler, for appellant. William Ruger, for respondents.

PINNEY, J., (after stating the facts.) 1. There can be no doubt but that the deed and agreement, which were clearly given to secure the debt of Robinson to Lovejoy, constituted a mortgage. It is settled that whenever property is transferred, no matter in what form, or by what conveyance, as a mere security for a debt, the person to whom the transfer is made takes merely as a mortgagee, and has no other rights or remedies than the law accords to mortgagees. We have here an absolute deed, and a defeasance in a separate instrument, and the two constitute a mortgage. *Howe v. Carpenter*, 49 Wis. 702, 6 N. W. Rep. 357; *Brinkman v. Jones*, 44 Wis. 498; *Schreiber v. Le Clair*, 66 Wis. 579, 29 N. W. Rep. 570, 889; *Starks v. Redfield*, 52 Wis. 352, 9 N. W. Rep. 168; *Holle v. McCulloch*, 58 Wis. 448, 17 N. W. Rep. 322; *Phelan v. Fitzpatrick*, (Wis.; Jan. term, 1893,) 54 N. W. Rep. 614. Robinson remained the owner of the legal title, and Lovejoy had a mere security, not a title. He could acquire the title only upon foreclosure and sale, or by some arrangement with Robinson which would operate to extinguish his equity of redemption. It is impossible to hold that it was the intent that the deed and contract should so operate, and secure to Robinson merely a conditional right of purchase. There was no extinguishment of the pre-existing debt against Robinson. The amount he is to pay to obtain a deed is the precise amount of that debt, and Robinson still remains Lovejoy's debtor,—a circumstance, in itself, usually held decisive. But the testimony of Lovejoy is conclusive, and is, in substance, that "the taking of the contract was to get our pay for the debt he owed us," and that the amount of the previous indebtedness is stated in the contract. He testified, in effect, that his purpose in making the provision in the agreement in regard to the title to the crops was to get security, and so no one could take the crops, if he had any other debts. The stipulation was not for a general surrender of possession by the mortgagor to the mortgagee, but is special in character and purpose; and the possession was to remain in Lovejoy only until \$1,000 of the principal sum, and all matured interest, should be paid. But it is clear that it was intended that Robinson should remain, as he did in fact, in possession, as he had theretofore; for it is stipulated that in case of default on his part he "would forthwith deliver up the said premises" to the said Lovejoy. The provision in question, when fairly construed, amounts to no more than an attempted mortgage or pledge of the crops that might be thereafter

planted and raised on the premises, until the \$1,000 and matured interest should be paid, —a right which would not be secured by an ordinary mortgage, and which was not to continue until the remainder of the debt should be paid. The objections to the claim set up by Lovejoy to the fund paid into court out of the crop planted and raised three years after the execution of the agreement are insuperable.

2. Robinson could not grant or mortgage that which he did not actually or potentially own, either absolutely or by way of security. The crop raised on the farm by him in 1890 was not in existence when the agreement was made, either actually or potentially; and Robinson could not, therefore, grant it by way of security. The seed had not been planted, and had not germinated so as to constitute a possibility coupled with an interest which might be the subject of sale or transfer. Conceding that, within some of the authorities cited by respondents, the agreement would be operative when the crop should come into existence. (*McCaffrey v. Woodin*, 65 N. Y. 459.) or would amount to a revocable license to Lovejoy to enter on the premises, and take the after-acquired crops, according to the terms of the license, or that it might be made operative by a delivery, or other equivalent, of the crops after they were raised, still it is plain that in this view of the case the agreement, as a title or charge on the crops, was inoperative in law, and invalid as to creditors. That the provision in question would be invalid as to crops thereafter to be planted was settled in *Comstock v. Scales*, 7 Wis. 159, and reaffirmed in *Lamson v. Moffat*, 61 Wis. 153, 21 N. W. Rep. 62. The subject-matter not being in existence, there was nothing for the agreement to operate on until the crops were raised and delivered. The case of a lien reserved in like manner by a landlord, in a lease, upon crops to be raised by a tenant for rent to accrue, has been thought to be an exception to the ordinary rule that a mortgage upon after-acquired property, without some further act to attach the property to it when it is acquired or comes into existence, would be void. *Andrew v. Newcomb*, 32 N. Y. 417; *Reynolds v. Ellis*, 103 N. Y. 115, 8 N. E. Rep. 392. The doctrine of *Comstock v. Scales* has been strictly adhered to in this state in many subsequent cases. *Chynowith v. Tenney*, 10 Wis. 397; *Single v. Phelps*, 20 Wis. 398; *Mowry v. White*, 21 Wis. 417. In *Hunter v. Bosworth*, 43 Wis. 590, the court was 'appealed to, strongly, to reverse the rule of *Comstock v. Scales*, but without effect. *Funk v. Paul*, 64 Wis. 35, 38, 24 N. W. Rep. 419; *Bank v. Knowles*, 67 Wis. 386, 28 N. W. Rep. 225. In *Single v. Phelps*, 20 Wis. 398, where there was no subsequent act ratifying such security, as delivery of the property after it came into existence, or setting it apart with intent that the mortgage should apply to and

blind it, it was held that the filing of such a mortgage in the town clerk's office would be wholly inoperative, and would furnish no notice that any property had been subsequently acquired, or that any subsequent act had been performed, necessary to make it operative in respect thereto. It is plain, therefore, that such a mortgage, even though filed in the proper town clerk's office, would be wholly inoperative, as to creditors or subsequent purchasers, unless, before their rights attached, the property was delivered to the mortgagee, or the subsequent act necessary to make it valid was performed; and this would seem to render actual possession necessary by the mortgagee of such property, in order to be able to maintain his rights in respect to it. For want of such actual and continued possession of the property claimed to be affected by it, the agreement was absolutely void as to the creditors of Robinson, whether prior or subsequent to its date, or to the time when the crop was raised. *Rev. St. § 2313*. It is sufficient that the relation of debtor and creditor existed between the plaintiff and Robinson at some time while the goods were in the actual possession of the debtor. *Reynolds v. Ellis*, 103 N. Y. 115, 8 N. E. Rep. 392. The law does not favor secret liens on property, such as the one asserted by Lovejoy to the crop in question, on account of the deceitful and fraudulent use that may be made of them, to the prejudice of creditors and subsequent purchasers. Robinson remained in possession of the premises, and of the crops raised from time to time thereon, and apparently as the owner of them, in like manner as before the execution of the agreement; and this fact furnished the ready basis of credit by which persons might be drawn in to deal with him on the faith of his ostensible ownership. And if it be conceded that the agreement was valid and operative, as between Robinson and Lovejoy, it certainly was not as against the former's creditors, either prior or subsequent, for reasons already stated.

3. In addition to the objections already noticed, as against Robinson's creditors, the stipulation in the agreement in respect to the crops was fraudulent and void in law, for the reason that there was reserved in it to Robinson, as mortgagor, the right to such portion of the crops raised from year to year as might be necessary to feed the stock on the farm, belonging to him, and such as he might use for food in his family, to be apportioned and set apart by the parties when the crop should be in readiness; thus reserving to him, as against his creditors, a substantial trust, for his benefit, in every crop that might be raised under this arrangement, and which it was at the time contemplated should continue at least 10 years. The case, in principle, is not distinguishable from that of *Blakeslee v. Rossman*, 43 Wis. 116. The validity of such a security is not an open question in this

state. It is not a question of intent, for the arrangement necessarily tends to hinder, delay, and defraud creditors, and the fraud which the law imputes to it is conclusive, and no amount of evidence of good intent will suffice to remove the fraudulent taint imputed to it as a matter of law. *Anderson v. Patterson*, 64 Wis. 557, 25 N. W. Rep. 541. It is impossible to overlook or ignore the manifest fraudulent character of this agreement, as against creditors. If sustained, it would furnish an apt and ready device to cheat and defraud the creditors of every person engaged in similar pursuits, and in embarrassed circumstances, so that he might take to his own use a large portion of the annual profits of his lands, and hold them in defiance of creditors, if he happened to have a friendly mortgagee at hand, willing to enter into such an arrangement with him as the one disclosed by this record. Mr. Lovejoy had no right to use his debt and mortgage security for any such improper purpose, and his testimony shows that it was intended, in point of fact, that this instrument should have precisely the effect that we ascribe to it in law, namely, "so that no one else could take hold of them, [the crops,] if he had any other debts. I allowed him to take out of the crops he raised a sufficient amount to feed his stock he had on the premises, and a sufficient amount, each year, to take care of his family, and to pay his expenses. We have never had any particular settlement. He has used all the crops that I did not get. I have no account whatever of what he used. * * * I have allowed him to sell out of the crops, and buy other things with it." It being incontestable that this provision was given by way of security, and has the effect of a mortgage on the crops to be thereafter raised, it is impossible to sustain it, as against the claim of the creditors of Robinson, either prior or subsequent, for manifestly it was aimed against both, and was to be operative, as already observed, for the period of at least 10 years. It is not only fraudulent in law, but the evidence tends strongly to show that it is fraudulent in fact. It was but a fair inference that it was intended for the purpose for which the parties have used it, and is of such a mischievous and reprehensible character that we cannot hesitate to condemn it. For these reasons the judgment of the court, awarding the money paid into court by the garnishee to the defendant Lovejoy, was erroneous, and must be reversed.

The judgment of the circuit court is reversed, and the cause remanded, with directions to give judgment in favor of the plaintiff for the fund paid into court, or against the party to whom it has been paid, for the amount of his judgment and costs.

CASSODAY, J. (concurring.) I have no doubt a valid stipulation may be inserted

in a real-estate mortgage, whereby the mortgagee may be deemed to be in possession, and the mortgagor, as his agent, continue to occupy, cultivate, and dispose of the crops, and, after paying the expenses for doing so, apply the net proceeds in payment of the mortgage debt. Especially may this be done where, as here, the old mortgage is overdue, and inadequate security, and a new, equitable mortgage, containing such stipulation, is taken in lieu thereof. The difficulty with the stipulation in question is that Robinson thereby reserved to himself such portion of the crops raised on the premises as might be necessary to feed his stock and support his family, without any regard to the expense of raising such crops. This seems to be a conveyance or transfer in writing, therefore, of goods, chattels, or things in action, made in trust for the use of the person making the same, and hence, under the statute, is void against the creditors, existing or subsequent, of said Robinson. Section 2306, Rev. St. It also appears to be in conflict with the statute which declares, in effect, that every conveyance or assignment, in writing, of any estate or interest in lands or in goods, or of any rents or profits issuing therefrom, and every charge thereon, made with the intent to hinder, delay, or defraud the creditors of the person making the same, should be void. Section 2320. For these reasons I concur in the decision in this case.

STANDARD LIFE & ACC. INS. CO. v. BOARD OF ASSESSORS OF DETROIT.

(Supreme Court of Michigan. April 28, 1893.)

TAXATION — INSURANCE COMPANIES — CONSTITUTIONAL LAW — UNIFORMITY — RIGHT TO DEDUCT REAL-ESTATE MORTGAGES FROM NET ASSETS.

1. Pub. Acts 1891, No. 200, provides that, in computing the taxable property of insurance companies organized under the laws of the state, the value of the land on which the company pays taxes shall be deducted from its net assets above all liabilities, as shown by the last report of the insurance commissioner, and the remainder shall be the amount for which the company shall be assessed. Pub. Acts 1893 amend such a statute by adding a proviso thereto that no such deduction shall be made for real-estate mortgages owned by such companies. *Held*, that such amendment, so far as it provides that there shall be no deduction from their assets for mortgages upon which they pay taxes, is in contravention of Const. art. 14, §§ 11, 12, providing that taxation shall be uniform, and that all assessments on property shall be at its cash value.

2. The fact that the assessors of a certain city have not assessed any mortgages against an insurance company therein does not render an assessment by them, without deducting such mortgages from its assets, legal, where no deduction has been made from its assets for mortgages held by it in other counties, which have been assessed or are liable to assessment.

Proceeding by the Standard Life & Accident Insurance Company against the board of assessors of Detroit for a writ of mandamus requiring defendants to deduct from

the assessment made against plaintiff the amount of the real-estate mortgages held by it. Writ granted.

Keena & Lightner, for relator. John J. Speed, for respondents.

MONTGOMERY, J. The tax law of 1891 (Act No. 200, Pub. Acts 1891) provided for the assessment, as personal property, of all shares in banks organized in this state under any law of this state or of the United States, at their cash value, after deducting the value of the real estate taxed to the banks. It also provided that, in computing the taxable property of insurance companies organized under the laws of this state, the value of the real property on which the company pays taxes shall be deducted from its net assets above all liabilities, as determined and shown by the last report of the commissioner of insurance, and the remainder shall be the amount for which the company shall be assessed. In the case of Common Council of City of Detroit v. Board, etc., of City of Detroit, 91 Mich. 78, 51 N. W. Rep. 787, it was held that Act No. 200, above referred to, was intended to treat real-estate mortgages as an interest in realty, for the purpose of taxation, and that the amount of real-estate mortgages assessed to banks and insurance companies should be deducted from their assets, in making the assessment. By an act of the present legislature the provisions of Act 200 have been amended by adding a proviso to each of sections 2 and 4 of the tax law of 1891, which provides as to each that no such deduction shall be made for real-estate mortgages owned by such banks or insurance companies. In the present case, relator contends that this provision is unconstitutional. Sections 11, 12, art. 14, of the constitution, read as follows: "Sec. 11. The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law. Sec. 12. All assessments hereafter authorized shall be on property at its cash value." It is clear, in so far as the amendments to sections 2 and 4 attempt to provide that banks and insurance companies shall not have deducted from their assets the amount of real-estate mortgages upon which they respectively pay taxes, they are in contravention of these provisions of the constitution. If the net assets of these institutions should consist wholly of real-estate mortgages, then, under the terms of the law of 1891, as amended, the corporations would be assessed for the full amount of their net assets, and also a like amount upon the real-estate mortgages held by such companies. That this is a violation of the rule of uniformity of taxation, it needs no argument to demonstrate. See Attorney General v. Board of Supervisors, 71 Mich.

16, 38 N. W. Rep. 639; San Mateo County v. Railroad Co., 8 Sawy. 238, 13 Fed. Rep. 722; Woodbridge v. Detroit, 8 Mich. 801; Bank v. Britton, 105 U. S. 822. It appears from the answer of the respondents in the present case that they, as assessors of the city of Detroit, have not assessed against the relator any mortgages. It does not appear, however, whether mortgages held by relator in other counties have been assessed or not. To the extent that such mortgages have been assessed, or are liable to assessment, it is the duty of the respondents to deduct the amount thereof from the assessment made, and mandamus will issue, directing such action.

LONG, J., did not sit. The other justices concurred.

PARKER v. ST. MARTIN et al.

(Supreme Court of Minnesota. April 7, 1893.)

REDEMPTION FROM MORTGAGE FORECLOSURE— VALIDITY OF PRIOR LIENS.

1. A subsequent lienholder cannot be deprived of his right to collect his debt by redemption, to the extent of the value of the property over the amount paid to redeem, by the interposition of the liens of fraudulent and simulated securities. But, if thereby prevented from redeeming, his damages would not exceed the amount of his debt.

2. In a case where a lien creditor redeems from a prior lienholder and redemptioner, and the property is ample security for all the liens, the court will not, at the instance of such subsequent lienholder, undertake to inquire into the validity of amount due on prior liens in order to enhance the value of the property in the hands of the last redemptioner.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Cauty, Judge.

Action by Hazen M. Parker against Emanuel S. St. Martin and others to recover the amount of a mortgage fraudulently placed on land by defendants, and redeemed by plaintiff as subsequent lienor. Judgment for defendants. Plaintiff appeals. Affirmed.

Hazen M. Parker, for appellant. James W. Lawrence, for respondents.

VANDEBURGH, J. In 1884 one Peterson died seised of the lands described in the complaint, then subject to a mortgage thereon, previously executed by him to the Northwestern Mutual Life Insurance Company. He left, him surviving, his wife, Hilda, and four minor children, to whom the land was assigned by the probate court, in the proportion of one third to the widow, and the remaining two thirds to the children, undivided. The mortgage was afterwards foreclosed, and the year for redemption expired January 27, 1890. Prior to the foreclosure the defendant St. Martin was appointed guardian of the estate of the minor children, and on or about December 30, 1889, he obtained a license of the probate court to sell

their interest in the land at private sale. It is further alleged in the complaint, and admitted by the demurrer, that on the 25th day of January, 1890, the three defendants conspired together to cause a mortgage to be made of the two-thirds interest of the minor children, alleged to be without consideration, but nominally for the sum of \$1,500 and interest, which should be an apparent incumbrance thereon for that sum; the object being to practice a fraud upon subsequent lienholders who should redeem from such foreclosure sale, and thereby secure to themselves the amount of the consideration named in the mortgage in case such subsequent lienholders, or any of them, should redeem. To this end it was agreed between the defendants that St. Martin, acting as guardian, should sell the interest of the minor children to defendant Ballif under the probate license, and that the latter should execute the mortgage as above described, with note for same amount, to McLeod, without any consideration running from the latter. It was also agreed between them that Ballif should make no redemption, but McLeod should redeem by virtue of his mortgage, as a creditor having a lien, and that, in case any subsequent creditor having a lien should redeem from him, then, from the redemption money paid him, to the amount of the mortgage, should be paid Ballif's purchase money for the land conveyed to him by the guardian's deed, (\$650,) and the balance should be divided between the defendants. The guardian's report of sale was made and approved January 25, 1890, and the same day the deed was recorded, and also the mortgage to McLeod, who also, at the same time, filed notice of his intention to redeem; he being the fifth in order of redemption creditors. None of the owners of the land having redeemed, the creditors made redemption in their order. Subsequently to the execution of the mortgage, and on the 27th day of January, 1890, the plaintiff recovered a judgment against Hilda Peterson which on that day became a lien on her one-third interest in the land, and on the same day filed notice of intention to redeem. There were other redemption creditors subsequent to the mortgage, but having liens prior to that of plaintiff, so that plaintiff was the last redemption creditor, and the eighth in order. The amount of plaintiff's judgment was \$52.37; but neither the value of the land nor the amount of the lien claims, save as above stated, appears. The plaintiff made final redemption, and in the amount paid was included the sum of \$1,513.60, being the amount of the mortgage above referred to, and the interest thereon, as called for by the terms of the same; and the defendants, it is alleged, recovered the same of the redemption creditors entitled to redeem next in order to the mortgage, and applied and divided the proceeds as they had previously agreed to do, as above stated. The plaintiff had no notice of the fraudulent character of

the mortgage, and was deceived thereby, and made redemption in reliance upon the record thereof as a valid lien. The plaintiff therefore claims that as the result of the alleged conspiracy, and the fraudulent conduct of the defendants, he was obliged to pay the amount of the mortgage in addition to what he was lawfully required to do in order to effect redemption; and he claims that he is entitled to recover the same of the defendants, on the ground that the mortgage was absolutely without consideration, and that McLeod was not in fact a creditor having a lien, entitled to redeem, but was a fraudulent redemptioner.

On the first impression the case stated in the complaint seems very plausible, but upon a careful examination it will appear, we think, that it fails to make a case warranting a recovery by the plaintiff. It omits any reference to some matters essential to be considered in order to a clear understanding of the case, but which cannot well be overlooked in the discussion. In the absence of any allegation as to the value of the property, or the amount of the original mortgage and other liens, we may infer that it was sufficient to pay them all, including plaintiff's judgment, notwithstanding McLeod's intervening incumbrance. Again, nothing is stated in respect to the understanding between the parties in the event that there should be no redemption from McLeod, and the title should finally rest in him, but it is proper to consider the legal relations and rights of the parties in that contingency.

The first and most essential condition of the contract was that McLeod should make the redemption, and secure the title. The stipulation as to the division of the profits depended upon a subsequent redemption from him. The guardian's sale, mortgage, and redemption by McLeod were, according to the agreement, to be parts of one entire transaction. It was a device or plan to secure a redemption. It was doubtless also anticipated that other lienholders would redeem from McLeod, but if they had not done so the legal title would have passed to him; for there is no question that his redemption was effectual, as between the parties. In that case McLeod would either be adjudged to hold the title as trustee, subject to an accounting for his advances, or he would be obliged to pay over the consideration of his mortgage.

The fact that no consideration money was paid to Ballif at the time did not necessarily make the mortgage without consideration, as between McLeod and the real beneficiaries, especially if, as we think may be inferred, the consideration for the guardian's sale was raised by, and was to come from, the McLeod mortgage, as a part of the transaction; and, since the redemptions have been made under and from it, it cannot be treated as wholly invalid, for the purposes of this case. If the facts alleged are true, the par-

ties may still be liable to account for the proceeds of the mortgage, as if actually advanced, on the application of the minors, if they have not voluntarily done so. If the consideration had been paid over at the date of its execution, its validity could not have been questioned by creditors, for the owner of property may incur it; but the result would have been no different, as respects subsequent redeeming creditors. It is not alleged that the incumbrance was excessive. A subsequent lien creditor is entitled to his right to secure the amount of his debt by redemption, if the property is sufficient. He cannot lawfully be deprived of this right by the interposition of apparent and simulated, but spurious, circumstances. What the exact form of remedy should be, in any particular case, it is not necessary to determine here. But if fraudulently prevented from redeeming, or his right to do so is seriously impaired, his damages would not exceed the amount of his debt and expenses necessarily incurred. The court will not consider the speculation or extra value of the land beyond this, or allow him the benefit of his bargain in addition to the recovery of his debt. In this case it does not appear that the incumbrance in question was void or excessive, or that the property is not amply sufficient to pay all the creditors, including this mortgage, or that the plaintiff would be willing to surrender the property, if fully reimbursed and his own debt paid. The purpose of the statute, in providing for redemption by creditors, is to enable them to collect their debts out of the debtor's lands, to the extent of the value of the property over the amount paid to redeem; and when this is effected, and the redemptioner elects to take and keep the property, the object is attained. We do not hold that a subsequent lienholder can be obliged to pay a debt which the debtor does not owe, and which is not a lien; but if he chooses to do so, and takes no steps to protect himself before redemption, but thereby collects his debt, it is difficult to see wherein he is damaged. He must investigate beforehand, and decide upon the course to pursue; otherwise the courts may be called on, in every case, to investigate the amount actually due on the claims of prior redemptioners, or as to their validity, in order to increase the value of the estate finally purchased.

Order affirmed.

DICKINSON, J., did not participate in this decision.

FLANIGAN v. SEELYE et al.

(Supreme Court of Minnesota. April 7, 1893.)

CHATTEL MORTGAGE TO SEVERAL MORTGAGEES—
RELEASE BY ONE—TENDER.

1. A mortgage running to several mortgagees jointly to secure a joint debt may be paid to and released by either mortgagee.

2. A tender to either is good, and is operative as to the interests of all the mortgagees.
(Syllabus by the Court.)

Appeal from district court, Hennepin county; Pond, Judge.

Action by James E. Flanigan against Henry U. Seelye and another to recover the possession of personal property. There was judgment for defendants, and, plaintiff's motion for a new trial being denied, he appeals. Order reversed.

James E. Markham, for appellant. Penney, Jamison & Hayne, for respondents.

VANDERBURGH, J. Defendant Nettle Seelye took possession of premises belonging to her upon the surrender of a lease. In the house thereon was a large amount of personal property, a portion of which belonged to plaintiff, subject to a chattel mortgage running to defendants, Nettle and Henry Seelye, to secure a joint debt due them. Of the balance some belonged to the plaintiff, and some either belonged to or was claimed by third parties. The evidence tended to prove that before the commencement of the action, and before the foreclosure of the mortgage, the plaintiff tendered the amount due thereon to the defendant Henry W. Seelye, one of the mortgagees, and notified him that he should thereupon claim the property covered thereby, and that he also subsequently made a similar claim and demand of the property from the defendant Nettle Seelye, after the foreclosure, and after she took possession thereunder. We think there was an issue for the jury both as to the tender to Henry Seelye and the refusal of the money by him, and the demand of the mortgaged property by the plaintiff before suit brought; but, in view of the harsh rule invoked by the plaintiff, the court very properly suggested that the evidence of tender and refusal should be clear and convincing. We think, however, that the court erred in refusing to charge the jury that a tender to one of two joint debtors and mortgagees was sufficient. On the contrary, the court charged the jury that such tender should have been made to both mortgagees. But their interest is joint and individual. You cannot compel a discharge by either without paying the whole debt; but by payment of the whole debt to either the mortgage is discharged. You may therefore pay to either. Either may receive payment and discharge the mortgage, and a tender of payment to either is good. *Oatman v. Walker*, 33 Me. 67; *Jones, Mortg.* §§ 896, 958.

The creditor, receiving payment, becomes a trustee for all having an interest in the fund. A tender to one, if operative at all, must be followed by certain legal results as to the property mortgaged. Obviously it could not operate to release an individual interest. It would release all or none. While the evidence would justify the court in sending to the jury the question of the sufficiency of

the demand made by plaintiff to indicate that plaintiff claimed possession of the mortgaged property on the ground of the tender and refusal, as respects the rest of the property claimed by him it is not so clear that the demand was sufficient, in view of the claims of third persons to a portion thereof, to identify what he was entitled to in case the jury should find he did not own it all. Unless he owned all the furniture demanded, it seems to us that the defendants' objection to the sufficiency of the demand was well taken.

Order reversed and new trial granted.

HODDERLY v. BACKUS.

(Supreme Court of Minnesota. April 7, 1893.)

RECOVERY OF PERSONAL PROPERTY—FRAUDULENT SALE BY BAILEE.

1. Held that, upon the undisputed evidence, defendant was entitled to a verdict.

2. The custody of personal property by a bailee is consistent with the title of the owner, and, in the absence of conduct on the part of the owner operating to mislead a purchaser, the latter can acquire no title through a fraudulent sale by the bailee.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

Action by A. H. Hedderly against E. W. Backus to recover possession of a horse. There was judgment for defendant, and plaintiff appeals. Order affirmed.

L. R. Larson, for appellant. White & Egelston, for respondent.

VANDEBURGH, J. The undisputed evidence, we think, would require the jury to find that the horse in controversy belongs to the defendant. It is clear that his title is superior to that of plaintiff. He purchased the horse of one Thurston on the 18th day of October, 1890, and paid \$1,000 for him. He was turned over to one McNaughton to keep for the defendant. It is true that McNaughton, who procured a subsequent bill of sale of the horse of Thurston, assumed to sell the horse to the plaintiff in April, 1891, while in possession of him, for the sum of \$130, but no title did or could pass by that sale. The fact that McNaughton held the horse as bailee of the defendant did not give him colorable authority to sell, nor work an estoppel against defendant. His custody as bailee was entirely consistent with the defendant's ownership. *Rawley v. Brown*, 71 N. Y. 85; *Lowery v. Erskine*, 113 N. Y. 52, 20 N. E. Rep. 588. The possession of McNaughton, while evidence of ownership, was, of course, not conclusive; and it does not appear that defendant held him out as owner, or acquiesced in his claim of ownership, or, by any act or omission of his, misled the plaintiff, to his prejudice. Plaintiff, therefore, purchased of McNaughton at his peril,

and must look to him, or his legal representatives, for his damages. It is also true that, in the fall of 1890, defendant, having learned that McNaughton had a subsequent bill of sale of the horse from Thurston, and that he had made a bill of sale of him to one Bruce, paid the latter \$100, to avoid a lawsuit. But we fail to see any connection between this circumstance and the plaintiff's title to the horse, or that it is any evidence in support of it, since it was clearly established that defendant's title was, in any event, prior and superior to that of McNaughton, or any one claiming under him. Plaintiff failed to make a case for the jury, and the court properly directed a verdict for the defendant. Order affirmed.

ELFELT v. STILLWATER ST. RY. CO.

(Supreme Court of Minnesota. April 24, 1893.)

HIGHWAYS—ESTABLISHMENT BY USER—EVIDENCE—STREET RAILWAY NO ADDITIONAL SERVITUDE.

1. Evidence held to sustain a finding of fact.

2. The operation of Gen. St. 1878, c. 13, § 74, as amended by Laws 1879, c. 51, declaring that when a road shall have been continuously used, kept in repair, and worked for six years it shall be a public highway, is not affected by the fact that proceedings previously commenced to lay it out as a highway are still pending.

3. A street railway imposes no additional servitude upon a street.

(Syllabus by the Court.)

Appeal from district court, Washington county; Crosby, Judge.

Action by Charles D. Elfelt against the Stillwater Street-Railway Company for the restitution of certain real property in the town of Stillwater, alleged to be unlawfully occupied by the defendant by a line of street railway, and to recover damages for such unlawful occupation, and the withholding of said premises. Defendant justified under authority granted by the county commissioners, based upon pending proceedings for the condemnation of said premises for highway purposes. The action was tried before the court without a jury,—a jury being waived,—and judgment ordered for the defendant. From an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Moritz Helm, for appellant. J. N. Castle, for respondent.

GILFILLAN, C. J. The court below, trying the case without a jury, found as a fact that ever since 1880 the road in question "has been used by the public as such, and kept in repair and worked as such by the public authorities," and the evidence fully sustains that finding. This was sufficient to constitute it a public highway, under Gen. St. 1878, c. 13, § 74, as amended by Laws 1879, c. 51. But appellant claims that because, prior to the beginning

of that period, the county commissioners began proceedings to lay out the highway, and such proceedings went no further than a verdict in 1877 on an appeal by this appellant to the district court, the proceedings are to be deemed still pending, and their pendency prevents the operation of that statute. The statute makes no such exception to its operation, and, indeed, we think one of the conditions the legislature had in view, in passing it, was that there were then, and in future would be, a great many instances in which proceedings to lay out highways were, or would be, defective or incomplete, but in which, notwithstanding such defective or incomplete state of the proceedings, the public would use, keep in repair, and work the road for the time specified. The pendency of the proceedings, if they are to be deemed as pending, had no such effect as claimed. The documentary evidence objected to could have no possible bearing upon the finding above quoted, and so could not prejudice.

This court has always recognized the distinction between an ordinary commercial railway and a street railway, in respect to laying them upon a street. The former imposes an additional servitude on the street, while the latter, being only a mode of using the street for legitimate street purposes, does not. Order affirmed.

VANDERBURGH, J., took no part in this decision.

INGLEE v. WELLES et al.

(Supreme Court of Minnesota. May 3, 1893.)

ACTION AGAINST DECEDENT AND OTHERS—JURISDICTION—AFFIDAVIT FOR PUBLICATION.

1. Under Laws 1881, (Ex. Sess.) c. 81, the fact that the named defendant was dead when the action was commenced will not prevent the court from acquiring jurisdiction to determine the rights of "other persons, or parties unknown," claiming an interest in the real estate described in the complaint.

2. Other objections to the affidavit for publication held not well taken.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Cauty, Judge.

Appeal by Wilbur B. Godding and another from an order denying their motion to vacate a judgment heretofore entered in this action on October 29, 1887. Affirmed.

The action was brought to determine the adverse claims of Henry T. Welles, Della Godding, "also all other persons or parties unknown," to certain real estate in Hennepin county. As to Welles, the action was dismissed. Godding and the unknown defendants were served by publication. The affidavit to obtain the order for publication stated " * * * that said defendants, and all defendants named in the title of this action, save and except Henry T. Welles, as affiant is informed and believes, are not

residents of the state of Minnesota; that the place of residence of them, and all of them, save Henry T. Welles, is unknown to affiant and to his client, the plaintiff in this action; that said action is brought by plaintiff under the provisions of section 2, c. 75, of the Statutes of 1878, and the acts amendatory thereof, for the purpose of determining the adverse claims of said defendants in and to the property described in the complaint, to wit, lot twelve, (12,) in block twelve, (12,) in Lennox & Newell's addition to St. Anthony, in Hennepin county, Minnesota; * * * that affiant has made due search for said defendants, but they, nor their place of residence, cannot be found, nor personal service of the summons herein had upon them. * * * " The printer's affidavit filed in the action states " * * * that the district court summons, a printed copy of which is hereto attached, * * * " was duly published. No reference is made in the affidavit to publication of the notice of lis pendens, but a printed copy of a due notice of lis pendens, following the summons, appeared in the newspaper clipping attached to the affidavit, and referred to therein. The appellants are the nonresident heirs of defendant Della W. Godding, who was dead at the time the action was instituted.

Little & Nunn, for appellants. C. G. Laybourn and Kellogg & Laybourn, for respondent.

PER CURIAM. We are of the opinion that the proof of publication of the notice of lis pendens with the summons is sufficient; also, that the nature of the action, and the non-residence of the named defendant, Della W. Godding, sufficiently appeared from the affidavit for publication. We are also of opinion that the mere fact that the named defendant was dead before the action was brought did not prevent the court from acquiring jurisdiction to determine the right of "persons or parties unknown" claiming an interest in the land described in the complaint. These being all the objections to the judgment that are urged by the appellants, the order appealed from must be affirmed.

McGEAGH v. NORDBERG.

(Supreme Court of Minnesota. May 9, 1893.)

TRIAL BY JURY—WAIVING RIGHT TO—APPEAL.

1. The waiver of a jury when a cause is called for trial is a waiver of jury trial only of the issues then formed, and not an agreement to waive it as to all new and different issues that may thereafter be formed under amended pleadings.

2. The municipal court act provides that "the party demanding a jury in a civil action shall be required to advance and pay * * * a jury fee of \$3, and unless such jury is demanded, and such fee paid, upon the calling of the calendar on the first day of the term at which the same is set for trial, it shall be considered to be, and the same shall be, waived, and said action tried by the court." Held, that an appellant who assigns as error the denial of his demand for a jury trial

should make it appear from the record that his demand was accompanied by payment of the jury fee into court.

(Syllabus by the Court.)

Appeal from municipal court of Minneapolis; Mahoney, Judge.

Action by S. A. McGeagh against Peter N. Nordberg to recover for services rendered. Plaintiff had judgment, and defendant appeals. Affirmed.

A. B. Darelius, for appellant. Robert Stratton, for respondent.

MITCHELL, J. This was an action to recover for services as agent or broker in securing a loan for defendant. In his original complaint the plaintiff declared on an express contract to pay a specified amount. When the case was called both parties waived a jury, and the trial was commenced before the court. On the trial the plaintiff offered evidence of the reasonable value of his services, which was excluded as not being admissible under the pleadings. Thereupon the plaintiff asked and obtained leave to amend his complaint so as to allege an implied contract to pay what the services were reasonably worth, and the cause was continued over the term. The cause, being again at issue upon the amended pleadings, and being "on the calendar of the May 17, 1892, general term of the court, which date was the first day of that term for setting cases, was called to be set for a day certain. The defendant, in open court, demanded a trial by jury, which the court refused to grant," to which refusal defendant excepted. The cause was continued over until the June term, when, upon the case being again called, "the defendant demanded, in open court, a trial by jury, which the court refused, to which refusal the defendant duly excepted," and thereafter, upon a day set, the cause was tried by the court without a jury. The principal question in the case is whether the court erred in refusing defendant a jury trial.

It will be observed that the record is silent as to the ground upon which defendant's demand was refused. It is a familiar rule that, to entitle an appellant to a reversal, the error assigned must appear affirmatively of record, as every reasonable presumption is in favor of the regularity of the proceedings of the court below. If the court had refused defendant's demand on the ground that the waiver of a jury trial of the issues under the original pleadings amounted to a waiver of a jury trial of the issues subsequently formed under the amended pleadings, we have no doubt this would have been error. The issues under the two sets of pleadings were essentially different. All that defendant waived was a jury trial of the issues then formed, and not of any and all other issues

that might possibly be thereafter formed under amended pleadings, and which he could not anticipate. He might well be willing to waive a jury trial of the issue as to the existence of a special contract, and yet not be willing to leave the question of the reasonable value of plaintiff's services to the court. The case is very different from one of a mere formal amendment of pleadings, which leaves the issues the same.

But for anything that appears of record, defendant's demand might have been refused on an entirely different ground. Section 13 of the municipal court act of Minneapolis provides: "The party demanding a jury in any civil action shall be required to advance and pay to the clerk of said court, on the first day of the term at which such action is set for trial, a jury fee of three dollars; and unless such jury is demanded, and such fee paid, upon the calling of the calendar, on the first day of the term at which the same is set for trial, it shall be considered to be, and the same shall be, waived, and said action tried by the court." The record fails to show that defendant had paid, or offered to pay, the requisite jury fee, and the trial court may have rightfully denied his demand on that ground. The power of the legislature to require the prepayment of a reasonable jury fee as a condition to entitle a party to a jury trial, and to provide that the failure to do so shall amount to a waiver of a jury, is undoubted. *Adams v. Corrison*, 7 Minn. 456, (Gil. 365.)

The other assignments of error, having reference to the competency of certain evidence, and the sufficiency of the evidence to sustain the findings, contain nothing worthy of special mention, except to say that we do not think any of them are well taken. Order affirmed.

VANDEBURGH, J., absent, took no part.

STATE ex rel. HART et al. v. COMMON COUNCIL OF CITY OF DULUTH et al.

(Supreme Court of Minnesota. May 2, 1893.)

CERTIORARI—WHEN LIES—MUNICIPAL CORPORATIONS—POWER OF COUNCIL TO REMOVE FIRE COMMISSIONERS—SUFFICIENT CAUSE.

1. Where the power of a municipal body to remove from office is not discretionary, but only for cause, after notice and hearing, the proceedings are judicial in their nature, and may be reviewed on certiorari.

2. On such review the court will inspect the record to see whether the body had jurisdiction, and kept within it, and whether the charges preferred were sufficient in law, and will examine the evidence, not for the purpose of weighing it, but to ascertain whether it furnished any legal and substantial basis for the removal.

3. Such bodies being essentially legislative and administrative, their proceedings, even when judicial in their nature, are not to be tested by the strict legal rules which prevail in courts of law. If they keep within their jurisdiction, and the evi-

dence furnishes a legal and substantial basis for their decision, it will not be disturbed for mere informalities or irregularities which might amount to reversible error in the proceedings of a court.

4. "Sufficient cause" means "legal cause," and must be one that specially relates to and affects the administration of the office,—one touching the qualifications of the officer, or his performance of its duties.

5. While the charges need not be stated with the formal exactness required in pleadings in courts, yet they should contain a specification of facts constituting a cause for removal, with reasonable precision, sufficient to inform the incumbent of the particular grounds upon which the charges are based.

6. The sufficiency and reasonableness of the charges are questions of law for the court.

7. The city charter of Duluth vests the power of removing the fire commissioners from office exclusively in the common council, and a resolution of that body preferring charges against such commissioners, and fixing a time and place of hearing, is not one which requires the approval of the mayor.

8. The charges in the case considered, and held insufficient.

(Syllabus by the Court.)

Certiorari in the name of the state, on relation of James Hart, Jr., and others, against the common council of the city of Duluth and others, to review and quash the action of respondents in removing relators from the office of fire commissioners. Judgment for relators.

B. C. Rude and A. L. Thurman, for relators. J. D. Holmes, for respondents.

MITCHELL, J. By the charter of the city of Duluth, all powers and duties connected with, and incident to, the government and discipline of the fire department of the city are vested in three commissioners, called the "Board of Fire Commissioners," who have entire control of the department, including the appointment and discharge of all employees connected with it, and making their own rules and regulations for the government of the same. These commissioners are, "on nomination of the mayor," "appointed by the common council," and hold their office for the term of three years. The charter provides that "any member of said board may at any time be removed by a vote of two thirds of all the members elect of the common council of said city for sufficient cause: * * * provided, that the said common council shall previously cause a copy of the charges preferred against such member sought to be removed, and notice of the time and place of hearing the same, to be served on him at least ten days previous to the day so assigned, and opportunity be given him to make his defense personally or by counsel." It is here sought, by certiorari, to review the proceedings of the common council in assuming to remove the relators from the office of fire commissioners.

1. It is urged by respondents that the power of removal from office conferred on the common council is purely administrative and quasi political, and therefore that their proceedings cannot be reviewed on certiorari.

That this power may not be "judicial," in the sense that it can only be conferred upon the courts, in whom all judicial power is vested under the constitution, has nothing to do with the question; for there is nothing now better settled than that certiorari will lie to review the quasi judicial acts and proceedings of municipal officers and bodies. Neither is there anything better settled than that while the incumbent has no vested right of property, as against the state, in a public office, yet his right to it has always been recognized by the courts as a privilege entitled to the protection of the law, and that proceedings, in all cases where the amotion from office is for cause, upon notice and hearing, are adversary and judicial in their nature, and may be reviewed on certiorari. We think there is practically no conflict in the authorities on this point, the only difference among them being merely as to what they will review on such a writ. Some courts, restricting the writ to its original common-law office, hold that it brings up for review only the record, and not the evidence, and hence that they will not look into the evidence at all, but merely inspect the record, to see whether the inferior tribunal had jurisdiction, and had not exceeded it, and had proceeded according to law, or, as expressed in one case, whether the tribunal "had kept within its jurisdiction, or whether the cause assigned was a cause for removal under the statute." Other courts hold that the evidence may be brought up, not for the purpose of weighing it, to ascertain the preponderance, but merely to ascertain whether there was any evidence at all to sustain the decision of the inferior tribunal,—whether it furnished any legal and substantial basis for the decision. The latter is the doctrine of this court as to the office of the writ of certiorari. But, while this is so, we recognize the prime importance of each department of government avoiding anything like improper interference with the others in the discharge of their functions; also, that while city councils and other municipal bodies may not have the power to remove from office except for cause, yet, this power being designed to insure efficiency and fidelity in the discharge of official duty, the degree of incompetency or inefficiency which amounts to sufficient cause for removal must of necessity, within certain established limits, rest somewhat in the sound discretion in the officer or body in whom the power of removal is vested. We also recognize the fact that while in the exercise of this power their proceedings are quasi judicial, and hence reviewable by the courts, yet they are not courts, but essentially legislative and administrative bodies; and that their action should be considered in view of their nature and the purposes for which they were organized, and not tested by the strict legal rules which prevail in trials in courts of law. Hence, if such a

body has kept within its jurisdiction, and the evidence furnished any legal and substantial basis for their action, it ought not to be disturbed for any mere informalities or irregularities which might have amounted to reversible error in the proceedings of a court. To apply any other rule to the proceedings of such bodies would be impracticable, and disastrous in the extreme to public interests.

2. The first contention of relators is that the common council never acquired jurisdiction, because the notice of hearing and the copy of the charges were not served on them as required by the charter. The particular objection is that, when the service was made on them, the resolution of the common council preferring these charges against them had neither been approved by the mayor, nor passed over his veto, as required by section 1, c. 3, of the city charter. There is no merit in this point. Under the charter the power of removal from office is vested solely in the common council, and the mayor has no power over, or control of, their proceedings in presenting or investigating charges against a city official with a view to removal from office. Their action in preferring charges against relators was not such an ordinance or resolution as comes within the purview of section 1, c. 3, and did not require the approval of the mayor before it took effect.

3. The next question is whether the charges presented were sufficient in law to constitute a cause for removal,—whether they were sufficient in form and substance to authorize the common council to proceed. "Cause," or "sufficient cause," means "legal cause," and not any cause which the council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. An attempt to remove an officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it. *Bagg's Case*, 11 Coke, 93b; *Rex v. Richardson*, 1 Burrows, 517-540; *State v. Love*, 39 N. J. Law, 14; *State v. McGarry*, 21 Wis. 496; *State v. Common Council*, 9 Wis. 254; *People v. Thompson*, 94 N. Y. 451. While the charges need not be stated with the technical nicety or formal exactness required in pleadings in courts, yet they must be specifically stated with substantial certainty. The specifications of the alleged causes should be formulated with such reasonable detail and precision as

shall inform the incumbent what dereliction of duty is urged against him. There should be a statement of charges with a specification of facts constituting a sufficient cause for removal, sufficiently distinct to apprise the officer of the grounds upon which the charges are based. *Andrews v. King*, 77 Me. 224; *People v. Thompson*, supra; *Dill. Mun. Corp. § 255*. The sufficiency and reasonableness of the cause of removal are questions for the courts. *Dill. Mun. Corp. § 252*, and cases cited. This has been the settled law ever since *Bagg's Case*, supra, and we are not aware of any respectable authority to the contrary. Of course, cases (many of which are cited by respondents) where an officer or body was vested with an absolute power of removal at discretion are not in point.

Upon examination of the charges in this case we are clearly of opinion that they are not sufficient in law. Considering them as a whole, they show on their face that they were not formulated in a very judicial frame of mind. They read more like a heated hostile declamation than a calm and deliberate statement of charges with a view to a fair investigation. Many of them are mere glittering generalities, without any statement or specification of facts; such as, for example, "using their official positions to gratify their personal feelings and prejudices;" "that neither ability, impartiality, nor sense of justice characterize their management of one of the most important branches of the city government;" "that the gratification of their personal spites and prejudices is the paramount motive often actuating and controlling them in the supposed discharge of their duties;" "that they have no just appreciation of the responsibilities that should characterize the discharge of the duties of the important office of fire commissioner," etc. It hardly need be said that such general accusations as these are entirely lacking in any specification of facts to apprise any one of the grounds of the charges which he is called on to meet. Some of the charges, such as that "the reasonable recommendations and requests of the common council are treated with the utmost contempt," have no relation whatever to the administration of the office of fire commissioner, and remind us of some of the charges in *Bagg's Case*. The first part of the fifth charge, viz. failure to make monthly reports to the common council, as required by the charter, was virtually abandoned, no attempt having been made to substantiate it, and hence may be left out of account altogether. The only charges that even attempt to state any specific cause for removal are the fourth and the last part of the fifth. Indeed, these are the only ones which counsel for respondents seriously attempts to support. The fourth relates to the discharge of officers of the fire department without cause, or from improper motives, but is entirely lacking in specifications of either dates or names. As the board of fire

commissioners has, under the charter, absolute power to discharge any of the employees or officers of the department at their discretion, and may, in the performance of their duties, have had occasion to exercise this power frequently, so general and indefinite a statement is not sufficient to advise them what particular acts are the basis of the charge. The last part of the fifth charge, accusing the relators generally of being "incompetent" and "inefficient," without specifying wherein or in what respect, is also entirely too vague and general. We agree with counsel that "incompetency" and "inefficiency" in the discharge of official duty may be good grounds for removal, and that it may not be necessary to specify in detail particular acts or facts. But these words are so general that they may mean anything or everything which might constitute good cause for removal. For example, incompetency might result from physical disability, from mental disability, or from lack of integrity, etc. So, inefficiency might consist of habitual neglect of duty, incapacity to preserve discipline, or of a variety of things. Hence, while it is not required to go into details, yet the charges ought at least to advise the officer in what respect he is claimed to be incompetent or inefficient. Our conclusion is that none of the charges relied on are sufficient in law. This renders it unnecessary to consider the evidence at all. We may say, however, that a perusal of it impresses us with the feeling that it furnished no reasonable basis for the action of the council in removing the relators from office. It is perfectly apparent that this whole trouble grew out of a foolish quarrel between the common council and the board of fire commissioners, over the suspension by the latter of a fireman by the name of Twaddle. The proceedings of the common council in the matter are quashed.

VANDEBURGH, J., absent, took no part.

NORTHWESTERN GUARANTY LOAN CO. v. CHANNELL.

(Supreme Court of Minnesota. May 11, 1893.)

ARBITRATION—VALIDITY OF SUBMISSION—COMPUTATION OF TIME.

1. An agreement to submit certain matters to arbitrators, under the statute, is of no effect if the names of the arbitrators are not in it when it is acknowledged. They cannot be inserted afterwards.

2. The statutory rule for computing time does not apply to ascertain the day, or the last day, on which a thing may be done, where such day is expressed by its date.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

The award filed in the statutory arbitration between the Northwestern Guaranty Loan Company and Charles E. Channell

was set aside by the district court, and the loan company appeals. Affirmed.

Chas. J. Bartleson, for appellant. Hart & Brewer, for respondent.

GILFILLAN, C. J. This is an appeal from an order of the district court rejecting and setting aside an award filed upon an attempt at a statutory arbitration between these parties. They attempted to submit certain matters to arbitration, but the agreement to do so, at the time it was signed and acknowledged by the parties, did not contain the names of any arbitrators. They appear to have been unable to agree on arbitrators, and so entered into a written agreement authorizing two other persons to select them. The two selected three persons as arbitrators, and their names were inserted in the agreement of submission, after it was signed and acknowledged, by the two persons so authorized, or one of them. The agreement of submission required the arbitrators to make and report their award on or before the 10th day of July, 1892. That day fell on Sunday, and the award was filed on the 11th. The statute provides (Gen. St. 1878, c. 89, § 8) that "no award made after the time so agreed upon shall have any legal effect or operation unless made upon a recommitment of the award by the court to which it is reported." Other objections are made to the award, but either of these is conclusive, and it is unnecessary to consider the others. It was held in *Barney v. Flower*, 27 Minn. 403, 7 N. W. Rep. 823, that the jurisdiction created by arbitration "is a special jurisdiction, which can be created only in the manner prescribed by the statute. Every material requirement of the statute must be complied with. Among them is the acknowledgment prescribed;" and it was also held that the appearance of the parties before the arbitrators, without objection, did not cure the defect. The acknowledgment of an agreement, incomplete by reason of material stipulations being omitted, will not do. If one material part may be left blank, any other or all may. If the names of the arbitrators may be left to be afterwards inserted, no reason can be given why the parties may not do the same with the subject-matter of the arbitration, or with any other thing required by the statute to be in the agreement. Because not complete when acknowledged, this agreement was of no effect as a statutory submission to arbitration.

It is conceded that, if the award was filed too late, it was of no effect; but it is claimed that the statutory rule for computing time, of excluding the first and including the last day, and excluding the last when it is Sunday, applies, and that, in determining when was the last day for fil-

ing the award, the tenth, because it was Sunday, should be excluded, and the eleventh held to be the last day. But the statute was intended to apply only when it is necessary to have a rule for ascertaining the first day or the last day on which a thing may be done. Such a rule is necessary only when a thing is to be done within a specified period; as within a week, month, or year, or designated number of days, weeks, months, or years. When the first or last day is expressed, no rule is needed to ascertain what that day is. The statutory rule does not apply here, and the award was filed too late. Order affirmed.

VANDERBURGH, J., took no part in this decision.

STATE ex rel. SHANNON et al. v. JUDGES OF DISTRICT COURT OF ELEVENTH JUDICIAL DISTRICT et al.

(Supreme Court of Minnesota. May 11, 1893.)

MUNICIPAL CORPORATIONS—GRADING STREETS—ASSESSMENT OF BENEFITS—VALIDITY.

The decision of the last October term, to the effect that by the charter of the city of Duluth a permanent grade for a street must be established before proceedings can be begun to permanently improve the street at the expense of the property, adhered to on reargument.

(Syllabus by the Court.)

On reargument. Former decision (53 N. W. Rep. 800) affirmed.

S. D. Allen, Jaques & Hudson, and M. Douglas, for relators. H. F. Greene, J. G. Williams, and B. C. Rude, for respondents.

GILFILLAN, O. J. When this case was before us at the last October term, we held the assessment to be invalid for two reasons, one of which was that by the charter of the city of Duluth the permanent grade of a street must be established before proceedings for the permanent improvement of the street at the expense of property benefited can be begun. Of this point, on the suggestion that an amendment to the charter made in 1891 had been overlooked, we granted a reargument. The amendment of 1891, to which our attention is now called, and which, it is claimed, has the effect to dispense with the necessity of establishing the grade of a street before proceeding to permanently improve it, is chapter 55, § 17, amending section 7, subc. 5, of the charter enacted in 1887, (which section had no relation whatever to the question now in hand,) by adding as follows: "If for any cause any assessment heretofore or hereafter made by the city of Duluth for any local improvement shall be set aside by any court, or, by reason of any irregularity or omission, shall be pronounced invalid, or

shall be in fact invalid, the board of public works are authorized to reassess the cost of making said improvement upon the property benefited thereby, in proportion to the benefit that such piece or parcel of land has received." As, according to the original charter, amended in 1889, as construed by this court, the previous establishment of a permanent grade goes to the power or authority of the common council to order the permanent improvement,—to its jurisdiction, so to speak,—the amendment of 1891 does not dispense with the necessity of first establishing a grade, unless it also dispenses with any other matter or thing necessary to such power or authority, or prescribed for the exercise of it. For instance, by the act of 1891, § 14, the council has no power to order the work to be done until the matter has been first referred to the board of public works, and if they report adversely the council cannot order the work done, except by a two-thirds vote of all the members of the council-elect, and, if the board report unanimously against it, then by a three-fourths vote of all the members. These provisions, as well as that requiring a permanent grade, are intended for the protection of property owners, and, if any one can be dispensed with, all can. Without questioning the power of the legislature to authorize an assessment where the work has actually been done, and the property actually benefited, though all preliminary acts were omitted, it would require a clear expression by the legislature before we could hold it intended to do away with provisions so manifestly carefully inserted in the charter for the protection of property owners. There is no such clear expression of legislative intent in the act of 1891. The terms of the act may have full effect by holding that it applies to a case where there was authority to make the original assessment, but it is invalid by reason of some irregularity or omission not affecting the jurisdiction of the council in the premises. It is conceded by respondents' counsel that such would be the effect of the amendment were it not for the words, "or shall be in fact invalid." Those words, he argues, were inserted so as to include cases where the original assessment may be invalid for reasons even going to the power of the council to order the work done. But a more obvious—indeed, a very apparent—purpose in inserting them was to enable the city, in case it discovered irregularities and omissions in the assessment, rendering it invalid, to correct them by a reassessment, without going to the trouble and cost of procuring the judgment of a court declaring the invalidity. We adhere to our former decision.

VANDERBURGH, J., took no part in this decision.

RUGLAND v. TOLLEFSEN et al.

(Supreme Court of Minnesota. May 11, 1893.)

ACTION ON NOTE—BONA FIDE PURCHASERS—EVIDENCE—INSTRUCTIONS.

A charge held erroneous because it might mislead the jury to suppose they could, from the evidence, find a certain fact, there being no evidence of such fact.

(Syllabus by the Court.)

Appeal from district court, Otter Tail county; Searle, Judge.

Action on a note by Stephen C. Rugland, administrator of the estate of Anna Brooks, deceased, against Lauritz Tollefsen and others. Defendants had judgment, and plaintiff appeals. Reversed.

Chas. C. Houpt, for appellant. Jenkins & Treat, for respondents.

GILFILLAN, C. J. Upon the question whether, when she purchased the note in suit, the plaintiff had notice of its usurious character, the evidence, though scant, was probably enough to justify leaving it to the jury. But there was no evidence whatever that Rugland acted as her agent in making the purchase, and therefore the charge that if the jury believed that he was her agent to make, and as such made, the purchase, his knowledge as to the character of the note would be notice of it to her, and she could not recover, was erroneous, because it might mislead the jury into supposing they could, from the evidence, find such agency.

Order reversed.

VANDERBURGH, J., absent.

BROWN v. WINONA & S. W. RY. CO.

(Supreme Court of Minnesota. May 11, 1893.)

DIVERTING SURFACE WATER — LIABILITY FOR OVERFLOWING ADJOINING LANDS.

The rule stated in *O'Brien v. City of St. Paul*, 25 Minn. 331, that "an owner may improve his land for the purpose for which such land is ordinarily used, and may do what is necessary for that purpose. He may build upon it, or raise, or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go,"—followed, and held that it makes no difference under the rule that the water shed over other land passed to it in a stream, instead of in a diffused manner.

(Syllabus by the Court.)

Appeal from district court, Winona county; Start, Judge.

Action by Daniel Brown against the Winona & Southwestern Railway Company to recover damages for overflowing plaintiff's land by diverting the surface water in the construction of defendant's road. Plaintiff had judgment, and defendant appeals. Reversed.

Thomas Simpson and Henry M. Lamberton, for appellant. Keyes & Brown, for respondent.

GILFILLAN, C. J. The defendant constructed its road, running from east to west, across block 2, in the village of Utica, in this state. For the purpose of laying its track it raised an embankment across the block, taking the earth from along each side, thus making on each side what is called a "borrow pit." The two pits were connected by a culvert through the embankment. On the north side the surface of the ground slopes for a considerable distance towards this part of the embankment from the north and north-east and northwest, so that the surface waters from rains and melting snows flow towards that part of the embankment, and before it was there flowed over the lands to the south and east. The effect of the embankment was to stop the flow of surface water in a diffused manner over the surface of the ground to the south; to gather it into the north borrow pit, from which it flowed through the culvert to that on the south side, and from that, at its lower or easterly end, it flowed in a stream upon plaintiff's lot in the same block. It is to be assumed, for the purpose of the point involved, that the presence of the embankment, culvert, and borrow pits was the cause of the water flowing in a stream on plaintiff's land, and that no such quantity of surface water would have reached his land but for their existence. No question is made of the defendant's right to make the embankment, culvert, and borrow pits, nor is it claimed that they were not necessary to the construction of the railroad in the usual way of constructing railroads over similar ground, nor is any negligence in the manner of doing the work seriously claimed. The case was, in effect, left to the jury, upon the proposition (upon which respondent's counsel squarely present their case here) that if the embankment, culvert, and borrow pits, though carefully made, and necessary to the construction and operation of the road, caused the surface waters to accumulate and flow in a stream, as they would not have done had not the natural surface of the ground been disturbed, upon plaintiff's land, doing damage, the defendant is liable.

The question of the rights of landowners in respect to surface waters has, in one form or another, been many times before this court. From the memorandum of the learned judge who tried the cause, it is apparent that he misapprehended to some extent the decisions of this court on the subject. We are not surprised that he did so, for in some of the opinions are expressions which, disconnected from the facts of the cases in which they were written, would point to the conclusion at which he arrived. This makes it proper to analyze most of those decisions. The civil-law doctrine of servitudes in respect

to surface waters has never been admitted in this state. Nor has the common-law rule been admitted, in the rigorous form in which it has been expressed by some text writers and decisions. Surface water has been styled a common enemy, which every landowner may get rid of as best he can, and every owner must guard against as best he may. We have held that each owner's absolute liberty in respect to such waters must be modified by the maxim that each must so enjoy his own as not unnecessarily to injure another's. In *O'Brien v. City of St. Paul*, 25 Minn. 331, an attempt was made to state the rule on the subject thus: "An owner may improve his land for the purpose for which such land is ordinarily used, and may do what is necessary for that purpose. He may build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go." Any more restricted rule than this would be likely to seriously interfere with the proper improvement and enjoyment of lands. Every landowner must hold his own land subject, so far as surface waters are concerned, to whatever effect on his land the proper improvement and enjoyment of their land by his neighbors may have. In that case the court declined to decide whether in any case an owner can lawfully improve his own land in such a way as to cause the surface water to flow off in streams on the land of another, but it did decide that he may not do so unless it be necessary to the proper improvement and enjoyment of his own land, and, because the defendant had done so without such necessity, it held the plaintiff entitled to recover. *Jordan v. Railway Co.*, 42 Minn. 172, 43 N. W. Rep. 849, is the only case in which the facts presented, so that it had to be decided, the question which the court declined to decide in the *O'Brien* Case. It was a case where, as an incident or necessary consequence of properly constructing the defendant's railroad, the surface waters were collected in a ditch, and flowed in streams, in increased and injurious quantities, on plaintiff's land. The court held it came within the rule stated in the *O'Brien* Case, and that plaintiff could not recover. In *Hogenson v. Railway Co.*, 31 Minn. 224, 17 N. W. Rep. 374, the only attempt by defendant to improve its own land was by collecting the surface waters naturally resting on it, and, by means of ditches, conducting them to, and depositing them on, the land of the plaintiff. It was held plaintiff could recover. The court referred to the rule in the *O'Brien* Case, but held that one may not improve his own land by merely transferring to the land of another a burden which nature has imposed on his own. In reference to that decision the court, in the *Jordan* Case, said: "It is

only where such shifting of the burden follows as an incident to using or improving his land, as such land is ordinarily used or improved, that it can be justified." *Township of Blakely v. Devine*, 36 Minn. 53, 29 N. W. Rep. 842, was a case where the town authorities, for the purpose of relieving a highway from surface waters collecting on it, made ditches to conduct such waters to and discharge them on the land of the defendant, and he had constructed an embankment to prevent the waters flowing on his land. The action was to restrain him from so preventing them. No question of liability of the town was in the case. The court stated the question as follows: "The material question would seem to be the right of the defendant to protect his land from the overflow of the surface water collected in the highway, chiefly as the result of heavy rains." The town authorities were really endeavoring, in the action, to impose a servitude on the defendant's land, and maintain it as dumping ground for waters collecting on the highway, and the court held it could not do this. In *Pye v. Mankato*, 36 Minn. 373, 31 N. W. Rep. 863, the defendant, in improving a street, had constructed a gutter to collect and convey to the river surface water which had previously, following a natural depression in the ground, flowed across the street, which gutter was "negligently and wrongfully constructed, wholly insufficient in capacity to contain and carry off the water, and as a consequence it overflowed, and was cast in large and injurious quantities upon, the land of plaintiff." The negligent and wrongful constructing of the gutter could not be deemed doing what was necessary to the proper improvement of the street. The opinion states five propositions as to the liability of a municipal corporation in respect to surface waters in grading its streets. The fifth is as follows: "But a city will be liable if it collects and gathers surface water by artificial means, such as sewers and drains, and casts it upon the premises of another in increased and injurious quantities. Such an act amounts to a positive trespass." As applied to and explained by the facts of the case then in hand, the proposition was correct, though as a general rule applicable to a landowner in improving his land for the purposes for which such land is ordinarily used, it may be criticised as not sufficiently guarded and qualified. The proper qualification of it is given at the end of the opinion, in stating the reason for the defendant's liability, thus: "Having intercepted the natural flow of this water, undertaken to gather up and conduct it in another direction by an artificial channel, it was incumbent on the city to use reasonable care to do this in such a way as not to cause a positive trespass upon the lands of others. To fail to do this is negligence. Such was the fact in this case, and this brings it within the cases last cited." As thus qualified the proposition is within the rule in the

O'Brien Case, for that rule does not admit of a landowner causing damage to the land of others by the negligent manner in which he improves his own land. *Rowe v. Railway Co.*, 41 Minn. 384, 43 N. W. Rep. 76, was a case of obstructing and setting surface waters back upon plaintiff's land. The only point decided was that a landowner, in improving his own land, is not obliged to provide for the passage of such waters as previously flowed from other land upon and over his own. Though there were no facts in the case calling for it, the opinion says, speaking of an owner's rights with respect to surface water, "he is not permitted to collect in a stream or body, and turn it upon the lands of others, to their injury," citing the *Hogenson and Township of Blakely Cases*. *Follmann v. City of Mankato*, 45 Minn. 457, 48 N. W. Rep. 192, was, like that of *Pye v. Mankato*, a case of negligence. The opinion in one place says: "If the result of improvements actually made is to collect such water in a stream, and turn it thereon, [on the land of another,] to the damage of the owner, an action will lie." This expresses more nearly than language found in any other opinion of this court the proposition decided by the court below in this case. But it was not necessary to the decision of the case, for later in the opinion the court, after referring to certain acts of negligence on the part of defendant, says: "And in respect to the particular injury complained of the evidence is sufficient to show that it was due to an invasion of surface water, traceable to the acts and negligence above specified." The opinion in *Beach v. Gaylord*, 43 Minn. 476, 45 N. W. Rep. 1095, contains a similar unguarded statement, though that was a case where the injury did not follow as a necessary incident to the owner's proper improvement of his land. The action was for damage to plaintiff's premises by defendant gathering the rain water falling upon the roof of his house into a gutter, in which it flowed to a pipe which discharged it—of course, in a stream—upon the ground so near plaintiff's line that it flowed in an increased quantity at that point upon her lot, doing damage. It was found as a fact by the court below that there was no apparent necessity for so doing, in the proper improvement and enjoyment of defendant's own land, so that the case was really like that upon which the court held the defendant liable in the O'Brien Case.

From this review of the cases, it is apparent that the *Jordan Case* is the only one before this court in which was distinctly presented for decision the point involved in the proposition upon which the trial court left this case to the jury. For the sake of precision, we will restate the question: When an owner improves his land for the purpose for which such land is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, is he liable because, as an

incident of so improving, surface waters accumulate and flow in a stream upon the lands of others? A doubt upon this was suggested in the O'Brien Case. But on more mature consideration we are of opinion that the owner so improving is not liable. The rule stated in that case has frequently been quoted in other cases in this court, and its correctness has never been questioned; and, but for the doubt suggested in that case, we do not think it would have been questioned that a case like this comes within it. One's land may be incidentally, even seriously, injured in value and usefulness by the proper improvement of adjacent land, withdrawing from it surface waters, the presence of which may improve its fertility and value, or shedding upon it surface waters which would not otherwise go there, and drowning it, or otherwise impairing its value, or causing such waters to remain upon it, although their presence may render it comparatively valueless, and no action will lie. When the injury is incidental to the proper improvement of adjacent land, it is impossible to see that the manner in which such improvement operates to cause the injury—whether by drawing off the waters, or setting them back so that they cannot flow off, or causing them to run either in a diffused manner or in streams—can make any difference with the liability. If a man's land be injured to the extent of \$500 by surface water coming upon it, it would seem illogical and unreasonable that he may recover if it come in streams, but cannot recover if it come in a diffused manner. The test of liability must be, is the injury incidental to another man doing on his own land what he has a right to do, i. e. improve it for the purpose for which such land is ordinarily used, doing what is necessary for that purpose? It must, however, be understood that one cannot improve his own land by merely transferring waters which would naturally rest upon it to the land of another. Order reversed.

VANDERBURGH, J., took no part in this decision.

OLSON v. SHARPLESS et al.

(Supreme Court of Minnesota. April 27, 1893.)

STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—SALE OF GOODS—FAILURE TO DELIVER—DAMAGES.

1. *Held*, that certain writings, when taken together, constituted a sufficient memorandum of a contract for the sale of goods under the statute of frauds.

2. Also, that the admission of certain evidence was not, under the particular facts of the case, in conflict with the rule that, on the seller's failure to deliver the goods, the measure of damages is the difference between the contract price and the price at the time when, and the place where, the goods should have been delivered.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Cauty, Judge.

Action by S. E. Olson, doing business as S. E. Olson & Co., against Henry W. Sharpless and another, partners as Sharpless Bros., to recover damages for the breach of an alleged contract of sale of certain dry goods. The facts appearing on the trial showed that plaintiff, a retail merchant in Minneapolis, upon solicitation, gave to one L. F. Rockwell, the travelling salesman of defendants, wholesale dealers in Philadelphia, the following order, (defendants' Exhibit 2:)

Mo. Nov. 19, 1890.

"Sharpless Bros.

To S. E. Olson & Co.

Town of Minneapolis, Minn."

Order No.

Ship. by Ft.

Terms: Date shipment, Jan. 15th, Feby. 1.

Date bill, Apr. 10th. Salesman, Rockwell.

Net Reg.

120 pcs. 2,911 cashmere.

40.

Then follows itemized description of the 120 pieces, including those referred to in correspondence as "high-color" pieces. This order was forwarded by Rockwell to defendants with the following, (Exhibit 3:)"Stillwater, Minn., Nov. 19, '90. Messrs. Sharpless Bros., J. C. C.—Gentlemen: * * * S. E. Olson would like to have you wire the acceptance of the inclosed order as it stands, or write them in regard to the high colors. * * * Yours, truly, L. F. Rockwell,"—upon receipt of which defendants sent the following telegram, (Exhibit 4:)"S. E. Olson & Co., Minneapolis, Minn.: Forty cents net best can accept for nineteen pieces high colors cassimeres; reply, if want. Sharpless Bros." This telegram was received by plaintiff November 27, 1890, and on the same day plaintiff mailed to defendants a letter, which was lost, but the substance of which was proved to have been as follows: "Your telegram of November 27th received. We accept your terms,—101 pieces, 40 cents regular; 19 pieces, 40 cents net." Two days later, defendants wrote plaintiff as follows, (Exhibit 5:)"Nov. 29, 1890. Messrs. S. E. Olson & Co.—Gentlemen: On the 27th inst. we wired you regarding the order that Mr. Rockwell had taken from you on colored cashmeres. Best price that we can accept is 40 cents regular for ordinary colors, and 40 cents net for high colors. We have as yet heard nothing from you. Please wire, on receipt of this, your decision. If we do not hear from you by telegram on Wednesday, December 30, we shall consider the order canceled. * * * Yours, respt., Sharpless Bros. Per Groff." Defendants never received an answer to this letter, but admitted receiving plaintiff's letter of acceptance of the 27th November. Defendants refusing to perform the alleged contract contained in their correspondence, plaintiff was compelled to, and did, purchase the same goods from other dealers.

To recover the difference between the market value and the contract price of the goods, plaintiff brought this action. The action was tried by the court without a jury, a jury being waived, and judgment was ordered for plaintiff. Defendants appeal from the judgment. Affirmed.

Keith, Evans, Thompson & Fairchild, for appellants. J. F. McGee, for respondent.

MITCHELL, J. Defendants' assignments of error are all directed to two general propositions: First, that no contract or agreement was ever arrived at between the parties; and, second, that the trial court adopted an erroneous measure of damages. In support of the first proposition it is urged (1) that the defendants never accepted plaintiff's order for the goods, and hence that no contract was agreed to, even orally, and, (2) even if there was, there was no written memorandum of it sufficient to satisfy the statute of frauds. The memorandum need not be a single paper. Several papers may be taken together to make up the memorandum, providing they refer to one another, or are so connected together, by reference or by internal evidence, that parol testimony is not necessary to establish their connection with the contract. The order, with the letter of defendants' agent accompanying the same, and defendants' telegram and letter to plaintiff, together with plaintiff's letter of acceptance, which had been lost, but of whose contents secondary evidence was introduced, fully justified a finding that the minds of the parties had met and agreed on the terms of the contract, and also satisfied the requirement of the statute of frauds. With the meaning of the technical trade terms "net" and "regular" explained, the writings, when taken together, contained all the essential elements of the contract,—the names of the buyer and seller, the description of the property, the price, the date of delivery or shipment, etc. The suggestion that the telegram and letter of defendants to plaintiff were intended merely to adjust the price, and left them still free to reject the order on any other ground, seems to us more ingenious than ingenuous. Undoubtedly, when the order was forwarded to defendants, they were at liberty to accept or reject it, as they saw fit, or to demand from plaintiff a property statement before deciding whether to accept or reject it. But that right was ended when the offer was accepted. They could not thereafter attach any new condition to the performance of their contract. The fair import of their communications to plaintiff (and what, as we think, any business man would have understood from them) was an offer to sell the goods according to the terms of the order, subject only to a modification of the price of the 19 pieces specified; and when plaintiff replied, ac-

cepting the offer, the contract was closed. There is nothing in the point that plaintiff did not seasonably notify defendants of his acceptance of the offer. The testimony is that he mailed his acceptance on the same day he received the telegram, (November 27th,) which in due course of mail presumably reached defendants on or before December 1st.

2. The place of delivery being Philadelphia, where the sellers did business, the defendants' counsel correctly state the measure of damages as being the difference between the contract price and the market price in that city at the time when the goods should have been delivered, (which was January 15th;) and they assign as error the admission of evidence as to the price of the same goods in the city of New York, where plaintiff bought them, between January 15th and 20th. It appears in evidence that all goods of this brand are manufactured by one mill; that they "have a fixed [by which we understand is meant uniform] price in the trade;" that a single agent of the manufacturers, whose office is in New York, has control of the entire output of the mill, and fixes the price of the goods for the trade; that plaintiff applied to this agent, and obtained his prices and terms, and then went to H. R. Chaffin & Co., and, finding their terms a little more favorable as to time of payment, purchased of them at prices as favorable as he could obtain anywhere. It also appears that the prices which he paid were less than 5 per cent. in excess of those at which defendants had contracted for with him. It also appears that defendants wrote to plaintiff in November that the price in Philadelphia had been already advanced one cent a yard, and again, in December, that they had written to all jobbers that on January 1st the goods would be advanced 5 per cent. It seems to us that the effect and fair import of this evidence was to show that plaintiff had duplicated the order in New York on at least as favorable terms as could have been obtained in Philadelphia; and, if so, certainly defendants have no ground of complaint. Judgment affirmed.

VANDEBURGH, J., absent, took no part.

LEE v. CLARK.

(Supreme Court of Minnesota. May 19, 1893.)
SERVICE OF SUMMONS — INDORSEMENT BY ATTORNEYS.

The original summons in an action was duly subscribed by plaintiff's attorneys, and their place of business was stated with unnecessary particularity. It was also indorsed upon the back in the same way. Attached to the summons was the complaint, duly signed by plaintiff's attorneys. Copies of the summons and of the complaint were served together upon defendant, accurate and complete in every re-

spect, except that the firm name of the plaintiff's attorneys was omitted when transcribing the subscription to the summons. Held a mere irregularity, and that, if defendant desired to take advantage of it, he should have done so by a motion to set aside the service.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Canty, Judge.

Assumpsit by Mary B. Lee against Matt Clark. Plaintiff had judgment by default, and, from an order denying a motion to vacate the same, defendant appeals. Affirmed.

Ewing & Ewing, for appellant. Penney, Jamison & Hayne, for respondent.

COLLINS, J. The summons in this action, which was brought for the recovery of money, was in strict compliance with the requirements of Gen. St. 1878, c. 66, §§ 53, 54, being subscribed thus: "Penney & Rogers, Attorneys for Plaintiff, No. 43 Washington Avenue South, Rooms 7, 8, and 9, Minneapolis, Minn." The same words and figures appeared as an indorsement upon the back of the summons. The original complaint, properly subscribed by plaintiff's attorneys, was attached to the summons. From the affidavit of service it appears that a private person made the same July 28, 1890, by handing to and leaving with the defendant's wife, at the house of his usual abode, (said wife being then a resident of the house, and a person of suitable age and discretion,) true and correct copies of the summons and complaint. November 28, 1890, judgment was entered against defendant for want of answer upon filing the original summons and complaint, with due proof of service, made on defendant as before stated, and an affidavit of no answer. In July, 1892, defendant moved to set aside and vacate the judgment, on the ground of an irregularity or defect in the mode of service of the summons, which he claimed went to the jurisdiction of the court to enter the same; and on the hearing it was conclusively shown that the firm name of plaintiff's attorneys, "Penney & Rogers," as this firm name appeared, in connection with the firm's place of business as before indicated, in the subscription to the original summons, had been omitted from the copy left with Mrs. Clark. In every other respect—the street, the number thereof, the numbers of the rooms, and the city in which the attorneys had their office, including the full indorsement on the back—the copy served was accurate and complete. The defendant's counsel urge this defect and omission as fatal to the service, and as rendering the judgment absolutely void.

The original summons and attached complaint were regular in every way, and the affidavit of the person serving the same showed due service of both upon the de-

defendant. The court, *prima facie*, had acquired jurisdiction of defendant's person, and upon the filing of these papers and proofs, with an affidavit of no answer, was fully authorized to enter the judgment. From the copies of the summons and complaint actually served it clearly appeared who plaintiff's attorneys were, as well as the location of their office, the latter with unnecessary particularity. The defect in the copy of the summons was not substantial, nor of a character calculated to mislead, nor is there any intimation that defendant was misled thereby. The omission to transcribe the names of plaintiff's attorneys when copying the summons for service was of no more consequence than was the error in the original summons and copy, as served, which was the subject of consideration in *Millette v. Mehmke*, 26 Minn. 306, 3 N. W. Rep. 700. At most the omission was but a mere irregularity, and, if defendant desired to take advantage of the same, he should have done so by a motion to set aside the service. See *Creveling v. Moore*, 39 Mich. 563; *Low v. Mills*, 61 Mich. 35, 27 N. W. Rep. 877; *Mabbett v. Vick*, 53 Wis. 158, 10 N. W. Rep. 84. When there has been a departure from the requirements of the statute in regard to the service of a summons in any substantial matter affecting the rights of a defendant, jurisdiction of his person will not be acquired, and a judgment entered on such service will be set aside and vacated on proper application. But no such case is now before us. Order affirmed.

VANDERBURGH, J., absent, took no part.

EASTON v. SORENSON, County Auditor.

(Supreme Court of Minnesota. May 19, 1893.)
VOID TAX SALES—RECOVERY OF PURCHASE MONEY
—LIMITATION OF ACTION.

As against a claim upon a county to have returned the amount of money paid out for lands at a void tax sale, as provided in Gen. St. 1878, c. 11, § 97, as amended by Gen. Laws 1881, c. 10, the statute of limitations commences to run on the day of the entry of judgment against the purchaser adjudging and decreeing such sale void.

(Syllabus by the Court.)

Appeal from district court, Fillmore county; Farmer, Judge.

Action by J. C. Easton against T. A. Sorenson, auditor of Fillmore county, to recover money paid for land at a void tax sale. From an order overruling his demurrer to the complaint, defendant appeals. Reversed.

Geo. W. Rockwell, Co. Atty., H. W. Childs, Atty. Gen., and Geo. B. Edgerton, Asst. Atty. Gen., for appellant. Kingsley & Shepherd, for respondent.

COLLINS, J. Appeal from an order overruling a general demurrer to the complaint. The main question is whether plaintiff is entitled, under Gen. St. 1878, c. 11, § 97, as amended by Gen. Laws 1881, c. 10, to have returned to him out of the county treasury the amounts paid for certain lands at tax sales held in the years 1866, 1867, and 1868. Tax certificates were duly issued at such sales, upon which plaintiff obtained tax deeds on and prior to August 11, 1871. A judgment adjudging and decreeing these tax sales, the certificates, and the deeds null and void was duly entered November 24, 1880. Plaintiff made no demand upon the county auditor for a warrant on the county treasurer, according to the complaint, until June 30, 1890,—nearly ten years after the judgment had been declared void and set aside; therefore much more than six years had elapsed between the day on which judgment was entered against the plaintiff and the day on which demand was made on the county auditor for a warrant on the treasurer, and it is the position of counsel for defendant auditor that the cause of action was barred by the statute of limitations. Gen. St. 1878, c. 68, §§ 3, 6. This depends upon when the cause of action accrued. If at the time of the entry of judgment, in 1880, the position before referred to is unassailable, and the order appealed from must be reversed. Upon the other hand, if the cause of action did not accrue until a demand was made, the statute was not set in motion until then, and the complaint stated a good cause of action. In *Corbin v. Morrow*, 46 Minn. 522, 49 N. W. Rep. 201, it was held that, in order to bring himself within the provisions of the statute first above cited, it is incumbent upon one claiming a right to have the amount he had paid out returned to him out of the county treasury to show by his complaint that he has made such demand, accompanied by proper evidence of his right to make it. As the action, said the court, must be based on a breach of duty by the auditor, the complaint must show affirmatively that it was the auditor's duty to issue the warrant. Respondent's counsel rely upon this case, arguing that the language used justifies the assertion that no cause of action accrues until demand is made. In *Brown v. Brown*, 28 Minn. 501, 11 N. W. Rep. 64, this court held that where a loan of money was made upon the condition that the debt therefor should become due and payable when demand was made, and not before, the statute of limitations began to run from the date of the demand, and not from the date of the loan. In *Branch v. Dawson*, 33 Minn. 399, 23 N. W. Rep. 552, the rule was established that the right to sue a bank upon a general deposit does not accrue, nor does the statute of limitations upon it begin to run, until a demand of payment, unless

such demand is in some way dispensed with. In each of these cases care was taken to place the conclusion upon the ground that it was the intention of the parties to a contract to make a request for payment a condition precedent to the liability to pay the money, and therefore, as no action would lie until the condition was performed, the statute of limitations commenced to run when demand was made, and not before. Neither of these cases is authority in respondent's behalf, for there is no resemblance between a purchaser at a tax sale and a bank depositor. The liability of a banker to his depositor grows out of contract, while in the case of a purchaser at a tax sale, where the sale has been adjudged void, the duty of the auditor to issue a warrant and the liability of the county to refund arise by virtue of the statute. The relations between the parties are not at all similar, being contractual in the one case and statutory in the other. In *Litchfield v. McDonald*, 35 Minn. 167, 23 N. W. Rep. 191, it was held that the leave to be obtained (Gen. St. 1878, c. 78, §§ 1-3) from a district court or judge, before bringing action upon an official bond, was no part of an aggrieved person's cause of action, and hence that the time of obtaining such leave cut no figure in the application of a statute of limitations; the statute commenced to run from the time the wrong complained of was perpetrated, and not from the time leave to sue was obtained. The cause of action, if there was one, accrued independently of and prior to the application for leave, and was the very basis on which the application rested. So it was with the demand in controversy here, and the language used in the *Litchfield Case* when considering the claim that the statute of limitations commenced to run when leave to sue the bond was obtained, and not before, changing it to fit the present facts, is exactly in point. It need not be repeated. The plaintiff's right to have his money returned was complete when the judgment was entered against him, and whether he received it promptly was a matter entirely within his control. His cause of action then accrued, although his right to maintain a suit upon this cause depended upon his taking certain preliminary steps, clearly requisite for the information of the officers and the protection of the county. It would be absurd to say that one entitled to receive money out of the county treasury, upon making proof of his right, can indefinitely prolong the time within which suit may be brought by voluntarily omitting to make his proof. This proof is no part of the cause of action, but simply evidence that a cause of action exists. The following cases may be cited as analogous to the one at bar: *Hintrager v. Traut*, 69 Iowa, 743, 27 N. W. Rep. 807; *Atchison, etc., Ry. Co. v. Burlingame Tp.*,

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36 Kan. 633, 14 Pac. Rep. 271; *High v. Commissioners*, 92 Ind. 587; *Codman v. Rogers*, 10 Pick. 112. The statute of limitations commenced to run against plaintiff's claim upon the county on the day judgment was entered against him. Order reversed.

VANDERBURGH, J., absent, did not sit.

LANCOURE v. DUPRE.

(Supreme Court of Minnesota. May 19, 1893.)

VENDOR AND PURCHASER—CONTRACT OF SALE—BREACH OF BY VENDOR—DAMAGES.

1. In an action by a vendee for a breach of contract to sell real property because of the inability of the vendor to convey good title, the former is entitled to recover of the vendor interest upon all moneys paid on the contract from the date of payment, whether the same was paid as principal or as interest; and is also entitled to recover such sums as he may have paid as taxes upon the premises, with interest from the dates of payment.

2. The general rule in such cases is that the vendee may also recover the value of improvements put on the land by him in good faith, in so far as such improvements may, at the time of the rescission of the contract, permanently enhance the value of the land.

3. As against these items of damage the vendor is entitled to offset the rental value of the premises, to be estimated without the improvements placed thereon by the vendee.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Otis, Judge.

Action by Olive Lancoure against Peter Dupre for a breach of contract to convey land. Defendant had judgment, and plaintiff appeals. Reversed.

Warner, Richardson & Lawrence, for appellant. C. D. & Thos. D. O'Brien, for respondent.

COLLINS, J. The defendant, in the year 1877, sold to plaintiff the tract of land described in the complaint, and executed and delivered to her his bond for a deed. One half of the agreed purchase price was paid by plaintiff about the time of the purchase. Plaintiff went into possession, and remained until March 1, 1886, when she elected to rescind the contract, abandoned the premises, and brought this action to recover damages because of the failure and inability of defendant to convey a good title in accordance with the conditions of his bond. In this instrument it was stated that the premises to be conveyed were the same deeded by one Porter and his wife to Joseph Nadeau in the year 1874, and by said Nadeau and his wife to defendant, April 4, 1876. At the date of conveyance to defendant, Nadeau was a married man, as defendant well knew, but his wife at that time refused, and she has ever since refused, to join in the deed, or to consent in writing to the same. By reason of this refusal, defendant's title to the premises

was and has remained defective, subject to the inchoate interest and estate of Nadeau's wife known as the "dower right." In 1882, the plaintiff, desiring to make substantial improvements on the land, offered to pay the balance of the purchase price to defendant, providing he would convey a good title to her, but, discovering the defect before mentioned, she refused to accept his deed solely because of such defect. Thereupon the defendant assured her that he could and would secure a further and sufficient conveyance from Nadeau and his wife, so as to perfect his own title, and would convey the same to plaintiff, and that she could safely make the proposed improvements. At this time the balance of the purchase price was not due, although plaintiff, at her option, could pay it. Relying upon the statement in the bond as to the source of title, and representations that the defendant was able to convey a good title to the land, the plaintiff was induced to purchase; and, relying upon his further statements and representations that he could and would perfect his defective title, as well as upon the original statements and representations, the plaintiff placed betterments upon the land in 1882 at a cost of \$800, as was found by the court. She had also, while in possession, paid the annual interest on account of the deferred purchase-price payment, and had also paid the taxes as they fell due for several years. The defendant was unable and has refused to perfect his title by deed or otherwise, and in March, 1886, as before stated, plaintiff took such steps as were essential to rescind the contract to purchase, and brought this action. This appeal is by plaintiff from a judgment entered in conformity with the findings of fact and conclusions of law of the trial court.

When ordering judgment for plaintiff, the court below recognized her right to recover the amount paid as part of the purchase price, with interest from the date of payment, and to recover the amounts she had paid as interest upon the deferred payment, and to recover the amounts paid for taxes. As against those sums it offset the rental value of the premises while plaintiff held possession. No interest was allowed her upon the amounts paid as interest on the deferred purchase-price payment, nor upon the sums annually paid as taxes, nor was interest allowed to defendant upon the amounts determined to be due to him as annual rental. Nor was anything awarded to plaintiff as compensation for the improvements placed upon the premises in 1882. The refusal of the court to allow for improvements was based on the fact that plaintiff made no effort to prove the value or worth of the same to the land at the time of the rescission. Their cost four years earlier had been established, but there was nothing in the pleadings or proof from which their worth to the land, when plaintiff elected to rescind and abandoned the premises, or, rather, in what amount these

improvements had enhanced the value of the land, could be determined. The correctness of this view of the law is the principal question before us, the other questions being in reference to the right of plaintiff to recover interest upon the amounts paid as interest and for taxes, and whether defendant should be allowed interest upon the annual rental value of the land.

Where there is a rescission of a land contract because the seller is unable or refuses to convey a good title, the purchaser should certainly be put in statu quo, as nearly as possible. Literal restoration seems impossible when the contract has been acted upon, payments made, possession enjoyed, and permanent improvements placed on the premises. When the damages are capable of measurement, the doctrine requiring that there be awarded to the injured party compensation equivalent to the actual damages he has sustained is not, in a case like this, at all inequitable. Indeed, it is obvious that in no other manner could justice be done to the plaintiff; and it was said in *Erickson v. Bennet*, 30 Minn. 326, 40 N. W. Rep. 157, that, generally, where one contracts to convey real estate, knowing that he has no title, and cannot perform his contract, the recovery is not limited by the technical rule of damages usually applicable in actions upon the covenants in a deed of conveyance, but that it is measured by the broader rule of compensation generally applied in cases of breach of contract and of fraud. The statements and representations as to title and source of title, and his ability to convey, before mentioned, were relied upon by plaintiff, and induced her to purchase, and in good faith to make permanent improvements. They were false, and defendant knew, or should have known, of their falsity. They amounted to a fraud upon the plaintiff. The defendant cannot complain if he be required to compensate her and make good the loss. But the amount which plaintiff lost because deprived of her improvements was not what they cost in 1882, but was what they were worth to the land when she was compelled to remove from the same; that is, the amount the land was permanently enhanced in value thereby. To illustrate: The value of the dwelling house rebuilt by the plaintiff could not be increased or decreased in value by defendant's course. Had he complied with his contract, the house would have been worth no more and no less than it was when he refused to perform. In either event its present value would have been the same. Had the plaintiff lost it by the elements on the day she gave it up her loss would have been its value, not what it cost. That she was deprived of it through defendant's fault, and not by the elements, cannot augment the amount of her loss, nor increase the compensation she should receive there-

for. If, then, the true measure of damages in such cases be compensation, the trial court did not err when refusing to allow to plaintiff the cost of her betterments. The generally accepted and proper rule, in our opinion, where there is a rescission of a contract for the sale of land for want of a perfect title, is that improvements put on the land in good faith by the purchaser must be accounted for, in so far as they may at the time of the rescission permanently enhance the value of the land. *Winters v. Elliott*, 1 Lea, 676; *Mason v. Lawing*, 10 Lea, 284. See, also, *Davis v. Strobbridge*, 44 Mich. 157, 6 N. W. Rep. 205; *Sheard v. Welburn*, 67 Mich. 387, 34 N. W. Rep. 716; *Harris v. Harris*, 70 Pa. St. 170. But counsel for appellant argue that the theory of the rule is such as to cast upon the plaintiff all of the loss from the effect of the elements upon the improvements, and at the same time she is adjudged liable to defendant for the rental value therefor, because full rent presumably includes payment for depreciation in value through ordinary wear and tear. If there is anything in the record to justify the claim that, when determining the rental value of the premises allowed defendant, the court below included the rental value of plaintiff's improvements, there would be force in the argument, but there is not. The court should have fixed the rental value of the land alone,—the property the defendant sold, agreed to convey, but did not. The law requires the purchaser to account to the seller for the rental value of the premises sold, and of which the former has had possession. We cannot assume that the trial court improperly assessed the rental value under a misconception of the law, for there is nothing in the record to indicate it, and the presumption is the other way. Again, the rental value per annum was fixed by the court at the same for each of the five years preceding the making of the improvements as it was for each of the years subsequent thereto, and this tends to demonstrate that the value of the use of the improvements was not included. The plaintiff was entitled to recover interest upon the sums paid as interest upon the deferred payment, and also upon the amounts paid for taxes. This must follow from the fact that she can recover the amount of the payments; and as against these various sums the defendant can offset and recover the annual rentals with interest from the end of each year of plaintiff's possession. There could be no serious obstacle in the way of a modification of the judgment so as to allow to the respective parties interest as above indicated, but, in our opinion, justice requires that the case be remanded for a new trial. It is so ordered. Judgment reversed.

VANDEBURGH, J., took no part.

MERCHANT et al. v. HOWELL et al.

(Supreme Court of Minnesota. May 19, 1893.)

CONTRACTS—ORDER FOR GOODS—CONSTRUCTION—EVIDENCE.

Defendants ordered from plaintiffs "600 2-inch boiler-flue ferrules; 1,500 2½-inch; and 1,200 3-inch. This is outside diameter." *Held*, that it was competent to show, for the purpose of explaining the meaning of the order, that, in the trade in which both parties were engaged, boiler-flue ferrules are standard articles of common use, and that it was the general custom to designate them by the size of the flues on which they were to be used; also that boiler flues are always manufactured in certain regular and standard sizes of exact outside diameters, and that, if the dimensions named in the order were to be applied to the ferrules, and not to the flues, the ferrules could not be used as "boiler-flue ferrules."

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Hooker, Judge.

Action by Henry W. Merchant and others, copartners as Merchant & Co., against Robert R. Howell and others, as R. R. Howell & Co., for the price of goods sold and delivered. Plaintiffs had judgment, and, from an order granting a new trial, they appeal. Affirmed.

Geo. F. Edwards, for appellants. Hart & Brewer, for respondents.

COLLINS, J. The real controversy between the parties to this action is whether the defendants' written order for boiler-flue ferrules, which plaintiffs undertook to fill, was, and should have been so understood, for ferrules of the dimensions specified, outside diameter measurements, the gauge thickness being about 1-18 of an inch, or for ferrules which would fit upon and over boiler flues of these diameter measurements, outside. The defendants contend that their order for "600 2-inch boiler-flue ferrules; 1,500 2½-inch; and 1,200 3-inch. This is outside diameter,"—was plain and unambiguous, and that the specified dimensions clearly referred to the flues, not to the ferrules; while plaintiffs insist with equal positiveness and confidence that the order plainly stated what the diameters of the ferrules, outside measurements, should be, not the diameters of the flues for which they were intended. And counsel upon either side have demonstrated the correctness of their respective positions—to their own satisfaction. The court below conducted the trial upon the theory that the language used in the order was of doubtful construction, and, plaintiffs objecting, allowed defendants to show by competent witnesses which interpretation would have been put upon it, and how it would have been construed, generally, by persons engaged in the trade. Testimony upon the same point was produced by plaintiffs, and, it seems almost needless to remark, the

witnesses differed as to how the language of the order should have been understood and construed by those who dealt in such articles. The court also allowed defendants to show, plaintiffs objecting, that all boiler flues are made in standard sizes, and that the ferrules furnished in accordance with plaintiffs' construction would not fit upon any of these standard sizes. In fact, plaintiffs seem to have admitted this, for in all of their communications with defendants since the latter advised them of the alleged mistake they have spoken of the ferrules as worthless, except as scrap metal. After receiving the testimony above mentioned, and by which a very grave doubt had been raised as to how the order should have been construed, if none had before existed, the court, upon its motion, directed a verdict for plaintiffs for the contract price of the goods, and such a verdict was returned. Later the court granted the defendants' motion for a new trial, on the ground that it ought not to have taken the case from the jury, and the present appeal is from the order granting a new trial.

We do not agree with the claim made by plaintiffs' counsel that the language used in the order was so plain and clear as to warrant but one construction of it, and that the one which his clients placed upon it. If, then, there was a doubt whether on the face of the order it should have been interpreted by them, as it evidently was, when filled, they have no cause to complain of the rulings of the court respecting the admissibility of testimony tending to explain the language, or of the order granting a new trial. The subject-matter of the contract was boiler-flue ferrules, not ferrules. It was shown that boiler-flue ferrules were articles in common use, and that plaintiffs had been engaged in selling them to the trade for many years. It was also shown that boiler flues were manufactured in standard sizes only, such sizes being fixed in inches and fractions thereof, outside measurement. No flues are made between 1½-inch and 2-inch outside diameter, and knowledge of this fact, which stands undisputed, must be attributed to plaintiffs; so that a ferrule 1-18 of an inch gauge, with an outside diameter of 2 inches, could not be used upon a 1½-inch or a 2-inch flue, being too large for the one, and too small for the other. The same objections were made to the 2½-inch and 3-inch ferrules furnished by plaintiffs, the fact being that no boiler flues were manufactured on which any of these ferrules would fit. With this condition of affairs, of long standing when defendants gave their order for boiler-flue ferrules,—an article of common use,—evidence of custom and usage, so called, and the understanding of those engaged in this particular line of trade, was admissible to show what was intended, and what should

have been understood, by plaintiffs. It is a rule of interpretation that the intention of the parties to a contract is to be ascertained by applying its terms to the subject-matter. The subject or object to which it is to be applied may be ascertained by extrinsic evidence, if it can be done without a departure from the rational meaning of the words actually used. If the meaning is involved in uncertainty, the intention may be ascertained by such testimony, and, when so ascertained, will be taken as the meaning of the parties, if such meaning can be distinctly derived from a fair and rational interpretation of the language employed. It was well said in *Paine v. Smith*, 33 Minn. 495, 24 N. W. Rep. 305, that in a commercial community any words or phrases acquire a technical meaning, well understood by those in a particular trade or bargains. Certain business customs and usages also become well established and understood by business men, who, in making their contracts, assume them for granted, and contract with reference to them, without taking time to incorporate them into the express terms of their business. On this branch of the case the court should have submitted it to the jury. Under the pleadings and the testimony, the defendants were not entitled to recover upon their counterclaim for damages. As late as August 21, 1890, defendants urged shipment of the goods, and, on August 29th, expressed their satisfaction at being advised of the forwarding of a part on that day, asking that the balance be sent quickly. They could not consistently urge shipment of the goods, and retain their right to demand damages for the previously existing delay in filling their order. See *Fowlds v. Evans*, 54 N. W. Rep. 743, (this term.) Order affirmed.

VANDEBURGH, J., absent, took no part.

SEELEY v. KILLORAN.

(Supreme Court of Minnesota. May 19, 1893.)

ELECTION CONTEST—APPEAL FROM COUNTY CANVASSERS—TIME OF TAKING.

An election contest over a county office, conducted under the provisions of Gen. Laws 1891, c. 4, must be instituted by an appeal from the decision of the board of canvassers to the district court, taken within the time and in the manner prescribed in section 76 of said chapter. If the notice of appeal therein mentioned is not entered with the clerk within 20 days after the day of election, the district court acquires no jurisdiction of the proceeding.

(Syllabus by the Court.)

Appeal from district court, Itasca county; Holland, Judge.

Proceedings by Charles E. Seeley against J. F. Killoran to contest the election of a county officer. Defendant had judgment, and plaintiff appeals. Affirmed.

True & Wetherby and Hawkins & McCarthy, (Ohoate & Merrill, of counsel,) for appellant. Draper, Davis & Hollister, for respondent.

COLLINS, J. This was a proceeding to contest an election for a county office, and was dismissed by the district court upon the ground that notice of appeal from the decision of the county canvassing board had not been entered with the clerk of said court within 20 days after the day of election, as provided by Gen. Laws 1891, c. 4, § 76. In the case of *Baberick v. Magner*, 9 Minn. 232, (Gil. 217,) it was held that the statute then in force—the act of March 12, 1861—provided but one way of instituting an election contest, and that was by appeal to the district court from the decision of the board of canvassers, as provided by section 81 of the act, and that, unless an appeal was taken by notice thereof entered with the clerk of the proper district court within 20 days after the day of election, the court acquired no jurisdiction whatever of the proceeding. The sections of the act of 1861 which related to the question then before the court were section 31, before mentioned, and sections 49 and 52, which authorized and provided the method for conducting the contest. The corresponding sections in the Revision of 1866 were numbered 29 and 49 of chapter 1. Section 29 provided for the entry of a notice of appeal with the clerk of the court within 20 days from the day of election in case of a contest, while section 49 specified the method to be pursued in prosecuting the contest. The only material change effected in the original sections by the Revision of 1866 consisted in an omission from section 29 of the provision found in section 31 of the act of 1861, relating to an appeal to the proper branch of the legislature from a decision of the canvassing board relative to the election of senators and representatives. This was so declared in *Borer v. Kolars*, 23 Minn. 445, in which the necessity of entering a notice of appeal with the clerk of the court under the provisions found in the Revision of 1866 was considered, and it was held that sections 29, 46, and 49 of chapter 1 of the Revision sustained the same relation to each other as did the corresponding sections in the act of 1861, and also that the construction given to the latter in *Baberick v. Magner* must govern when construing the latter. The order appealed from, dismissing the proceeding because notice had not been entered within 20 days as provided for in said section 29, was affirmed. In the statute which controls this case we find similar provisions, (Gen. Laws 1891, c. 4, §§ 76, 91, 95.) Section 76 is substantially a re-enactment of section 29 of the Revision, and provides that at the close of the labors of the canvassing board it shall declare the person having the highest number of votes for any county office duly elect-

ed, subject to an appeal to the district court of the proper county, and that, in case of an appeal, notice thereof must be entered with the clerk of said court within 20 days after the day of election; while sections 91 and 95 are substantially re-enactments of sections 46 and 49 of the Revision of 1866, authorizing the contest, and providing the course of procedure. There is nothing elsewhere in the general election law of 1891 which suggests that it was the intention of the legislature to confer jurisdiction upon the district court in contested election cases instituted under that law, except as prescribed in section 76; and similar statutory provisions had theretofore been construed by this court as going to the jurisdiction of the court to entertain the case at all. The provisions of the act of 1891 in reference to contests must be construed with reference to decisions upon like enactments. The reasoning in *Borer v. Kolars* completely covers the main points made on the appeal, and cannot be improved upon. Relator's counsel argue that the words in section 76, "within twenty days after the election," should be construed as meaning within 20 days after the result of the election is officially declared by the board of canvassers, because of a provision providing for an adjournment of the board from day to day for a period not exceeding 10 days. To disregard the plain language in section 76, and give it the construction asked for by counsel, would be the rankest kind of judicial legislation. It is not capable of any such interpretation. The district court failed to acquire jurisdiction of the contest, and its order dismissing was correct. Order affirmed.

VANDERBURGH, J., absent.

TEMPLE v. NORRIS.

(Supreme Court of Minnesota. May 19, 1893.)

SERVICE OF PROCESS—LEAVING COPY AT RESIDENCE.

A person who has attained the age of 14 is at years of legal discretion, and *prima facie* is a person of "suitable age and discretion," within the meaning of Gen. St. 1878, c. 66, § 59, subd. 4, regulating the manner of the service of a summons in a civil action.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Canty, Judge.

Action by Ruby D. Temple against Mary L. Norris to set aside a sale of land on the foreclosure of a mortgage given by plaintiff, on the ground that the service of process in the foreclosure proceedings was void. From an order sustaining a general demurrer to the complaint, plaintiff appeals. Affirmed.

J. F. Keene, for appellant. Stocker & Matchan, for respondent.

COLLINS, J. But one feature of the complaint in this action need be considered. It was therein alleged that the only person upon whom a copy of the foreclosure notice was served was but "fourteen years old, and no more, and was wholly unaccustomed to, and unfamiliar with, business transactions and all legal proceedings, and that she was not of suitable age or discretion; that she was then wholly incapable of understanding and comprehending the nature and gravity of the transaction, and did not understand the nature or gravity thereof." The statute does not, in terms, require that service shall be made by leaving a copy of the notice with a person accustomed to, or familiar with, business transactions or legal proceedings, or with a person who is capable of understanding and comprehending the nature and gravity of the transaction, or who does understand and comprehend it. It does require that the person with whom a copy is left, when service is made at the house of the usual abode, shall be of suitable age and discretion. Gen. St. 1878, c. 81, § 5, and Id. c. 66, § 59, subd. 4. Now it should not be inferred that because the person with whom the copy was left was unfamiliar with, and unaccustomed to, business transactions and legal proceedings, and because she did not understand and comprehend what counsel terms the "gravity" of the transaction, that she was not a person of suitable age and discretion, within the meaning of the statute. This same charge might easily be made with regard to many adults, so that the allegation, when analyzed, really amounts to nothing more than charging that because the girl, who was the daughter of the occupant of the mortgaged premises, was but 14 years of age, she was not of suitable age and discretion. There is no averment in the complaint that she was not ordinarily intelligent, and in full possession of her faculties, and we must therefore presume that she was as well informed, and as capable, as the ordinary female of the age of 14 years. At common law, on the attainment of this number of years, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes them, at those years, to be capable of crime. 1 Hale, P. C. 25; Bac. Abr. "Infancy," A. H. By the terms of our Penal Code, (section 17,) a child of the age of 7, and under the age of 12, years, is presumed incapable of crime, but even this presumption may be removed by proof of sufficient capacity. At common law a female of the age of 14 is at years of legal discretion, and may choose a guardian. 1 Bl. Comm. 463. By our statute the right to nominate a guardian is conferred upon an infant of the age of 14. And the summons in a civil action is to be served upon an infant defendant when 14 years of age or upwards,—not upon a guardian. These

statutory provisions indicate that a person who has attained the age of 14 is at years of legal discretion, and, it must follow, of suitable age and discretion, in the contemplation of the statute regulating the service of the notice of foreclosure. There is no requirement that the notice must be left in the hands of a person of full age. As the pleading stated Miss Lyon to have been 14 years of age, and failed to allege that she was not ordinarily intelligent and capable, and in full possession of all her faculties, or to negative in any other manner the presumption before referred to, the demurrer was well taken. Of course the bare averment that she was not a person of suitable age and discretion was a mere conclusion of law. On the other point argued by counsel, we call attention to *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. Rep. 533. Order affirmed.

VANDERBURGH, J., took no part in this case.

STATE ex rel. SHISSLER v. PORTER,
Judge.

(Supreme Court of Minnesota. May 19, 1903.)
CONSTITUTIONAL LAW—TITLE OF ACT—MUNICIPAL CHARTER.

1. In so far as they relate to the term of office of the judge of the municipal court for the city of Mankato, Sp. Laws 1887, c. 8, Sp. Laws 1889, c. 12, and Sp. Laws 1891, c. 47, are unconstitutional and void.

2. The subject of the attempted legislation is not expressed in the titles to these laws, as required by section 27, art. 4, of the constitution.

(Syllabus by the Court.)

Original proceedings in the name of the state, on the relation of Ira P. Shissler, against Jerome E. Porter, judge of the municipal court of the city of Mankato, to determine whether respondent's term of office is two or three years. Judgment for respondent.

Lorin Oray and Wm. N. Plymat, for relator. Pfau & Young, for respondent.

COLLINS, J. The relator seeks by this proceeding to obtain immediate possession of the office of judge of the municipal court of the city of Mankato; he having been elected to that office at the city election held April 4, 1893. His claim is that the term of office of the respondent—who was last elected to the same office at the election held in 1891, duly qualified, and has since discharged the duties—expired on Monday, the 10th day of April, 1893. The question is whether the respondent's term of office is two or three years. The facts are that the city of Mankato was chartered and organized long prior to the year 1885. A municipal court for the city was created by Sp. Laws 1885, c. 119; the same being an act of the legislature entitled "An act to establish a municipal

court in the city of Mankato, Blue Earth county, Minnesota." This was an independent act, providing for the establishment of the court, and defining its powers and jurisdiction, and was similar in all respects to like acts which have passed the legislature from time to time under the authority of that section of the constitution which provides for certain named courts, and for the creation of "such other courts, inferior to the supreme court, as the legislature may * * * establish by a two-thirds vote." It is conceded that this act has never been referred to directly by the legislature, except in an amendatory act now known as chapter 78, Sp. Laws 1887; the amendment relating simply to the salary of the judge of the court. By section 2 of the original enactment of 1885 it was provided that the qualified electors of the city of Mankato, at the city election to be holden on the first Tuesday in April of that year, and on the day of the city election every third year thereafter, should elect a judge of the court, who should hold his office for the term of three years, and until his successor was elected and qualified. By section 3 it was provided that there should also be elected a special judge of said court, whose manner of election, term of office, powers, duties, and qualifications, should be the same as those of the judge. Both of these officers were required to be residents and qualified electors of the city, persons learned in the law, and duly admitted to practice as attorneys in this state. By the terms of sections 2 and 3, vacancies in either of these offices were to be filled by appointment by the governor; the appointees to be qualified persons, and to hold office until the next annual city election occurring more than 30 days after the vacancy should have happened, when a judge or a special judge, or both, as the case might be, should be elected for a term of three years. We call attention to some of those provisions for the purpose of showing the painstaking care of the legislature when establishing the court, which is a court of record, having civil jurisdiction in cases where the amounts in controversy do not exceed \$500. Its criminal jurisdiction is that of a justice of the peace, and is exclusive in the city. The respondent was first elected in April, 1888. There was no attempt made to elect a municipal judge from that time until the annual city election of 1891, when he was re-elected, as before stated. So it will be seen that respondent held the office for three years under his first election.

In the year 1887 an act was passed, (Sp. Laws 1887, c. 8,) entitled "An act to amend and consolidate the charter of the city of Mankato, state of Minnesota." This was really a new charter for the city. We find no reference to the municipal court, or the judges thereof, except in section 2, subc. 2, where it is provided that the elective officers of the city shall be a mayor, a municipal judge, treas-

urer, and city recorder. The recorder and treasurer are to be elected for two years, and "all other elective officers * * * shall hold their offices for one year, or until their successors are elected and qualified." There was also a provision which had the effect to continue in office all persons then holding office under the prior charter until the expiration of the terms for which they were elected or appointed. It is claimed by the relator that by this act the term of office of municipal judge was reduced from three years to one, and that, when respondent was elected in 1888, he was elected for but one year.

In the year 1889 various amendments were made to the act of 1887, by an act entitled "An act entitled 'An act to amend the charter of the city of Mankato in the state of Minnesota,'" now Sp. Laws 1889, c. 12. In section 2 of the act the elective officers of the city—mayor, municipal judge, etc.—were named, the same as in section 2 of the statute of 1887. An election was provided for the year 1889, and for every two years thereafter, and the term of office of every officer elected under the act was to commence on the second Tuesday of April of the year in which he was elected, and was to continue for two years. The only substantial change in the amendment of 1889, relating to elections or terms of office, was to substitute biennial for annual elections, and to make the terms of office for the respective officers two years, instead of one. It will have been noticed that a municipal judge was not elected in 1889. In the year 1891, Sp. Laws 1891, c. 47, another act was passed, entitled "An act to amend chapter 8 of the Special Laws of the State of Minnesota for the year 1887, entitled 'An act to amend and consolidate the charter of the city of Mankato, state of Minnesota,' as amended by chapter 12 of the Special Laws of the State of Minnesota for the year 1889, entitled 'An act entitled an act to amend the charter of the city of Mankato, in the state of Minnesota.'" This was, in substance, as was chapter 8, supra, a new charter. An election was provided for the first Tuesday in April, 1891, and every two years thereafter. The elective officers were to be a mayor, municipal judge, a special judge, treasurer, and recorder. These officers, it was provided, should be elected for two years, and until their successors were elected and qualified. The municipal court was not mentioned in this act, nor were the judges thereof, except as above stated. Our attention has not been directed to any other legislation bearing upon the subject, and the relator rests his claim to immediate possession of the office on the amendatory statutes of 1887, 1889, and 1891, before mentioned, and in which he contends the term of the office in question was first reduced to one year, to take effect in the year 1888, when respondent was first elected, and then enlarged to two years, taking ef-

fect, as to respondent's second term, in the year 1891, when he was last elected.

It is the position of the respondent that the term of the judge of the municipal court, as fixed by the act of 1885, establishing the court, has not been changed or shortened by the so-called amendatory acts, because, if the language used therein could be given that effect, it would prove ineffectual; the subject-matter of such legislation not having been expressed, it is claimed, in the title to either of these various acts, as required by paragraph 27, art. 4, of the constitution, which provides that no law shall embrace more than one subject, which shall be expressed in its title. The main argument of counsel for the relator seems to be based upon their contention that the act of 1885, establishing the court, was an amendment to the then existing city charter, and upon its passage became incorporated into and a part of it, so that the subsequent enactments of the legislature amendatory of the charter affected the act. The city charter was not mentioned, and to create this court it was not necessary that it should be. That such an act might be styled as amendatory of a charter, or might be made a part of a city charter, either originally or by legislation subsequent to the granting of corporate powers, we do not now question, although the policy and wisdom of establishing such tribunals by independent and distinctive legislation are strongly suggested by the fact that they can only be lawfully created, under the constitution, by a two-thirds vote of the legislature, while acts relating to offices purely municipal need but a majority vote. But we are not to consider what might have been enacted as a part of the original charter, but what was enacted; so that, taking it for granted that a municipal court might have been provided and created in the charter act, without special reference to such court in the title, it was not. The city charter was wholly silent on the subject, and covered only such subjects as are ordinarily found in a charter. Nor was there anything in the act of 1885, establishing the court, indicating an intention to add it to, or make it a part of, the charter, or to amend any of the charter provisions; and whether that could have been done legally, under its title, may well be questioned. Of course the functions of the newly-constituted court were to be exercised within the limits of the municipality; and it was established, undoubtedly, at the instance and for the convenience of its residents. That its judges were to be chosen by ballot, by and from among the electors of the city, and that the city recorder was to be clerk of the court, was not significant, or of any greater effect than would have been a requirement that from among the qualified electors of the city the governor should appoint those officers. These provisions simply pointed at, and specified, the means and

methods by which the court was to be equipped with its proper complement of officials. Prior to the passage of Sp. Laws 1885, c. 119,—an act to establish a municipal court in the city of Mankato, according to its title,—that city had been chartered by the legislature. The act or bill for the charter was full and complete, and the subject embraced therein was tersely, but clearly, expressed in its title. It is probable that the subject-matter covered by said chapter 119 might have been incorporated into this original legislation, or, with a proper and suggestive title, the act creating the court might have been lawfully passed as an amendment to the charter. But this was not the course which was pursued. Instead of adopting a title which would have indicated a purpose to amend the charter, or make the new law a part of it, the exact object of the legislation was expressed. Two laws were then in force, separate and distinct enactments,—one creating and chartering a city, but making no provision for a municipal court, nor was it essential that it should; the other establishing such a court, and not referring at all to the city charter. The fact that the law establishing a judicial tribunal might have been made a part of the charter originally, or by amendment, does not affect the fact that such was not the course of the legislature. Nor can it have weight when considering the legislation through which it is urged the term of office of the municipal judge, as fixed in chapter 119, has been reduced to the term of two years.

The constitutional requirement as to the entitling of laws has often been discussed in the opinions of this court. The substance of what has been said, so far as we need to repeat it at this time, is that an amendatory law is for the amendment, not of what might have been enacted under the title of the original statute, but of what was enacted. Hence the sufficiency of the title of an act merely declared to be amendatory of a prior law, to justify the legislation which may be enacted under it, depends, not alone upon the fact that the title of the original statute was so comprehensive that the legislation in question might have been properly enacted in such prior law, but it depends also upon the nature and extent of the prior enactment, to amend which is the declared purpose or subject of the later act. And when the title of an act is such that the legislature can be deemed to have been fairly apprised of its general character by its subject, as expressed in such title, and all the provisions of such act have a just and proper reference thereto, and are such as, by the nature of the subject so indicated, are manifestly appropriate in that connection, and might reasonably be looked for in a measure of such a character, the title is sufficient. *State v. Cassidy*, 22 Minn. 312; *State v.*

Klein, Id. 323; State v. Smith, 35 Minn. 257, 23 N. W. Rep. 241. Applying this language to the case at bar, it will be seen that it is of no materiality that the matter found in and covered by the act establishing the court might have been germane to the subject embraced in the original charter, and have been sufficiently expressed in the title to that law, for the nature and extent of the charter itself must be consulted. And when we are examining the title to the amendatory act of 1891, under which relator claims his right to an immediate possession of the office, and the titles to the acts of which that was an amendment, we are to inquire whether the legislators were fairly informed by such titles of the nature and character of the proposed legislation. In view of the independent charter provisions in existence at the time of the enactment of the law establishing the court, and the title of that law, would amendments to the latter be looked for in measures which, if dependence could be placed upon their titles, related solely to the charter? We think not. The titles to these amendatory acts, if the legislation embraced therein was designed to affect the provisions of chapter 119, were very misleading, and well calculated to accomplish the mischief the constitutional requirement was expressly designed to prevent. As the subject of that part of the legislation heretofore referred to in Sp. Laws 1887, c. 8, Sp. Laws 1889, c. 12, and Sp. Laws 1891, c. 47, was not expressed in the titles of either of these acts, the term of office of the judge of the municipal court for the city of Mankato remains at three years. Order to show cause discharged.

VANDEBURGH, J., absent, took no part herein.

SLETTE v. GREAT NORTHERN RY. CO.
(Supreme Court of Minnesota. May 22, 1893.)

PERSONAL INJURIES—PROXIMATE CAUSE—NEGLIGENCE—EVIDENCE—EXCESSIVE DAMAGES.

1. Evidence showing the running of a freight train at excessive speed *held* to justify the conclusion that it was negligence and a proximate cause of a collision with a hand car running over the road in advance of the train.

2. Evidence *held* to justify the conclusion that the foreman of the hand car was negligent in not having stopped and taken the car off the track, he knowing that the train was following; also that the plaintiff, a section man on the car, under the direction of the foreman, might be deemed not negligent, even though the foreman was negligent.

3. A verdict for \$4,100 for a broken leg *held* excessive.

(Syllabus by the Court.)

Appeal from district court, Yellow Medicine county; Powers, Judge.

Action for personal injuries by Hans P. Slette against the Great Northern Railway Company. Plaintiff had judgment, and from an order denying a new trial, defendant appeals. Reversed.

M. D. Grover and Cyrus Wellington, for appellant. Spooner & Taylor, for respondent.

DICKINSON, J. The plaintiff was a section man in the defendant's service. He and his foreman, one Palmer, went out from Cottonwood station with a hand car, going northeast, to engage in their work on the road. Only these two men were on the car. They knew then, from seeing the smoke of the engine, that a train was coming towards Cottonwood from the southwest, the train being then about two miles away, according to the plaintiff's testimony, but much more than that according to some of the evidence. It was an irregular freight train, not running on schedule time. The railway track over which the hand car was run seems to have been constructed on an embankment, but there were two farm crossings where the car might be taken off to let the train pass. The first was about a half mile from Cottonwood and the other a half mile further on. Between the first and second crossings there was a steep descending grade, going northeast, and a bridge and a reverse curve in the road. When the men started out, the purpose was to run to the first crossing, and take the car off there to let the train pass; but when they reached that place, the car then running rapidly, the foreman determined to run on to the second crossing, and by his direction they went on without stopping. The plaintiff thinks that the train was then about a half mile distant. It being down grade, and with a favoring wind, they ran the car rapidly; but before reaching the bridge the train came in sight, it being then, as estimated, from 900 to 1,100 feet from the hand car. The engineer then first saw the car and tried to stop the train. Palmer kept on with the hand car until he had crossed the bridge. Then the car was stopped, and the two men attempted to take it off the track. They had not time to fully do this before the engine came up. The plaintiff ran out to the side of the embankment, as he testifies, before the engine struck the car. The car was thrown upon him, and his leg broken. He prosecutes this action to recover for the injury.

The court instructed the jury to consider the question of the alleged negligence of the defendant in only two particulars: First, as to the speed of the train; and, second, as to the negligence of the plaintiff's foreman. Involved with these was also the question whether the plaintiff was also guilty of negligence. We are of the opinion that the evidence as to the speed of the train and as to the plaintiff's conduct presented a case for the jury, both as respects the negligence of the defendant and the contributory negligence on the part of the plaintiff. There were 15 loaded cars in the train. It passed the station at Cottonwood, without stopping, at a rate of speed estimated by several wit-

nesses at from 30 to 35 miles an hour, although evidence on the part of the defendant tended to show that the speed was not more than 16 or 17 miles an hour. The running regulations forbade such trains to pass stations at a speed greater than 8 miles an hour. The train was provided only with hand brakes. If the train was running at the greater speed above mentioned, it was very much in excess of that allowed by the regulations of the defendant, as it would seem, and much greater than the ordinary speed of freight trains at that place. If the train had been running at only the ordinary rate of speed it is reasonable to suppose that the accident might not have occurred. In the view of the jury the extraordinary speed of the train may have been a proximate cause of the collision. But intimately related to this feature of the case is that of the plaintiff's own conduct. For one not employed in railway service to risk his life by attempting to run a hand car in advance of a train known to be approaching, would, of course, be negligence. But such a conclusion is not a matter of course in the case of railroad section men, whose duty requires them to thus be upon and pass over the railway, although there may be obvious danger in so doing. From the fact that such conduct is dangerous it does not necessarily follow that it should be characterized as negligence. The service necessarily involves exposure to danger, and the question of the propriety of the servant's conduct must be considered with regard to the nature of the service and the duties which he has to perform. It could not be said as a matter of legal inference that these section men were negligent, in view of the duties connected with their service, in starting out from their station to run a half mile to the first crossing, although they knew that a train was following them, which might stop for a considerable time at the station, although it might not, as it did not, stop at all. That was a question proper to submit to the jury. Nor do we feel at liberty to say that the plaintiff is conclusively chargeable with negligence from the fact that the car was not stopped, or that the plaintiff did not get off, at the first crossing. According to the evidence the car passed there at a speed of 16 miles an hour, making it unsafe for the plaintiff to get off. He had not the control of the car, but was working under the direction of and with the foreman, who then told him, as the plaintiff testified, to "work hard to the next crossing." He did not know, as may be supposed from the evidence, that the train was coming at an unusual rate of speed. It was not unnatural that he should defer somewhat to the judgment and direction of the foreman, and, as the latter was, as we understand, also engaged in propelling the car, the plaintiff might well be at a loss as to what he should do, even if he had appreciated the danger of going on. The time for de-

cision would seem to have been but brief, as the first crossing where the car could be conveniently taken off was quickly passed, and the car running on an embankment, as we understand. Under the circumstances, we think that it was for the jury to say whether the plaintiff was chargeable with want of such care as ordinarily prudent men would exercise in the same situation. Our conclusion is the same as respects the subsequent conduct of the plaintiff. The necessity for endeavoring to take the car off the track, so as to prevent a collision, was apparent; not merely because of the danger to property, but from a regard to the safety of the persons on the train. The evidence justified the belief that the plaintiff, after having tried to get the car off, attempted to get out of the way of danger when it became apparent that a collision was inevitable. The court submitted to the jury the question whether the plaintiff's foreman was chargeable with negligence. Although the foreman was a fellow servant with the plaintiff, yet, under the act of 1887, the negligence of the fellow servant might constitute a ground for recovery against the master. *Steffenson v. Railway Co.*, 45 Minn. 355, 47 N. W. Rep. 1068. We think that the case presented was proper for the consideration of the jury upon the point as to whether the foreman was negligent in not stopping at the first crossing, or beyond that point, as soon as it was discovered that the train was overtaking the hand car. The foreman may have been chargeable with negligence, and yet the plaintiff may be deemed to have been not negligent. The foreman could have stopped the car at will. Presumably the plaintiff would have lent his aid in doing so if the foreman had not determined to go on. He testifies that he suggested at the first crossing that they should stop there. On the other hand, as has been already said, the plaintiff was not controlling the movement of the car, nor propelling it alone; and for him to have refused to lend his aid in propelling might have increased, rather than averted, the danger, unless the foreman had deferred to him, and relinquished his determination to go on.

But it is contended that the verdict was excessive, and we think that it must be so considered. It was for \$4,100. The plaintiff was 30 years of age. He was earning \$35 a month, and there is no suggestion that his earning capacity was greater than was thus indicated. The injury consisted only in a transverse fracture of the thigh bone. As appears by the testimony of the physician called by the plaintiff, his recovery had been satisfactory, but, as is common in such cases, the leg was shortened from a half to three-quarters of an inch. This would cause the plaintiff to limp in walking, but even this would be obviated by wearing a high-heeled boot. The physician considered that the leg would be as good as ever, save as above in-

dicted, and excepting also that it might be expected to tire a little quicker from this cause, and that there might be a tendency to rheumatic pain. Of course, the pain, loss of time, and expense (\$100) incident to such an injury are to be considered. But, in view of the whole case, we are unable to resist the conclusion that the verdict was beyond the proper limits of mere compensation. Taking the plaintiff's own showing as to his earning capacity, the amount of the verdict is equal to the sum of his earnings for nine and a half years' labor; and that is to be recovered in advance and at once. The interest on that sum at 6 per cent. a year would be considerably more than one half of what he has been accustomed to earn. And yet it seems to be apparent that his earning capacity for the future will be but little, if at all, impaired. It is not without reluctance that we determine that the verdict should not stand; but the growing tendency in the direction of extravagant verdicts in this class of cases should prompt the courts to see to it that the bounds of reasonable compensation be not plainly exceeded, unless the case justifies punitive damages, as this case does not. For this cause alone the order denying a new trial is reversed.

VANDEBURGH, J., did not participate.

McMANUS et al. v. LOUDEN.

(Supreme Court of Minnesota. May 22, 1893.)

CUSTOM AND USAGE—MEANING OF WORDS— EVIDENCE.

Evidence tending to prove a particular custom to treat the word "cord," in the measurement of cedar posts, as comprising 256 cubic feet, *held* so inconclusive that the verdict of the jury to the contrary should be sustained.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Start, Judge.

Action on a contract by John J. McManus and others, copartners as McManus & Sons, against Robert Loudon. Plaintiffs had judgment, and defendant appeals. Affirmed.

S. L. Smith and Cotton & Dibell, for appellant. H. S. Lord, (John H. Norton, of counsel,) for respondents.

DICKINSON, J. By a written contract between these parties, the plaintiffs agreed to haul the "cedar posts," to be cut on specified tracts of land, for which the defendant agreed to pay two dollars "per cord." Having done the work, the plaintiffs seek by this action to recover a part of the stipulated price, which is claimed to have been unpaid. The issue to which this appeal relates is as to the number of cords of posts hauled, and this depends upon the meaning of the word "cord" in the contract. The plaintiffs claim that this word, as used in the contract, has the ordinary and well-understood meaning,—

128 cubic feet. The defendant's contention is that, in accordance with a particular custom, in estimating the quantity of cedar posts the word "cord" designates a cubic measurement of 256 feet. The verdict, in favor of the plaintiffs, is to be regarded as expressing the conclusion of the jury that the evidence did not establish the existence of such a custom; at least, as respects the business of hauling or transporting such property. The question now before us, on this appeal from an order refusing a new trial, is whether the evidence required a contrary conclusion as to the fact of the existence of the alleged custom. It seems that such cedar posts are largely cut and sold to be sawed into blocks for street paving, and that in general the posts are about eight feet long. Considerable evidence was introduced, going to show the existence of a particular custom, in dealing in such cedar posts in this part of the country, to regard a cord as comprising 256 cubic feet. But we agree with the conclusion of the learned judge, whose decision is here for review, that the proof was so inconclusive as to the existence of the alleged custom that the verdict of the jury should not be set aside. The word "cord," in the contract, is of common use, and in general of well-known and unvarying meaning. Its meaning is of even mathematical certainty. It was not sought to be shown that its common meaning did not prevail generally in this locality, but only that in the measurement of cedar posts it had a very different signification; being then understood as expressing the quantity of 256 cubic feet. The proof of the particular usage was opposed to the general and ordinary meaning and use of the word. To establish the alleged custom it was necessary that the proof should show a uniform use of the word, in this particular business, in a sense entirely different from its still generally prevailing signification. This peculiar use should appear to have been so general that all persons dealing in respect to the subject must be presumed to have known, and to have contracted with reference to, that customary usage. While the proof tended strongly to show a somewhat common practice in accordance with the defendant's claim, it did not conclusively show that the practice had been so uniform that it could be declared, notwithstanding the opinion of the jury to the contrary, that it had ripened into a custom. There was evidence reasonably tending to show that the practice or usage was of somewhat recent origin in this locality, and that it was not uniform; that the term "cord," or "single cord," was still used, even in respect to cedar posts, in its ordinary signification; the quantity of 256 cubic feet being regarded as a "double cord." It may be added, as was noticed by the court below, that the defendant's own conduct was such as to justify doubt whether he understood the word "cord" as having any other than its

general meaning. If it meant 256 cubic feet, he had overpaid the plaintiffs on the contract to a considerable amount. It appeared that the plaintiffs had no knowledge of the alleged custom or usage. The question was properly for the jury. Order affirmed.

VANDERBURGH, J., being absent by reason of sickness, did not participate.

MEYERS et al. v. DULUTH TRANSFER RY. CO. et al.

(Supreme Court of Minnesota. May 22, 1893.)
INJUNCTION—DISSOLUTION—DISCRETION OF COURT.

Order sustained, which dissolved a temporary injunction, restraining the defendant from constructing its railroad over the plaintiff's premises.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Stearns, Judge.

Action by Jacob R. Meyers and others against the Duluth Transfer Railway Company and others to restrain the construction of a railway over certain land. From an order dissolving the temporary writ, plaintiffs appeal. Affirmed.

R. R. Briggs, for appellants. J. L. Washburn, for respondents.

DICKINSON, J. This action is prosecuted to restrain the defendant railway company from constructing its railroad across certain land, an undivided one-third of which is owned by the plaintiffs. Upon the commencement of the action a temporary injunction, restraining the defendants from constructing the road, was issued upon the ex parte order of the court commissioner. After the service of a verified answer, the court, upon the defendants' motion, dissolved the injunction. This is an appeal by the plaintiffs from the order of dissolution. The motion was heard and granted upon the pleadings, and upon the record of certain condemnation proceedings through which the defendant railway company claims to have acquired the right to construct its road over these premises. On the part of the defendants it was made to appear that in May, 1892, the railway company instituted condemnation proceedings to secure a right of way over these premises; and in the course of such proceedings, after due notice, the petition of the railway company was heard by the district court, where it was determined that the taking of the premises in question was necessary, and commissioners were appointed to assess the compensation to be paid therefor to the plaintiffs, among others. This order was filed June 29th. On the 8th or 9th of July, while the commissioners thus appointed were proceeding with the condemnation proceedings, the plaintiffs appealed to this court from the order appointing such commissioners. The plaintiffs executed the usual statutory stay bond on such appeal.

On the 9th of July the commissioners executed their award and report, which was filed in the clerk's office July 12th, determining the compensation to be paid to the plaintiffs and others for the taking of this land. The amount thus awarded to the plaintiffs was tendered to them, but refused, and it was then deposited in court, to be paid under its direction. Afterwards the railway company entered upon the premises, and commenced the construction of its road; and thereupon, about the 1st of August, the plaintiffs commenced this action to restrain the defendants, and for the recovery of damages for the acts done on the land. The premises were vacant and unoccupied.

The granting, refusing, or dissolving of a temporary injunction pendente lite, while the issues involved in the action are untried, must necessarily rest largely in judicial discretion, to be exercised with regard to the circumstances of the case. That discretion will be influenced by a consideration of the relative injury and inconvenience which may be likely to result to the parties, respectively, from the allowance or disallowance of such relief. High, Inj. 598. And where it is sought to thus restrain the prosecution of an enterprise of a quasi public nature, as is the case here presented, the court may also consider how far public interests may be affected by a suspension of the undertaking. Even where it has been finally determined that a railroad has been wrongfully constructed on the plaintiff's premises, an injunction has been withheld, to enable the company to proceed to effect a legal condemnation of the land. *Harrington v. Railroad Co.*, 17 Minn. 215, 229, (Gil. 188); *Lohman v. Railroad Co.*, 18 Minn. 174, 175, (Gil. 157.) And see *Wood v. Railway Co.*, 33 Beav. 290. As this case was presented to the court on the motion for the dissolution of the temporary injunction, the court would have been justified in the conclusion (and we may assume that this was its conclusion) that the prosecution of the work sought to be enjoined would not irreparably, or even seriously, injure the plaintiffs' property; that the defendant was empowered to acquire the right of way by condemnation; and that, in good faith, it had instituted and carried forward the proceedings for that purpose to the point of the making of an award of damages, and tender of payment, before it had entered upon the land. In view of these considerations, and of the injury which might result from the suspension of such a work, we think that it would have been fairly within the discretion of the court to have refused a temporary injunction; and, if an injunction might have been refused in the first instance, the court might dissolve one granted ex parte. Of course, if the defendants' acts were unlawful, the plaintiff is not without a remedy therefor. Order affirmed.

VANDERBURGH, J., did not sit.

COOLEY v. MINNESOTA TRANSFER RY. CO., (HOGAN, Intervener.)

(Supreme Court of Minnesota. May 22, 1893.)

GARNISHMENT — WHO SUBJECT TO — CARRIERS — LIEN FOR CHARGES—PRIORITY.

1. A railway company, after the termination of the transportation of property, and while it is holding the same only as a warehouseman, is liable to garnishment in respect to such property. Such a garnishment at the suit of a stranger to the contract of carriage, while it remains in force, excuses the company from delivering the property to the shipper or consignee.

2. The lien of the carrier and warehouseman for keeping the property is superior to that of a pledgee who had procured the property to be transported and stored.

3. Evidence held to conclusively show that the owners of personal property pledged it to the plaintiff to secure their indebtedness to him.

4. A perfected pledge held not avoided or terminated by the fact that for a special purpose, and for the benefit of the pledgee, he caused the property to be nominally consigned, on a shipment of the same, to the pledgors.

5. A subsequent garnishment by an existing creditor of the pledgors would not thereby acquire a right superior to that of the pledgee.

6. A sale of the pledged property by the pledgors to the pledgee, subsequent to the garnishment, would not extinguish the rights of the pledgee, as between himself and the garnishing creditor.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Egan, Judge.

Replevin by Edwin Cooley against the Minnesota Transfer Railway Company, defendant, and William Hogan, intervener. Judgment was entered for defendant and intervener, and, from an order denying a new trial, plaintiff appeals. Affirmed as to defendant, and reversed as to intervener.

A. D. Polk and Henry C. James, for appellant. John C. Bullitt, Jr., for respondent. Moritz Helm and John D. O'Brien, for intervener.

DICKINSON, J. This was an action of replevin to recover 43 horses and mules which, in the course of transportation by rail from Deadwood, Dak., to St. Paul, had been delivered to the defendant, the Transfer Railway Company, and unloaded, and left in its yards. The possession of the property by the railway company was rightful; at least, until it refused to deliver it to the plaintiff, upon his demand, on the 14th day of April, 1891. The property had been owned by Cable & Chute prior to March 20th of that year. The plaintiff's asserted right to recover it rests upon the alleged fact that at the latter date, at Deadwood, Cable & Chute had delivered it to the plaintiff in pledge, to secure him for certain indebtedness and liability incurred in their behalf; it being agreed that the plaintiff should take the property to St. Paul, and dispose of it for his reimbursement. The railway company asserts a lien upon, and right to retain

possession of, the property, on account of its charges for feeding and caring for the same, (amounting to \$489,) from the time when it was received by it, April 8th, until it was taken by the plaintiff in this action of replevin, on the 15th day of May. While the railway company was so holding the property, and before the plaintiff demanded that it be surrendered to him, William Hogan had commenced an action on contract against Cable & Chute for the recovery of \$1,500 and interest, and had caused process of garnishment to be served upon the railway company on account of its holding this property, which Hogan claimed to belong to Cable & Chute. During the pendency of this action of replevin, Hogan was allowed, upon his motion, to intervene, as a party therein, without objection, so far as appears. He had then recovered judgment in his action against Cable & Chute. His contention in this action is that the property belonged to Cable & Chute, and that he secured a lien thereon by virtue of the garnishee proceedings, and that as to him the alleged pledge to the plaintiff was invalid, if any such pledge was made. The plaintiff, having taken the property by virtue of the process in this action, sold the same. The court, deciding the case without a jury, found that Cable & Chute "pretended or attempted" to pledge the property to the plaintiff, but that this was void as to creditors, and as to the defendant, and that, as to the intervener, (Hogan,) Cable & Chute remained the absolute owners. Judgment was allowed in favor of the railway company, against the plaintiff, for the recovery of the amount of its charges for keeping, \$489, and in favor of the intervener, Hogan, and against the plaintiff, for the recovery of the amount of his (Hogan's) judgment against Cable & Chute. This appeal by the plaintiff is from an order refusing a new trial.

A chattel mortgage had been given by Cable & Chute to the plaintiff, covering some, but not all, of the property here involved, long before the alleged pledge. We deem this of little importance, for, if we could ascertain from the case what part of this property was included in the mortgage, it does not appear what was the value of the same. The plaintiff's case really rests upon the pledge, rather than upon the prior mortgage. The case, as between the plaintiff and the railway company, seems plain, irrespective of the question as to the sufficiency and effect of the pledge. When the plaintiff demanded possession of the property, there having been a delay of several days on account of some unadjusted claim of charges for transportation, the defendant was not holding the property in the relation of a carrier, but as a warehouseman, and such had been the case for some six days; and in the meantime, and just before such demand, the garnishment had been made in behalf of Hogan. The garnishment

legally charged the company with the responsibility of retaining the property, as in the custody of the law, in order that it might be applied to the satisfaction of Hogan's debt, if he should succeed in maintaining his claim. It excused the company from delivering the property to the plaintiff, Drake, *Attachm.* 453; *Stiles v. Davis*, 1 Black, 101. Whether goods in the possession of a common carrier, and while actually in transit, may be the subject of garnishment, we do not consider. We do not construe the finding of the court to be that the defendant retained the property as a common carrier. The defendant company had a lien upon the property for its proper charges for keeping it; and the determination of the court, awarding a recovery therefor against the plaintiff, who had replevied and sold it, was justified by the evidence, and was in accordance with the law. Whether the pledge was complete and effectual, or not, the result, in this particular, would be the same.

Different questions are presented, as between the plaintiff and the intervener. As between them, the question is one of priority of rights. If the pledge to the plaintiff was complete and effectual, and was still in force at the time of the garnishment by Hogan, any rights which the latter might acquire by the garnishment would be subordinate to those of the plaintiff as pledgee. It does not appear on what ground, or for what reason, the court found the pledge to have been void as to Hogan, a creditor of Cable & Chute. If it was because the evidence was deemed insufficient to establish the fact of the pledge having been made at Deadwood, we should be compelled to say that the court had failed to fully appreciate the force of the evidence; for, as we read it, it is all one way, and was of such a nature as to forbid any other conclusion than that the property was, by Cable & Chute, actually and completely delivered to, and taken possession of by, the plaintiff, to be by the latter retained, and disposed of for his reimbursement. It may be supposed, however, that the court considered that the circumstances connected with its transportation to St. Paul avoided or terminated the pledge, or precluded the plaintiff from asserting his rights as a pledgee, as against Hogan. These circumstances were as follows: Cable & Chute had taken the property to Deadwood pursuant to some agreement with Streeter & Co., who had some contract or work of railroad construction there. Cable & Chute had a subcontract under Streeter & Co., and their agreement with Streeter & Co. involved an undertaking on the part of the latter to furnish transportation for this property to Deadwood, and back to St. Paul. Cable & Chute had completed their contract, so that they were entitled to call upon Streeter & Co. to have the property returned to St. Paul without

expense to them. When the property was pledged to the plaintiff, his agent, who had it in his possession, arranged with Cable & Chute to conceal this fact from Streeter & Co., lest the latter should refuse to abide by their agreement to have it transported back to St. Paul. Hence the shipment was made in the name of Streeter & Co., and Cable & Chute were named as consignees; and Streeter & Co. arranged the matter of transportation so that no charge was made therefor to the plaintiff, nor to Cable & Chute. This did not avoid or terminate the pledge. The plaintiff employed an agent who remained in charge of the property during its transportation to St. Paul. The possession was never in fact restored to Cable & Chute, nor do they appear to have ever claimed to be in possession after they delivered the property to the plaintiff. As between those parties, it is certain that the pledge remained effectual. Even if, after the property had been delivered in pledge to the plaintiff, the latter had intrusted it again to the pledgors as his agents or bailees for the special purpose of taking it to St. Paul in his behalf, to be there again restored to him, we suppose that the pledge would remain good. The possession of the original pledgors, as the agents of the pledgee, would be his possession. *Casey v. Cavaroc*, 98 U. S. 467. But, however that may be, this case is stronger for the plaintiff than that just supposed, for the property was not in fact redelivered to the pledgors, but remained, uninterruptedly, in the custody of the plaintiff's agent.

The fact that the plaintiff, for the purpose above stated, employed the names of Cable & Chute as consignees, so that it might appear that the property was shipped for them, did not, as we have said, divest the plaintiff of his pledge. Neither did it subordinate the plaintiff's rights, as pledgee, to the subsequent claim of Hogan under the garnishment, or estop the former from claiming the preference which his pledge secured to him. There is no registry law relating to the pledging of property. If the pledge was effectual, it is not material whether Hogan had notice of it or not. His debt was not created in reliance upon any appearance of continued possession, or of absolute title, in Cable & Chute, by reason of their being named as consignees. It long antedated the transactions here in question. Nor, even if the concealment of the pledge from Streeter & Co., for the purpose stated, was a fraud upon the latter, it would not affect the case of Hogan. It did not concern him in any way. But it is not even apparent that the concealment was a fraud upon Streeter & Co. Their agreement to secure free transportation back to St. Paul was not discharged by the pledging of the property to the plaintiff. In brief, the pledge to the plaintiff was valid, and was prior and superior to any rights acquired by the subse-

quent garnishment, and there is nothing in the case to estop him from asserting his superior right.

A considerable time after the garnishment, while the plaintiff still held the property, it seems that Cable & Chute sold the same to him for a specified price, which he was to apply as payment on the indebtedness to him. It is contended that thereby the plaintiff waived and lost his rights as pledgee, so that, by reason of the garnishment, the intervenor's rights were superior to any remaining in the plaintiff. We cannot so hold. The transfer of the legal title, for a specified price, to be applied on the debt, was not inconsistent with, and did not divest the plaintiff of, the essential rights which he already had under the pledge; that is, the possession of the property, and the right to dispose of it for the satisfaction of his debt. That right still remained, as against creditors of the pledgor who might have secured attachments subsequent to the pledge. It may be that the added interest which the sale conferred—the legal title—was held subject to the intervening garnishment, and that the plaintiff might be accountable to the intervenor for the value of the property in excess of the debt, if there was any such excess. But the case does not present that question. It is unnecessary to consider whether the claim of the intervenor was a proper subject of litigation in this action. As between the plaintiff and the defendant railway company, the order is affirmed. As between the plaintiff and the intervenor, it is reversed.

VANDERBURGH, J., did not take part in this decision.

PUSHOR v. VILLAGE OF MORRIS.

(Supreme Court of Minnesota. May 22, 1893.)
POOR PERSONS—LIABILITY FOR SUPPORT—STEVENS COUNTY—REPEAL OF STATUTE.

1. By the repeal, in 1893, of the special law of 1889, c. 273, establishing the town system of caring for the poor in Stevens county, the county system was re-established.

2. The law repealing the prior special law was not unconstitutional.

(Syllabus by the Court.)

Appeal from district court, Stevens county; Brown, Judge.

Action by Joseph W. Pushor against the village of Morris. Defendant had judgment, and plaintiff appeals. Affirmed.

Charles B. Marvin, (S. A. Flaherty, of counsel.) for appellant. William C. Bicknell, for respondent.

DICKINSON, J. By this appeal a decision is sought as to the construction and effect of certain legislation, as respects the question whether at this time the care of the poor in the county of Stevens is a duty resting upon the county, or whether that duty rests upon the towns and villages. It is

conceded that prior to the legislation of 1889 the county system of caring for the poor, as provided by the General Statutes then in force, (chapter 15, Gen. St. 1878,) prevailed in this county. By chapter 273 of the Special Laws of 1889, (approved April 22d,) "each town and incorporated village" in the counties of Stevens and Grant were charged with the duty of the support of the poor in such towns and villages. This may be designated the "town system." Chapter 170 of the General Laws of 1889 contained provisions relating both to the county system and the town system, and authorized any county to change from one to the other in a manner prescribed by that law. By section 1 of this act, each county was charged with the care of the poor residing therein, as provided by chapter 15, Gen. St. 1878, "unless otherwise provided by law." By section 15 it was provided that "all counties in this state which are now under the town system of caring for the poor shall so continue, unless the said system shall hereafter be changed in accordance with the provisions of this act." In 1893, by a special act approved March 11th, the above special law relating to Stevens and Grant counties, (chapter 273,) was, in terms, repealed. The effect of this legislation was as follows: (1) The town system was established in this county by the special act of 1889. (2) The general act of the same year left it still in force; it being apparent from the provision in section 15 that it was not intended by that act to change the system already established in any county. (3) Upon the repeal of the special law, in 1893, the provision in section 1 of the general law of 1889 became applicable to this county, making the support of the poor a county charge; for, in respect to this county, it then ceased to be "otherwise provided by law." If this was not the purpose and effect of the repealing act, it had no practical effect. Even without that repeal the county might have changed from the town system to the county system in the manner prescribed by the general law of 1889. The repealing act of 1893 was not inhibited by the amendment in 1891 of section 33, art. 4, of the constitution. That amendment expressly authorized the legislature to "repeal any existing special or local law." Order affirmed.

VANDERBURGH, J., absent.

STATE ex rel. STEES et al. v. OTIS, Judge.
(Supreme Court of Minnesota. May 22, 1893.)
EMINENT DOMAIN—COMPENSATION—CONSTITUTIONAL LAW—CONDEMNATION PROCEEDINGS—NOTICE.

1. The charter of the city of St. Paul, as amended in 1891, imposes upon the city the duty of paying the compensation assessed for the taking of property for public use; hence the law authorizing such taking of property is not unconstitutional.

2. A notice of the meeting of the board of public works for the purpose of assessing upon the property benefited the cost of a public improvement is invalid if, in advance of any hearing, it defines a limited district as embracing the property upon which the assessment is to be made.

(Syllabus by the Court.)

Certiorari in the name of the state on the relation of John A. Stees and others to Charles E. Otis, judge of the district court of Ramsey county, to review certain condemnation proceedings. Judgment for relators.

S. L. Pierce, for relators. Leon T. Chamberlain and Hermon W. Phillips, for respondent.

DICKINSON, J. By a writ of certiorari, the proceedings, under the charter of the city of St. Paul, for the widening of East Seventh street, and involving a condemnation of land for that purpose, have been brought here for review. Two questions are presented: First. Under the city charter, in its present form, is there such provision for the payment of the damages which may be assessed in favor of the landowner for the taking of his land that such compensation is "secured" to him, as required by the constitution? Second. Was the notice of the meeting of the board of public works for the assessment of damages and benefits insufficient for the reason that it specified the limits of the district to be assessed?

1. The argument of the relators upon the first of these points is, in brief, that while by the provisions of the charter the confirmation of the assessment of damages completes the condemnation, so that the city may then take possession, no absolute duty of paying the damages assessed rests upon the city, and that such compensation can only be made from the fund derived from collections of special assessments. We cannot admit the correctness of this premise upon which it is claimed that the city is without power to constitutionally condemn private property for public use. We hold, on the contrary, that upon the completion of the condemnation proceedings it becomes the absolute duty of the city to pay, within six months thereafter, the damages awarded, with interest at the rate of 7 per cent. per annum. In so holding we only restate what is unequivocally expressed in the last of the legislative enactments to which we are cited,—chapter 12, §§ 2, 3, Sp. Laws 1891, amending sections 17 and 18 of the prior law of 1887. Section 17 in the law of 1887 provided for the payment of the damages awarded "as soon as a sufficient amount of the assessments shall have been collected for that purpose;" and by the terms of section 18 the city was not authorized to take possession until the money was thus collected and ready to be paid. Some other provisions of the law need not be particularly referred to. But by the amendment

of 1891 it was provided that, the assessment having been confirmed, it should be a lawful and sufficient condemnation, and "the city of St. Paul shall thereupon cause to be paid to the owner of such property the amount of damages over and above all benefits which may have been awarded therefor within six months after date of the confirmation of such assessment, with interest at the rate of seven per cent per annum;" and (by section 3) that, upon the confirmation of the assessment, the city should have the right to take possession of the premises ordered to be condemned. It is plain that the very purpose of the amendment of 1891 was to impose upon the city the absolute duty to pay the damages awarded in such proceedings, and to change the law requiring payment to be made out of a special limited fund. It may be presumed that this amendment was made in the law by reason of the decision of this court a few months before in the Lincoln Park Case, 44 Minn. 299, 46 N. W. Rep. 355. In view of this plain effect of the above act (chapter 12) it may not be very important whether the prior act of the same year, (chapter 6, Sp. Laws 1891,) which was both introduced in the legislature and passed before chapter 12, contemplated that the city should be chargeable with the payment of such compensation to the landowner. The later law must be given effect. We will, however, say in this connection that the twenty-fourth subdivision of the section in the earlier of these acts, specifying the purposes for which taxes may be levied, (page 202, Sp. Laws 1891,) would include, as a proper purpose for the levying of taxes, the providing of means for the discharge of any obligation legally imposed upon the city, as, under the later act, is the duty of paying for lands condemned for public use pursuant to the charter. The law imposing upon the city the obligation to pay the damages awarded, and only a reasonable time being allowed therefor, interest being added to compensate for the delay, the proceeding was not subject to objection on constitutional grounds. See *Commissioners v. Henry*, 38 Minn. 266, 36 N. W. Rep. 874.

2. The improvement for which assessments were made upon the property of the relators consisted of the widening of East Seventh street from Broadway to Rosabel street, the land condemned for that purpose being a strip on one side of East Seventh street, between the two other streets named. The notice given by the board of public works, the sufficiency of which is called in question, was to the effect that the board would meet at a given time and place to make assessments of damages and benefits arising from this improvement "on the property on the line of said Seventh street from Jackson street to Kittson street, and deemed benefited or damaged thereby." In other words, the notice was, in effect, that the distribution by assessment of the cost of the improvement would

be confined to the property on Seventh street between Jackson and Klitsson streets. It involved or was based upon a determination by the board, in advance of any notice or hearing, defining the district specially benefited, and upon which therefore, under the charter, the cost should be assessed. It will be seen that the district to be assessed, as indicated in this notice, is not coextensive with the improvement. It is not "the property fronting upon such improvement." Whether it extends beyond the limits of the improvement, or is of less extent, is not probably material. The rule of frontage was not adopted as the basis of the assessment, but the rule of special benefit, irrespective of frontage; and the procedure must be such as is required when assessments are to be made according to the latter rule. It is apparent from the charter provisions, to which it is unnecessary to refer particularly, that when such assessments are to be made upon what may be conveniently termed the "rule of benefit," as distinguished from the more arbitrary rule of frontage, it is for the board of public works to determine what property is specially benefited. See *Rogers v. City of St. Paul*, 22 Minn. 494. The question now is whether that board may—as it seems to have practically done in this case—determine this without notice and without opportunity to the parties interested to be heard. The statute answers the question in terms which leave little room for doubt. We refer to Sp. Laws 1887, c. 7, tit. 1, subc. 7, p. 335, which contains these provisions: "Sec. 7. Whenever any order is passed by the common council by virtue hereof for the making of any public improvement which shall require the appropriation or condemnation of any land or real estate, the said board of public works shall, as soon as practicable, proceed to ascertain and assess the damages and recompense due the owners of such land respectively, and at the same time to determine what real estate will be benefited by such improvement, and assess the damages, together with the costs of the proceedings, on the real estate by them deemed benefited, in proportion, as nearly as may be, to the benefit resulting to each separate lot or parcel thereof. Sec. 8. The said board of public works shall then give fifteen days' notice by one publication in the official newspaper of the city of the time and place of their meeting, for the purpose of making said assessment, in which notice they shall specify what such assessment is to be for, and they shall describe the land to be condemned as near as may be by general description, and all persons interested in such improvement shall have the right to be present and be heard. . . . The board shall view the premises to be condemned, and receive any legal evidence that may be offered for the purpose of proving the true value thereof, or the damages that will be sustained, or benefits conferred, by reason of the contemplated im-

provement." From a careful reading of this statute it is apparent that the specified notice is required to be given of the time and place of meeting, for the purpose not only of the assessment of damages or compensation for the taking of the land, but also of the assessment of benefits, and that all persons interested are entitled to be heard. Without such notice and hearing, the board is not authorized to determine upon what district or property the burden shall be imposed, unless, at least, the rule of frontage is adopted as the basis of the assessment; and, since the board is to distribute and assess the whole cost of the improvement upon the property deemed to be specially benefited, if that be possible at least, it follows that any predetermination by the board fixing or limiting, as was done by this notice, the district over which the burden was to be distributed, would be prejudicial to the rights of those owning property within that district. They had a right to have the burden distributed as widely as, after a proper hearing, the board should judge to be just. But by this notice the board deprived itself of the power, unless it should proceed de novo under a different notice, to carry the assessment beyond the limits specified in this notice, even though it might appear upon hearing that the special benefit extended much beyond such limits. This was prejudicial to the relators. For this defect in the notice it is considered that judgment against the property of the relators should not have been allowed, and the same is, as to such property, reversed.

VANDERBURGH, J., absent.

McCORMICK et al. v. VOLSACK.

(Supreme Court of South Dakota. May 29, 1893.)

TRIAL—INSTRUCTIONS—DURESS.

1. Where a defendant admits the execution of a written instrument, but seeks to avoid liability thereon, on the ground that it was executed under duress, the trial court should instruct the jury as to what constitutes duress.

2. In such case, a charge which instructs the jury that if the instrument sued upon "was obtained by means of threats, coercion, or subjecting the defendant to fear," or "obtained by force, threats of violence, or fear," the plaintiffs could not recover, is defective and erroneous in not going further, and advising the jury as to the nature or character of the threats or coercion or fear which would avoid apparent consent.

(Syllabus by the Court.)

Appeal from circuit court, Day county; J. O. Andrews, Judge.

Action on a judgment by L. J. McCormick and another, as surviving partners of the firm of C. H. & L. J. McCormick, against Andrew Nelson Volsack. Defendant had judgment, and plaintiffs appeal. Reversed.

H. H. Potter and George F. Miller, (F. V. Brown, of counsel,) for appellants. J. H. Lund and Julian Bennett, for respondent.

KELLAM, J. This was an action brought by appellants as plaintiffs against the respondent as defendant upon a confession of judgment alleged to have been executed by respondent in the state of Minnesota. The defense was that the same was executed by respondent under duress and menace. The case was tried to a jury, who returned a verdict for the defendant, and from a judgment on such verdict this appeal is taken.

Among the errors assigned is that the court erred in instructing the jury as to what would constitute such duress or menace as would avoid defendant's act of executing the confession. The court, after properly charging the jury that, the signing being admitted, the burden of avoiding it was upon the defendant, proceeded as follows: "Now, as a matter of law, the court instructs you that if the confession of judgment was obtained under such circumstances,—that is, by means of threats, coercion, or subjecting the defendant to fear,—then, in that event, it would not be such a confession of judgment as is recognized by law as the voluntary act of the defendant, and the plaintiffs could not recover thereon. Notwithstanding as a matter of fact that the defendant may have owed at the time of this alleged confession, yet if the confession was obtained, as I say, in this manner,—by force, threats of violence, or fear,—then it would not be a voluntary act of the defendant, and the plaintiff could not recover." We think this instruction as to what would avoid the confession was too liberal, and allowed the jury too much latitude, when it told them that either "threats, coercion, or subjecting the defendant to fear," or, as again expressed, "force, threats of violence, or fear," would be sufficient to destroy his legal liability. Under our statutes the duress or menace which will avoid apparent consent are clearly defined. Sections 3504, 3505, Comp. Laws. Compared with these statutory provisions, we think such general instructions would not sufficiently inform the jury as to the essential elements of duress; that is, as to the nature or character of the threats or coercion or fear which would avoid formal or apparent consent. But this confession was made and executed in Minnesota, and this question ought probably to be tested by the law of that state. It was not shown upon the trial what the law of that state was. In such case the authorities are not entirely agreed as to what presumption attaches. In 19 Amer. & Eng. Enc. Law, p. 47, it is said that the weight of authority is that the foreign statute will be presumed to be the same as that of the forum. On the other hand, Prof. Greenleaf says that, in the absence of evidence as to a foreign law, it will be presumed that the general principles and rules of the common law are there in force. 1 Greenl. Ev. p. 43.

Without now deciding which presumption should prevail in this jurisdiction, we are of the opinion that the instruction was fairly criticisable under both the common law and our statutes, and would allow and justify the jury in finding an avoiding duress or menace upon facts which would not legally constitute such. The facts upon which they might find duress were in each case stated disjunctively. They might find duress if they believed from the evidence that the signing was the result of fear of any kind upon the part of the defendant. While it was not probably so intended by the court, we think the effect of the charge was that the jury might find the confession avoided if they believed from the evidence that it was executed through fear of ultimate consequences to the defendant if he did not sign it, without limiting such consequences to any of the recognized forms of duress. Cooley thus defines "duress:" "Duress is either of the person or of the goods of the party, and the former is either by imprisonment, by threats, or by an exhibition of force that apparently cannot be resisted. * * * Threats constitute duress where they cause reasonable apprehension of loss of life, or of some great bodily harm, or of imprisonment." Cooley, Torts, 506. Parsons, in speaking of duress that will avoid contracts, says: "Duress by threats does not exist wherever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong, as of death, or great bodily injury, or unlawful imprisonment." 1 Pars. Cont. 393. Greenleaf says: "The common law divided it [duress] into two classes, namely duress per minas, and duress of imprisonment. Duress per minas is restricted to fear of loss of life or of mayhem or loss of limb, or, in other words, of remediless harm to the person." 2 Greenl. Ev. § 301. Undoubtedly these definitions are too narrow to be now accepted as inflexible, but they serve to show the importance of fully and carefully informing the jury in a case like this as to the character of the compulsion or threats or fear which will avoid a contract. Threats reasonably producing fear of great bodily harm would be duress, but threats reasonably producing a fear that if he did not execute the confession plaintiff would use other more expensive or troublesome means of procuring judgment or collecting the debt would not be duress. In this case, if the jury believed all the evidence of defendant as to the circumstances under which this confession was consented to and signed, they might have properly found duress; but they ought not to have so found if they only believed from the evidence that defendant executed the confession through fear of something which would not constitute duress. It is easy, in this case, to say that the jury evidently believed the statements of

the defendant as to the circumstances under which he signed the confession, and discredited that of plaintiffs' witnesses, and that defendant's statements made a clear case of duress; but under the instructions of the court the jury might have returned this same verdict if they discredited all of defendant's statements which distinctively brought the alleged duress within the definition of the law, but still believed that he signed it through fear of some other consequences than of injury to person or property. We cannot tell how much or how little of the evidence of either witness they believed, and the error of the instruction is that it left them at liberty to find such verdict upon utterly insufficient evidence. We think the failure of the instructions to go further, and define to the jury what consequences must be reasonably feared or apprehended in order to avoid the execution of the confession was a defect and error that might have worked to the plaintiffs' prejudice. The judgment of the circuit court is reversed, and the cause remanded for a new trial. All the judges concurring.

**MCCORMICK HARVESTING MACH. CO.
v. REED, (JAMES, Garnishee.)**

(Supreme Court of Wisconsin. May 2, 1893.)

APPEAL—WHEN LIES—GARNISHMENT.

The main defendant in garnishee proceedings cannot appeal from a judgment against the garnishee, after the latter has sued out and served a writ of certiorari in the same proceeding.

Appeal from circuit court, Rock county; John R. Bennett, Judge.

Action by the McCormick Harvesting Machine Company against Maurice Reed and S. L. James, garnishee. Judgment was rendered against the garnishee. From an order denying its motion to dismiss the appeal of Maurice Reed, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

This was a garnishee proceeding in justice court against S. L. James in aid of an execution upon a judgment in favor of the McCormick Harvesting Machine Company against Maurice Reed. Judgment was rendered in the garnishee proceedings against the garnishee, January 5, 1892, for \$178.46 and costs. On the 23d day of January, 1892, the garnishee, defendant James, sued out a writ of certiorari from the circuit court, in the usual form, alleging loss of jurisdiction by the justice. The writ was served upon the justice on the same day, and thereafter on said day the defendant Reed filed a notice of appeal with the justice. Appellant moved to dismiss the appeal in the circuit court on the ground that no appeal could be taken after the writ of certiorari had been served. The motion was overruled, and from the order overruling the motion, plaintiff appeals. The cer-

tiorari action was heard in the circuit court, and judgment rendered affirming the justice's judgment, but upon appeal to this court, at the present term, that judgment was reversed, on the ground that the justice had lost jurisdiction, and the cause was remanded to the circuit court, with directions to reverse the judgment of the justice. *Machine Co. v. James*, 54 N. W. Rep. 1088.

Doe & Sutherland, for appellant. F. C. Burpee, for respondent.

WINSLOW, J., (after stating the facts.) The exact question presented is whether an appeal can be taken by the main defendant in a garnishee action after the garnishee defendant has sued out and served a common-law writ of certiorari in the same action. We think this question must be answered in the negative. The issuance and service of the writ at once removed the entire record of the garnishee action from the justice court to the circuit court. *Neuman v. State*, 76 Wis. 112, 45 N. W. Rep. 30. There was nothing left for the appeal to act upon. How could the justice make a return upon the appeal of the "testimony, proceedings, and judgment," when the entire record of the cause had already, by the operation of the writ of certiorari, been removed from his tribunal? Again, the difficulties attending the splitting up of the action into two separate actions, one of which may be pending in one court and one in another, and in which contradictory judgments may be rendered, seem insurmountable. Legislation might, perhaps, remedy the difficulty, but until it does we think such an appeal must be held inoperative. Order reversed, and cause remanded, with directions to dismiss the appeal.

DAYTON v. DEARHOLT.

(Supreme Court of Wisconsin. May 2, 1893.)

USURY—WHAT CONSTITUTES.

Plaintiff applied to defendant for a loan of \$300 for six months at a given interest, to be secured by a chattel mortgage on personal property, and agreed to pay defendant, "for acting as my agent in procuring such loan, and for examining said property, and drawing the necessary papers, * * * the sum of \$40." Plaintiff was unable to pay the principal when due, and an extension of one month was obtained, on payment of \$10. The time was extended, on payment of \$10 each month, for nearly a year. Plaintiff claimed that the \$40 withheld from the original loan, and the monthly payments of \$10, were in fact payments of interest on the loan, and brought action to recover the amount of such payments exceeding 10 per cent. as usurious. There was evidence that defendant obtained the loan from his father-in-law, who had been engaged in such transactions for years. There was also evidence that the money really belonged to defendant. *Held*, that on either theory a verdict for plaintiff would not be disturbed.

Appeal from superior court, Milwaukee county; F. L. Gilson, Judge.

Action by May Dayton against S. J. Dearholt to recover usurious interest. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.:

This is an action to recover back usurious interest. In July, 1887, defendant lived at Reedsburg, but was doing business in Milwaukee under the name of the Milwaukee Mortgage Loan Company, the business being in charge of one Breuheiser. Plaintiff applied at the Milwaukee office for a loan of \$300, July 22, 1887, and signed an application, the material parts of which are as follows: "Milwaukee, Wis., July 22nd, 1887. May Dayton and Geo. Darling, of the city of Milwaukee, Milwaukee county, state of Wisconsin, hereby apply to Milwaukee Mortgage Loan Company to act as my agent to procure for me a loan of three hundred dollars, for six months, with interest at X per cent. per annum, to be secured by chattel mortgage on personal property owned by me, situated at my residence 129 2nd street, and described in a certain chattel mortgage, executed by me and bearing even date herewith. And I agree to pay Milwaukee Mortgage Loan Company, for acting as my agent in procuring such loan, and for examining said property, and drawing the necessary papers to perfect such loan, if they are able to procure the same, the sum of sixty dollars; they to charge nothing for examining said property, or for services of any kind, unless they procure said loan for me." Plaintiff was unable to pay the principal when due, and made application for an extension of time, to obtain which she was obliged to sign the following paper, and at the same time pay the defendant or his agent \$10: "If the Milwaukee Mortgage Loan Company procure for me extension of loan described in my application No. 477 for one month from the 22nd day of January, 1888, I agree to and do pay them ten dollars for their services in procuring such extension for me, I to be at no other expense." In the same way the time was extended, on payment of \$10 each month thereafter, for more than a year. Payments were also made on the principal from time to time until the principal was nearly paid. The plaintiff claimed that the sum of \$60 held back by the defendant from the original amount of the loan, ostensibly as pay for services in procuring the loan, and the monthly payments of \$10, ostensibly for services in procuring extensions of the loan, were in fact payments of interest on the loan, and she brings this action to recover the amount of such payments of interest exceeding 10 per cent. per annum as usurious. It was claimed by defendant that the true nature of the transaction was shown by the papers; that the payments were in fact payments for services in procuring the loan and extensions thereof; that the defendant acted simply as agent of plaintiff, and procured the money loaned from one Mackey, his father-

in-law, who knew nothing of the transaction; and that consequently there was no usury in the transaction. The jury found for the plaintiff for the amount claimed by her to be usurious payments of interest, and, from judgment thereon, defendant appealed.

Austin & Hamilton, for appellant. McElroy & Trottman, for respondent.

WINSLOW, J., (after stating the facts.) The question is, did the evidence justify the jury in finding that the transactions in question were usurious? "It is entirely immaterial in what manner or form, or under what pretense, the usury was exacted and paid. The contract will not be held good merely because upon its face and by its words it is free from taint, if substantially it be usurious. Courts look at the substance of the transaction, without regard to the shifts by which it is endeavored to avoid the provisions of the statute." *Lee v. Peckham*, 17 Wis. 383. Looking at the transactions in this case in the light of this general rule, we agree entirely with the jury that the carefully worded contracts and applications, by which it is made to appear that the defendant was acting as agent only for the plaintiff, and receiving the moneys in question for services as such agent, were in fact but the flimsiest of shifts and devices by which the real character of the transaction was expected to be concealed. They were the stereotyped contrivances of the usurer. We have little patience to discuss the evidence. If the jury came to the conclusion that Mackey knew and approved of the taking of usurious interest, there was sufficient evidence to justify them in so finding. According to Dearholt's own evidence, his agency for Mackey was of long standing. He loaned and reloaned Mackey's money, and used his own judgment as to the character of the loans. He sent him monthly statements of such loans, which were numerous. Dearholt says: "He [Mackey] was to receive a legal rate of interest for his money, and he allowed me to loan it to parties, for which they were willing to give me a commission." Mackey was his father-in-law, and their business relations seem to have been of the most intimate nature. That he knew of the nature of Dearholt's loans can hardly be a subject of doubt. On the other hand, there was also ample evidence from which the jury would be justified in finding that Mackey was merely a man of straw, and that the money loaned was in fact the money of Dearholt. Mackey died February 15, 1889, before the payments had all been made on the note. His administrator never had possession of the note, and never received any money from this loan. Since Mackey's death, Dearholt says he has accounted to his wife (Mackey's daughter) for the proceeds collected after her father's death. She was not, of course, entitled to these moneys as heir of her father,

because the personal property passed to the administrator. The plaintiff's evidence is positive that she borrowed the money of defendant under an agreement to pay \$10 per month interest. Transparent subterfuges are abundant in the evidence which tend to confirm the idea that Dearholt was in fact the real party in interest. If the jury reached either of the conclusions above indicated, the verdict was right. The charge of the court was fair, and certainly not too favorable to the plaintiff. We have discovered no error. Judgment affirmed.

In re PITT'S ESTATE.

Appeal of McMASTER.

(Supreme Court of Wisconsin. May 2, 1893.)

WITNESS—CONFIDENTIAL COMMUNICATIONS—WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—EVIDENCE.

1. Where an attorney who drew a will signs it as a witness at the request of testatrix, he is free, in an action to contest the will, to testify to any fact in regard to the will and its execution which he learned by virtue of his professional relation.

2. Testatrix, aged 63 years, made her will a short time before her death, and while suffering great pain. She had no children, and, after giving a number of legacies, left over half her estate to a nephew and niece. Several witnesses testified as their opinion that she was not competent to make a will, but they did not give circumstances on which the opinion was based. Testatrix's doctor, lawyer, and pastor testified that she was fully competent to make a will at the time she did. *Held*, that the evidence justified a finding of testamentary capacity.

3. On a contest of a will, the facts that proponent and wife occupied testatrix's house with her, nursed her in her last illness, and were bequeathed half of her estate, do not raise a presumption of undue influence where there is no evidence that they had any control over testatrix, or that they tried to prejudice her against any relative, or even that they knew what the provisions of the will were until after it was executed, though proponent employed his attorney to draft the will.

Appeal from circuit court, Rock county; John R. Bennett, Judge.

Application by Emmett Scriven, executor, to admit to probate an instrument propounded as the last will of Susan R. Pitt, deceased. From a judgment of the circuit court affirming a judgment of the county court admitting the instrument, A. H. McMaster appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

This is an appeal from the judgment of the circuit court affirming the order of the county court for Rock county admitting to probate an instrument propounded as the last will of Susan R. Pitt, deceased, made August 3, 1891. She died on the 10th day of the same month. The validity of her will was contested by A. H. McMaster, one of her heirs at law, on the ground of want of testamentary capacity of the testatrix; that it was not executed by her, if at all, with full knowledge of its provisions; and

that it was made and obtained through fraud and undue influence on the deceased, practiced by Emmett Scriven and Hattie Scriven and others. The county court, after a hearing, admitted the instrument propounded to probate as the last will and testament of the deceased, and the circuit court, after a full hearing, found in its favor. The testatrix was a widow, aged 63 years, and had been in feeble health for many months prior to her death, and for the last two months was confined to her bed, and died from the effects of a cancer. She left no child or children, nor any descendant of such, surviving her. Her heirs at law were two sisters, one residing in Vermont and the other in New York, and several children of a deceased brother and of two deceased sisters. Of these the McMaster family would have taken one-fifth of the estate, and the proponent Emmett Scriven, his mother, Ellen Scriven, his wife, Hattie Scriven, and his sister, Susie Scriven, for each of whom provision is made by her will, would have taken no part of the estate. Her estate was of the value of \$15,000, consisting of a farm of 128 acres of land, a house and a lot and one-half of land in Beloit, and certain personal estate. She gave her niece Ellen Scriven \$1,000, to her niece Susie Scriven \$500 and her homestead in Beloit, Wis., and to her sister Mrs. R. C. Peck \$500, and to her sisters Diana Chase and Dorcas Wilson \$500, to be divided between them according to the judgment of her executor; to her nephews Hugh and Warren McMaster \$1,000 each, to her nephews Frank and Fred Peckham \$500 each, and to Mrs. David Amita, Mrs. P. E. Favor, and Mrs. J. E. Vette \$500 each; to her physician, Dr. Thompson, and to her friend Mrs. Austin Gibbs, \$100 each; and to the First Baptist Church of Beloit \$500, to purchase a pipe organ costing \$1,000, if bought within one year after her death; and all the rest of her estate, after paying said legacies, to her nephew and niece, Mr. Emmett Scriven and Mrs. Emmett (Hattie) Scriven. It will be seen that Mr. and Mrs. Emmett Scriven would take under this will somewhat more than one-half of the entire estate. Mr. and Mrs. Haynes had resided with the testatrix in her homestead in Beloit for about 17 months, occupying part of the house, and the rest was reserved for her; and in March, 1891, the contract for such occupancy had been renewed for another year, she having expressed herself as being satisfied that they should remain that length of time. About two weeks prior to July 20th of that year, without assigning any reason, the testatrix said to Mrs. Haynes: "I feel as though I ought to tell you that we are going to take steps to put you out of here," and that she had put it in the hands of Emmett Scriven to get the Haynes family out. She had a short time before offered them \$50 to move out, and Mrs. H. wanted more, and she told Mrs. Haynes, "If you

get any more out of me than I have offered it will be at the end of a law suit." Emmett Scriven then saw Mr. Haynes about the matter, and he wanted \$150, and it was agreed between Haynes and Wickham, Scriven's attorney, that Haynes should have the \$150, when the latter claimed that the testatrix owed him \$25 for board, and he wanted that in addition; and that Wickham saw Scriven about it, when the latter said that he would pay the \$25 if he had to pay it out of his own pocket. The Haynes family moved out July 20th, and Emmett Scriven and family, consisting of himself and wife, Hattie, his mother, Ellen Scriven, and his sister, Susie Scriven, moved in. The paper propounded as such last will was drawn by J. G. Wickham, an attorney, and attested by him and Dr. C. W. Merriman. At the time of executing it, and for a considerable space of time prior thereto, the testatrix had been a very sick woman, and she suffered constant pain, and was subject to paroxysms, which were very excruciating. At the date of the will she was prostrated in bed; and the attorney who drew the will and who was called for that purpose by Emmett Scriven, visited her three times, in order to complete it, the last visit being August 3d, at which time she signed it, raised in her bed, and bolstered up with pillows. The will was taken away by Dr. Merriman, and kept by him until the day of her death, when it was given to Emmett Scriven, and by him taken to Janesville, and deposited for probate with the county judge. The only declaration shown to have been made by the testatrix as to her intended disposition of her property was that made some considerable time previous, when, in speaking of her relatives, she said she supposed they would all get a slice of her estate. There is no testimony whatever to show that any conversation had been had with her with reference to a plan or scheme of the will, or any particular disposition of her estate, prior to her instructions given to Mr. Wickham in regard to its preparation. It does not appear that she was solicited by any one to make any disposition in favor of any particular person. Mr. Wickham testifies to three visits to her in obtaining her views and instructions, and that it was read over twice to her before it was executed. He testified fully as to the execution of the will, and as to what took place between him and the testatrix. Objection was made to his testimony on the ground that he was not a competent witness to testify to what took place between him and his client, the testatrix, but the court overruled the objection. The proof of the formal execution of the will was full and complete. The more important testimony in relation to the competency of the testatrix was by Mr. Wickham, Dr. Merriman, and the Reverend Mr. Bestor, her pastor, who called on her to see her several times, and it showed that she

was entirely competent to make the will. There was considerable other testimony on the subject of competency, and several witnesses who had seen her expressed the opinion that she was not competent, but did not testify to facts and circumstances sufficient to justify such conclusion. The testimony all showed that she suffered a great deal of pain, but there is no proof to show that her utterances were incoherent or irrational. She had a dread of the pain and suffering that she must undergo before death might come to her relief. She would look at times deathly, and her eyes would be closed. She had the exhaustion, mental and physical, that is the result of protracted suffering. After the will had been made, and before her death, Emmett Scriven showed Hugh McMaster a statement of the provisions of the will, but it did not contain the residuary clause, or the provision disposing of her homestead to Hattie Scriven, his wife. The will was delivered, after its execution, to Dr. Merriman, who kept the same until the day the testatrix died, when it was delivered to Emmett Scriven, and by him taken to Janesville. The testimony on the subject of the competency of the testatrix took quite a wide range, and it is not only impracticable, but would be unprofitable, to state the facts more in detail. Other facts will be referred to in the opinion.

Orton & Hughes and O'Brien & O'Brien, for appellant. J. G. Wickham and Winans & Hyzer, for respondent.

PINNEY, J., (after stating the facts.) 1. The objection made to the reception in evidence of the instructions given by the testatrix to Mr. Wickham, the attorney who prepared her will, and what took place between them on the subject of the will, is founded on the statute, (section 4076,) which provides that "an attorney or counsellor shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." The testatrix requested Mr. Wickham to sign the will which was the result of the communications between them as a subscribing witness, and he signed it accordingly. This must be held to be a waiver of objection to his competency, so as to leave the witness free to perform the duties of the position, and to testify to any matter in relation to the will and its execution of which he acquired knowledge by virtue of his professional relation, including the mental condition of the testatrix at the time. In re Will of Coleman, 111 N. Y. 220, 19 N. E. Rep. 71; Alberti v. Railroad Co., 118 N. Y. 85, 23 N. E. Rep. 35. Some other objections were made to rulings upon questions of evidence, but none of them possess sufficient significance to require special notice.

2. Upon the question of the testamentary

competency of the testatrix the evidence, in our opinion, preponderates decidedly in favor of the proponent. There is no doubt she was racked and tortured with pain which it was extremely difficult to endure, and which had reduced her physical and mental vigor, but there is no evidence that her mind wandered in the least, or that her utterances were at any time in the least incoherent or irrational, or that she labored under any mental delusion whatever. On the contrary, all that she is shown to have said or done at the time and for a month or more before the execution of the will indicates that, though at times irritable and excitable, yet her mental faculties and her capacity to understand the situation and extent of her property, and to remember all who had natural claims on her bounty, and her ability to judge of the situation, and act intelligently in respect to it, still remained sufficiently clear and strong. The scheme of the will shows that it was a matter to which she must have given considerable thought, and, although Emmett Scriven and Hattie, his wife, take under the will half, at least, of her estate, it is to be remembered that they came to her aid and support in her last illness, and that very many others of her kindred lived in other states, and some at a great distance. She had a right to make the discrimination in this respect she did, and, though it was argued that this fact and others already mentioned subject the will to some suspicion as to whether it was procured by undue influence, yet this fact alone in its bearing on the question of her mental competency is of little significance. If the testatrix was deficient in testamentary capacity, or the will was the result of undue influence on the part of the Scriven family, it is not reasonable, under the circumstances, to suppose that about one-half of the entire estate would have been given to 13 other legatees. Quite a number of witnesses, particularly on the part of the proponent, expressed opinions unfavorable to her testamentary capacity, but the facts they state to justify their conclusions are few, and do not throw much light on the question. Mere opinion, without substantial grounds to justify it, is of comparatively little value. Several other witnesses, and among them her attending physician, and Mr. Wickham, who drew the will, give quite clear and convincing testimony showing that she was fully competent to make a testamentary disposition of her property at the time she executed this will. We cannot say, under all the circumstances, that the will is open to objection as being a grossly unreasonable one. The test of testamentary capacity acted on in *Delanfield v. Parish*, 25 N. Y. 9, has been adopted in this state, and applied in numerous cases, that "it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his prop-

erty, his relations to the persons who were or should or might have been the objects of his bounty, and the scope and bearing of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment concerning them." In *re Lewis' Will*, 51 Wis. 104, 7 N. W. Rep. 829, and cases there cited; *Will of Patrick Carroll*, 50 Wis. 437, 7 N. W. Rep. 434; *Will of Smith*, 52 Wis. 552, 8 N. W. Rep. 616, 9 N. W. Rep. 665; In *re Will of Blakely*, 48 Wis. 294, 4 N. W. Rep. 337. One error occurred in drafting the will in stating the relationship of one of the legatees to the testatrix, but this was corrected at her suggestion, and it is said that Mrs. R. O. Peck, a sister of the deceased, and so described in the will, to whom \$500 was given by it, was dead at the date of the will. The evidence is not entirely clear on the question, but, if so, there is nothing to show that she knew of the death of this sister when she made the will. These facts do not tend to show a want of testamentary capacity. As the circuit court heard the witnesses testify, and had opportunities for judging of their intelligence, fairness, and candor which we do not possess, we do not feel that we could interfere with the finding of that court, unless we are able to say that there is quite a preponderance of evidence against its conclusion. For reasons already stated, we think the evidence sustains the finding of the circuit court.

3. It was argued that, in consequence of the relations of Emmett Scriven and his wife to the testatrix, the burden of vindicating the will against the imputation that it was procured by fraud and undue influence was on them. They occupied her house, and were caring for her and nursing her in her illness, but we do not understand that by reason of these facts they stood in any fiduciary relation to the testatrix, within the meaning of the rule invoked by appellants, which would impose upon them the burden of showing an absence of fraud or undue influence in a will made by the testatrix containing substantial provisions in their favor. Ordinarily, the proponent of a will "is not called upon to show affirmatively that there was no undue influence used to procure the making of the will. Undue influence is a defense, and the evidence of it must regularly come from the contestant." *Tyler v. Gardiner*, 35 N. Y. 559; *Boyse v. Rossborough*, 6 H. L. Cas. 2; *Clapp v. Fullerton*, 34 N. Y. 192. In *Boyse v. Rossborough*, supra, the lord chancellor says: "One point, however, is beyond dispute, and that is that when once it has been proved that a will has been executed with due

solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed." And this language is cited with approval and was acted on in *Armstrong v. Armstrong*, 63 Wis. 169, 23 N. W. Rep. 407. In the *Jackman Will Case*, 26 Wis. 111, it was said that undue influence "cannot be presumed from conjecture or suspicion without reasonable and satisfactory proof of facts establishing the contrivance and undue influence; * * * that it must be such an influence as to destroy the freedom of the testator's will, and thus render his act obviously more the offspring of the will of others than of his own. It must be an influence specially directed towards the object of procuring a will in favor of particular parties; * * * that it must be such as was intended to mislead him to the extent of making a will essentially contrary to his duty; and it must have proved successful to some extent, certainly, * * * and must be such as in some degree to destroy the free agency of the testator, and constrain him to do not only what is against his will, but what he is unable to refuse or too weak to resist." There must be proof that the act was obtained by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. In this case it is contended that Scriven and his wife had the opportunity to exercise undue influence over the testatrix; that they had the temptation to exercise it; and because of the liberal provisions in the will in their favor it is to be presumed that it was the result of such influence acting on the mind of the testatrix, and this presumption must prevail unless rebutted. It may be conceded that there are circumstances in this case which beget suspicion, but the judgment of the court cannot go upon mere suspicion. The special circumstances in *Davis v. Dean*, 66 Wis. 108, 110, 26 N. W. Rep. 737, and *Will of Slinger*, 72 Wis. 27-33, 37 N. W. Rep. 236, clearly distinguish those cases from the present, and, like the case of *Tyler v. Gardiner*, 35 N. Y. 559, show under what circumstances the burden of proof will be placed on the claimant under the will to show that the will was not the result of undue influence. It was there held that, "when it appears from the proof that the will was made by a testatrix on her deathbed; that her faculties were enfeebled by long and wasting disease; that she had been for a considerable period under the active and controlling influence of the principal beneficiary; that during this period she had been imbued with causeless antipathy to her only son, and had been induced to expel him from her house, and to pursue him with unmerited accusations; that the will

originated with the chief beneficiary, who framed the written instructions, engaged the counsel, and superintended its execution; that it involved a complete revolution of intention, and an entire departure from previous testamentary dispositions; that it was made under mistaken impressions of fact, recently imbibed, and vitally affecting its provisions; these facts, coupled with gross inequality and apparent injustice, raise a presumption of undue influence, and cast the burden of proof of repelling it upon the party to whom it is imputed." These cases have but a few features in common with the present case. There is nothing whatever to show that the Scriven family had any control or influence over the testatrix, or that they had tried to imbue her with prejudice against any of her relatives, or that the will originated with them or either of them, or that they even knew what its provisions were, or were proposed to be, until after it was executed. The only thing that is shown is that Scriven employed for the testatrix Mr. Wickham to prepare the will, but it does not appear that any member of the family was present when any of the instructions for it were given, much less that they, or either of them, made any suggestion as to its provisions, or any request of the testatrix. In short, there is nothing whatever showing or tending to show that all the provisions of the will were not the free, uninfluenced result of the deliberate and intelligent judgment of the testatrix. The facts shown by the contestant did not, in our judgment, change the burden of proof on the subject of undue influence, or establish it by a preponderance of evidence, against that produced by the proponent. On this point, as well as on that of testamentary capacity, we think the evidence does not warrant a reversal of the findings of the circuit court. The contest was originated and prosecuted in good faith by the contestant, and, in accordance with the settled rule of the court, he is to be allowed his taxable costs of the litigation to be paid out of the estate. The judgment of the circuit court must be affirmed. The judgment of the circuit court is affirmed, the appellant's taxable costs to be paid out of the estate of the testatrix.

IN re GUNYON'S ESTATE.

Appeal of CHURCH et al.

(Supreme Court of Wisconsin. May 2, 1893.)

ELECTION TO TAKE UNDER WILL—WHAT CONSTITUTES.

Rev. St. § 2172, provides that a widow shall be deemed to have elected to take under her husband's will unless, within one year after his death, she file a notice of her election to take the provision made by law. *Held*, that where a widow sealed and acknowledged her notice of election to take the provision made by law for her, but died before filing it, the elec-

tion was not complete, and a filing thereof by her executor, though within one year after the death of her husband, did not make such election valid.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Contest between William P. McLaren, as executor of Fanny Gunyon, and John Church and another, executors of Robert Gunyon, to determine the respective rights of the parties in the estate of Robert Gunyon. From a decree awarding the executors of Fanny Gunyon dower and homestead rights in Robert Gunyon's estate, and also one-third of his personal estate, the executors of Robert Gunyon appeal. Reversed.

The other facts fully appear in the following statement by PINNEY, J.:

Robert Gunyon and Fanny Gunyon, his wife, were childless, and much advanced in years. The former made his will February 10, 1892, without making any provision whatever by it in favor of his wife, and died four days thereafter; the latter also made her will, and on the 25th of the same month, and after the death of her husband, she sealed and acknowledged her election, "in case of the allowance of any will or codicil of my late husband, Robert Gunyon, to take the provision made by law, instead of the provision made by will or codicil," and died on the 3d of March next thereafter, testate. On the 14th of April following, the will of Robert Gunyon, deceased, was admitted to probate, and on the same day the executor of his widow produced and filed in the county court her said election, and the executors of her husband filed a petition asking that it be stricken from the files, and that the court decree the rights of the widow and her executor, and adjudge what part and portion of the estate was subject to her rights, etc., and the executor of Fanny Gunyon, deceased, demurred thereto. The county court decided that the election of said widow was duly made and filed, and that pursuant thereto she and the legal representatives of her estate are entitled to the same dower and homestead rights as if said Robert Gunyon, her husband, had died intestate, leaving lawful issue, and also to one-third part of his personal estate, as provided by Rev. St. § 2172, as amended. The demurrer to the petition was accordingly sustained, and the petition was dismissed, with costs. The executors of Robert Gunyon, deceased, appealed to the circuit court, where the decision so appealed from was affirmed, and they thereupon appealed from such judgment of affirmance.

Frank J. Lenicheck and Dalberg & Becher, for appellants. Miller, Noyes & Miller, for respondent.

PINNEY, J., (after stating the facts.) The statute (section 2170) provides, in substance, that, if a jointure or pecuniary provi-

sion be made for the wife, "she shall make her election after the death of her husband whether she will take such jointure or pecuniary provision, or the share of his estate" thereafter provided by section 2172; and section 2171 provides that if any lands be devised to a woman, or other provision be made for her in the will of her husband, she shall make her election "whether she will take the lands so devised or the provision so made, or whether she will claim the share of his estate provided in section 2172; but she shall not be entitled to both, unless it plainly appears by the will to have been so intended by the testator." By section 2172 it is provided that, when a widow shall be entitled to an election under either of the two preceding sections, she shall be deemed to have elected to take such jointure, devise, or other provision, "unless, within one year after the death of her husband, she file in the court having jurisdiction of the settlement of his estate notice in writing that she elects to take the provisions made for her by law, instead of such jointure, devise, or other provision; and upon filing such notice she shall be entitled to the same dower in his lands, and the same right to the homestead, as if he had died intestate, leaving lawful issue, and the same share of his personal estate as if he had died intestate: provided that, when he shall have died testate, the share of personal estate which she may so take shall not exceed the one-third part of his net personal estate." On the part of the executors of the husband it is contended that, as his will made no provision whatever in favor of his wife, no case existed for any election or choice by her, and that the will of her husband operated to exclude her entirely from the benefit of the provisions of section 2172, and that her so-called election to take against or contrary to the provisions of his will was wholly inoperative; that in any view of the case her so-called election was ineffectual and void, because it was not filed in the proper court during the lifetime of the widow of the testator. The first question is one of difficulty in view of the very general testamentary power of the husband, and the fact that the rights of the wife are made to depend upon statutory provisions of a positive and arbitrary nature. In *Albright v. Albright*, 70 Wis. 528, 36 N. W. Rep. 254, attention was called to the difficulty felt to exist, and, as it is not necessary now to decide the question, we mention it again, so that the legislature in its wisdom may settle the uncertainty in accordance with the wise and liberal policy of our laws in favor of the wife. Without a valid election to take against the will of Robert Gunyon, deceased, or renunciation of its provisions, the personal representative of his widow, Fanny Gunyon, cannot, it is conceded, have the benefit of the provisions of section 2172 as to the personal estate of the testator; all right

which she might have had to the homestead and to dower in her husband's real estate having expired at her death. The right to make such election or renunciation is purely a personal privilege of the widow, and is terminated by her death. It is not a property right which survives to her representatives or heirs. To be operative, it must be complete within her lifetime, and by the statute it is required to be, by notice filed in the court within one year after the death of her husband; "and upon filing such notice, she shall be entitled," etc., as in the statute stated. Until filed in court she may reconsider it, and claim under the will. It is giving of the notice, by filing it, which is made by the statute the operative act of election or renunciation, and, where a right, grows out of an election, it cannot arise or come into existence until the election is complete. It is well settled that the election in such case cannot be made by any one in her name or otherwise, after her death. *Schouler, Dom. Rel. § 206; Sherman v. Newton, 6 Gray, 307; Atherton v. Corliss, 101 Mass. 44, 45; Crozier's Appeal, 90 Pa. St. 384; Jackson's Appeal, 126 Pa. St. 105, 107, 108, 17 Atl. Rep. 535; Welch v. Anderson, 28 Mo. 293.* It does not appear in what way the election executed by the widow came to the hands of her executor, but presumably with her other papers. Had she, however, delivered it to him, or to any other person, with instructions to file it in the proper court, this would have created a mere agency which would have been certainly terminated by her death. For these reasons the claims of the executor of Fanny Gunyon cannot be sustained, and the judgment of the circuit court in his favor is erroneous, and must be reversed.

The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to reverse the order of the county court, and to remit the cause to that court for further proceedings according to law.

O'DONNELL v. BRAND.

(Supreme Court of Wisconsin. May 2, 1893.)

CONTRACTS—RESCISSIION—WHAT CONSTITUTES.

Plaintiff agreed in writing to sell to defendant a certain lot, and received \$100 as part payment on the purchase price. Afterwards defendant stated to plaintiff that he did not want the lot, and that he had got to lose the \$100 paid. To this plaintiff only replied that he (plaintiff) "must see about it." *Held*, that the conversation did not constitute a rescission of the contract, nor estop defendant to insist on his equitable interest in the lot, even if a parol surrender of such interest would be valid.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by Patrick O'Donnell against Moses H. Brand to cancel a contract for the sale of realty, and to foreclose any equitable interest defendant might have thereunder.

From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

This is an appeal from an order of the circuit court of Milwaukee county sustaining a demurrer to the plaintiff's complaint, the object of which was to obtain a rescission or cancellation of a written memorandum or agreement of sale by the plaintiff, through his agent, T. Dore, to the defendant of lot 12, block 43, Third ward of Milwaukee; \$100 of the purchase price having been paid at the date thereof, July 24, 1890, and the balance thereof was to be paid \$2,400 September 24th thereafter, \$2,500 on the 24th of November, and \$10,000 on or before three and five years, in equal payments of \$5,000, and to be secured by a mortgage on the above premises, with interest at the rate of 6 per cent. per annum from the date of the contract until all should be paid; all rents received by the seller to the 24th of November to be paid over to the purchaser; and when the deed was delivered and mortgage received by him he should cease to collect rents, except when ordered to do so by the purchaser; the vendor to furnish a full and sufficient deed with abstract of title to said described property, free, and clear of all incumbrances. The complaint, after setting out the contract, alleges that the plaintiff procured a full and complete abstract of title in due season, at a cost of \$25, showing that the plaintiff had a good and perfect title to the lot, free and clear of all incumbrances; that afterwards, when the first payment of \$2,400 became due, the plaintiff verbally extended the time for making it for thirty days; that within two or three days after the expiration thereof the plaintiff met the defendant, when the latter peremptorily stated to the plaintiff that he did not want his (the plaintiff's) lot, and that he had got to lose his \$100 which he had paid on account of the purchase money, to which the plaintiff responded that he "must see about it," and the defendant made no reply, but he immediately left the plaintiff; that the defendant informed Dore, plaintiff's agent in the sale of said property, of what he had stated to the plaintiff when they met with respect to the purchase of the lot; that the plaintiff concluded that he would not attempt to compel the defendant to perform the agreement, and about two weeks thereafter so informed the said Dore; that plaintiff has never attempted to compel the defendant to perform the agreement, and that defendant has not since performed or offered to perform it, or paid or offered to pay any part of the purchase money; that on the 18th of June, 1892, he caused the agreement for the sale of the lot to be recorded in the office of the register of deeds, so that it became a cloud upon the plaintiff's title; that the plaintiff's attorney called on the defendant on the 16th of July, 1892, and

requested defendant to remove such cloud by the execution and delivery of a quitclaim deed, a copy of which is made an exhibit, but the defendant refused to execute it, or to release the agreement, without compensation, and claimed that it was still in force, and had not been rescinded; that he would take the lot at the price mentioned in the agreement, with interest, or that he (the defendant) would release the agreement for \$100. The plaintiff claims that the defendant is estopped from denying that he surrendered the agreement and relinquished all claim to the lot on or about the 24th of October, 1890, by the statement made by him to the plaintiff when they met in October, 1890, and the failure of the defendant to perform the agreement on his part. Judgment was demanded that the agreement and record thereof be canceled and annulled, and that the defendant be barred and foreclosed of and from all right, title, etc., in or to the said lot under or by virtue of the said agreement, and for general relief. The defendant demurred, upon the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action. The plaintiff appeals from an order sustaining the demurrer, with leave to the plaintiff to amend, etc.

Wilson Graham, for appellant. Williams & Robinson, for respondent.

PINNEY, J., (after stating the facts.) The agreement for the sale and conveyance of the premises in question to the defendant vested in him an interest in land. The plaintiff thereby became a trustee of the legal title for the use of the defendant, and bound to convey it to him upon his paying or securing the payment of the unpaid purchase money as specified in the contract. The defendant thus acquired an equitable title or interest in the lot in question, and the defendant became the trustee of the plaintiff for the unpaid purchase money, and bound to pay it, with interest as stipulated in the agreement. The contract contains no provision whereby it might be rescinded, and the interest of the defendant in the lot surrendered. Since the making of the contract the plaintiff has been at all times, and now is, in possession of it. It is contended that what took place between the parties when they met October 24, 1890, as above stated, amounted to a relinquishment of the lot and surrender of the agreement, and that the defendant is now estopped from disputing it. All that took place was that the defendant abruptly and peremptorily stated, as it is alleged in the complaint, and as if it was optional with him whether or not he should pay the balance of the purchase money or not, that he "did not want the lot, and that he had got to lose his hundred dollars which he had paid on it," to which the plaintiff responded that he, the plaintiff, "must see

about it," and the parties then separated. The plaintiff afterwards concluded that he would not attempt to compel the defendant to perform the agreement on his part, but it is not claimed that he notified the defendant of his determination, and nothing took place between them thereafter in respect to the matter until July 18, 1892, when, the defendant having caused the contract to be recorded in the office of the register of deeds about three weeks previous, the plaintiff's attorney tendered to the defendant a deed of quitclaim or release of the lot to the plaintiff, and demanded that he should execute and acknowledge it. The defendant refused to do this without compensation, and claimed that the contract was still in force, and that he would take the lot at the price named in the agreement, with interest, or would release the agreement for \$100. The plaintiff soon after brought this action. The defendant did not part with the agreement, nor did the plaintiff do any act or change his position in reliance upon the refusal of the defendant to take the lot. He did not even manifest a wish to rescind the contract upon being allowed to retain the \$100. If the plaintiff was entitled to rescind the contract, he was bound, as a condition of doing so, to restore to the defendant the \$100 he had received under it. After such a considerable lapse of time, his attempted acceptance in July, 1892, of the defendant's offer of October 24, 1890, came too late to bind the latter and enable the plaintiff to retain the \$100. The plaintiff should have signified his acceptance of the offer within a reasonable time, and secured a proper relinquishment or surrender in writing. The case is utterly destitute of any element of estoppel against the defendant. All that took place between the parties in relation to the alleged relinquishment or surrender was by parol, and the minds of the parties do not appear to have met upon any terms of rescission or surrender, even if a parol surrender would be valid. But by section 2302, Rev. St., "no estate or interest in lands * * * shall be * * * surrendered, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party * * * surrendering * * * the same." A surrender is "the effectual yielding up of an estate or interest to one having the immediate reversion or remainder wherein such particular estate or interest may merge," and may be "by such act or acts as are inconsistent with the continuance of such former estate or interest, and must be accepted and acted upon by the other, or by both parties. When such acts and acceptance so concur under such circumstances, the party thus surrendering is estopped from subsequently disclaiming the effectiveness of such surrender." It is essential to such estoppel that the party to whom such surrender by act in pais or operation of law is made shall have acted upon the

faith of it in some material respect. *Telford v. Frost*, 78 Wis. 172, 44 N. W. Rep. 835, and cases cited; *Dougherty v. Catlett*, 129 Ill. 431, 21 N. E. Rep. 932; *Kneeland v. Schmidt*, 78 Wis. 348, 47 N. W. Rep. 438; *Witman v. Watry*, 31 Wis. 638. Here the defendant had no possession of the lot to surrender, and he did not deliver up his contract or make any written release or surrender by deed. There was at most a mere offer to relinquish the lot, which was not seasonably accepted. When the defendant was asked to put the relinquishment or surrender in writing, he had a right to retract his offer, as he did. For these reasons the circuit court properly sustained the defendant's demurrer.

The order of the circuit court is affirmed.

SAWTELLE v. RIPLEY.

(Supreme Court of Wisconsin. May 2, 1893.)

WILLS—ACTION TO CONSTRUCT—PARTIES.

1. Where doubt has arisen as to the construction of a paragraph in a will, one who is named as a beneficiary in the will, but who has no interest under such paragraph, is not a proper person to maintain an action for the construction thereof, but where the executor in his answer asks for the construction of the paragraph, and it is manifest that a judicial construction of the same is imperatively necessary, a court of equity will retain jurisdiction of the action.

2. In such an action a person who was named an executor of the will, and also a trustee of the trust created by the paragraph in question, and who has declined to act as executor, is a necessary party.

Appeal from circuit court, Waukesha county; A. Scott Sloan, Judge.

Action by Mary A. G. Sawtelle against Mark Ripley as executor and others for the construction of a will. Judgment was rendered declaring one clause of will void, and defendant executor appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action to construe the will of Ward Witham, deceased. Plaintiff is a granddaughter of deceased, and named as a legatee of \$500 in the will. She sets forth in her complaint that doubt and uncertainty has arisen as to the meaning and effect of the fifth clause of the will, and prays for a construction of the same. The appellant, as executor, answered, admitting the general allegations of the complaint as to the relationship of the parties, the making and probate of the will, and that doubt and uncertainty had arisen as to the construction of the fifth paragraph thereof and the duties of the executor thereunder, alleging that plaintiff is not interested in the construction of the same in any way, and also prayed for a construction of said paragraph, and that the same be declared legal and valid. The defendant Lorenzo Witham answered separately, alleging that said fifth paragraph was void for uncertainty, and that

the sum bequeathed thereby became a part of the residuary estate. The other defendants, who are the remaining legatees named in the will, did not appear. It appeared that the testator died January 22, 1888, leaving a will, which was probated February 23, 1888, and which, after certain bequests, among which was a bequest of \$500 to the plaintiff, his granddaughter, contained the following provision: "I give, devise, and bequeath to my executors the sum of five thousand dollars, in trust nevertheless for following uses and purposes: Said sum is by my said executors to be invested in some good interest-bearing securities, and the net yearly income thereof shall be used and applied by my said executors to the support, maintenance, and education, or aiding in the support, maintenance, and education of such indigent orphan children under the age of fourteen years, in the said county of Rock and state of Wisconsin, as in the judgment of my said executors may be most needy and deserving. Said income of said five thousand dollars to be used and applied as above until the year nineteen hundred, and then the said sum of five thousand dollars is to be given to such indigent orphan children, in Rock county, Wisconsin, as my executors shall think most needy and deserving." There was also a residuary clause covering all the rest, residue, and remainder of his estate, real and personal, but plaintiff was in no event a beneficiary under the residuary clause. Mark Ripley and N. N. Jackman were named in the will as executors. Before probate of the will, Jackman duly declined to act as executor, and Ripley accepted and qualified alone, and is still acting as executor. The plaintiff was paid her bequest of \$500 on becoming 21 years of age, which was after the commencement of this action. Upon these facts the circuit court concluded (1) that plaintiff was a proper party to bring this action; (2) that the execution of the trusts of the will by Ripley alone is legal and valid; (3) that the fifth paragraph of the will is void for indefiniteness and uncertainty; (4) that the \$5,000 named in said fifth paragraph becomes a part of the residuary estate; (5) that the taxable costs and disbursements of all parties, and \$50 to the attorney of each party appearing, be paid out of the estate and from said \$5,000 fund. The appellant excepted to the 1st, 3d, 4th, and 5th conclusions of law, and judgment was entered in accordance with the findings. Ripley, as executor, appeals from that part of the judgment which adjudges the fifth clause of the will void and that the amount named therein becomes part of the residuary estate; also from that part which adjudges plaintiff a proper party to bring the action, and awards her costs.

Doe & Sutherland, for appellant. John Nichols and E. F. Carpenter, for respondent.

WINSLOW, J., (after stating the facts.) The plaintiff is in no way interested in the construction of the fifth paragraph of the will. If the bequest in trust therein contained is valid, she takes nothing under it, and if it be void the money bequeathed thereby passes under the residuary clause of the will, and becomes a part of the residuum of the estate, in which she does not share. *Hawk. Wills*, p. 40. She was not therefore a proper party to bring an action for construction of the clause of the will in question, not being in any way interested in any possible construction thereof, either as executor, trustee, or cestui que trust. *Chipman v. Montgomery*, 63 N. Y. 221; *Bailey v. Briggs*, 56 N. Y. 407. The executor Ripley, however, could rightfully bring the action, and he, having answered to the merits, and praying the judgment of the court construing the fifth clause of the will, we see no substantial reason why a court of equity should not retain jurisdiction, and pass upon the questions so affirmatively raised by the executor, especially as it is manifest that a judicial construction of said clause is imperatively necessary. We have concluded, therefore, to retain jurisdiction of the action on this ground. A difficulty, however, arises which seems to us to render it necessary that another party should be before the court before final judgment should be passed upon said clause. Under said fifth paragraph of the will, if it be valid, Jackman and Ripley were nominated trustees of a trust which was entirely distinct from the office of executor, and which might exist for years after their duties as executors had been performed. Jackman had declined to act as executor of the will, but he has not, so far as is shown, ever declined the trust created by said fifth paragraph, nor is it shown that there is any impediment to his executing such trust. *Tainter v. Clark*, 13 Metc. (Mass.) 220; *Wills v. Cowper*, 2 Ham. (Ohio.) 124; *Conklin v. Egerton's Adm'r*, 21 Wend. 430; *Clark v. Tainter*, 7 Cush. 568. In this view, he is manifestly an essential party to an action wherein a construction of said paragraph is sought. Much may depend on his action either in accepting or declining this trust. It is a very serious question whether his declination may not render the execution of the trust impossible, because of the personal confidence reposed by the testator in the trustees whom he has named. 2 Perry, Trusts, (4th Ed.) §§ 721, 729. We shall decline to pass upon the merits of the controversy until Mr. Jackman has been made a party to the action, and it be ascertained whether he accepts or declines the trust. The action will be remanded to the circuit court, with directions to cause Mr. Jackman to be made a party defendant, and to take such further proceedings as may be necessary to definitely ascertain whether or not he declines or accepts the trust, and then to proceed to judgment upon the mer-

its. Inasmuch as this action is retained in court simply on the ground that the executor Ripley has prayed construction of the will, and the action has thus become practically on behalf of the state, we have concluded that no costs should be taxed against respondent on this appeal, but they will be ordered to be allowed out of the estate. By this court: Judgment reversed and cause remanded for further proceeding in accordance with this opinion, appellant's costs to be taxed and allowed out of the estate.

STATE ex rel. VAN RYN v. HORAN.
(Supreme Court of Wisconsin. May 2, 1893.)
ELECTIONS—DEPOSITING BALLOTS IN WRONG BOX
—EFFECT.

Where, at an election, two ballot boxes are provided, one for ballots for judges, and another for ballots for municipal officers, and some of the ballots cast are deposited in the wrong box, the voters will not be deprived of their rights by the mistake or fraud of the election officers in so doing.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by the state, commenced under Rev. St. § 3463, in the nature of a quo warranto, on the relation of Henry J. Van Ryn against James H. Horan, to try title to the office of alderman for the Fourth ward of the city of Milwaukee. From a judgment for the relator, defendant appeals. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action to try the title to the office of alderman for the Fourth ward of the city of Milwaukee. At the municipal election held April 5, 1892, the parties were opposing candidates. A judicial election for a justice of this court was held at the same time and place, the votes being placed in a separate box, as by law required. There were five election precincts in the ward. The returns of the inspectors of the various precincts showed that Horan received 1,127 votes, and Van Ryn 1,124 votes in the ward, and Horan accordingly received the certificate of election, and is now holding the office. The dispute on the trial was concerning the vote of the First election precinct. According to the return of the inspectors Van Ryn received in this precinct 131 votes, and Horan 189 votes. The fact was abundantly proven, however, and found by the court, that in this precinct, upon counting of the votes at the close of the poll, 12 judicial ballots were found in the municipal box, and 12 municipal ballots were found in the judicial box, 11 of which municipal ballots contained the name of Van Ryn, and one the name of Horan. These last-named ballots were none of them counted by the inspectors, but were marked "Disallowed." If counted, the relator had a majority. The ballots, it seems, had been preserved, and the respondent introduced them in evidence upon the trial, and a re-

count of all the precincts was had by witnesses in open court. The changes on this recount were a net gain of two votes for Horan in the 2d, 3d, 4th, and 5th precincts. In the First precinct the recount showed a gain for Horan of four votes and a loss for Van Ryn of three votes, and the package contained an excess of votes above the poll list of at least four votes. If the gains so shown for Horan were allowed, he would be elected, whether the judicial votes were counted or not. A jury being present upon the trial, and it being claimed that this package had been tampered with since the election, the question was submitted to the jury whether said package had been tampered with since it was sealed by the inspectors, and the jury found in the affirmative. The court found that the municipal votes found in the judicial box should be counted, and, in accordance with the verdict of the jury, that the package of ballots of the First precinct had been tampered with, and accordingly found that Horan had received 1,131 votes, and Van Ryn 1,137 votes, and was elected, and rendered judgment for the relator, from which defendant appealed.

Rose & Bell and F. M. Hoyt, for appellant. Toohey, Doerfler & Gilmore and W. C. Williams, for respondent.

WINSLOW, J., (after stating the facts.) There is but one serious question in this case, and that is whether the municipal ballots found in the judicial box should be counted. The circuit court found, as the evidence abundantly showed, that these were ballots duly cast, but deposited by mistake, inadvertence, or otherwise, by the inspectors, in the judicial box. The question is, shall the voters be deprived of their ballots by the mistake or fraud of the inspectors in so putting their ballots in the wrong box? This question must be answered in the negative. Judge McCrary well states the rule as follows: "It is a rule, well grounded in justice and reason, and well established by authority and precedent, that the voter shall not be deprived of his rights as an elector, either by fraud or the mistake of the election officers, if it is possible to prevent it." Amer. Law Elec. § 131. The authorities also support this position. *Parvin v. Wimberg*, (Ind. Sup.) 30 N. E. Rep. 790; *People v. Bates*, 11 Mich. 362. In this case it appeared that the number of judicial votes found in the municipal box was exactly the same as the number of municipal votes found in the judicial box, and that, if the judicial votes in the municipal box were added to the municipal votes found therein, the total number of votes substantially agreed with the poll list. The fact that they were legal votes put in the wrong box by fault of the inspectors was thus clearly demonstrated. There was sufficient evidence also to sustain the verdict and

finding that the package of ballots from the First precinct had been tampered with. This fact being proven, it became of no value as evidence. Amer. Law Elec. §§ 277, 278; *Albert v. Twohig*, (Neb.) 53 N. W. Rep. 582. No other questions requiring discussion are presented by the record. Under the proof and findings the relator was clearly entitled to judgment. Judgment affirmed.

SOHNS v. SLOTEMAN et al.

(Supreme Court of Wisconsin. May 2, 1893.)

PARTNERSHIP—WHEAT CONSTITUTES—SUBMISSION TO ARBITRATION—AGREEMENT NOT TO DISCONTINUE ACTION—EFFECT.

1. Plaintiff was employed by defendants, contractors for the steam-heating apparatus in two certain buildings, to do the work and furnish the materials under both contracts for one-half the net profits. Held not to constitute a partnership, but an arrangement for measuring plaintiff's compensation.

2. A provision in a submission to arbitration that it should not operate as a discontinuance of the actions or the garnishments auxiliary thereto, but should stay proceedings until their discontinuance, to follow on the award therein made, was valid; and, the award not having been paid, it was proper to move for trial and judgment.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by Henry G. Sohns against O. T. Sloteman and another for labor and materials furnished. From a judgment for plaintiff, defendants appeal. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action for labor and materials furnished. The defendants had entered into two separate contracts with St. Amellanus Orphan Asylum and Rev. William Grutza to put in steam-heating apparatus in two certain buildings. Afterwards defendants employed plaintiff to do the work and furnish the materials under both contracts for one-half of the net profits. Plaintiff went on with the work under both contracts, and claims to have fully completed the same, and brought this action for the balance which he claims to be due him for such work and materials. The action was commenced February 25, 1890, and at the same time garnishee actions were commenced against the asylum and Grutza auxiliary thereto. April 2, 1890, a written agreement was made between plaintiff and defendants reciting that controversies had arisen between the parties as to the settlement of the accounts between them, and that the actions aforesaid had been commenced, and agreeing to submit all such matters to three named arbitrators, whose award should be performed by both parties. Such agreement also contained the following provision: "And we do further mutually covenant and agree that this submission shall not operate as a discontinuance of the aforesaid suits now pending or the garnishments auxiliary thereto, but that its effect shall be to stay

proceedings until their discontinuance, which shall follow upon the award herein made, and upon the St. Amelianus Orphan Asylum and said Rev. William Grutza paying to either of us or both the amount or amounts respectively awarded by said arbitrators: provided, however, that such award be made in writing under the hands of said arbitrators, or any two of them, ready to be delivered to us, or either of us, on or before the 10th day of August, 1890." The arbitrators made an award August 5, 1890, by which they ordered that defendants should pay plaintiff, on or before August 15, 1890, \$335, with interest from March 1, 1890, at 7 per cent., and that said actions should be discontinued upon payment of said sum within the time limited. The award was not complied with either by defendants or by the garnishees. October 3, 1891, defendants moved to dismiss the action, which motion was denied. Defendants served their answer October 15, 1891, in which they alleged that plaintiff had never completed either contract, and that they had paid plaintiff in full. They also allege the agreement to arbitrate, and the award thereon, and set up two counterclaims for damages on account of failure by plaintiff to complete said contracts. The action was referred to Hugh Ryan, as sole referee, to hear, try, and determine, who after full trial found substantially for the plaintiff upon the contested matters of fact, that he had performed his contracts, and that there was due him under the same \$319.70, with interest and costs. Upon motion the report of the referee was confirmed, and judgment rendered thereon, from which defendants appeal.

G. J. Cox, for appellants. J. W. Wegner, for respondent.

WINSLOW, J., (after stating the facts.) We shall not review the evidence upon the disputed questions of fact. Examination of it shows that there was sufficient evidence to justify the findings made thereon by the referee, and confirmed by the court, and that there is not a clear and satisfactory preponderance against such findings. It is objected that, by the agreement to do the work for one-half the net profits, the plaintiff became a partner of defendants, and cannot maintain this action at law. We regard this as simply an arrangement by which the amount of plaintiff's compensation is measured. *La Flex v. Burr*, 77 Wis. 538, 46 N. W. Rep. 801.

The most serious question arises upon the effect of the agreement of arbitration. It is well settled in this state that a mere submission of a controversy to arbitration operates ipso facto as a discontinuance of a pending action thereon, because the parties have chosen another forum for the determination of their controversies. *Muckey v. Pierce*, 3 Wis. 307; *Dolph v. Clemens*, 4 Wis. 181; *Bigelow*

v. Goss, 5 Wis. 421, and cases cited in note. The effect, however, of a provision in the agreement of submission that the action shall not be discontinued has not been determined by this court, so far as we are aware. We see no good reason why such a provision should not be operative. The ground on which it is held that bare submission operates as a discontinuance is that it shows that the parties have agreed to a discontinuance because they have sought another tribunal. When the submission by its terms affirmatively shows that they have not agreed to a discontinuance, the reason for the rule is entirely lacking. Nor do we see any reason on grounds of public policy why a stipulation that the action shall not be discontinued, but only stayed, should not be held valid. We come, then, to a consideration of the meaning of the stipulation in the agreement of submission. It seems very plain that the parties intended that the main action and the garnishee actions should remain in court, not only pending the arbitration and award, but until the award was paid. Plainly, the plaintiff did not propose to lose the benefit of his pending action and his garnishee proceedings while he was making an effort to arrange the matter and get his pay by means of the arbitration. Substantially the agreement is that the suits shall be stayed and shall be finally discontinued, provided an award is made and paid within a reasonable time; otherwise not. The award was not paid, either within the time limited by the award itself, or within more than a year thereafter. We think the stay of proceedings agreed for in the submission must be held to have expired long before this action was moved for trial, and the event upon which alone it was agreed that the action should be discontinued, namely, payment of the award, never having taken place, we think the case was properly moved to trial and judgment. The agreement contemplated discontinuance from one event only, and entirely rebuts the idea that it can result from any other event. No other points require attention. Judgment affirmed.

FREDE v. PFLUGRADT et al.

(Supreme Court of Wisconsin. May 2, 1893.)

EQUITY—CANCELLATION OF DEED—DEFENSES.

1. Plaintiff, to secure the performance of her husband's contract, executed to one P. a deed of a certain lot. She afterwards sued P. and one R., alleging that her husband had fully performed his contract; that she was entitled to a return of the deed; but that P. had conveyed the lot to R., who had notice of the facts, —and prayed for a cancellation of both deeds. On the trial it appeared that, after the execution of the deed by plaintiff, P., by an oral agreement, purchased from her the lot in question, paid full consideration, went into possession, and subsequently conveyed the same to R. *Held*, that the complaint was properly dismissed.

2. It was not necessary that P., to avail

himself of the subsequent parol agreement, should sue for specific performance of the same, or that he should set it up as a counterclaim in the present suit, but it was sufficient to simply plead it as a matter of defense.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action in equity by Caroline Frede against William J. Pflugradt and Ferdinand Ruemmele to cancel a deed of land. Complaint dismissed, and plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action in equity for the cancellation and redelivery of a deed of land. Plaintiff was the wife of Ernest Frede. She owned lot 28, block 17, Ludington's subdivision, Milwaukee. Her husband owned lot 27 in the same subdivision. On the 15th of September, 1890, Ernest Frede contracted with defendant Pflugradt to build a house according to certain plans on lot 27, and on the 1st of December following convey the lot, with the house completed, to Pflugradt. In consideration of this contract, Pflugradt agreed to assume a mortgage of \$825 on said lot 27, deed to Frede lots 5 and 6, block 8, Meule Park, and pay \$375 in money. To secure the performance of her husband's contract, and for no other consideration, the plaintiff executed at the same time a warranty deed of her lot, No. 28, running to Pflugradt, which was immediately delivered, and was recorded October 4, 1890. Plaintiff claims in her complaint that her husband fully performed his contract according to its terms, whereby she is entitled to a return of her deed, but that Pflugradt has conveyed the property to defendant Ruemmele, who had notice of the facts; and she prays that the deeds from herself to Pflugradt, and from Pflugradt to Ruemmele, be canceled, and that said defendants be directed to release to her, and that she have an accounting for the profits. Defendant Pflugradt admits the original execution and delivery of the deed as security only, but alleges that in October, 1890, by agreement between himself and Ernest and Caroline Frede, a new oral contract was made between them, cancelling the first agreement, and by which Caroline Frede sold lot 28 absolutely to Pflugradt, and received a full consideration therefor, and Pflugradt received and held possession of said lot 28, and held the same until he sold it to Ruemmele, in January, 1891, since which time Ruemmele has been in possession. The facts are not pleaded as a counterclaim, but simply as a defense. There is no bill of exceptions. The findings of fact of the court are substantially in accordance with the facts alleged in defendants' answer, and as a conclusion the court held that there had been such partial performance of the oral contract to convey lot 28 as to take the same out of the statute of frauds, and that the complaint should therefore be dismissed. From judgment thereon, plaintiff appeals.

Frank J. Lenicheck, for appellant. Williams & May, for respondents.

WINSLOW, J., (after stating the facts.) There being no bill of exceptions, the evidence is not before us, and the findings of the court must be accepted as verities. By them it appears that after the execution and delivery of the deed of lot 28, as collateral security only, the defendant Pflugradt, by oral agreement, purchased the lot of plaintiff, paid full consideration therefor, and went into possession thereof. These facts clearly entitled defendant Pflugradt to a specific performance of the oral contract to convey. *Blanchard v. McDougal*, 6 Wis. 167. The plaintiff contends that these facts are only available to defendant in an action brought to compel specific performance, or under a counterclaim for that purpose, in the present action. The position is not tenable. The plaintiff has come into equity, asking that her deed to defendant be canceled, and the defendant's title be compulsorily released to her. Surely equity will not do this when it appears that the defendant is clearly entitled to a conveyance of the premises from the plaintiff. It might have been better to have pleaded the facts as a counterclaim, and prayed for affirmative relief, but the failure so to do does not prejudice plaintiff, nor will it suffice to compel a court of equity to do that which is monstrously inequitable. The statement of the proposition would seem to be its own answer.

Judgment affirmed.

DREFAHL v. CONNELL.

(Supreme Court of Wisconsin. May 2, 1893.)
NEGLIGENCE — SUFFICIENCY OF COMPLAINT — ACTION AGAINST COUNTY HOSPITAL SUPERINTENDENT.

A complaint, in an action against the superintendent of a county hospital to recover damages for breaches of defendant's duty, alleging that plaintiff was lawfully an inmate of the hospital, and, as such, was entitled to proper care, treatment, and food; that defendant had full control of the hospital, and was furnished with necessary assistance, help, food, and supplies; and that he failed to supply plaintiff with wholesome food, so that his sickness was augmented,—states a good cause of action.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Fritz Drefahl against M. E. Connell to recover damages resulting from defendant's breach of duty as hospital superintendent. From an order overruling his demurrer to the complaint, defendant appeals. Affirmed.

The other facts fully appear in the following statement by CASSODAY, J.:

The complaint alleges, in effect, that during all the time from April 15, 1891, to May 3, 1892, the defendant held the offices of one of the superintendents of the poor of the county of Milwaukee, and superintendent of the county hospital of said county; that during all said time the plaintiff was lawfully an inmate of said hospital;

that he was afflicted with a disease affecting his legs; that during all of said time it was the duty of said defendant, as such superintendent, to furnish to the plaintiff, as such inmate, a physician of reasonable and sufficient skill and experience, and such skillful and appropriate medical treatment as the nature of the plaintiff's case demanded, to furnish the plaintiff with food of the kind best suited to his debilitated condition, to maintain proper discipline among the inmates, officers, and employes of the hospital, so that the plaintiff might receive proper food and careful and considerate treatment; that during all of said time the defendant, as such superintendent, was well and sufficiently provided with all the assistant physicians, nurses, cooks, attendants, and servants and food and medicines required for the performance of his said duties, and had full control over them; that the defendant had full control of the furnishing of the supplies of every kind for said hospital, and was in every way able to perform his said duties as such officer and towards the plaintiff; that, disregarding his duties, the defendant neglected to give to the plaintiff sufficient and proper medical attendance; that he failed and neglected to provide for the plaintiff sufficient or suitable food, but furnished him food of a very coarse and indigestible kind, wholly unsuitable for his condition, and frequently furnished him ill cooked and unwholesome food, by the use of which the plaintiff became greatly debilitated, and suffered great pain, which is one of the causes of the plaintiff's failure to recover his health; that the defendant wholly failed to maintain proper discipline, whereby at meal times the stronger and more active inmates would rush to the table first, and take for themselves all the best portions of the food; that the plaintiff, being lame and weak, was frequently prevented from getting to the table in time to obtain proper food, but had to be content with the leavings, which were wholly unsuited to his physical condition; that the defendant wholly failed and neglected to exercise a proper supervision over his subordinates, but suffered them to grossly neglect their respective duties towards the plaintiff, and hence the plaintiff did not have the medical treatment his condition required, and continued to suffer, and did suffer, and does still suffer, great pain, both mentally and bodily, and continues ill from said sickness; that by reason of such neglect by the defendant the disease with which the plaintiff was afflicted grew much worse; that his body was much weaker and his general health greatly injured; that he suffered great bodily pain and mental anguish; that his disease has become so seated that he can never be cured, and will remain an invalid, and will be wholly dependent upon charity for support; and that he is a man about 40 years of age, and has thereby sus-

tained damage in the sum of \$5,000, for which he demands judgment. To that complaint the defendant demurred, on the ground that it appeared on the face thereof that the same did not state facts sufficient to constitute a cause of action against the defendant. Thereupon the plaintiff moved the court to strike from the record said demurrer, for the reason that the same was frivolous, and made for the purpose of delay. The court thereupon refused to strike out said demurrer, but made an order overruling the same, from which the defendant brings this appeal.

Robert Luscombe and J. G. Flanders, for appellant. Dunlop & Bruncken, for respondent.

CASSODAY, J., (after stating the facts.) A demurrer to a complaint for insufficiency can only be sustained when the complaint fails to state any cause of action whatever. *Moritz v. Splitt*, 55 Wis. 443, 13 N. W. Rep. 555. Where, as here, a complaint states a good and complete cause of action as to certain failures of duty on the part of the defendant, such general demurrer will not be sustained merely because the complaint attempts, but fails, to state other failures of duty on the part of the defendant. *Bronson v. Markey*, 53 Wis. 98, 10 N. W. Rep. 106; *Town of Plainfield v. Village of Plainfield*, 67 Wis. 526, 30 N. W. Rep. 673. This is not an action for the breach of contract. The theory of the complaint is that the plaintiff was poor and diseased, and rightfully committed to the hospital, and was lawfully an inmate thereof, and, as such, was entitled to proper care, treatment, food, and medicine, as mentioned in the foregoing statement; that the defendant, as superintendent, had the full charge, control, and management of the hospital; that he was furnished with all necessary assistance, help, food, medicine, and supplies; that, instead of performing his duty in the premises, he neglected and failed to perform the same, so far as the plaintiff was concerned, in the particulars therein mentioned; that in consequence thereof the plaintiff suffered pain and anguish, and his sickness was augmented and prolonged, to his great damage, as mentioned. We must hold that the complaint states a good cause of action. The order of the superior court for Milwaukee county is affirmed.

SHELDON v. DAVIDSON.

(Supreme Court of Wisconsin. May 2, 1893.)

DECEIT—WHAT CONSTITUTES—REPRESENTATIONS AS TO FUTURE EVENTS.

1. A complaint in an action for damages, alleging that defendant, in order to induce plaintiff to lease from him certain premises, fraudulently concealed the fact that a certain building thereon did not belong to him, but

which fails to allege that defendant knew or had reason to know that plaintiff was ignorant of the fact that defendant did not own such building, and that the leasing of the premises by plaintiff was actually induced by such concealment, is demurrable for failure to state a cause of action.

2. A representation by defendant that plaintiff could have possession of such building on a certain date, several months after the making of such representation, is not actionable, though such event did not occur, in that it relates to a future, and not to a past or present, event.

3. Such representation would not be actionable for the further reason that it is a mere opinion, on which plaintiff had no right to rely.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by John H. Sheldon against Agnes Davidson to recover damages for failure to give plaintiff possession of a building standing on premises leased by plaintiff from defendant. There was judgment for defendant on a demurrer to the complaint, and plaintiff appeals. Affirmed.

Austin & Hamilton, for appellant. Miller, Noyes & Miller, for respondent.

ORTON, J. This is an appeal from an order sustaining a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The complaint alleges substantially the following facts: The defendant, on the 16th day of March, 1891, leased to the plaintiff the south half of lot 3, in block 60, in the Fourth ward of the city of Milwaukee, for the term of five years, at a rent of \$600 per year, payable in monthly installments the 1st of each month, the first payment to be made on the 1st day of May following. On the front part of said lot there was a brick dwelling house and store, and it was agreed that the plaintiff, the lessee, should expend in improving said buildings the sum of \$1,000. It was in said lease agreed that the same should not take effect as to the east 60 feet of said lot until a certain lease then in effect between the defendant, as lessor, and one John Veldt, should terminate, on the 10th day of September, 1891. On said 60 feet there was a barn standing. A copy of the lease is appended to the complaint. It is alleged in the complaint that by the terms of said lease the plaintiff "was to have the use, benefit, and occupation of the said premises, and the aforesaid buildings." There is no such stipulation in said lease. If there had been, it would have embraced the barn on said east 60 feet. The plaintiff made due inquiry of the defendant as to the terms and conditions of said lease between the defendant and said Veldt, and the defendant, with intent to deceive and defraud the plaintiff, and for the purpose of inducing him to sign said lease, falsely and fraudulently concealed from this plaintiff the fact that the barn standing upon the said east 60 feet of said lot was not the property of said defendant, but

was the property of said Veldt, and that the plaintiff could not obtain possession thereof on the 10th day of September next ensuing, and falsely represented to the plaintiff, and for the purpose of inducing the plaintiff to execute said lease, that he could have possession of said 60 feet and the stable standing thereon on and after September 10th next ensuing. "The plaintiff, relying upon the said representations, was thereby induced to sign the aforesaid lease, and did so sign it within a few days thereafter." The said representations were false, in that by the terms of said lease from the defendant to the said Veldt, which was to expire on the 10th day of September, 1891, the said barn was to become the property of the said Veldt, and he was to have the privilege of removing the same, which the defendant well knew. At the expiration of said lease between the defendant and said Veldt, said Veldt removed said barn from said premises, and the defendant has refused to restore the same, or compensate the plaintiff therefor. By reason of the premises the plaintiff was damaged \$1,000. The gravamen of the complaint is the fraudulent concealment of the fact that the building on the east 60 feet of the lot was not the property of the defendant, but was the property of Veldt, the lessee; and the false representation that the plaintiff could have possession of the said 60 feet, and the stable standing thereon, on and after September 10th next ensuing.

1. As to the concealment as a cause of action. That barn on the 60 feet must have been placed there by the tenant, Veldt, temporarily for his own use, with the privilege of removal at the end of his term, and was never a part of the realty. It could not have been so attached to the soil as to become a part of the realty. If it had been, the plaintiff would have been entitled to it by the terms of his lease, and he could have prevented its removal. We conclude, therefore, that the barn was a tenant's fixture in fact as well as by the terms of the Veldt lease, and removable by him during his term. The Veldt lease is referred to in the plaintiff's lease. The plaintiff does not state that he did not know all about that lease, and all about the character of that building as having been placed there by the tenant, and removable. He states only that he inquired of the defendant about the terms and conditions of that lease, and does not state whether the defendant told him what they were or not. He does not state that the defendant knew, or had reason to know, that he, the plaintiff, was ignorant of the fact that the defendant did not own the barn. The defendant might well have supposed that the plaintiff knew the terms of that lease referred to in his own lease, and the character of the barn as a fixture was open to common observation. But more material than even this is the absence of any

avermment that the plaintiff was induced to sign the lease by such fraudulent concealment. It states merely that the concealment was for the purpose of inducing him to do so, but fails to state that he was actually induced to do so by it. It is very clear that there are not sufficient allegations in the complaint to make the fraudulent concealment a cause of action.

2. As to the false representation that the plaintiff "could have possession of said east 60 feet, and the stable standing thereon, on and after September 10th next ensuing." The plaintiff did have possession of the 60 feet, so that such part of the representation at least was not false. As to the other part of the representation, it relates to a future event, and is not of an existing fact or of a past event, and therefore is not actionable if such event should not occur. It is a mere opinion, prediction, or promise of a future condition of things, upon which the plaintiff had no right to rely. In *Morrison v. Koch*, 32 Wis. 254, the representation was that a certain dam "would always in the future continue to furnish the full amount of the power conveyed." Mr. Justice Lyon said in the opinion: "It seems quite clear that no charge of fraud can be predicated upon it. At most there was a mere expression of opinion that in the future the conditions on which the water supply depended would remain favorable to a continuance of the supply. It is wanting in all the essential elements which constitute a fraud." In *Patterson v. Wright*, 64 Wis. 289, 25 N. W. Rep. 10, the representation was that the party "said or promised that he would pay a certain sum of money as a consideration of and to induce the giving of certain notes, and upon which they were obtained." It was held "that the representation must relate to a present or past state of facts, and that relief as for deceit cannot be obtained for the nonperformance of a promise or other statements looking to the future;" citing the above case; *Bigelow, Frauds*, 11, 12; and *Fenwick v. Grimes*, 5 Cranch, C. O. 439. In *Maltby v. Austin*, 65 Wis. 527, 27 N. W. Rep. 162, the representation was "of the value of a certain tract of land," and in *Prince v. Overholser*, 75 Wis. 648, 44 N. W. Rep. 775, it was "that a certain bounty land warrant would locate any kind of government land," and neither was held actionable. The principle has become elementary in respect to all representations relating to the future, and as mere expressions of opinion. This representation is not fraudulent or actionable for both reasons. It relates to a future event, and is a mere opinion, viz. "that the plaintiff could have possession of the building on the east 60 feet of the lot on and after September 10th next ensuing." This statement was made before March 16, 1891. This disposes of all the pretended deceit or fraud alleged in the complaint. The demurrer was properly sustained. The or-

der of the superior court is affirmed, and the cause remanded for further proceedings according to law.

TOWN OF EAGLE RIVER v. BROWN et al.

(Supreme Court of Wisconsin. May 2, 1893.)

TAXATION—"MERCHANTS' GOODS"—PINE LOGS—CHANGING ASSESSMENT.

1. Pine logs kept for sale are "merchants' goods, wares, and commodities," within the meaning of Sanb. & B. Ann. St. § 1040, providing that such property shall be assessed in the district where located.

2. Sanb. & B. Ann. St. § 1040, provides that no change of location or sale of personal property after May 1st shall affect the assessment in such year. *Held*, that an assessor had no authority to change an assessment from the sellers to the buyers of property, where the sale was made after May 1st; and the fact that the buyers unnecessarily listed the property for taxation against themselves as manufacturers did not affect the assessment against the sellers.

Appeal from circuit court, Oneida county; Charles V. Bardeen, Judge.

Action by the town of Eagle River against W. H. Brown and another to recover taxes on personal property. Judgment for defendants, and plaintiff appeals. Affirmed.

N. A. Colman and Alban & Barnes, for appellant. A. W. Shelton, for respondents.

ORTON, J. The material facts of this case are as follows: The firm of Hunter & O'Connor, during the winter of 1890 and 1891, and within six months before the 1st day of May, 1891, cut between fourteen and fifteen million feet of pine logs, and banked the same on the St. German waters of the Wisconsin river, within the town of Eagle River, and owned the same on the 1st day of May, 1891, and kept said logs for sale where they were so banked. On the 28th day of May following, the said firm of Hunter & O'Connor sold the said logs, where they were so banked and kept for sale, to the respondents, Brown & Robbins. The said logs were assessed by the assessor of said town of Eagle River to the said firm of Hunter & O'Connor as of the 1st day of May, 1891, where they were so banked and kept for sale. On the 11th day of June, 1891, W. H. Brown, of the firm of Brown & Robbins, the respondents, made an affidavit to the effect that said firm was the owner of the said logs that are and were banked or piled at the main Wisconsin river on St. German, in the town of Eagle River, and that said logs are to be manufactured at the mills owned by them and others located at Rhinelander, in the town of Pelican, in the county of Oneida. On the same day one J. T. Hogan made an affidavit that he is the assessor of the said town of Pelican, and that said logs were listed with him and assessed by him to said Brown & Robbins. One F. W. McIntire testified as a witness on the trial that he was chairman of the town of Eagle

River, and an officer of the board of review of that town; that he knew the logs banked on the St. German waters of the Wisconsin river in the winter of 1890 and 1891 by Hunter & O'Connor, and assessed to them in the spring of 1891; that they were changed on the assessment roll of the town of Eagle River about the middle of July, 1891, to said Brown & Robbins by the assessor of said town, while the said board of review was in session, the assessor being present by the direction of the said board and of himself; and that said Brown told him to have said logs assessed to Brown & Robbins, instead of Hunter & O'Connor, and showed him the above affidavits which were on file in the clerk's office. The assessment roll was in evidence, which showed that said change of the assessment had been made. The change was made by the direction of the board of review when in session. But there is no record of any such action of the board, and none was ever made. The said Brown, as a witness on the trial, testified that he never made any such request to the board, or to the said McIntire, and never requested or directed such a change of the assessment; that he merely said that said firm of Brown & Robbins owned the logs, and that they were assessed to them in the town of Pelican. Timothy O'Connor testified that his firm of Hunter & O'Connor cut and banked said logs in the town of Eagle River, and had them there for sale, and had never made any arrangements to manufacture them. This action is brought by said town of Eagle River to recover the said tax from the defendants, Brown & Robbins.

The above facts are substantially found by the court, and judgment was rendered in favor of said Brown & Robbins, the respondents, from which the plaintiff town has appealed to this court. On the only issue of fact the court found that the defendants, Brown & Robbins, never instructed the said board of review to assess said logs to them, and never informed said board that they were the owners of said logs at the time as of which they should be assessed. Section 1040, Sanb. & B. Ann. St., provides that "no change of location or sale of any personal property after the first day of May in any year shall affect the assessment made in such year." It also provides that "merchants' goods, wares, and commodities, kept for sale, * * * shall be assessed in the district where located." The case of *Torrey v. Shawano Co.*, 79 Wis. 152, 48 N. W. Rep. 246, rules this case, so far as the district in which these logs should have been assessed is concerned. In that case the property was railroad ties, telegraph poles, and posts kept for sale, and they were held to be assessable in the district where they were so kept for sale or located. In the above section saw logs are classed with railroad ties, lumber, etc.

1. The logs were assessable in the town of Eagle River where they were banked and

kept for sale, or where they were located when the assessment should have been made, and was made.

2. The logs were assessed by the assessor of said town as of the 1st of May, 1891, while they were located in said town.

3. They were assessed properly to Hunter & O'Connor, who owned them on the 1st day of May, 1891, and until the 26th day of the same month.

4. The change of title to said logs, or their sale to Brown & Robbins on the 26th day of May, 1891, did not affect the assessment so made to Hunter & O'Connor.

5. The assessor of the town of Eagle River had no right or authority by the verbal direction of the board of review, or otherwise, to change said assessment from Hunter & O'Connor to Brown & Robbins, on account of such change of title to the property on the 26th day of May, 1891. There is no record evidence of any action of the board of review in directing such a change of the assessment, and, if there had been, such action on their part would have been without authority, and unlawful. Chapter 258, Laws 1882, only relates to the property of nonresidents, and chapter 473, Laws 1891, had not taken effect until after the logs had been properly assessed to Hunter & O'Connor, in the town of Eagle River, and the tax of that year had attached to them. That act, if it had taken effect, embodies the same provision that "no change of location or sale of any personal property, after the first day of May in any year, shall affect the assessment made in such year." The unaccountable action of Brown & Robbins in having the logs listed and assessed against them as manufacturers, after they had purchased them, in the town of Pelican, where their mills were situated, did not of course affect the assessment of the logs to Hunter & O'Connor, while they owned them, before the 26th day of May of that year. Whether by such action they may not be estopped to deny the legality of that assessment is a question not in this case. They are clearly not liable to pay the tax assessed on the logs in the town of Eagle River to Hunter & O'Connor, while they owned them and kept them for sale in that town. There was no valid assessment, and there is no lawful tax in said town against the respondents on these logs. There can be no other result. The judgment of the circuit court is affirmed.

SEYRING v. ESCHWEILER.

(Supreme Court of Wisconsin. May 2, 1893.)
REVIEW ON APPEAL—HARMLESS ERROR—INSTRUCTIONS—ACTION FOR SERVICES.

1. The failure to give an instruction for which there was no request is not available error.

2. In an action for services rendered in surveying, where defendant admitted that he employed plaintiff, but alleged that he did it for a certain company, he was asked whether

he gave plaintiff notice that he was an agent of the company. *Held*, that the error in sustaining an objection to such question was harmless, as plaintiff had already testified that when he employed plaintiff he told him that the work was to be done on the land of the company, and that he, defendant, was not personally liable therefor.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by F. R. Seyring against Franz C. Eschweiler. From a judgment for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by LYON, C. J.:

Plaintiff is a surveyor, and did professional work at the request of defendant, worth \$25. This action is to recover therefor. It was commenced in justice's court, and appealed to the supreme court. The defense is that the work was done for a corporation known as the Cement Land Company, and not for the defendant. The defendant admits that he engaged plaintiff to do the surveying, but testified that he informed him at the time that the work was to be done for and on account of the Cement Land Company, and not the defendant. The plaintiff testified that defendant did not so inform him, and that he did the work without knowing that the Cement Company had any interest in it. On this testimony the court instructed the jury that if the credit was given to the Cement Company the defendant is not liable, but if given to defendant he is liable to pay for the work. No instruction was proposed on behalf of the defendant, and no other question was submitted to the jury. The jury returned a general verdict for the plaintiff for the amount of his claim. The defendant appeals from the judgment against him entered pursuant to the verdict.

W. J. Kershaw and Ernest Bruncken, for appellant. J. Thiemann, for respondent.

LYON, C. J., (after stating the facts.) Undoubtedly the court instructed the jury correctly on the law of the case, for, if the jury believed the testimony of the plaintiff, (as they manifestly did,) a verdict for him was the inevitable result. It might have aided the jury had the court stated to them the rules of law by which they were to determine to whom the credit was given; as, that if defendant told plaintiff when he employed him that the work was to be done for the Cement Company, and did not agree to be personally responsible therefor, the jury should find that the credit was given to the Cement Company. But the court was not asked to give such instruction, and the failure to do so is not error.

The plaintiff objected to the following question put to the defendant in his own behalf, when testifying as a witness: "Did you give any notice that you were an agent of the Cement Land Company?" The objection was sustained. We have had some

trouble with this ruling, and it illustrates the danger and folly of unfounded objections to testimony, for in the hurry of the trial the court will sometimes inadvertently sustain them, and thus endanger a judgment recovered by the objecting party, as happens in this case. The question was a proper one, and but for a single consideration its rejection would work a reversal of the judgment. Just before the question was put the defendant testified that he told plaintiff, when he employed him to do the surveying, that it was to be done on the land of the Cement Company, and that he (defendant) was not personally liable for the work. This testimony covers the whole ground of the rejected question, and of the defense; and the answer to such question, had the court allowed it to be answered, could not have strengthened the defense. The ruling was, therefore, quite immaterial, and could not have prejudiced the defense. The foregoing are the only errors of law alleged. The bill of exceptions does not purport to contain all the testimony, but only so much thereof as is necessary to present the questions of law arising on the trial. Hence, we cannot review the case on the facts. The judgment of the superior court is affirmed.

STATE v. MUELLER.

(Supreme Court of Wisconsin. May 2, 1893.)

RAPE—INFORMATION—AIDED BY VERDICT—CONVICTION FOR LESSER OFFENSE—WHEN SUSTAINED.

1. Rev. St. § 4381, provides that "any person who shall ravish and carnally know any female of the age of 12 years or more by force and against her will" shall be guilty of a felony. Section 4669 provides that an information for a statutory offense shall be good, after verdict, if it describes the offense in words of substantially the same meaning as those of the statute. *Held*, that an information which charged that defendant did with force and arms "violently" and "feloniously" make an assault on such female, and did "violently" and against her will "feloniously" ravish and carnally know her, sufficiently stated the statutory offense.

2. A verdict of guilty of an assault with intent to commit rape will be sustained under an information charging the crime of rape, since the lesser crime is necessarily included within the greater. *State v. Shear*, 8 N. W. Rep. 287, 51 Wis. 460, distinguished.

Report from circuit court, Sheboygan county; N. S. Gilson, Judge.

Michael Mueller was indicted for rape, and convicted of an assault with intent to commit rape. At defendant's request the case was reported to the supreme court, under Rev. St. § 4721. Affirmed.

The other facts fully appear in the following statement by CASSODAY, J.:

The information charges, in effect, that June 20, 1892, at the county of Sheboygan, in this state, the defendant, Michael Mueller, did, with force and arms, in and upon one

Emma Mueller, a female of the age of 12 years or more, to wit, of the age of 15 years, violently and feloniously make an assault, and her, the said Emma Mueller, then and there, violently and against her will feloniously did ravish and carnally know, against the peace and dignity of the state of Wisconsin. The defendant, being arraigned in open court, entered a plea of not guilty to said charge. The issue thus formed was thereupon duly tried before the court and a jury, and at the conclusion thereof the jury returned the following verdict: "We find the defendant guilty of an assault with the intent to commit the crime of rape." Whereupon the defendant moved the court in arrest of judgment upon said verdict, for the reasons—First, that the information did not charge an offense as provided by the statute; secondly, that the defendant was found guilty of an offense not charged in the information. That in case said motion should be denied, the defendant moved to set aside the verdict and for a new trial, for the reason that said verdict is contrary to the law and evidence in the case. Whereupon the trial judge, at the request of the defendant, and as provided by section 4721, Rev. St., reported to this court, for answer, the following questions of law arising therein, to wit: (1) Can the defendant be punished for an assault with intent to commit the crime of rape, pursuant to the provisions of section 4383, Rev. St.? (2) If the question shall be answered negatively, then can said defendant be punished for an assault, pursuant to the provisions of section 4696, Rev. St.? (3) Should a new trial be granted to determine the question whether the defendant is guilty or innocent of an assault, as charged in the information?

J. L. O'Connor, Atty Gen., for the State.
Carl Runge, for defendant.

CASSODAY, J., (after stating the facts.) Section 4381, Rev. St., as amended, provides that: "Any person who shall ravish and carnally know any female of the age of twelve years or more, by force and against her will, shall be punished by imprisonment in the state prison," etc. Chapter 350, Laws 1891, (section 4699, Rev. St.,) provides that: "When the offense charged has been created by any statute, or the punishment of such offense has been declared by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offense in the words of the statute, or in words of substantially the same meaning; and words used in the statute to define a public offense need not be strictly pursued in charging an offense, under such statutes, but other words conveying the same meaning may be used." Under these statutes we are constrained to hold that the information does charge an offense. This ap-

pears to be in harmony with the repeated rulings of this court. *State v. Whitton*, 72 Wis. 18, 38 N. W. Rep. 331; *Kilkelly v. State*, 43 Wis. 604; *Bonneville v. State*, 53 Wis. 685, 11 N. W. Rep. 427; *Cross v. State*, 55 Wis. 264, 12 N. W. Rep. 425; *Steuer v. State*, 59 Wis. 475, 18 N. W. Rep. 433. In the last case cited it was, in effect, stated as the true rule of pleading at common law "that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is to be held for really is." True, the language of section 4381, supra, is to the effect that the offense can only be committed "by force and against her will," whereas the information charges, in effect, that the defendant did with force and arms violently and feloniously make the assault, and her, the said Emma, then and there, violently and against her will feloniously did ravish and carnally know. Certainly the information charges that the offense was committed by force and against the will of the female, as emphatically as the statute, and it would seem with more particularity. Such an information has been held good in Massachusetts and North Carolina. *Com. v. Fogerty*, 8 Gray, 489; *State v. Johnson*, 67 N. C. 55.

But, as indicated in the foregoing statement, the jury only found the defendant "guilty of an assault with the intent to commit the crime of rape." That is the offense made punishable by section 4383, Rev. St., which declares that: "Any person who shall assault any female with intent to commit the crime of rape shall be punished," etc. The question recurs whether that verdict can be sustained, and such punishment inflicted, under this information, which simply charges the crime of rape. That, in the language of the attorney general, depends upon whether "the proof necessary to establish the greater crime establishes every element of the lesser crime." Obviously, the crime of rape cannot be committed without an "assault * * * with intent to commit the crime of rape." It follows that the assault with the intent to commit the crime of rape, of which the defendant was thus found guilty, was necessarily included within the greater crime charged in the information. This is abundantly supported by the authorities cited by the attorney general. *State v. Bagan*, 41 Minn. 285, 43 N. W. Rep. 5; *Com. v. Cooper*, 15 Mass. 187; *Com. v. Drum*, 19 Pick. 479; *Com. v. Dean*, 109 Mass. 349; *State v. Cross*, 12 Iowa, 66; *State v. Atherton*, 50 Iowa, 189; *Richardson v. State*, 54 Ala. 158. Had the defendant been acquitted of the offense charged, it would manifestly have been a bar to a new prosecution for the crime of which he was convicted. The case is clearly distinguishable from *State v. Shear*, 51 Wis. 460, 8 N. W. Rep. 287. Besides, the statute declares, in effect, that whenever any person

informed against for felony shall on trial be acquitted by verdict of part of the offenses charged in the information, and convicted of the residue thereof, such verdict may be received and recorded by the court, and thereupon the person charged shall be adjudged guilty of the offense, if any, which shall appear to the court to be substantially charged by the residue of such information, and shall be sentenced and punished accordingly. Section 4895. The first question certified, to wit: "Can the defendant be punished for an assault with intent to commit the crime of rape, pursuant to the provisions of section 4383 of the Revised Statutes," must, for the reasons given, be answered in the affirmative. This makes it unnecessary to answer either of the other questions certified.

PLATTO v. GETTELMAN.

(Supreme Court of Wisconsin. May 2, 1893.)

FIXTURES—ESTOPPEL TO DENY LESSEE'S RIGHT TO REMOVE.

A lessee mortgaged all buildings on the premises to secure payment of the rent, and erected buildings capable of being removed without injury to the freehold. After the lessee had assigned the lease to defendant the lessor made an affidavit to renew the mortgage on the files of the clerk, and the lessee subsequently sold defendant his interest in the improvements. *Held*, that the lessor was estopped to deny defendant's right to remove the buildings during the term.

Appeal from superior court, Milwaukee county; F. L. Gilson, Judge.

Suit by J. V. V. Platto against Adam Gettelman to enjoin the removal of certain buildings on premises leased by plaintiff to defendant's assignor. From a judgment for defendant, plaintiff appeals. *Affirmed*.

M. N. Lando, for appellant. Fiebing & Killilea, for respondent.

ORTON, J. One Robert Martin and wife, August 10, 1880, leased of the said plaintiff a part of a certain lot in the city of Milwaukee, which was unimproved ground, for the term of five years from September 1, 1880. There was a mortgage clause in said lease, whereby the said Martin and wife mortgaged "all buildings erected or placed upon said premises," together with other personal property to secure the rent. The said lessees erected on said ground a light two-story wooden building, wood shed, and appurtenances for their business of a saloon, and so erected as to be subject to removal without injury to the freehold. The lease was renewable, at the end of the term, for another five years, but at an increased rent. On October 12, 1882, the said lessees assigned said lease to the respondent with the consent of the plaintiff as lessor, and by his request said chattel mortgage clause on the improvements was continued by said assignment. On May 3, 1883, the plaintiff made his affi-

davit to renew said chattel mortgage on the files of the clerk. The said original lessees first mortgaged the said buildings to the respondent to secure \$1,000 on June 15, 1883, and afterwards sold and conveyed their interest in the said improvements to the respondent. Before the assigned lease of the respondent expired, the plaintiff renewed the same with increased rents for another three years, with the option for two years more. Before this lease expired the plaintiff brought this suit to restrain the respondent from removing said building from said premises. The said plaintiff filled out and wrote all the leases and renewals himself. These are the material facts of this case, and the superior court very properly found that the said buildings were the property of the defendant, and that the plaintiff had never purchased the same, and has no interest in them, and that the defendant has the right to remove them during his term, and vacated the injunction and dismissed the complaint, with damages and costs. The plaintiff appears to have expected that the lessees, Martin and wife, would construct on the lot temporary buildings for his trade and occupation, that he would have the right to sell or remove; and he recognized their right to do so by taking a mortgage thereon with their furniture as collateral security for his rent. He renewed the mortgage, and continued it after the respondent had bought and owned the buildings. There could not be stronger estoppel against his right to now claim them. It is estoppel on estoppel, thrice repeated. The plaintiff not only has no equity on which to restrain the defendant from removing the buildings, but he has not the semblance of any legal right to them. The judgment of the superior court is affirmed.

HAUSMAN v. CITY OF MADISON.

(Supreme Court of Wisconsin. May 2, 1893.)

MUNICIPAL CORPORATIONS—ICE ON SIDEWALKS—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

1. Where the snow on a building melts in a sudden thaw, drips upon the sidewalk and freezes, and there is nothing unusual in the construction of the building or sidewalk, the city is not liable for injuries received by slipping on the walk.

2. In an action against a city for injuries received by falling on an icy sidewalk in the daytime, where it appeared that the snow on an adjoining building melted in a sudden thaw and froze on the walk; that plaintiff had previously seen ice form there in the same way; that there was nothing to prevent his seeing the ice if he had looked; and that there was room to pass without stepping on the ice,—he was guilty of contributory negligence.

Appeal from circuit court, Dane county; Robert G. Siebecker, Judge.

Action by C. F. Hausman against the city of Madison for injuries received by falling on an icy sidewalk. A nonsuit was granted, and plaintiff appeals. *Affirmed*.

Bushnell, Rogers & Hall, for appellant.
B. W. Jones, for respondent.

ORTON, J. This action is brought to recover damages for a personal injury to the plaintiff, caused by the defective condition and want of repair of a sidewalk of said city. At the close of the testimony for the plaintiff the circuit court granted a nonsuit on the motion of the defendant. The grounds of the motion were that there was no negligence on the part of the city shown, and that there was contributory negligence on the part of the plaintiff shown by the evidence. Of course, either one or the other of these grounds, sustained by clear and satisfactory testimony, would be sufficient to justify the nonsuit. In an action for negligence a nonsuit is proper only when the inference of contributory negligence on the part of the plaintiff, or of the absence of negligence on the part of the defendant, is deducible from the undisputed facts and circumstances proved. *Hoye v. Railway Co.*, 62 Wis. 666, 23 N. W. Rep. 14. From the facts established by the indisputable evidence we are satisfied that under this rule the defendant, in respect to this ice on the walk, was not guilty of any culpable negligence, and that the plaintiff contributed to his own injury by his want of ordinary care. Without detailing the testimony, the facts established by it appear to be as follows: On the 26th day of January, 1892, between 9 and 10 o'clock in the forenoon, the plaintiff, without any special business, and not hurried, was walking along the walk on South Blair street of the city, near the place of business of Warren & Sorenson, until he came to a place where there was ice a few feet wide on the walk, which was an inch or two thick where travelers walked and some thicker next to the adjacent building, and gradually run out about the middle of the walk, or perhaps nearer the outside of the walk. It was nearly level, and was not piled up, except near the building. On this ice he slipped and fell, and broke his left arm. The ice at that place was caused by the melting of ice and snow on the roofs and in the gutters of that building, which was one story in front and two in the rear, during the day, and spattering down on the walk; and at night it froze up and made this patch of ice. This was usual in the winter, and there were other similar places on the walks, and from a similar cause. There was nothing in the construction of the building or in its condition upon which any culpable negligence of its owner or of the city could be predicated. The walk at that place had a slope lengthways, according to the established grade of the street, and an inclination of a few inches towards the gutter, but only such as is common with all sidewalks properly constructed. From the description by the several witnesses of this ice it appears to have been

formed by the melted snow and ice on the adjacent building, by the warmth of the day, spattered or sprinkled down on the walk next to the building, and towards night, and at night, by freezing as it fell, and making naturally thicker ice near the building, and the water running off towards the gutter, the ice became thinner and thinner, until it was stopped running by freezing near the middle of the walk. Its average thickness could not have exceeded an inch. From this description any one may be reminded of many similar places on the walks in the winter. If it should be held that it was the duty of the city to remove the ice from all such places on the walks in the winter, it would be a duty of impossible performance, with all the manual labor and machinery within its command. The gutters and pipes of buildings are liable to freeze up in this latitude in the winter, and the melting snow and ice, caused by the heat of the sun in the daytime, will naturally and necessarily fall over the eaves and down on the walks, and run off into the gutters of the streets. At the freezing time of the evening it will be arrested in its flow, and congealed with the same descent or inclination of the walks,—thicker where it falls, and growing thinner, until it ceases to run at this place, about the middle of the walk. These conditions are produced by natural causes, or the operation of the laws of gravitation and temperature. Such places may be defects in the walks, but they are natural and common defects, for which the municipality is not responsible. They are unpreventable and irreparable. As said in *Taylor v. City of Yonkers*, a late case in New York, (11 N. E. Rep. 642:) "It often happens that a fall of rain or the melting of adjoining snow is suddenly followed by a severe cold, which covers everything with a film or layer of ice, and makes the walks slippery and dangerous. This frozen surface is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting the result." Our own cases are sufficient authority for holding that the presence of such ice on the walk is not a defect for which the city is liable. *Grossenbach v. City of Milwaukee*, 65 Wis. 31, 26 N. W. Rep. 182; *Schroth v. City of Prescott*, 63 Wis. 652, 24 N. W. Rep. 405; *Cook v. Milwaukee*, 27 Wis. 192. The cases cited by the learned counsel of the appellant are not applicable. There is no evidence that this ice was piled up so as to make it oval or uneven, except close to the building, where a pedestrian would not walk. I think we can say that there is no evidence whatever of the culpable negligence of the city for not preventing or removing this layer of ice on the walk. For that reason alone the trial court was warranted in granting the nonsuit.

On the other ground for the nonsuit—of the contributory negligence of the plaintiff—

very little need be said, as the evidence is very short and to the point. The plaintiff testified that at this time he was not employed, and was laying off, and walking around. At this time he was on his way towards the depot, and was walking right along. He saw the walk ahead of him, and looked at it. He was looking at the sidewalk straight ahead. His attention was not diverted, and he was not looking away. He could see that walk just as well as he could then see the floor, (in the room where he was examined.) He did not notice the ice on the walk. He resided in the same block where the ice was, and had passed the same place often before, and saw how the ice was formed by the water spattering down from the roofs, and had seen the ice there and in several other places on that walk. From his own testimony there cannot be the least question but that the plaintiff slipped and fell on this ice through his own want of ordinary care. He knew all about it, and how it was formed, and passed the place nearly every day going to the depot to see the trains come in, and looked at the walk right ahead of him at this time, and it was daylight, so that he could see it. There was room on the walk where there was no ice for him to pass over, if he chose to do so. He was grossly careless, or he would not have slipped down on this narrow patch of level ice. This conclusion is inevitable. He was well aware of all the danger there was in passing over this place, and took no precaution for his safety. The learned city attorney cites many cases of this court in his excellent brief, from *Achtenhagen v. Wattertown*, 18 Wis. 331, down to *Hopkins v. Rush River*, 70 Wis. 10, 34 N. W. Rep. 909, and 35 N. W. Rep. 939, illustrative of such negligence. In *Schaefer v. Sandusky*, 33 Ohio St. 243, the court says in a similar case: "If the snow and ice presented a dangerous obstruction," etc., "it must follow, since its nature and character were known to the plaintiff, that it was imprudence in him to venture upon it, or that, if it was prudent for him to pass over it, he did not exercise due care." To the same effect is *Wilson v. Charlestown*, 8 Allen, 137. It is said in *Quincy v. Barker*, 81 Ill. 300: "If it be conceded that the ice upon the sidewalk was an obstruction, it was a defect in the walk that could be readily detected. It was in the center of the walk, and in plain view, and could not escape the attention of a pedestrian unless he was walking in a hasty and reckless manner." There are many other cases cited in the brief of the learned counsel of the respondent to similar effect. This appears to be one of the plainest cases of contributory negligence to be found in the books. There was an utter want of common care and prudence on the part of the plaintiff. The judgment of the circuit court is affirmed.

GAYNOR v. BLEWETT et al.

(Supreme Court of Wisconsin. May 2, 1893.)
PROCEEDING TO LIMIT JUDGMENT — SUFFICIENCY
OF COMPLAINT.

A judgment debtor filed a supplemental complaint, alleging that as between the two judgment creditors, B. and G., there was nothing due B. on the judgment claim; that the judgment debtor had obtained from G. a satisfaction of the judgment, admittedly without paying any consideration therefor; that B. was insolvent; and that, if on a fair accounting between B. and G. there was anything found due B., he, the judgment debtor, was ready and willing to pay it; and he prayed that the satisfaction executed by G. be decreed to be a complete discharge of the judgment, and that B. and G. be restrained from collecting any money on account thereof. *Held*, that this did not constitute an action of interpleader, and hence the complaint was not defective in failing to deny collusion between plaintiff and either B. or G., or in failing to allege that the amount of the judgment had been paid by plaintiff into court.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by James Gaynor against Edmund Blewett, impleaded with Patrick Gaynor, to limit the enforcement of a judgment. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by PINNEY, J.:

This is an appeal from an order sustaining the demurrer of the respondent Blewett to the plaintiff's complaint, which is in the nature of a supplemental complaint upon the foot of the judgment recovered by said Blewett and Patrick Gaynor against the plaintiff herein, James Gaynor, March 31, 1890, for \$8,061.45 damages and \$53.05 costs, for moneys earned by the plaintiffs in the original action, under a contract in respect to a logging business with the appellant, James Gaynor, and which judgment was affirmed by this court, (*Blewett v. Gaynor*, 77 Wis. 378-393, 46 N. W. Rep. 547.) where the original case is fully stated, and from which it appears that the plaintiff in the present complaint defended the action, on the ground that he, as copartner with the plaintiff, Blewett, therein, and acting for the firm, made a settlement of the subject-matter with the defendant, James Gaynor, the plaintiff in this suit, and the testimony of the said Patrick Gaynor was produced to support that contention, but it was negated by the finding of the court. This court, noticing the argument that as to Patrick Gaynor he ought not to be allowed to recover in that action, and that the judgment should only have been in favor of the plaintiffs for one-half of their claim, says: "There would be force in this contention if it were established that, as between the two plaintiffs, each was entitled to one-half the sum due from the defendant; but their rights as between themselves are not shown by the evidence in this case. And if it should upon investigation be shown

that Patrick Gaynor, as between himself and Blewett, was entitled to one-half of the sum due them from the defendant, (James Gaynor,) or more or less than one-half, the defendant could probably limit the plaintiff, Blewett, in collecting the judgment, to the amount which was actually due him from the defendant as between himself and Patrick Gaynor, upon his obtaining a release of the judgment by Patrick Gaynor, or by some proper proceeding to satisfy the judgment." The appellant, James Gaynor, in the present complaint, after setting out the proceedings in the action, the recovery of the judgment, and its affirmance in the supreme court, alleges, in substance, that there is nothing whatever due to the defendant Edmund Blewett upon the said logging contract aforesaid as between himself and the said Patrick Gaynor; that Blewett abandoned working under it at the end of the second season, and the defendant Patrick Gaynor went on and completed it alone; that Blewett received under the contract, prior to July 1, 1885, over \$3,000 more than he paid out thereunder, no part of which has the said Patrick Gaynor shared or received the benefit of, but all of which Blewett should account for to him, with interest; that Patrick Gaynor had received no profits under the contract, but had incurred a loss thereunder, and paid out more than he had received; that he had assumed an indebtedness, and become liable for expenses incurred in the prosecution of the logging business under said contract, in a sum exceeding \$3,000, a schedule of the particulars of which is annexed to the complaint, for one-half of which Blewett should account to him, Patrick, and that said Patrick Gaynor makes a further claim against said Blewett for failure to appear and do his share of the work under said contract for the seasons following the logging season of 1884-85, until the same was completed, amounting to a sum exceeding \$3,000; and it is alleged that all of these matters shall be taken into account, with interest, in an equitable adjustment under said logging contract between said Blewett and said Patrick Gaynor, but that the plaintiff, James Gaynor, has not sufficient information to state the account for either party, or make it more definite than is above given; that James Gaynor's attorney, after the recovery of said judgment against him, drew a satisfaction of the judgment, sent it to Patrick Gaynor, and asked him if he would not execute it, in view of what the supreme court had said in respect to limiting the judgment, and as there was nothing actually due said Blewett as between him and said Patrick Gaynor; that the said Patrick Gaynor executed said satisfaction of judgment, which was acknowledged and returned and filed in the original cause, and is an absolute satisfaction of the entire judgment, but it is admitted that said James Gaynor paid said Patrick nothing for it at

that or any other time. The complaint further sets out divers proceedings which had been instituted on said judgment against said James Gaynor, the judgment debtor therein, and it is charged that they are being conducted by Blewett alone, without the concurrence of Patrick Gaynor, and that it is his purpose to collect from the plaintiff in this complaint the whole of said judgment and appropriate it to his use. It charges that the defendant Blewett is wholly insolvent, and alleges that, if on a fair accounting between the said Blewett and Patrick Gaynor, the defendants in the present complaint, of all matters and accounts arising from or growing out of said logging contract, there is still due to the defendant Blewett any sum thereunder and the said judgment, the plaintiff, James Gaynor, is ready and willing to pay it, and he prays for an accounting between said Patrick Gaynor and Blewett in respect to the matters aforesaid; that each of them be compelled to state the account between them thereunder as each claims it to be, and that it be adjudged that as between them there is nothing due said Blewett upon the contract, and that the satisfaction executed by Gaynor of the judgment be decreed to be a full and complete discharge thereof, and for an injunction during the pendency of the complaint restraining the defendants in the present complaint and each of them, their agents, servants, and attorneys, from in any manner attempting to collect, have, or receive any sum of money whatever under and by virtue of the judgment aforesaid, and for general relief. The defendant Blewett demurred to the complaint, for that it did not state a case giving the court equitable jurisdiction of the subject-matter, and that the complaint did not state facts sufficient to constitute a cause of action. The circuit court sustained the demurrer, treating the complaint as one in an action for interpleader, and ordered that the plaintiff have 20 days to amend by the insertion therein of an allegation denying collusion between the plaintiff and either of the parties defendant, and also by alleging that the amount of the judgment, with interest, had been paid by the plaintiff, James Gaynor, into court subject to the order of the court upon the determination of the action, and requiring that, as a condition of filing such complaint, the plaintiff pay into court the amount of such judgment and \$10 costs of the demurrer. The plaintiff, James Gaynor, appealed from this order.

George E. Sutherland, for appellant. E. S. Bragg, for respondent.

PINNEY, J., (after stating the facts.) If the complaint of James Gaynor, the judgment debtor in the original action, showed upon its face that he wished to pay the judgment, and, owing to a dispute between the judgment creditors, Blewett and Patrick

saloon under such lease, and paid the installments of rent which became due September 15 and December 15, 1890. In December, 1890, plaintiff leased the Academy of Music, except the store or saloon thus leased to Vollert and some other rooms, to a corporation known as the Milwaukee Theatre Company, in which defendant was a stockholder and officer. The term of such lease commenced January 1, 1891, and will expire May 1, 1895. The lessee was also the owner of a building known as the Davidson Theatre, in Milwaukee, and the two companies were to some extent rivals in procuring theatrical, musical, and other entertainments and exhibitions in their respective theatres. The lease contained covenants by which the lessee assumed the agreements for such entertainments and exhibitions theretofore made by the lessor, and that one-half, at least, of all performances, exhibitions, and entertainments contracted for by the lessee should be had and held in the Academy of Music. Pending the negotiations for such lease to the theatre company the defendant executed an obligation in writing, under seal, to the plaintiff, in which he covenanted to pay plaintiff the stipulated rent of the leased building. The obligation also contains the following covenant, which is the basis of this action: "And in case the leasing of said Academy of Music to the Milwaukee Theatre Company shall cause the present tenant of the saloon in said academy to leave said building or throw up his lease, the undersigned hereby covenants and agrees with the Academy of Music Company to assume said lease and pay the rent therefor, and save the Academy of Music Company harmless because of the same, for the full term of said saloon lease." Tony Vollert failed to pay the rent of the saloon which became payable March 15, 1891. Under date of January 14, 1891, he notified plaintiff by letter that by reason of the falling off of his business after January 1st, caused by the closing of the theatre, he would be unable to pay the agreed rent. Plaintiff immediately sent this letter to the defendant. In May, 1891, the plaintiff served a notice upon Vollert to quit the possession of the saloon, and commenced proceedings to dispossess him. Pending such proceedings Vollert voluntarily surrendered the possession of the saloon to plaintiff, on condition that no costs should be taxed against him. June 5, 1891, plaintiff tendered possession of the saloon to the defendant, but he refused to accept the same or pay any rent therefor. This action was brought upon the above covenant after June 15, 1891, when another installment of rent became due, to recover the accrued and unpaid rent. There was testimony on the trial to the effect that the patrons of the saloon were mostly visitors to the entertainments and exhibitions in the Academy of Music, and the employees therein; that until the building was leased to the theatre company it was so managed

and operated by plaintiff that Vollert was able to pay his rent from the profits of his business; and that, after the theatre company took possession, there were less entertainments in the building, and fewer persons employed therein, and consequently that the business and profits of Vollert were so greatly reduced that he became entirely unable to pay the rent, and for that reason was compelled to surrender the saloon, and give up his lease. Vollert died before the action was tried. There was a special verdict. The controlling fact found therein is that the leasing of the Academy of Music by the plaintiff corporation to the Milwaukee Theatre Company caused Vollert to leave said building, and throw up his lease. The other facts found were undisputed, and were directed by the court. These are that Vollert so left the building and threw up his lease May 15th, and the possession of the building was tendered by plaintiff to defendant, and refused by the latter, June 5, 1891. The court held the measure of plaintiff's damages to be the unpaid rent accruing under Vollert's lease from June 5th to June 15th, and the quarter's rent due at the latter date by the terms of such lease, and interest thereon from those dates respectively. On this basis the jury assessed plaintiff's damages at \$304.24. They also returned a general verdict for plaintiff. A motion by defendant for a new trial was denied, and judgment for plaintiff entered for the damages assessed by the jury and for costs. The defendant appeals from the judgment.

Miller, Noyes & Miller, for appellant. Rogers & Mann, (George E. Sutherland, of counsel,) for respondent.

LYON, C. J., (after stating the facts.) The plaintiff corporation leased its building, known as the Academy of Music, in the city of Milwaukee, except a store therein used as a saloon, and some other rooms, to the Milwaukee Theatre Company, a corporation in which defendant was interested as a stockholder and officer. About three months before such lease was executed, such store or saloon was leased by plaintiff to one Tony Vollert for three years from September 15, 1890, at a specified rental. Vollert had made two payments of rent, and was not in default when the building was thus leased to the theatre company. In the negotiations for the lease to that company the plaintiff evidently was apprehensive that the theatre company might, if it had control of the Academy of Music, take the entertainments and performances which otherwise would be held therein to the Davidson Theatre, which that company owned and controlled, to the injury of the good will of the academy, and so it sought to guard itself against that contingency by certain covenants in the lease mentioned in the above statement of facts. Moreover, the business of Vollert depended

sale,—that is, to a sale after 10 days from the date of the judgment,—still the requirements of the statute are not thereby fulfilled. The statute requires the consent of the parties. This clearly means the parties to the action, especially subsequent mortgagees or incumbrancers, who may pay the judgment before sale, and become subrogated to the rights of the plaintiff. The defendant Earles is such an incumbrancer, and he has not consented to a sale earlier than one year after the date of the judgment. Section 3162 is a revision of several former sections of the statutes, one of which is section 8, c. 143, Laws 1877. By that section it was first enacted that the mortgaged premises should not be sold until one year from the date of the judgment, "unless all the parties to the action consent to an earlier sale." The revised section provides how such consent shall be evidenced; that is, by stipulation of the parties, in writing, to be filed with the clerk. True, it drops the words "to the action," found in the original section, but it seems quite apparent that these words were omitted as unnecessary, not to change the meaning and effect of the original section. Had the revisers intended so to change the section that the word "parties" should mean parties to the mortgage instead of to the action, they would doubtless have changed the phraseology of the section to express that intention, or at least would have stated such intention in their notes. They did neither. The conclusion is irresistible that they did not intend to make any change in the law as expressed in the act of 1877, in the particular under consideration. We conclude, therefore, that the consent of the defendant Earles, at least, must be obtained before a sale of the mortgaged premises within a year after date of judgment can be upheld. We do not determine whether such consent has been given by the mortgagor, or whether the consent of the other defendants, who are made parties merely because they are officers of the mortgagor, is essential. The judgment of the superior court must be affirmed.

TOWN OF NESHKORO v. NEST et al.

(Supreme Court of Wisconsin. May 2, 1893.)

MUNICIPAL CORPORATIONS—HIGHWAYS—ENJOINING OBSTRUCTION.

A town has such an interest in a public highway within its limits as will entitle it to maintain an action to enjoin a person from obstructing the same. 2 Sanb. & B. Ann. St. § 3180, providing that an equitable action may be brought before a nuisance is established in an action at law, applies to such an action.

Appeal from circuit court, Marquette county; Robert G. Siebecker, Judge.

Action by the town of Neshkoro against Gustav Nest and others to enjoin them from obstructing a highway. Judgment was rendered for defendants, and plaintiff appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

This was an action in equity for an injunction restraining defendants from obstructing with logs, timbers, trees, etc., an alleged public highway in appellants town, and directing the removal of such obstructions already placed therein. It appeared by the complaint that a much traveled highway had existed for many years across defendants' farm; that the defendants began to obstruct the same in April, 1891, by felling trees, building fences, and otherwise obstructing the same so that travel became impossible, and have renewed such obstructions as often as the town removed them, and threaten to continue so to do, and also threaten to shoot the officers of the town if they attempt to clear the way of obstructions. It also appears that defendants claim that the locus in quo has ceased to be a highway by virtue of a pretended alteration of said highway, made by the county board of supervisors of Marquette county, by which said road was made to run around defendants' premises instead of across the same; but the complaint charges facts which, if true, show that such alteration was void, and of no effect for lack of a petition signed by the required number of freeholders. A demurrer to the complaint on the ground of insufficiency of facts, and that plaintiff has an adequate remedy at law, was sustained by the court, and plaintiff appeals.

Thompson, Harshaw & Davidson, for appellants. John J. Wood, Jr., and George E. Sutherland, for respondents.

WINSLOW, J., (after stating the facts.) It is insisted by respondents that the town has no such interest in a public highway as will entitle it to maintain an action in equity to prevent obstruction thereof, and they rely on *Milwaukee v. Railroad Co.*, 7 Wis. 85, and *Sheboygan v. Railroad Co.*, 21 Wis. 670, to justify their contention. How far these cases sustain respondents' position it is unnecessary to consider. This court has recently, in a number of cases, affirmed the right and power of a municipal corporation to maintain such an action. *Town of Jamestown v. Chicago, B. & N. R. Co.*, 69 Wis. 648, 34 N. W. Rep. 728; *City of Oshkosh v. Milwaukee & L. W. R. Co.*, 74 Wis. 534, 43 N. W. Rep. 489; *Waukesha H. M. S. Co. v. President, etc., of Village of Waukesha*, (Wis.) 53 N. W. Rep. 675. The question is no longer open.

It is further insisted that a court of equity will not interfere until the right is determined at law. This is not an indictment or information on behalf of the general public, but an action in equity by the town in its corporate capacity merely, based on its special interest, as the guardian of the highways within its limits; and we think it is within the provisions of chapter 190, Laws

1882, § 3180, Sanb. & B. Ann. St., which provide that an equitable action may be brought before the nuisance is established in an action at law. Order reversed, and cause remanded, with directions to overrule the demurrer.

CITY OF RACINE v. EMERSON.

(Supreme Court of Wisconsin. May 2, 1893.)

BOUNDARIES—CITY STREETS—BEST EVIDENCE.

In ascertaining the true line of a city street, fences built by adjoining lot owners on the line of the street, according to stakes set by the surveyor soon after the original survey was made, and maintained for 45 years, are better evidence of the location of such line than a new survey, made 40 years after the original survey, which changes such line.

Appeal from circuit court, Racine county; Robert G. Siebecker, Judge.

Action by the city of Racine against Thomas J. Emerson to recover a penalty for obstructing a street. From a judgment for plaintiff, defendant appeals. Reversed.

J. E. Dodge, for appellant. Samuel Ritchie, for respondent.

ORTON, J. This action is to recover the penalty, under a city ordinance, for the maintenance of an obstruction by the defendant, consisting of a fence in front of lots 11 and 12, in block 10, on the plat made by one Moses Vilas, in 1842, of section 16,—the school section,—as an addition to the village of Racine, on the east side of Wisconsin street. It is claimed that said fence is within the east side of Wisconsin street, two feet at one corner of said lots, and two feet eight inches at the other corner. The defendant has been present with this fence standing substantially where it is now since 1848, so that, if this fence is an obstruction to Wisconsin street, it is a very ancient one; and the defendant has been guilty of maintaining it over 40 years. The following seem to be the facts established by the evidence: This fractional section 16 was surveyed and platted, under an act of the territorial legislature requiring such duty to be performed by the school commissioners of the village of Racine, by one Moses Vilas, a surveyor, and competent to do such work, first, in 1842. The north and south streets on this plat were intended to correspond with, and to be a continuance of, the north and south streets in the old village plat of section 9. The first street north and south was Main street, near the lake; the next, Wisconsin street; and the next, Barnstable street, now called College avenue; the next, Chippewa street, now called Park avenue; the next, Villa street; the next, Campbell street, now called Grand avenue; and the next, Center street. The blocks were divided into lots as far west as Villa street, and as far south as Twelfth street; and the lots of the defendant were on the southeast corner, between

Wisconsin street and Ninth street, running east and west. In 1845 this plat was resurveyed by the said Vilas, and the lots and streets in the vicinity of the lots in question remained unchanged; and Wisconsin street extended south to the section line, and the blocks, not before divided, were divided into lots. In 1849, after the state was admitted into the Union, in accordance with Rev. St. 1849, p. 763, § 5, the appraisers of school lands, whose duty it was to plat and appraise school lands, adopted this plat of 1842 as extended in 1845, and filed the same in the office of the secretary of state, as the plat of this fractional school section. On these plats the blocks are 480 feet long north and south, and 240 feet wide east and west, divided into tiers of six lots each, 80 feet wide and 120 feet deep, according to the certificate; but these measurements were not very accurate, and varied considerably, as might be expected in surveying through a heavily timbered and wild tract of land. Stone monuments were placed in many places, as required by the statute then in force, and probably many stakes were stuck, to indicate the fixed lines of the survey; and one stone monument was placed at the southeast corner of lot 12, block 29, which still remains as a fixed point for any subsequent surveys. The defendant, in 1848, owned the lot next north of his present lots 11 and 12, and he called upon the said Vilas, as a surveyor and the maker of the plat, to determine the west line of his lot on Wisconsin street. There were then fences all along for a considerable distance on the east side of that street north and south, and in front of his lot, and had been for several years. The said Vilas determined and indicated said fence at the southwest corner of lots 11 and 12, between Wisconsin street and Ninth street, as on the true line. The present fence is on that line, and a fence in front of said lots has been on the same line since and before 1848. This old plat did service and was the basis of all the local surveys of the lines of lots on streets between owners during the settlement and improvement of this part of the city of Racine, down to the year 1881. When the common council of said city adopted a new and arbitrary plan of a resurvey and replatting of this part of the city, and employed surveyors to do the work according to such plan, they fixed the line of Main street according to said stone monument, and then made all the other streets north and south agree with that line, making the streets 60 feet wide, and divided the distance between Main street and Villa street equally between the blocks, as also the distance between Villa street and Center street between the included blocks, dividing the surplus equally between the blocks. By this plan the lines of lots were materially changed, and the location of fences and buildings had to be materially changed to

suit the new lines. Monuments were set at various points by this plan and resurvey in 1881, and in 1890 the city engineer, by the order of the common council, ran the lines of Wisconsin street according to said monuments and the newly-found distances, and found that the fence of the defendant was within that street, as above stated. On the ground of this new line, so found, this action is predicated. As early as 1844 the lots in this part of the city were occupied by lessees or purchasers, and fences were built along Wisconsin street according to stakes set to indicate the lines according to the old plat, and such fences, or many of them, still stand in the same places, and shade trees were set out and buildings erected on or according to such lines. Immediately across Ninth street, south of defendant's lots, is the lot of Dr. Hoy; and next to his is the lot of I. H. Tinsler; and in 1846 a fence was built on the east side of Wisconsin street in front of these lots and the next half lot south, so that there was about 200 feet of continuous fence along that line, which was built according to stakes set at the corners of the blocks and lots by the said Vilas, to indicate the true line according to his plat. In the next block south, Henry S. Durand owned the lots in 1849 or 1850, and found the fences built in front on Wisconsin street as old fences, and found the stakes at the corner of the lots according to which they were built; and they were then identified by the surveyor, Foster, as the stakes set when the plat was made. The said Durand built his buildings, still standing, according to said line so determined; and said fences and buildings correspond with the fence in front of the defendant's lots. There was also a brick barn built by Mr. Case, at an early day, north of these lots, whose water table corresponds with such line. Many survey stakes of the first plat were standing at the corners of the lots and blocks between 1842 and 1850, and then observed and since identified by several witnesses; and they stood on the line of said fences along Wisconsin street. On these facts the circuit court found that the survey, according to said plan of the city council of 1881, was a correct one, and should govern in determining the true east line of Wisconsin street, and held the defendant guilty of obstructing said street by said fence, and judgment was rendered against him for a fine of \$10 and costs.

The ruling question in this case is, where is the east line of Wisconsin street in front of the lot in question, according to the Vilas plat of 1842? *Miner v. Brader*, 65 Wis. 537, 27 N. W. Rep. 313. It is not, where is such line according to any subsequent survey or plat? All resurveys or subsequent surveys are of no effect except to determine that question. A resurvey, that changes lines and distances, and purports to correct inaccuracies or mistakes in the old plat, is not com-

petent evidence in the case. There are only two questions: (1) Where is the true line fixed by the original plat? (2) Is the fence in question on that line? A resurvey that changes or corrects the old survey and plat can never determine the first question. A resurvey must agree with the old survey and plat to be of any use in determining it. The survey made on the arbitrary plan established by the common council in 1881 does not agree with the old plat in courses or distances in the dimensions of blocks and lots, or in the lines of the streets. It seems to have been made to correct the old plat, to straighten the streets, and make a better plat than the old one. Resurveys for the lawful purpose of determining the lines of an old survey and plat are generally very unreliable as evidence of the true lines. The fact, generally known and quite apparent in the records of courts, is that two consecutive surveys by different surveyors seldom, if ever, agree; and the greater number of surveys, the greater number of differences and disagreements will occur. When two surveys disagree, the correct one cannot be determined by still another survey. It follows that resurveys are of very little use in such a case as this, except to confuse it. In *Miner v. Brader*, supra, there were two surveys, and they disagreed; and the court had to resort to the evidence of a practical location of the lines by monuments. Monuments set by the original survey in the ground, and named or referred to in the plat, are the highest and best evidence. If there are none such, then stakes set by the surveyor to indicate corners of lots or blocks, or the lines of streets at the time, or soon thereafter, are the next best evidence. The building of a fence or building according to such stakes, while they were present, become monuments after such stakes have been removed or disappeared, and the next best evidence of the true line. This case does not differ materially from *City of Racine v. J. I. Case Plow Co.*, 56 Wis. 539, 14 N. W. Rep. 599; *State v. Schwin*, 65 Wis. 207, 26 N. W. Rep. 563; *Miner v. Brader*, supra; *Koenigs v. Jung*, 73 Wis. 178, 40 N. W. Rep. 801; and some other cases in this court; and is ruled by them. The fence in front of this lot was evidently built according to stakes still standing, which were set by the surveyor Vilas; and this fence is on the line with 200 feet of fence built according to the stakes then standing in the blocks on the south side of Ninth street, and fences and buildings in the next block south built according to stakes then standing by Mr. Durand, only three or four years after the plat was made. This fence also agrees with buildings on the north side of said lot, set according to the original survey. This testimony is almost as conclusive that this fence was built on the line of Wisconsin street as if the original stakes of the survey were still standing there to indicate it. When the testimony is undisputed that this defend-

ant and several witnesses have been there present with these fences 45 years, and that they have not been materially changed in their location during all that time, the above facts would seem to be the most conclusive evidence that those fences were built on the true line according to the original plat. In the certificate to the old plat it is stated that a stone monument was set at the southeast corner of lot 12, block 29, in the northwest line of Main street, from which resurveys may be made; and stone monuments were also set at the northeast corner of each of the out lots, or undivided blocks, except those between Main street and the lake. All these stone monuments, except the first, are now absent. The line of Main street, determined by the first-named monument as a base line for a resurvey, was used for the resurvey made in the plan of the city council of 1881. But it seems that, having thus determined the line of Main street, all the blocks between that street and Villa street were apportioned, and the blocks between Villa street and Center street were also apportioned, and the lines of the intervening streets were changed accordingly. Such a rule of apportionment may be adopted in a suit between lot owners, where all the private parties in interest are represented, and where the lots or blocks are less or more than the dimensions called for by the original plat. It is not presumed, in such a case, that there was a defective survey, but only an imperfect measurement of the whole line. *Pereles v. Magoon*, 78 Wis. 27, 46 N. W. Rep. 1047. To make this principle the basis of a resurvey of the whole plat would cast the lines of private lot owners into general conflict and confusion, and materially affect their rights of property which they had enjoyed for nearly half a century, without their knowledge or consent. All the defendant needs to show is that the fence in question is on the line of Wisconsin street, according to the plat of 1842. That plat became a part of the deeds executed under and in reference to it. *Shufeldt v. Spaulding*, 37 Wis. 608. The defendant and others in the vicinity obtained their titles and went into possession and made their improvements, set out shade trees and built their buildings, with reference to that plat, soon after it was made, and according to the stakes set by the surveyor to mark the lines of that street then existing in many places. We are satisfied that the defendant resorted to the best evidence in existence of the true line of Wisconsin street in front of his lots. It is fortunate that this evidence is yet in existence. The time will soon come when it will have been lost by the destruction of all monuments, natural or artificial, and by the death of the old inhabitants. Then resort must be had to evidence of lesser degree to establish ancient boundaries, and long-continued occupation with respect to unchanged lines, and reputation, even, may be the best evidence

available. In any case of disputed boundary the testimony, or even the acts, of the surveyor who originally established it, and who pointed out the stakes set by himself to mark the line so many years ago, accompanied by continued use and occupation in recognition of such line, is not only proper, but strong, evidence that such was the true line, and better evidence than a new survey made more than 40 years afterwards, which changes such line. *Koenigs v. Jung*, supra. That case would seem to justify fully the testimony of Vilas' statements, which were objected to by the respondent in relation to his recognition of the stakes, and pointing out the true line in accordance with them. This line, so practically located, has become an ancient boundary, in favor of which the rules of evidence are and should be liberal. There have been so many cases similar to this in this court, and all the various questions here involved have been so repeatedly settled, that it is supererogation to again repeat them. In addition to the above cases are the following: *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. Rep. 106; *Vroman v. Dewey*, 23 Wis. 530; *Marsh v. Mitchell*, 25 Wis. 706; and *Nys v. Biemeret*, 44 Wis. 104; and many cases in other states are cited in the excellent brief of the learned counsel of the appellant which sustain the same principles. Such cases of the disturbance of the ancient lines and boundaries of streets, lots, and blocks in our cities and villages, by arbitrary resurveys under the authority of their officers, ought not to be encouraged. The public and private owners have acquiesced in the lines established by the first and original survey and plat, and by practical location and undisturbed possession for a great many years, and there does not seem to have been any necessity to disturb them at this late day. The judgment of the circuit court is reversed, and the cause remanded, with direction to enter judgment in favor of the defendant.

WINSLOW, J., took no part.

McDERMOTT v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin. May 2, 1893.)

CARRIERS—INJURIES TO PASSENGERS—EXCESSIVE DAMAGES—RECEPTION OF EVIDENCE.

1. Plaintiff, by reason of defendant's negligence, had several of her ribs fractured and her hip injured. She was laid up for several weeks at the time of the injury, and three years after she was still somewhat lame, and her health impaired. There was also some testimony, though not conclusive, that her injuries would be permanent. *Held*, that an award of \$1,000 was not so disproportioned to the injuries received as to warrant the court in setting aside the verdict.

2. Where, in an action to recover for personal injuries, plaintiff offered at the close of defendant's evidence to prove the probable length of plaintiff's life by mortality tables, it was within the sound discretion of the court to reject such testimony.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by Ellen McDermott against the Chicago & Northwestern Railway Company to recover for injuries sustained through defendant's alleged negligence. From a judgment awarding her \$1,000 damages, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by LYON, C. J.:

This is an action to recover damages for personal injuries received by plaintiff when alighting from the cars of the defendant railway company in the city of Milwaukee, which injury it is alleged was caused by the negligence of the railway company and its employes. The case was here on a former appeal, and the circumstances of the injury will be found sufficiently stated in 82 Wis. 246, 52 N. W. Rep. 85. On that appeal a judgment for plaintiff for \$3,000 was reversed for error, and a new trial awarded. The case has again been tried, and the trial resulted in a general verdict for plaintiff for \$1,000 damages. Plaintiff moved to set aside the verdict for alleged errors in certain rulings of the court on the trial, and for inadequacy of damages. The court denied the motion, and judgment was entered for plaintiff pursuant to the verdict. Plaintiff appeals from the judgment.

Elliott & Hickox, for appellant. Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

LYON, C. J., (after stating the facts.) I. As to the alleged inadequacy of damages, the rule was laid down by this court in *Robinson v. Town of Waupaca*, 77 Wis. 544, 46 N. W. Rep. 809, and is the law of this case, that "to justify the interference of this court with the verdict it must appear from the testimony that the damages awarded are so grossly disproportionate to the injury that in awarding them the jury must have been influenced by a perverted judgment." Does the testimony in this case justify the court in holding that this verdict was thus influenced? The testimony is to the effect that plaintiff was quite seriously injured. Some of her ribs were fractured, and one of her hips injured. She was laid up for several weeks by reason of her injuries, and doubtless suffered much pain. The broken ribs have healed, but after three years she still walks somewhat lame, and complains of pain. Her health seems impaired. She testified that she also received an internal injury from which she still suffers, but declined to tell what it was. The surgeons who examined her hip a few months before the trial could find no fracture or cause for her continued lameness and pain, and concluded that the hip joint was injured. The surgeon who attended her after she was injured was the only one examined as a witness on the trial. He testified

that on the first trial he expressed the opinion that the plaintiff would probably recover, but because she had not recovered at the time of the last trial, three years after she was injured, he was inclined to think the injury to the hip was permanent. As was said in *Robinson v. Town of Waupaca*, supra, in the consideration of the question of the alleged inadequacy of damages "we must assume that the jury found every fact going to mitigate or reduce the damages which they could properly find from the proofs." While the jury could not be permitted under the testimony to find that the plaintiff was not quite seriously injured, yet we do not think they were bound by the testimony to find that such injuries are permanent. The proof of the nature and extent thereof is not so specific and conclusive as to force such a finding; and, had there been a special finding that the evidence fails to prove that probably she will not recover, we do not think such finding could properly be disturbed. Were this action against an individual, the amount of the verdict, although moderate, would not necessarily impress the mind as being so entirely disproportioned to the injury as to force the conviction that it is the result of perverted judgment. It is scarcely necessary to say that the right of the case is not affected by the fact that the defendant is a corporation, perhaps a rich one. The learned circuit judge failed to detect the presence of any improper influence affecting the verdict, else he would have set it aside; and a careful perusal of the record discloses no evidence of the existence of any such influence, other than the mere fact of the moderate amount of the verdict. Had the jury been hostile to the plaintiff, and sufficiently corrupt to render a false verdict, they could easily have held her guilty of contributory negligence, thus entirely defeating her action, and probably no court could say the finding was unsupported by evidence. We find ourselves unable to say that the jury failed to exercise honest, intelligent judgment in assessing plaintiff's damages at \$1,000.

II. There is but a single ruling of the court affecting the question of damages to which plaintiff has preserved an exception. At the close of the defendant's testimony plaintiff's counsel offered to prove the probable length of life of plaintiff by the tables of mortality in use by insurance companies, to wit, the Actuarial, American, Carlisle, and Northampton tables. The court rejected the same as being offered out of order, and as being of doubtful value to the jury. We think it was within the sound discretion of the court, at that stage of the trial, to admit or reject the offered testimony. The observation of the judge concerning the doubtful value of such testimony was fully justified by what was said on that subject by this court in *Berrinkott v. Traphagen*, 39 Wis. 219. The judgment of the circuit court must be affirmed.

MILWAUKEE ST. RY. CO. v. ADLAM et al.
(Supreme Court of Wisconsin. May 2, 1893.)

MUNICIPAL CORPORATIONS — PAVING STREETS —
POWERS OF CONTRACTORS — RIGHTS OF STREET
RAILROAD.

Contractors, under a contract with a city to pave a certain street, have no power to obstruct the passage of street cars over such street during the paving of the same, where the contract gives no such power, and it is shown that such work has been, and can be, done without such interference.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by the Milwaukee Street Railway Company against A. B. Adlam and others to restrain defendants from obstructing the passage of plaintiff's cars over a certain street. From an order dissolving a temporary injunction, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by CASSODAY, J.:

It appears that, prior to 1892, Third street, between Harmon and Walnut streets, in Milwaukee, had been macadamized. That in May, June, and the fore part of July, 1892, the requisite steps had been taken to authorize the removal of from 9 to 11 inches of said macadam, and to repave the same with cedar blocks. That July 15, 1892, the defendants Adlam & Mosher, as parties of the first part, and Crilley & O'Donnell, as parties of the second part, and the city of Milwaukee, as party of the third part, entered into a written contract wherein and whereby the said Adlam & Mosher agreed, in effect, to and with the city, to furnish all material and do all work necessary and required to grade and pave the roadway and gutters with cedar blocks on Third street, from Walnut to Harmon streets, under the superintendence of the board of public works of the city, for the sum of \$1.19½ per square yard for the paving, which should include all necessary grading, and that they would complete said work according to specifications. That it was therein further agreed that the said board of public works should have the right and power, which was thereby reserved to them, to adjust and determine finally all questions, and that such adjustment and determination should be final and conclusive between the parties to said contract. That the said Adlam & Mosher would during the nighttime put up and maintain such barriers and lights as would effectually prevent the happening of any accident in consequence of the digging up, use, or occupancy of said street, and that the parties of the first part and second part thereby assumed the liability for, and would pay, on demand, any and all damages occasioned by the digging up, use, or occupancy of said street in doing said work. That thereupon Adlam & Mosher sublet a portion of said job to the defendant Roehring. That the said defendants thereupon entered upon the performance of said contract. That September 23, 1892, the plaintiff commenced this ac-

tion to restrain the defendants from obstructing in any manner the running of said cars over said street, or to do grading and paving thereon in such a way and in such a manner as to prevent the plaintiff from running its cars along the same, or to interfere with the running thereof, directly or indirectly, or the operation of its railroad. That the complaint alleged, among other things, the incorporation of the plaintiff; that it had 80 miles of track in said city, and was engaged in carrying passengers in said city over the same; that its cars were passing each day over the street in question for more than 14 hours, carrying many thousand passengers, and that such transportation of passengers over said track, and other tracks in the city, was of great convenience and benefit to the public; that the said Adlam & Mosher had the contract mentioned, and had sublet a portion thereof to the said Roehring; that in the execution of said contract the defendants threatened to obstruct and prevent the running of said cars on said street, and gave out that they would stop the same by the erection of barriers; that for many years previously many of the streets in said city, over which said street cars were run, had been repaired and repaved, and the grading done necessary for such repairs and repaving, without interfering with the running of such cars, and that the grading and paving in question could reasonably and properly be done without such interference; that it was the duty of the defendants to so grade and repave said streets as to allow said cars to continue to run thereon. That thereupon a preliminary injunction was granted, restraining the defendants from interfering with the running of said cars, by a court commissioner. That the defendants thereupon answered said complaint by way of admissions and denials, and alleged, in effect, that the grading and paving of said street was a great public improvement; that the street was much traveled, and was a public thoroughfare, and it was necessary to public travel that it should be completed as soon as practicable; that it was impracticable and impossible for the defendants to do the work required by the terms of said contract unless they had possession of said street, or at least one-half thereof, upon which to do said work; that it had always been customary in the city, whenever any street was graded and paved upon which said railway was located, either for the railway company to grade the portion of the street occupied by its tracks, and pave the same, or to put in temporary switches at a distance of from one to two blocks apart, so that the cars of said company might be switched in onto a single track for such distance, and thus enable the contractor to occupy one-half the street in grading or paving the same. That said answer was verified, and thereupon, and upon the record, said answer, and the affidavits of John Roehring and Fred

Gottschalk, the defendants obtained an order to show cause, September 30, 1892, why said temporary injunction should not be modified, vacated, and dissolved. That the said answer was supported and corroborated, in part, by the affidavits of said Roehring and Gottschalk, and stated, among other things, that the portion of Third street in question was 50 feet in width from curb to curb, and that the plaintiff's tracks occupied about 16 feet in the middle of said street, and that the cars extended beyond the track about 18 inches in addition. That upon the hearing of said application the plaintiff read in evidence, in support of its complaint, seven affidavits, one of which was made by the chief engineer of the plaintiff, of many years' experience, and of much experience in the city, who gave in detail the method of the doing of such work, and its necessities, and among other things stated, in effect, that the work could be done without hardship, and without delay, without interfering with the running of the plaintiff's cars, and that to accomplish that end it was not necessary that the contractors should have the use of the entire street, or of one-half thereof; that there remained of said street, outside of both tracks, more than sufficient ground so that they could, with ease and comfort, do the work under said contract without interfering with the running of the plaintiff's cars; that other streets, under similar circumstances, had been so regraded by the defendants and other contractors without interfering with such cars,—and giving the contracts made with two such other contractors, and one with the defendants Adlam & Mosher, in relation to which he stated that the said Adlam & Mosher did the work on Walnut street between Thirtieth and Twenty-Fourth streets, which consisted in grading and paving Walnut street between said streets, and that said work was done by them after July 21, 1892, and had been completed, and that they represented to the plaintiff that it would cost them, in addition, if the plaintiff's cars were allowed to run while they were doing said work, five cents per square yard, measured in the track, and on the side next to curbing, and they agreed to perform said work without interfering with the running of said cars while doing the same, and allow the cars to run across the same while the men were engaged in such work, at a reasonable speed, by the plaintiff paying them said five cents per square yard, and produced the written contract between the plaintiff and the said Adlam & Mosher, and also six other affidavits to some extent corroborating the same. Upon the hearing of said application it was ordered by the trial court that the said preliminary injunction theretofore granted therein by said court commissioner be, and the same was thereby, dissolved. From that order the plaintiff brings this appeal.

Miller, Noyes & Miller, for appellant.
Austin & Hamilton, for respondents.

CASSODAY, J., (after stating the facts.) This action is not against the city, but is only against its contractors engaged in the work of repaving the street, as mentioned in the foregoing statement. The contract of the defendants with the city is silent as to whether the defendants, in doing the work, were authorized to obstruct or interfere with the running of cars by the plaintiff on the street in question. Of course, it implies such occupancy of the street during the time as might be reasonably necessary to perform the work according to their contract. There is no claim or pretense that the plaintiff's tracks were not lawfully and rightfully in the street in question at the time of making such contract, nor that the plaintiff was not then lawfully and rightfully running its cars thereon. The permission to the railway company to use the street for the purposes indicated does not imply that the municipality thereby surrendered its right to make needful police regulations respecting the same, nor that the company was thereby authorized to unnecessarily obstruct the street, or interfere with travel thereon, or to negligently operate its cars. Elliott, Roads & S. 334. It may be fairly inferred that the defendants entered into the contract, and agreed to perform the work at the price therein named, with reference to the condition of the street and the railway tracks, and the running of cars thereon, at the time it was made. The primary object of a public street in a city is for public travel. *Jochem v. Robinson*, 66 Wis. 641, 29 N. W. Rep. 642; *Hay v. Weber*, 79 Wis. 590, 48 N. W. Rep. 859. As appears from the foregoing statement, the plaintiff is extensively engaged in the carriage of passengers upon the street in question, and other streets in the city. Assuming that, under its police power, the city had authority to arbitrarily stop the running of such cars during the time of such repaving, and that it might have delegated such power to these contractors, (questions not here decided,) yet it does not appear that the city has delegated any such power to the defendants, nor that it has attempted to exercise any such power. On the contrary, as will appear from the foregoing statement, the contract seems to contemplate the continuance of travel of some kind upon the street pending the performance of the work. Hence the provisions for putting up and maintaining barriers and lights at night to prevent accidents. Certainly, for much of the time, such cars would not be as likely to interfere with such repaving as other vehicles, since the cars would at all times move upon fixed lines. The public had as much right to travel by such cars as they had by other vehicles. To allow the contractors to arbitrarily stop the cars, and permit other vehicles to continue running on that street, pending the work, would be to authorize an

unwarrantable discrimination against, not only the plaintiff, but also against persons desiring to travel upon that street in the cars. It is fairly demonstrated by the affidavits in the record that there was no necessity for stopping the running of the cars over the street in question during such repairing. In fact it appears that other contractors—and, in one instance, these defendants—had repaved streets on which the plaintiff's tracks were located under agreements that they would not interfere with the running of cars thereon, at a reasonable speed, while doing the work. True, in such other cases, the contractors, respectively, exacted of the company, and the company paid, five cents per square yard, measured in the tracks, and on the side next to curbsings, as a condition of their not interfering with the running of cars thereon at a reasonable speed while doing the work; but that fact does not support the contention that such stoppage was an absolute, or even a reasonable, necessity. On the contrary, it fairly demonstrates that, while such continuous running slightly interfered with the performance of the work, yet that there was no reasonable necessity for absolutely suspending the running of cars. Such slight interference naturally suggests a slight increase in the cost of the work; but the price for doing the work is purely a matter of contract, and, as indicated, it may be fairly assumed that it was taken into account in making the contract in question. However that may be, the defendants have no contract relations with the plaintiff, and cannot enforce the making of such contract, or the payment of money, on the theory that there is a necessity that the running of the cars should be absolutely suspended, when it is thus demonstrated that no such necessity exists. While the defendants had the right to interfere with the running of such cars, so far as it became reasonably necessary in the performance of the work, yet such right to so hinder or obstruct was by no means absolute or continuous, but at most temporary, depending upon such necessity; and such necessity must have depended upon the width of the street, the nature of the work, the conditions of the weather, the duration of the obstruction, and perhaps other circumstances. The question is somewhat similar to the interference of travel upon streets and sidewalks by abutting owners, which has received some consideration from this court. *Jochem v. Robinson*, 66 Wis. 642, 29 N. W. Rep. 642; *Raymond v. Kliseberg*, (Wis.) 54 N. W. Rep. 612. In *Coke Co. v. Vestry of St. Mary*, Abbott's, 15 Q. B. Div. 5, the municipality was restrained from using steam rollers in repairing the street, in a way to injure the plaintiff's gas pipes in the earth beneath. Lindley, L. J., speaking for the court, said: "The authorities, and particularly *Asylum Dist. v. Hill*, 6 App. Cas.

193, show that an action lies for an injury to property, unless such injury is expressly authorized by statute, or is, physically speaking, the necessary consequence of what is so authorized." In *Hamilton v. Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. Rep. 206, the right of the railroad company to construct a bridge over a navigable stream in a way to interfere with the navigation thereon was involved; and Mr. Justice Field, giving the opinion of the court, said: "Two conditions, however, must be deemed to be embraced within this implied power,—one, that the bridges should be so constructed as to insure safety to the crossing of the trains, and be so kept at all times; and the other, that they should not interfere unnecessarily with the navigation of the streams." That language has been quoted approvingly by this court. *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 86, 38 N. W. Rep. 529. It follows from what has been said that the rights of neither of the parties to this action were absolute, as against the other, in respect to the street in question, but the rights of each were relative with respect to the duties and obligations of the other and the traveling public generally. The order of the superior court for Milwaukee county is reversed, and the cause is remanded for further proceedings according to law.

BROWN v. VANNAMAN.

(Supreme Court of Wisconsin. May 2, 1893.)

LIBEL — WHAT CONSTITUTES — PRIVILEGED COMMUNICATIONS — INSTRUCTIONS — VERDICT.

1. A letter, written by one of two rival milk sellers, advising a shipper to sell no more milk to the other unless he had surety for his goods, as such seller paid nothing to his shippers, is libelous per se.

2. In an action for such libel, an instruction that it was not enough for defendant to show that he believed the statements made by him were true, but that he must have had good reason to believe them true, was proper.

3. The letter was not a privileged communication, and an instruction to that effect was properly refused.

4. A verdict for \$2,500, though excessive, is not so excessive as to justify a reversal.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by F. E. Brown against A. Vannaman for libel and slander. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by CASSODAY, J.:

The complaint alleges, in effect, as a first cause of action, that in November, 1890, the plaintiff established himself in business in the city of Milwaukee, and engaged in purchasing milk, cream, and buttermilk from parties in that city and vicinity, and in the territory and country adjoining the city and county of Milwaukee, including one C. B. Lichtke, residing in the vicinity of Lannon, Waukesha county, at wholesale, and retail—

ing the same to his patrons in the city of Milwaukee, and has continued such business ever since. That the defendant was, in November, 1890, and ever since has been, and now is, engaged in buying milk and cream from parties in and about Milwaukee and in the adjoining country and territory at wholesale, and retailing the same to his patrons in said city. That May 13, 1891, at said city, the defendant wickedly, wrongfully, and maliciously wrote of and concerning the plaintiff and did maliciously publish and cause to be published of and concerning the plaintiff, in the vicinity of said Lannon, where the plaintiff purchased milk and cream for his patrons in his said business, the false, defamatory, and libelous words, (omitting innuendoes:) "Milwaukee, May 13, 1891. Office of Hutchinson's Milk Depot, 516 Grand Avenue. C. B. Lichtke, Lannon, Wis.—Dear Sir: I would advise you to look out for the man Brown that you are shipping milk or cream to, unless you have surety for your goods, as he does not pay any of his shippers anything, and he sells the milk and cream for about what it cost him, and the shippers are the losers. I know two men he owes over \$100 apiece. Stop and see me when you come to Milwaukee, and I will give you all the information you want. Stop at 516 Grand avenue, and ask for me. Yours, truly, A. Vannaman." That said complaint also alleges, in effect, as a second cause of action, certain slanderous words spoken of and concerning the plaintiff, June 18, 1891, at said city, in the presence and hearing of one Seyball; and also, as a third cause of action, certain slanderous words spoken of and concerning the plaintiff, August 10, 1891, at or in the vicinity of Hartland, in the county of Waukesha, in the presence and hearing of certain persons. The defendant demurred to each of said several causes of action and to the whole complaint for insufficiency, and upon the hearing of the demurrer the same was overruled as to the first cause of action alleged, but sustained as to the second and third causes of action. The defendant thereupon answered upon the merits, by way of admissions and denials and allegations as to the truth of certain things so published, and mitigating circumstances. At the close of the trial the jury returned a special verdict to the effect (1) that the charges made in the communication by the defendant against the plaintiff were not true; (2) that the defendant at the time of publishing the communication did not have good reason to believe that the charges made by him were true; (3) that the plaintiff was injured in his character, reputation, credit, or business by the charges made in the communication written and published by the defendant; (4) that the defendant was actuated by express malice in writing and publishing the communication; (5) that the jury were of the opinion that the plaintiff was entitled to recover, and assessed his damages at the sum

of \$2,500. Thereupon, and on July 21, 1892, in pursuance of the order of the court, judgment was entered on said special verdict in favor of the plaintiff and against the defendant for \$2,598.77 as damages and costs. From that judgment the defendant brings this appeal.

V. W. Seely, (N. S. Murphey, of counsel,) for appellant. Williams & May, for respondent.

CASSODAY, J., (after stating the facts.) The plaintiff and the defendant were rivals in the same business and in the same city. The manifest purpose of the letter of May 13, 1891, was to induce the person to whom it was sent to stop selling milk and cream to the plaintiff, and commence selling the same to the defendant. In other words, it was a written slander upon the plaintiff in his trade and business; and, as such, it tended directly to prejudice the plaintiff therein, and hence was, within the well-established rules of law, libelous per se, though not imputing any crime. *Gottbehuert v. Hubachek*, 36 Wis. 515; *Spieling v. Andrae*, 45 Wis. 330; *Singer v. Bender*, 64 Wis. 169, 24 N. W. Rep. 903; *Muetze v. Tuteur*, 77 Wis. 236, 46 N. W. Rep. 123. It follows, as a necessary sequence, that the exceptions to the several portions of the charge in harmony with the proposition of law above stated must be overruled. Error is assigned because, in submitting the second question contained in the special verdict, the court charged the jury that "it is not enough for the defendant to testify or to show to you that he believed that the statements made by him were true. He must have had good reason to believe that the charges made by him were true. The mere assertion by him, under oath, that he believed them to be true, without having good cause to believe that they were true, will not exempt him from liability." The court then submitted it to the jury to determine whether the defendant had good reason to believe the statements contained in his letter to be true or not. Counsel contend that if the defendant, at the time of sending the letter, believed such statements to be true, then the communication was privileged, and he assigns error because the court refused to give the following instruction: "I instruct you, as a matter of law, that if this letter of May 13, 1891, was written by the defendant, believing it to be true, in good faith, without malice, then it was a privileged communication, and this action cannot be maintained. It is the end of the case if you should find that it is a privileged communication under the rule that I have given you." The instruction so requested and refused seems to have been copied almost literally from one that was given, and held not to be error, in *Rude v. Nass*, 79 Wis. 326, 48 N. W. Rep. 555. The reason

for such ruling in that case was that the communication there involved, was conditionally privileged. This is apparent from what is there said to the effect that counsel on both sides in that case agreed to the rule of law as stated by Folger, C. J., in *Hamilton v. Eno*, 81 N. Y. 122, "that it is for the court to determine whether the subject-matter to which the alleged libel relates, the interest in it of the author of it, or his relations to it, are such as to furnish an excuse; but that the question of good faith, belief in the truth of the statement, and the existence of actual malice, remain for the jury." It was there further said, in behalf of this court, that "under this rule the question whether the alleged libel was conditionally privileged was a mixed question of law and fact, to be submitted to the jury under the charge of the court. That is what was done in this case." 79 Wis. 327, 48 N. W. Rep. 556. In the leading case of *Wright v. Woodgate*, 2 Crompt., M. & R. 577, Parke, B., said: "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made." This language was expressly sanctioned by Mr. Justice Daniel in *White v. Nicholls*, 3 How. 287; and also in a recent case in the house of lords,—*Jenoure v. Delmege*, (1891,) App. Cas. 78. In the case at bar the trial court held as a matter of law that the letter mentioned was not a privileged communication, and we are constrained to concur in such ruling. It does not appear that the defendant had any legitimate interest in the business conducted by the plaintiff, nor in the purchases made by him from the person to whom the letter was addressed, nor was he under any obligation or duty to make the communication, nor was the communication made in the interest of the public or good morals, but, on the contrary, the defendant wrote and published the letter as a mere volunteer, acting from motives of personal gain, to be secured through the injury of a rival in business. It certainly does not answer the description of either the second, third, or fourth kinds of privileged communications mentioned by Mr. Justice Daniel, and held by the supreme court of the United States, in the case cited. We think it is equally clear that it does not fall within the first kind, there defined, as follows: "Whenever the author and publisher of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests." We find no error in the charge given, nor in the instruction refused. Of

course, a mere belief, in the absence of any good reason to so believe, as mentioned in the portion of the charge quoted, would not be available as a defense. The only doubt we have had in this case is whether we should not reverse the judgment by reason of the excessive damages found. Had the trial court, in the exercise of the very large discretion vested in it in such cases, set aside the verdict, and granted a new trial, unless the plaintiff remitted a portion of such damages, we should have felt more certain that justice had been done between the parties. *Corcoran v. Harran*, 55 Wis. 125, 12 N. W. Rep. 468; *Baker v. City of Madison*, 62 Wis. 149, 22 N. W. Rep. 141, 583; *Murray v. Buell*, 74 Wis. 17, 41 N. W. Rep. 1010. But we cannot say that the damages found are so excessive as to create the belief that the jury were misled either by passion, prejudice, or ignorance, and that the court abused its discretion in allowing the verdict to stand; and hence, within the adjudications last cited, we do not feel authorized to reverse the judgment upon that ground. "Besides, the trial court has a much broader discretion in such matters than this court." *Heddles v. Railway Co.*, 74 Wis. 239, 42 N. W. Rep. 237. Other minor exceptions, mentioned in the brief of counsel, must be regarded as overruled. The judgment of the superior court for Milwaukee county is affirmed.

STARKE v. PAINE.

(Supreme Court of Wisconsin. May 2, 1893.)

REPLEVIN—WHEN LIES—MINGLING OF PROPERTY—RECOVERY.

1. Replevin in the definit *will lie* against an assignee for the benefit of creditors, who has invoiced and sold, as assets of his assignor, lumber ordered before the assignment, but refused on delivery, as not of the quality ordered, where the assignee was notified as to its true ownership, and warned not to invoice it.

2. Where the lumber is delivered on the assignor's dock, and becomes so mingled with other lumber that it is difficult to ascertain what part came into the assignee's hand, the owner may recover the full quantity, supplied, if necessary, from other lumber of the assignor.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Replevin by Henry Starke against Edward R. Paine, as assignee for the benefit of the creditors of the Island Sash & Door Company. Complaint dismissed, and plaintiff appeals. Reversed.

Rietbrock & Halsey and J. O. McKenney, for appellants. Turner & Timlin, for respondent.

ORTON, J. The facts of this case are as follows: The Island Sash & Door Company was a corporation, and had a factory and yard in the city of Milwaukee, for storing,

manufacturing, and selling lumber. The plaintiff was engaged in manufacturing lumber in the state of Michigan. On December 16, 1890, said corporation gave an order on the plaintiff, through his agents in Milwaukee, G. B. Van Pelt & Co., for a specified quantity and quality of lumber, to be delivered before the 15th day of June, 1891; and on said order the lumber described in the complaint was shipped, and landed upon the docks of said corporation, in two cargoes, on the 8th and 28th days of May, 1891, ready to be delivered to the corporation. The said corporation refused to accept or receive either of said cargoes, and claimed that the quality of the lumber was not according to said order, and they refused to pay for the same, or have anything to do with it. Thereupon the agent of the plaintiff informed said company that the plaintiff would endeavor to find a purchaser for the lumber where it then was, but before he was able to do so the said corporation made an assignment of their property for the benefit of their creditors to the defendant, Edward R. Paine. The said corporation, just before making said assignment, asked the plaintiff for an invoice of said lumber, and the plaintiff refused it. The plaintiff thereupon, fearing that the corporation was about to include said lumber in said assignment, through his said agents warned the defendant, as such assignee, not to invoice or schedule the same as the property of the said corporation, and notified him that the plaintiff was the owner of it, and that said corporation had refused to accept or receive it, and that he had not been paid for it. The defendant promised that he would not invoice the property if such was the case. After the plaintiff learned that the defendant, as said assignee, had received and invoiced it, and claimed it as a part of the assets of said assignor, he demanded in writing that the defendant should deliver it up to him, and he refused to do so. The said lumber still remained on the dock and in the yard of the corporation at this time. Afterwards, on the 20th day of August, 1891, the defendant, as such assignee, sold and delivered said lumber to one R. G. Miller, together with all the property of the corporation, except credits and choses in action. These facts were substantially proved on the trial. The jury found a special verdict in answer to the questions submitted to them by the court of the following facts, to wit: The two cargoes of lumber described in the complaint were landed on the dock of said corporation, the first on the 8th and the other on the 28th of May, 1891. The corporation refused to accept or receive either of them. The agent of the plaintiff refused to furnish the corporation with an invoice of said cargoes a few days prior to said assignment. The corporation did not take and convert said cargoes, or any part thereof, to its own use prior to said assignment. The defendant, as assignee, took and appro-

priated said lumber as having passed to him under and by virtue of said assignment. The lumber of both cargoes, or the greater part thereof, came into the hands of the defendant as such assignee. The defendant, as such assignee, on or about the 20th day of August, 1891, sold and delivered said lumber to one R. G. Miller. The defendant had in his possession at that time the whole, or very nearly the whole, of said lumber. The plaintiff demanded the return of said lumber from said assignee prior to said sale to the said Miller, and by his agent, immediately after said assignment, demanded and required of the defendant that said lumber should not be included in the inventory or schedule of property passing under said assignment. The value of the lumber described and claimed in the complaint, which came into the hands of the defendant, at said time, was \$2,859.51. The said corporation never accepted or received said lumber at any time. Many of these findings were directed by the court. There is no question but that the evidence sustains every one of these findings, and they certainly embrace every material issue in the case.

This action is replevin in the detinet. The circuit court, after the return of such special verdict of the jury into court, on motion of the defendant's counsel set aside the same, and rendered judgment in favor of the defendant, dismissing said complaint, for the reasons stated in the preamble of said order, that the court was convinced "that the defendant did not unlawfully detain the property at the time the action was commenced, and did not wrongfully take said property; no property having been seized on the writ." From these peculiar reasons and the briefs of counsel we conclude that the court did not so dispose of the case on its merits, but on the technical ground that the action would not lie against the defendant after he had sold and delivered the property, and was not in possession of it. The plaintiff's counsel asked leave to amend the complaint, by averring the wrongful taking of the property by the defendant, and it was refused. We do not think the court could have possibly disposed of the case on the ground that the plaintiff had not shown his right to recover in some form of action, for it is certainly a very clear case that both the corporation and its assignee attempted to violate the plaintiff's right to his own property, and colluded to defraud him of it without palliation or excuse. It seems to us that the plaintiff was entitled to recover in the action brought. The defendant, having sold the property before the action was commenced, and not then having it in his possession, will not defeat the action of replevin in the cepit or detinet. The action in the cepit will lie after the defendant has parted with the possession of the property. *Franke v. Herman*, 76 Wis. 428, 45 N. W. Rep. 812. And

in such case the plaintiff may waive the wrongful taking, and sue for the unlawful detention. *Oleson v. Merrill*, 20 Wis. 462. In that case it is also held that the plaintiff may show a wrongful taking, a demand and refusal, or any act amounting to conversion and a wrongful taking may be shown in place of a demand and refusal. *Gassner v. Marquardt*, 76 Wis. 579, 45 N. W. Rep. 674, is in point with this case. It is replevin in a justice's court, and the defendant answered that when the action was commenced he was not in possession of the property. The plaintiff recovered, and on appeal to the circuit court also, and this court affirmed the judgment. The defendant parted with the possession after demand and refusal, and before the action was commenced. Mr. Justice Cassoday said in the opinion: "A person thus wrongfully refusing to deliver up possession of property to the owner on demand cannot escape liability by wrongfully delivering such possession to a stranger, who he knows, or has good reason to believe, has no authority to receive it." The plea of non detinet puts in issue both the taking and detention. *Emmons v. Dowe*, 2 Wis. 322; *Ronge v. Dawson*, 9 Wis. 246. In *Lee v. Simmons*, 65 Wis. 523, 27 N. W. Rep. 174, there was similar fraudulent collusion between the assignor and assignee, and the plaintiff recovered against the assignee in replevin in the detinet. In this case the corporation that ordered the property and its assignee colluded to defraud the plaintiff of his property, and the assignee, after being warned and notified not to take said property, or schedule it under the assignment, and after another demand of it, fraudulently sold it, and parted with its possession, and he cannot set up such a fraudulent sale in defense of an action of replevin in the detinet. *Barnett v. Selling*, 70 N. Y. 492; *Nichols v. Michael*, 23 N. Y. 264. The action will lie against one who never had any possession except to order the sheriff to wrongfully levy upon the property. *Knapp v. Smith*, 27 N. Y. 277, and *Allen v. Crary*, 10 Wend. 349. Replevin in the detinet will lie against one who has wrongfully transferred the property to another. *Nichols v. Pinner*, 18 N. Y. 295, 315. The action will lie against one who has parted with the possession to another. *Ellis v. Lersner*, 48 Barb. 539, and *Brockway v. Burnap*, 16 Barb. 309. The cases are numerous where the action can be maintained if the defendant had possession of the property when the demand was made, and afterwards wrongfully parted with the possession before the action was commenced. But it is sufficient that it has been so held by this court, as shown above. There is no question but that this action was properly brought for a recovery in this case on the evidence and verdict of the jury, without any amendment of the complaint.

Some objection is made that the lumber was scattered about the yard of the corporation, and mingled with other lumber in such way as to make it difficult to ascertain what part of it came to the hands of the defendant, as assignee. In such case the plaintiff would be entitled to recover the full quantity of his lumber, supplied, if necessary, by other lumber of the corporation with which it had been so mixed or confused. *Eldred v. Oconto Co.*, 33 Wis. 133; *Jenkins v. Steanka*, 19 Wis. 126.

It may be well to speak of it, although the fact is not mentioned in the pleadings or noticed on the trial, that the said corporation of the Island Sash & Door Company advanced on the two cargoes of lumber about \$410. The defendant does not claim and cannot ask any deduction from the verdict on this account. If the action was against the corporation it might be different. The lumber not having been seized or found by the officer, the plaintiff is entitled under the statute to recover the full value thereof, with interest from the time of the demand and refusal to deliver it.

We are not aware of any decision of this court not in harmony with the above cases and conclusions. It is idle to contend that there was a delivery of the lumber, and that the title to it passed to the sash and door company, in the face of its persistent refusal to accept and receive it. Its willingness to accept it without payment or security, when it found itself insolvent, and was about to make an assignment, can have no other effect than as additional evidence of its intent to defraud the plaintiff of his property. There was some conflict in the testimony, but the jury had the right to believe the testimony of the plaintiff and his witnesses as against the conflicting testimony of the defendant's witnesses, and evidently did believe it. The testimony for the plaintiff was the more reasonable in view of the circumstances of the case and the conduct of the parties. The special verdict of the jury on the facts was sufficient, without any general verdict, for the plaintiff to authorize the court to find the proper conclusions of law in favor of the plaintiff,—that the plaintiff is the owner of the property, and that the defendant wrongfully and unjustly detains it and its value, and that the plaintiff recover such value, with interest from the time of the demand. The judgment of the circuit court, including the order setting aside the verdict, is reversed, and the cause remanded, with direction to make the proper findings of the issues and conclusions of law, and render judgment in favor of the plaintiff on the special verdict of the jury. Or the circuit court may, if it deems it proper to do so, in its discretion, grant a new trial in the action.

**WILCOX v. CONTINENTAL INS. CO. OF
NEW YORK.**

(Supreme Court of Wisconsin. May 2, 1893.)
INSURANCE—INCUMBRANCES—WAIVER OF CONDI-
TION.

Where a clause of an insurance policy provided that the entire policy should be void if the assured had or should procure other insurance, or incumber the property by mortgage, the existence of a mortgage and prior insurance on the insured property invalidated such policy, though the assured was not examined as to whether his property was incumbered, or verbally informed of the effect of such prior insurance or incumbrance, by defendant, such facts not constituting a waiver of the condition.

Appeal from circuit court, Dane county;
Robert G. Siebecker, Judge.

Action by Henry Wilcox against the Continental Insurance Company of New York to recover on a policy of insurance issued by defendant to plaintiff. There was judgment for defendant on a demurrer to the complaint, and plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by CASSODAY, J.:

The complaint alleges, in effect, the incorporation and location of the defendant. That May 20, 1892, the plaintiff was the owner of a stallion of the value of \$1,000, subject to a chattel mortgage thereon to one Connors for \$75, and then insured in the Mutual Reserve Live-Stock Insurance Company of Marshall, Mich., for the sum of \$200. That on said day the plaintiff applied to the defendant for an insurance policy against loss by fire upon said horse, which the defendant then and there examined, and agreed to issue such policy for the sum of \$200 as soon as the location of said horse for the summer should be fixed by the plaintiff; that at that time the defendant inspected said horse, but asked no questions of the plaintiff as to the title, or other insurance thereon, and that the plaintiff did not know that such facts were in any way material to the risk, or that the defendant intended that the policy to be issued thereon should contain a provision relative to said matters. That May 27, 1892, the plaintiff, having determined upon a location of said horse for the summer, paid to the defendant four dollars, being the premium for such insurance, and the defendant thereupon agreed to send to the plaintiff such policy to insure said horse for one year from June 3, 1892, in the sum named, and upon said last-named day the defendant did send to the plaintiff such policy. That said policy is attached to the complaint herein, and forms a part thereof, and, among other things, contained this clause: "This entire policy, unless otherwise provided by agreement indorsed thereon, or added thereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, or if the subject of insurance be

personal property, and be or become incumbered by a chattel mortgage." That June 21, 1892, and during the life of said policy, said stallion was destroyed by fire, without any fault upon the part of the plaintiff. That the plaintiff duly furnished to the defendant due proofs of said loss, as required by the policy, and did everything required of him by said policy to be done and performed to entitle him to the benefits thereof, but that the defendant, after full inquiry, denied all liability to the plaintiff on account of said loss, for the reason of the existence of said chattel mortgage and said prior insurance. From an order sustaining a demurrer to said complaint for insufficiency, the plaintiff brings this appeal.

Bushnell, Rogers & Hall, for appellant. H. W. Chynoweth, for respondent.

CASSODAY, J., (after stating the facts.) This is an action at law upon a contract in the form of a policy of insurance. There is no attempt to reform the contract by reason of any mistake or fraud, or otherwise. True, it is alleged, in effect, that in making the contract "the defendant fraudulently suppressed and concealed from this plaintiff the fact that said policy was to and did contain" the provision quoted in the foregoing statement. No facts are alleged, however, indicating such suppression or concealment. The most that can be inferred from the facts alleged is that, in making the contract for the insurance, the defendant's agent did not inform the plaintiff that the policy to be sent would contain such a provision, and that it was sent without any explanation that it did contain such a provision. The policy, which is made a part of the complaint, purports to be the "standard fire insurance policy of the state of Wisconsin," which we understand to be a policy in the form prepared by the insurance commissioner, and filed in his office, as provided in chapter 195, Laws 1891. Certainly the complaint contains no allegation that the policy in question is not such a policy, nor that the provision quoted is not contained in the policies usually issued by the defendant, and, besides, the act made it a penal offense for the company to issue any other form of policy. There is no fact alleged which could tend to mislead the plaintiff, or prevent him from reading the policy as soon as he obtained it, and from what has been said it may be fairly inferred that the parties contracted with reference to the policy upon which the action is brought. The defendant sent the policy to the plaintiff 18 days before the fire. It appears that the plaintiff received the policy about the time it was so sent. Upon such receipt of the policy the contract of insurance was complete in all its terms, and binding upon both parties. The plaintiff accepted it with all its conditions and limitations. In the absence of any fraud or mistake, he was,

on general principles and authority, conclusively presumed to know its contents. *Fuller v. Insurance Co.*, 36 Wis. 599; *Herbst v. Lowe*, 65 Wis. 321, 26 N. W. Rep. 751; *Bonneville v. Assurance Co.*, 63 Wis. 298, 32 N. W. Rep. 34; *Hankins v. Insurance Co.*, 70 Wis. 5, 35 N. W. Rep. 34; *Quinlan v. Insurance Co.*, 31 N. E. Rep. 31, 183 N. Y. 365. In this last case it was, in effect, held that the fact that the assured was ignorant of the conditions printed in the policy of insurance of the standard form prescribed by the statute of that state did not prevent the forfeiture by reason of his failure to comply with such conditions, since the conditions were part of the contract, and hence that he was bound to take notice of them. The clause of the policy quoted declares, in effect, that the entire policy shall be void in case the assured had or should procure any other insurance on the property covered by the policy, or incumbered the same by chattel mortgage, "unless otherwise provided by agreement indorsed thereon, or added thereto." There is no pretense of any such agreement indorsed thereon, or otherwise, and such prior insurance and chattel mortgage are admitted in the complaint. Such being the facts, it follows, from the authorities cited, that the policy was void in its inception, unless the condition was waived by the company. See, also, *O'Brien v. Insurance Co.*, 79 Wis. 403, 43 N. W. Rep. 714; *Bosworth v. Insurance Co.*, 80 Wis. 393, 49 N. W. Rep. 750. Counsel for the plaintiff seem to think that upon the facts stated the defendant had waived the breach of the conditions named, and rely upon *Alkan v. Insurance Co.*, 53 Wis. 136, 10 N. W. Rep. 91, and *Van Kirk v. Insurance Co.*, 79 Wis. 627, 43 N. W. Rep. 798; but the clause of the policy under consideration in each of those cases was entirely different from the one here in question. Besides, the defendant should not be held to have waived breaches of which it had no knowledge. It is true, as claimed by counsel, that had the plaintiff made a written application for the insurance in question, and falsely stated therein that there was no prior insurance or incumbrance, then the defendant, to make such misrepresentations available as a defense, would have been obliged, under the statute, to "attach to such policy, or indorse thereon, a true copy of any application or representations of the assured, which by the terms of such policy are made a part thereof, * * * or referred to therein," or be precluded from disproving the statements so made in such application upon the trial. Section 1945a; *Dunbar v. Insurance Co.*, 72 Wis. 492, 40 N. W. Rep. 386; *Stanhilber v. Insurance Co.*, 76 Wis. 290, 43 N. W. Rep. 221. The argument here is to the effect that the defense is based wholly upon a supposed "implied false representation" made by the plaintiff as to the nonexistence of such prior insurance and mortgage; and hence, in analogy to the rule

under the statute, the defendant should be precluded from proving the same. But we do not understand such to be the defense. On the contrary, we understand the defense to be based upon the strict terms of the contract, which, as already indicated, is to the effect that the policy should not be operative at all in case of such prior insurance or mortgage, unless by agreement in writing attached to or indorsed upon the policy, as mentioned.

The order of the circuit court is affirmed.

SMITH v. KNIGHT et al

(Supreme Court of Iowa. May 18, 1893.)

PARTNERSHIP AGREEMENT—RIGHT TO INTEREST—ACCOUNTING—REVIEW ON APPEAL—SPECIFIC PERFORMANCE.

1. A provision in a contract between partners, whereby an adjustment of past accounts should be had, in order to make a rest in the affairs of the firm to furnish a basis for future accountings, is no consideration for another provision in such contract, whereby each agrees to pay the other interest on his monthly balances from the time they first engaged in business up to date of such contract.

2. A promise by one partner to pay such interest would be no consideration for a like promise by the other, since, there being no provision in the original partnership agreement to pay such interest, there would be no legal obligation to do so; and the agreement to pay interest, where, by the law, no interest could be charged, would be, in effect, a gift by one partner to the other.

3. It further appearing in an accounting by one partner against the administratrix of the other that, if such agreement were enforced, the otherwise balance of \$11,000 to plaintiff's credit would be increased to over \$50,000, such agreement must be deemed too inequitable to warrant a court of equity in enforcing it.

4. A finding as to the rental value of the partnership property, and that plaintiff had the exclusive use and enjoyment of the partnership property from the death of his partner to the date of the bringing of the action for an accounting, will not be disturbed if not unsupported by the evidence.

5. Plaintiff was not entitled to compensation for his services in settling the partnership affairs, the agreement between the partners whereby each drew \$100 monthly from the firm not implying an agreement for compensation, in that, as there were only two partners, with equal interests, such practice amounted simply to an equal division of profits to that extent.

6. Where, on appeal in an equity case, the decision of the court below is substantially correct, the mere fact that some of the findings are erroneous will not reverse the decree.

Appeal from district court, Boone county; S. M. Weaver, Judge.

Action for a settlement of partnership account. From a decree entered by the district court, the plaintiff appeals.

Phillips & Day, for appellant. Gatch, Connor & Weaver and R. F. Jordan, for appellees.

GRANGER, J. This case was once before in this court on appeal, and was reversed and remanded, because it had not received full consideration in the district court. 42

N. W. Rep. 438. The case was remanded with a suggestion that it demanded "the attention of a careful referee, who shall present fully the evidence, together with his findings of law and fact upon all questions arising in the case." Thereafter the case was given to the Honorable B. P. Bird-sall as referee, and a sufficient statement of the case will be found in his findings of the facts, which, with some omissions, are as follows:

"Findings of Facts.

"That in the year 1869, D. B. Knight and Allan Smith entered into an oral agreement for a copartnership to erect a steam mill and elevator, and to do the business of buying and grinding and selling grain. Under the agreement they were to be equal partners, each furnishing an equal amount of capital, and sharing equally the profits and losses. No fixed amount of capital stock was agreed upon. They commenced the construction of a mill at Boone, Iowa, in the fall of 1869, and completed it for operation about May 1, 1870. The books of the firm were opened about the 1st day of May, 1870. Prior to this time each of the partners had kept an account of materials furnished and labor and material paid for by him in the construction of the mill, and for moneys paid out for merchandise on account of the firm. About the 1st day of May, 1870, each of the partners presented to the bookkeeper of the firm a statement of the amounts thus paid by each for account of the firm, and each partner was credited upon the books with the total amount of his payments thus made as of date May 1, 1870; the balance to the credit of D. N. Knight being \$16,721.50, to Allan Smith was \$10,054.38. Thereafter each partner was credited in his individual account with merchandise and cash furnished or payments made on account of the firm, and debited with all merchandise and cash received. No regular monthly balances were kept of their accounts until after January 30, 1882. No settlement of the partnership accounts has ever been had.

"Second. D. B. Knight died on the 25th day of January, 1886. The balance to the credit of each partner, as shown by the books, on January 30, 1886, was as follows: D. B. Knight, \$11,166.05; Allan Smith, \$11,957.67.

"Third. On the 11th day of June, 1884, D. B. Knight and Allan Smith entered into the following contract in writing, to wit: 'Whereas, Dan B. Knight and Allan Smith have heretofore been engaged in business under the firm name of Knight & Smith, of Boone, Iowa; and whereas, said Knight and Smith engaged in business with the understanding that each should furnish equal amounts of money, and share equally the profits and losses of the business; and whereas, there has never been an inspection of the firm accounts, and it is probable that

either Knight or Smith may at different times have had invested in their business an amount of money in excess of an equal one-half: Now it is hereby agreed by and between said Knight and Smith that as soon as possible after the date hereof the accounts and books of the said firm of Knight & Smith shall be inspected and corrected, and that the amount now justly due each partner, to wit, D. B. Knight and Allan Smith, shall be credited to them individually on the books of said firm. That in calculating the amount now due said D. B. Knight and Allan Smith interest shall be allowed on their just monthly balances from the time they first engaged in business up to this date at the rate of interest said firm may have paid for money borrowed by said firm during the time above specified of the banks of Boone, Iowa. That interest from this date shall be allowed said D. B. Knight and said Allan Smith on their monthly balances at the rate of interest the said firm may hereafter pay for money borrowed by said firm from the banks of Boone, Iowa. It is further agreed that neither partner shall be allowed interest hereafter on his monthly balances, when the total amount to the credit of such partner be in excess of \$15,000.00, unless such interest be agreed to in writing. It is further agreed that neither Knight nor Smith shall at any time reduce the amount of his credit on the books of said firm to a sum less than \$10,000.00 without the written consent of both said Knight and said Smith. Neither said Knight nor said Smith shall at any time use the firm name in any private business or speculation whatever. Witness our hands, this 11th day of June, 1884. D. B. Knight. Allan Smith.' This contract was drawn by one Arch C. Smith, in the office of Knight & Smith, and in the presence of both the partners, and was there signed, and after its execution was placed in an envelope indorsed, 'Firm agreement, Knight & Smith. Private,' and deposited in the firm safe, in the office of the firm; and I find that at the time of the execution of this contract D. B. Knight had sufficient mental capacity to comprehend and transact any ordinary business, and to make and enter into contracts, and that there was no fraud practiced by Smith in procuring the same. No settlement of the accounts of the partnership under this contract was ever made or entered upon.

"Fourth. D. B. Knight left surviving his wife, the defendant Fanny A. V. Knight, and two children, Harold Knight and Bertha Knight, as his heirs at law. In February, 1886, the said Fanny A. V. Knight was appointed administratrix of his estate, and is now acting in that capacity.

"Fifth. All the assets of the firm of Knight & Smith, personal and real, upon the death of Mr. Knight, were taken possession of by Allan Smith, as the surviving partner of

the firm, and ever since that time have been under his management and control. The amount received by him, and the disposition of the same, is hereafter shown in stating his account as surviving partner.

"Sixth. Allan Smith, surviving partner, and the administratrix of D. B. Knight's estate, being unable to agree upon a settlement of the partnership accounts, the plaintiff on the — day of —, 1886, commenced this action to wind up the partnership, and in his petition claims that the following items, appearing on the books prior to June 11, 1884, are erroneous, to wit." The referee here specifies the items objected to, and makes specific findings as to each. Then follows:

"Twenty-Third. With the foregoing corrections, I find the monthly balances of the partners would be shown in the exhibit following, which is made a part of this finding.

"Twenty-Fourth. Without any correction in the books, the monthly balances would be as shown in the following exhibit, which is made a part of this finding." Here follows, in parallel columns, a detailed statement of "monthly balances of D. B. Knight, as corrected, on the first of each month, and monthly balances of D. B. Knight, as on books, on the first of each month," from May, 1870, to February, 1886. Then, in the same manner, and for the same time, the balances of the plaintiff are presented. The referee then proceeds:

"Twenty-Fifth. I find that the firm of Knight & Smith paid interest for money borrowed at the banks of Boone, Iowa, at the following rates, to wit: From May 1, 1870, to January 1, 1880, at the rate of 15 per cent. per annum, from January 1, 1880, to February 1, 1886, at the rate of 10 per cent. per annum.

"Twenty-Sixth. I find that, if interest be allowed on monthly balances, as provided by the contract set out in the third finding of facts, upon the accounts of the partners as corrected, the balance to the credit of Allan Smith on the 1st day of February, 1886, would be \$14,733.20, and to D. B. Knight, \$11,472.93; the credit allowed to Allan Smith upon the excess of his monthly balances on the foregoing basis being \$3,102.43, and to D. B. Knight, \$404.89. If interest be allowed, as provided by said contract, from June 1, 1884, to February 1, 1886, upon the excess of monthly balances, the balance to the credit of Allan Smith on February 1, 1886, would be \$11,788.06, and to D. B. Knight, \$11,068.04; the balances of Allan Smith being continuously from June 1, 1884, to February 1, 1886, in excess of those of D. B. Knight, and the amount credited to him as interest upon such excess during said time being \$157.28.

"Twenty-Seventh. At the dissolution of the firm by the death of Mr. Knight, Allan Smith, the surviving partner, took possession of all the assets of the firm. On Janu-

ary 25, 1886, there was on hand the sum of \$4,800.47 in cash and in bank. There was on hand a large quantity of grain, flour, feed, and mill stuff, of the value in the aggregate of \$6,148.45. Allan Smith, against the objection of the administratrix, continued the business in the firm name of Knight & Smith up to August 31, 1886, when the merchandise on hand was charged over to one Col. William Smith, and the business carried on in his name for some time, when it was again transferred to the name of Allan Smith. No actual sale of the merchandise was made to William Smith at the time mentioned, but the transfer was in fact for the benefit of Allan Smith, and made for the purpose of separating his own from the firm business, and of creating a rest in the partnership accounts. No inventory of the personal property, merchandise, etc., on hand on January 25, 1886, was made by the surviving partner, Allan Smith, and the merchandise on hand was mingled with new purchases and new products in the operation of the mill by Mr. Smith. On April 30, 1886, Allan Smith made an inventory of the property then on hand, which he entered upon the daybook, with the value thereof. Subsequently he caused to be erased the value attached."

This is followed by an extended itemized accounting. The referee then says:

"I find that substantially all the accounts due the firm were collected, and all liabilities liquidated, by the surviving partner, within eight months after the dissolution of the firm by the death of D. B. Knight, except the liability upon the mortgage debt to Arch C. Smith, which was paid in March, 1888. That during the eight months following the death of Mr. Knight it was necessary and proper for the surviving partner to retain and pay, at the expense of the firm, a bookkeeper, which he did do. I find that he should be allowed the sum of eight hundred dollars on his account, and so credit him. I find that Allan Smith has occupied and used the mill and elevator continuously since January 25, 1886, and enjoyed the benefit thereof. That the fair rental value and the reasonable value of the use thereof during said period, exclusive of repairs, has been the sum of \$125 per month, amounting in the aggregate, to April 15, 1890, to the sum of \$6,437.50."

Following the findings of fact is a summarized "account of receipts and disbursements" by the plaintiff, with a debtor balance against him of \$10,041.67. The referee then concludes with the following:

"Findings of Law.

"(1) That the contract between the partners, D. B. Knight and Allan Smith, made on the 11th day of June, 1884, and set out in the third finding of facts herein, so far as the same provides for the allowance of interest upon the excess of monthly balances prior to

its date, is without consideration, is inequitable, provides for usurious interest, and should not be enforced. That there should be allowed the plaintiff upon the excess of his monthly balances interest from the date of said contract, to wit, June 11, 1884, to January 25, 1886, at the rate of 10 per cent. (2) That the accounts of the partners should be corrected in accordance with the findings of facts herein set forth. (3) That Allan Smith, as surviving partner, should account for the value of the merchandise on hand at the dissolution of the firm by the death of D. B. Knight on January 25, 1886, and for all moneys received by him on account of the firm from all sources, as shown by the finding of facts. (4) That he should be credited with all disbursements for account of the debts of the firm existing in the dissolution thereof, and for all taxes and insurance paid on the property, and all expenses on account of repairs, or incident to closing up the partnership business, as shown in the finding of facts herein set forth. (5) That he should account to the firm for the sum fixed in the finding of facts, as the reasonable rental value and value of the use of the firm property by him since January 25, 1886, and up to April 15, 1890. (6) That defendant Fanny A. V. Knight, as administratrix of the estate of D. B. Knight, deceased, is entitled to judgment against the plaintiff for one-half the amount found due from him to the firm upon the accounting herein, from which shall be deducted the excess of his account over that of D. B. Knight's on January 30, 1886. (7) That said Allan Smith, as surviving partner, should account for one-half of all personal property now on hand, and of all notes and accounts still on hand and unpaid, as shown by the foregoing report, excepting the cattle notes, for which he shall account for the one-fourth. (8) That the defendants be required to convey by proper deed of conveyance the undivided one-half of lot eleven, (11,) in block sixty-seven, (67,) in Boone, Iowa, to the plaintiff, Allan Smith. (9) That Allan Smith is the owner of the undivided one-half of the real estate belonging to said firm, to wit, lots 12, 13, and 14, in block 67, and lots 6, 7, and 8, in block 54, in the city of Boone, Iowa; and the defendants, Fanny A. V. Knight, Harold Knight, and Bertha Knight, are the owners each of the undivided one-sixth of said real estate. I therefore recommend that judgment be entered in favor of the defendant Fanny A. V. Knight, as administratrix of the estate of D. B. Knight, deceased, and against the plaintiff, Allan Smith, for the sum of \$4,300.80, which shall be a lien upon the interest of said Allan Smith and the aforesaid real estate. That the said Allan Smith be required to account to the said administratrix for the one-half of all personal property and other assets of the late firm of Knight & Smith, now on hand. That judgment be rendered confirming the shares of plaintiff and defend-

ants in the real estate as herein stated, and that partition thereof be made.

"Respectfully submitted,

"Ben. P. Birdsall, Referee."

Extended exceptions were filed to the report, upon the hearing of which certain additional items of credit were given to the plaintiff, aggregating \$555.03, and, thus modified, the report was confirmed by the district court. The court then, "to the end that the partnership business be finally and fully adjusted," appointed Samuel L. Moore, of Boone, Iowa, a receiver "to take and assume charge and control of all the remaining property and assets of said firm." On the 9th day of February, 1891, the receiver filed in the district court his report, showing a net balance in his hands of \$8,129.87. In the district court of Boone county was pending a suit of Allan Smith against A. V. Knight, Administratrix, et al., heirs of D. B. Knight, deceased, being the parties in interest in this suit, which suit was to obtain order for the sale of the real estate of Knight & Smith, and for general relief. On the 11th day of November, 1890, the district court entered an order consolidating that case with this, and hence the two suits are united for disposition.

On the 12th day of January, 1891, the plaintiff filed his supplemental bill for review and correction of former finding and judgment, and for general relief, and also a further report, as surviving partner, "touching said firm property, and receipts and disbursements and expenses in caring for said mill, elevators, and other property of said firm from the date of the report of the referee, Birdsall, to wit, April 15, 1890, up to the time the receiver took possession, October 7, 1890;" and also a "statement of the matters which entered into and affected his personal accounts" for the same time. On the 9th day of February, 1891, the cause was finally submitted to the district court, and the following, on this appeal, is the essential part of its decree: "After a due consideration of said report, and being fully advised in the premises, the court finds that said report, showing a net amount in receiver's hands of \$8,129.87, should be confirmed and approved, and said report is accordingly and is hereby approved and confirmed. Now, on the same day the cause comes on for hearing and trial, and, the parties appearing as before, thereupon the court, after due consideration of the records and evidence introduced by the parties, the findings reported by the referee, Hon. B. P. Birdsall, as modified and approved by the court under date of October 1, 1890, which report, as modified and approved, with the order of approval as entered thereon, is embodied as a part of this decree, reference being thereunto made, the reports of plaintiff as surviving partner, the report of S. L. Moore, receiver, the waiver filed by the defendant as to claim for rent of the mill property subsequent to April 15,

1891, and all other matters, records, and other evidence before the court material and competent to be considered in said cause, after the argument of the counsel, and after being fully advised in the premises, finds and determines that the issues involved between the parties are found in favor of the defendants. And on final accounting the plaintiff, Allan Smith, is indebted to the defendant, F. A. V. Knight, administratrix, in the sum of \$4,219.36. That the plaintiff is entitled to one-half the money shown in the referee's hands by his report, to wit, four thousand sixty-four and 93-100 dollars, (\$4,064.93,) and that the defendants, F. A. V. Knight, Bertha Knight, and Harold Knight, are each entitled to and own one-sixth of the money now in the receiver, S. L. Moore's, hands, to wit, to each the sum of \$1,354.78."

The foregoing presentation of the record brings us to the point where we may more intelligently consider the questions presented by counsel in argument.

1. The question important and far reaching in the case is the provision in the contract of June 11, 1884, as to the interest to be allowed on the monthly balance of the respective partners. By reference to the report of the referee it will be seen that he finds that the firm of Knight & Smith, from May 1, 1870, to January 1, 1880, paid to the banks of Boone interest at the rate of 15 per cent. per annum. His findings of facts further show that for that period the excess credits of Smith over Knight was such as to make the matter of the rate per cent. upon his credit balance quite important. The legal conclusion of the referee is that "the allowance of an interest upon the excess of monthly balances" prior to the date of the contract, "is without consideration, is inequitable, provides for usurious interest, and should not be enforced." The district court adopted this view in its confirmation of the report. This finding has reference to interest from the commencement of the partnership in 1869, to the making of the written contract June 11, 1884. From the latter date interest has been allowed at the rate specified in the contract.

The first proposition for us to consider is, was there a consideration to support the promise to pay interest on the credit balances prior to the date of the contract? An inspection of the contract indicates two purposes in its making: First, an adjustment of accounts because of past transactions; and, second, some additional provisions for the future conduct of the business. Nothing in the contract indicates the thought of a final adjustment or settlement. It is plain from the terms of the contract that the parties intended to ascertain the actual property rights of each in the firm to the date of the settlement or inspection, to be made as soon as possible, and receive credit therefor on the books, which would be an accounting as to past transactions, and the books would

be the evidence of it. It would be, in effect, a rest in the business affairs of the firm, from which future accountings could be made. Nothing in the record indicates to us in any way that the agreement as to the future of the firm induced the agreement as to the mode of adjusting past transactions. The condition of the business, under the statement of facts leading to the agreement, was a sufficient inducement for the agreement as to terms of settlement, and the future of the firm certainly possessed every inducement necessary to the contract in regard thereto. Appellant's contention, therefore, that the agreement as to interest or existing accounts or balances has support, as to consideration, because of other parts of the agreement, is not sustained in the record. To our minds, a proper position from which to view or determine the legal effect of the agreement to pay interest on the past balances would be to assume the contemplated settlement as final,—a closing up of the partnership affairs. One or two facts should be settled in this connection. There is a claim that at the commencement of the partnership there was a verbal agreement for the payment of this interest on monthly balances. One witness gives testimony to that effect, but it is of his recollection of a conversation between the partners nearly 20 years before his testimony was taken. This testimony is, to our minds, quite conclusively overcome by the other facts in the record. The contract of June 11, 1884, contains recitals of the terms of the contract as originally made, and makes particular mention of the portions of the capital to be furnished by each. There is nothing to show that at that time there was an expectation that the capital would be furnished, except in equal amounts. To this may be added the fact that for 15 years the business was carried on without a word between the partners, or an entry on the books corroborative of such an understanding. It seems to us that, had the written contract in this particular been intended as a confirmation of an agreement as to interest of such long standing, it would, when stating other facts as a reason for making a written contract, have specified the fact of the oral agreement. The language of the contract indicates that the subject of interest on monthly balances was then first considered. It also conclusively appears that each of the partners, in placing money to his credit in the firm, placed it there as capital for the use of the firm, and not as a loan, or to create an indebtedness of the firm to him. This fact is evidenced by the written agreement wherein it speaks of the money furnished being "invested in the business." From this standpoint we may consider the question presented in argument as to the legal effect of the written agreement to pay interest on past monthly balances. Having held that other provisions of the contract

furnished no consideration for the promise to pay interest on past balances, we are to inquire if there is anything in the record to overcome the presumption of the law that the contract, because in writing, is supported by a consideration. Every fact which could operate as a consideration seems to be disclosed by the record. It is urged that the agreement to pay this interest is mutual, being made without knowledge of who would be benefited by it, and that the promise of one is a consideration for the promise of another. We may be in better condition to consider the proposition by stating the rule as to what the obligations of the parties would have been in the absence of the written contract. Had they, under such circumstances, been settling the affairs of the partnership, it may be regarded as well settled, though perhaps not without some conflict of authority, that neither could have demanded interest on his excessive monthly balances, nor on his excess of capital furnished. In *Lindley on Partnership*, (2d Ed. p. 389,) the rule is stated as follows: "As a general rule, partners are not entitled to interest on their respective capitals, unless there is some agreement to that effect, or unless they have themselves been in the habit of charging such interest in their accounts; and, even where one partner has brought in his stipulated capital and the other has not, the former will not be entitled to interest on the winding up of the partnership, if it has not been previously charged and allowed in the accounts of the firm." The text has the support of a number of authorities cited. See *Clark v. Worden*, 10 Neb. 87, 4 N. W. Rep. 413. Mr. Justice Story, in *Dexter v. Arnold*, 3 Mason, 284, states the rule in the following words: "Interest is not allowed upon partnership accounts generally, until after a balance is struck on a settlement between the partners, unless the parties have otherwise agreed or acted in their partnership concerns." *Day v. Lockwood*, 24 Conn. 185; *Godfrey v. White*, 43 Mich. 171, 5 N. W. Rep. 243; *Lee v. Lashbrooke*, 8 Dana, 214; *Prentice v. Elliott*, 72 Ga. 154. In *Reynolds v. Mardis*, 17 Ala. 32, the syllabus indicates a different rule, and states it in these words: "When parties agree to invest equal amounts in their common business, and one advances a larger sum than the other, he is entitled upon settlement to an allowance of interest on the one-half of the excess so advanced by him from the date of the appropriation to the use of the firm." The case of *Clark v. Worden*, supra, comments upon the holding of the Alabama case, and doubts, at least, under the facts, if it was a case of partnership, saying: "Although the court treats this as a case of partnership, it certainly was not such in a general sense, but was more in the nature of a joint investment of money to await natural increase and enhancement of the value of real estate." To

avoid misapprehension, it may be well to state that the rule we announce is of general application. There are abundant exceptions to the rule, based upon agreements expressed, or deduced from a course of business indicating an understanding of the parties; but with rare exceptions is there an authority to be found justifying the payment of such interest in the absence of an agreement, expressed or implied.

We are, then, to the point that, without the written contract, no interest on the balances could be claimed, and from this situation we may consider the effect of the mutual promises. It is to be borne in mind that these promises or agreements were not dependent upon contingencies of the future, or the uncertainty of profits in contemplation, but an agreement based upon existing facts that were ascertainable and to be determined upon an inspection of the books. In the absence of the contract, the law fixed the rights of the parties upon the facts when determined. The district court estimated that by the agreement, if enforceable, the otherwise balance of \$11,000 to the plaintiff's credit would be increased to over \$50,000. Here is an advance of nearly \$40,000, and what is it for? Appellant says, for his promise that, if the inspection of the books should show a balance in Knight's favor, he should have the same advantage. Such a transaction does not invoke the rule of law that one promise is a consideration for another promise. In such case the transaction is an executory one, and the promises are such as, when performed, will come within the definition of a consideration as granting some right, interest, profit, or benefit to another, or assuming some obligation, responsibility, or loss. Neither party, in this case, in a legal sense, furnished such a consideration to sustain his right to the marvelous advantage to result. This case, as to consideration, is not unlike the following: A. and B., after an election, and before the result was known, agree that, if C. is elected, A. shall have B.'s horse; if D. is elected, B. shall have A.'s horse. Is one promise a consideration for the other, so as to be enforceable? As much so, we think, as the promises in this case. We have reserved for reference in this connection the case of *Kemmerer v. Kemmerer*, (Iowa,) 52 N. W. Rep. 194. The case was determined in this court in May, 1892. It supports the general rule we have announced, and has a direct bearing upon the particular point we are now considering. The issues involved a partnership accounting, and a question of interest upon past transactions of the firm. In the opinion it is said: "This interest the referee refused to allow, finding in effect that it was interest charged entirely upon past transactions, when there was no legal obligation to pay interest, and that the evidence as to the agreement between the defendants that said interest should be paid

was conflicting. This finding was all right. There is nothing in the partnership contract providing for the payment of interest, and the agreement to pay it, based upon transactions then past, would amount to nothing more than a gift by these partners to the firm. The same is true in this case. The agreement to pay interest, where, by the law, no interest could be charged, was but a gift by one partner to the other, and, not being performed, it is not enforceable. We are not differing materially as to the real purpose or motive for this particular feature of the contract from appellant's view, for in argument it is said: "As has been seen, it was not an unlawful agreement to make, and each took his chances of what would be monthly fluctuating balances as the books then stood. But when they had agreed to correct the books it would be still more uncertain what would be disclosed as to the monthly balances. These balances would be fluctuating. Knight claimed they would be more often and more largely in his favor, and, hoping to get the best of the bargain, provided, in consideration of Smith's promise to him, upon the basis of the same fluctuating balances, that the interest should be allowed as in the contract provided." The bargain was, then, to take chances upon what a computation in correction of the accounts would disclose, with a gain or loss to each partner, as the result should be in favor of or against his judgment. Every gambling enterprise is supported by the same consideration. The transaction, in this particular, was entirely without an element of business venture in its proper sense. Under appellant's theory it was a speculation by each party upon the correctness of his judgment as to past occurrences. The district court concurred with the referee in the conclusion that the contract was not only without consideration to support it, but because of its character, and the direful consequences to result, it was too inequitable to meet with favor at the hands of a court of equity. These conclusions are, to our mind, irresistible.

It is not important, in view of our holdings upon the other questions, that we should consider that of the contract being usurious.

2. D. B. Knight died January 25, 1886. The referee found that plaintiff took possession of a mill belonging to the firm, and occupied it continuously until April 15, 1890, and enjoyed the benefit thereof, and charged to him in the accounting, as rent therefor, \$6,473.50, being \$125 per month. Appellant earnestly contends that this finding is erroneous, and that appellant, as a surviving partner, should not be charged with such rent, because the preservation of the estate of the firm demanded that he should take possession of the mill, and operate it, which he did without benefit to himself, and, in fact, at a loss. We are satisfied from the

evidence, as were the referee and the district court, that the operation of the mill after the death of Knight was not for or on account of the firm, but for the plaintiff personally. Many of his doings are inconsistent with any different conclusion. It may be said in this connection that his management of the personal assets of the firm, under his doings as surviving partner, rendered it impossible for himself, or any other person after a short time, to know the extent of his liability as such surviving partner, and the conclusions as to such liability are but approximations. If they are erroneous, it is the result of his own mismanagement. With a proper inventory of all effects when he assumed his duties as surviving partner with a view to closing up the affairs of the firm, and a conduct of the business with that end in view, and on the account of the firm, instead of his personal account, an accurate accounting could have been had and the interests of all protected. The following from *Laswell v. Robbins*, 39 Ill. 209, is quite applicable to the facts of this case: "When the partnership terminated, plaintiff in error, if he had regarded the duties and obligations of a partner, instead of appropriating the property to his own use, would have made some disposition of it for the benefit of the members of the firm, or would, at least, have taken the necessary steps for a settlement. Property at the termination of the partnership belonged to the firm. If so, and the plaintiff has appropriated it to his own use, he must account for it on the settlement of the affairs of the partnership. It was then in his power to have had clear and satisfactory evidence of the articles and their value on hand at the time the partnership terminated. It would have been attended with but little difficulty to have made an inventory and fixed the value; but, having failed to do so, the defendant in error not having the power to so do, he must establish his claim in the best mode he can; and if, in doing so, he has to prove facts from which presumptions have to be indulged in which plaintiff in error thinks overcharge him, he will have no right to complain if he has failed to preserve the evidence which it was his duty to obtain." The rental value of the mill, as found by the referee, has full support in the testimony, and we see no reason why the conclusion should be disturbed.

3. The referee refused to allow plaintiff compensation for his services in settling the partnership affairs, and of this complaint is made. The general rule is that compensation to a surviving partner for such service is not allowed. Many authorities sustain the rule, and, among them, *Starr v. Case*, 59 Iowa, 503, 13 N. W. Rep. 645. The reason of the rule is that the law enjoins such duty under the contract of partnership. See *Beatty v. Wray*, (Pa.) 57 Amer. Dec. 677. Prior to the death of Knight each partner

drew from the firm \$100 per month, and this fact is regarded by appellant as implying an agreement for compensation. There being but two partners with equal interests, such a practice amounted simply to a division of profits to that extent. By what name it was called would make no difference. Nothing in the record shows that one partner, because of excessive service, was to receive more than the other, and the law, under the general rule, does not permit it. See *Beatty v. Wray*, supra. For such assistance as was necessary the plaintiff was entitled to an allowance, and received it in the accounting made by the referee.

4. Numerous complaints are made as to specific items of the accounting. These we cannot profitably consider in detail. They are questions of fact to be determined from the testimony, and that cannot be set out. It is doubtful if any two persons, upon separate examinations, would reach the same conclusion on each and all of these items. We have endeavored with care to know if the result, as to appellant, was sustained by the evidence, and many days have been given to an understanding of this voluminous record. We observe but a single item charged to the appellant that is without sufficient support. Among the assets of the estate was a house and lot rented to one Driscoll, and there was an unpaid balance for rent of \$212, for which appellant is made debtor. This uncollected amount was by appellant passed to the receiver, and by him sold. This occurred, of course, after the finding and report of the referee, but the confirmation of the report and the judgment as entered includes this item. The ground of appellees' contention in support of the charge is that there is testimony tending to show that the failure to collect this rent was through the negligence of appellant. We think the testimony is insufficient to sustain the finding, but this fact does not have the effect to modify the decree in this court. We are also of the opinion that in one or more particulars appellees are erroneously debited with items in excess of the one for \$212. We instance the item known in the record as for \$1,581.41, credited to Smith. It is a matter of doubt if the item was a matter of partnership accounting, but, if so, under the most favorable view of the evidence, the finding involves an error against appellees of \$440.90, which more than overcomes the erroneous debit item to appellant. But in this connection it is urged that this finding against appellees cannot be considered, because they have not appealed; the thought being that only matters of complaint by appellant are involved in the trial on appeal. On the other hand, it is contended by appellees that the whole case is for trial anew, and that such a judgment should be entered as the law and the facts will warrant.

Neither position, in our judgment, is correct. Appellees attach importance to the fact that in equity causes the trial is anew, and contend that it should be a trial of the whole case. On appeal in equity causes the trial is of the whole cause in so far as the appellate court is involved, but its province is not to reverse or modify judgments in favor of parties who are content with the judgment below, which fact is assumed in the absence of complaint by the party, and the legal mode of complaint is by appeal. Such a rule works no hardship, and we think it is a consistent rule of practice. *Hintrager v. Hennessy*, 46 Iowa, 600; *Devoe v. Hall*, 60 Iowa, 749, 14 N. W. Rep. 124; *Frost v. Parker*, 65 Iowa, 178, 21 N. W. Rep. 507; and *Huff v. Olmstead*, 67 Iowa, 598, 25 N. W. Rep. 784,—are equity cases in which the rule has been announced, and the Reports contain other cases of both forms of action announcing the same rule. This appeal was taken in the light of these holdings, and they must be held as conclusive of the question. As to the contention of appellant that we cannot consider anew findings of facts against appellees by the court below, we must say that we are not aware that such a rule has ever been sustained or announced. In *Frost v. Parker*, supra, it was said that a party not appealing from a judgment "must be regarded as satisfied with it." In that case this court refused to modify a decree in favor of the party not appealing, to which modification he would have been entitled on his own appeal. On the trial of an equity cause on appeal this court examines the entire record, to determine the decree that should be entered, and the findings of the district court are no limitation upon its course of procedure. It considers the case anew, and directs judgments in accord with its findings, except that, where one party indicates, by not appealing, that he is satisfied with the judgment, it will not be modified in his favor. If, in the judgment of this court, from an examination of the entire record, the decree below was correct, it will not reverse because of errors of the district court as to findings of particular facts. In *Alexander v. Buffington*, 66 Iowa, 360, 23 N. W. Rep. 754, it is said: "If there is a good reason for the support of the decree, it will not be reversed because it was based by the court below on a bad one." In *Bank v. Wright*, 48 N. W. Rep. 91, which was a law action, we held, as against the plaintiff, who had not appealed, that it could not urge as error a ruling against it by the district court, because no assignment of error brought it in question. In a supplemental opinion, on an application for a rehearing, we modified or changed the holding so as to permit matters of record to be urged by appellee without assignment of error, for the purpose of protecting a judgment in its favor by showing that the errors assigned by the appel-

lant were not prejudicial. 50 N. W. Rep. 23. That holding is in harmony with our views as expressed in this case.

These considerations lead us to a very satisfactory conclusion that the decree of the district court should be and is affirmed.

STATE v. HARPER.

(Supreme Court of Iowa. May 15, 1893.)

CRIMINAL LAW—TAKING CASE FROM JURY.

On a prosecution for seduction it is error to take the case from the jury after prosecutrix has testified, but before the state has rested, where it is possible that the state may have had other evidence of defendant's seductive arts.

Appeal from district court, Mahasha county; A. R. Dewey, Judge.

Defendant was indicted and put upon trial on the charge of having seduced one Alice Wignall. Judgment was rendered as follows: "At the conclusion of the evidence on the part of the prosecutrix the court arrests further proceedings in this case for the reason that the evidence shows no seduction. It is therefore ordered by the court that the said jury be discharged, and it is further ordered that the defendant be discharged, and the sureties on his bond be released." To the rulings of the court the plaintiff at the time excepted. The state appeals.

Byron W. Preston, for the State.

GIVEN, J. 1. It appears from the record that at the conclusion of the testimony given by the prosecutrix, and before the state had rested, the court, on its own motion, arrested further proceedings, and entered judgment as stated above. It is contended that this action of the court was erroneous, for two reasons, namely, that the state had not yet introduced all its testimony, and rested, and that there was such evidence of seduction that the case should have been left with the jury. The court, in taking the case from the jury before the state rested, must have acted upon the conclusion that the state could not produce other evidence of seduction than that given by the prosecutrix herself. While such is ordinarily the case, it is not necessarily so, and the freedom with which the defendant talked with the witness Burk on this subject indicates that the state may possibly have had other evidence to show the use of seductive arts. We think the state should have been permitted to introduce all its evidence. It is not necessary that we set out or discuss the evidence. It is sufficient to say that in view of the mature years and experience of the defendant, and the tender years and inexperience of the prosecutrix, and her statements of what was said and done, the question of seduction should have been submitted to the jury, with proper instructions.

Reversed.

MORGAN v. ZENOR.

(Supreme Court of Iowa. May 16, 1893.)

REPLEVIN FOR PROPERTY SEIZED UNDER EXECUTION—COLLATERAL ATTACK ON JUDGMENT.

An action will not lie against a sheriff to recover property seized under execution issued on a judgment rendered by a court of general jurisdiction, where it is not alleged that the court rendering the judgment did not have jurisdiction of the subject-matter, that the execution was defective, or that the property was exempt, but merely that the judgment is void because there never was any original notice, either actual or constructive, served on plaintiff, and the same was rendered wholly without jurisdiction.

Appeal from district court, Dallas county; J. H. Applegate, Judge.

Action to recover possession of personal property. Defendant demurred to plaintiff's petition, and, the demurrer being sustained, and plaintiff electing to stand on his petition, judgment was entered against him, from which he appeals.

John Shortley, for appellant. Alford & Gates, for appellee.

GIVEN, J. 1. Plaintiff, after alleging in his petition that he is the absolute and unqualified owner of the personal property described, and that the defendant sheriff wrongfully detains possession of said property from him, alleges as follows: "That said property was taken from this plaintiff by the defendant sheriff under a pretended execution issued out of the office of the clerk of the district court of the state of Iowa in and for Black Hawk county on a pretended judgment in favor of Jansen, McClurg & Co., and against this plaintiff, but plaintiff alleges that said judgment is absolutely void, for the reason that there never was any original notice, either actual or constructive, served upon or given to this plaintiff in the said cause, and the same was rendered wholly without jurisdiction. Said execution is likewise wholly null and void, and in no manner authorizes the seizure of said property by the said defendant sheriff. That the plaintiff has notified the defendant sheriff of the facts hereinbefore set out, and made demand for said property, but that the said defendant has refused and still refuses to give possession thereof to this plaintiff. That the alleged cause of detention, according to the best belief of plaintiff, is by virtue of said void and fraudulent execution. That the plaintiff has sustained damages by reason of the said wrongful detention in the sum of one hundred dollars, no part of which has been paid." Defendant demurred upon the following grounds: "First. The petition does not aver that the property seized and levied upon by the defendant herein, upon the execution held by him issued out of a district court of Black Hawk county, Iowa, was exempt from execution, but, on the contrary, shows that such property was subject to ex-

ecution, and subject to be levied upon by the defendant upon said execution. Second. The petition shows that it was taken on account of an execution issued out of the district court of Black Hawk county, Iowa, on a judgment in favor of Jansen, McClurg & Co. versus the plaintiff herein, and the plaintiff has no legal right to replevin property seized upon execution issued out of a court of record of this state against himself, unless said property is exempt from execution." It will be observed that it is not alleged that the court rendering the judgment did not have jurisdiction of the subject-matter, nor that the execution was informal or irregular on its face, or that the property was exempt from seizure. This action is based upon the allegation that there was no service of an original notice upon this plaintiff in that action. Section 3225 of the Code provides that in actions for the recovery of specific personal property the petition must be verified, and must contain a description of the property claimed, statement of its value, the facts constituting the plaintiff's right to the present possession, the extent of his interest in the property, and "that it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him, or against the property. But if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process." "At common law, the owner of a chattel cannot maintain an action of replevin for the possession of goods taken from him by virtue of legal process." *Cooley v. Davis*, 34 Iowa, 129; *Funk v. Israel*, 5 Iowa, 450. The last sentence of paragraph 4 of section 3225 of the Code quoted above modifies this rule, so far as to authorize the maintenance of an action for the recovery of specific personal property seized by legal process, when the verified petition states "the facts constituting an exemption from seizure by such process." While it is true that, under the statute, replevin will lie only for such property as is exempt from execution or attachment under the exemption laws, yet, if the property be seized and held by an officer without legal process, replevin may be maintained without regard to the character of the property. If the process issue from a court having no jurisdiction of the subject-matter, or if an execution issue without a judgment having been rendered, or if the law under which the process is issued be unconstitutional, the process is void, and replevin may be maintained for property seized by the officer. *Cooley v. Davis*, supra; *Campbell v. Williams*, 39 Iowa, 646. The general rule is that property seized on a legal writ issued by a court having jurisdiction of the subject-matter, under a valid statute, cannot be replevied by the owner. *Thompson v. Button*, 14 Johns. 84; *Kellogg v. Churchill*, 2 N. H. 412; *Freeman v. Howe*, 24 How. 450; *Deshler v. Dodge*, 16 How.

622; *Musgrave v. Hall*, 40 Me. 498; *Griffith v. Smith*, 22 Wls. 647. It is not alleged that the court rendering this judgment did not have jurisdiction of the subject-matter, and as it is a court of general jurisdiction we must presume that it had, in the absence of allegation to the contrary. Upon this petition we have a case wherein a court having jurisdiction of the subject-matter rendered judgment, upon which execution in due form was issued, and levied upon the property in question. Under the rule quoted above, this appellant may not contest the validity of that judgment in this form of action, but must resort to the proper remedies for such relief. Affirmed.

STATE v. SMITH.

(Supreme Court of Iowa. May 16, 1893.)

INDICTMENT—ALLEGATION OF TIME—GRAND JURY—FORMER JEOPARDY.

1. An indictment containing but one allegation as to the time of the commission of the offense, and stating that it was committed on a future day, is bad: the provisions of Code, § 4306, that no indictment is insufficient for want of an allegation of the time of any material fact when the time has once been stated, and of section 4305, that an indictment is good if it can be understood therefrom that the offense was committed some time prior to the finding of the indictment, being inapplicable.

2. Code, § 4256, provides that if, from any cause, the number of the panel be reduced to a less number than required, the court may order the sheriff to summon a sufficient number of qualified persons to complete the panel. *Held*, that where the grand jury returned a defective indictment, and was still in session when defendant was put on trial, it was proper to bring in the grand jury to find a new indictment, and, each member of the panel that returned the indictment being excused on defendant's challenge because of having formed an opinion, to summon other persons to complete the panel.

3. Where an indictment is fatally defective, although a jury is impaneled to try defendant, there being no trial or verdict, and the jury being discharged, defendant is not put in jeopardy so that he cannot be tried under a new indictment.

Appeal from district court, Tama county; L. G. Kinne, Judge.

Defendant was indicted, tried, and convicted of the crime of obtaining money by false pretenses, and judgment entered against him, from which he appeals.

Tom H. Milner, for appellant. John Y. Stone, Atty. Gen., and Thos. A. Cheshire, for the State.

GIVEN, J. 1. The following questions presented upon this appeal arise upon the following proceedings had in the case, as shown by the record: The defendant was held on preliminary examination to appear at the February term, 1891, of the district court for Tama county, to answer a charge of obtaining money by false pretenses. He appeared and waived challenge to the grand jury. On the 24th day of February, 1891, said grand jury returned an indictment against the de-

defendant charging him with the crime of obtaining money by false pretenses, alleging it to have been committed on the 17th day of December, 1891. The defendant was put upon trial at said term on this indictment, and at the conclusion of the evidence on the part of the state he moved for a verdict of not guilty, for the reasons that the indictment charged the crime to have been committed on an impossible date. The motion was overruled, and, as it was apparent on the face of the indictment that it charged the crime to have been committed on a date in the future, the court discharged the trial jury, had the grand jury, then in session, brought in, and called upon the defendant to examine and challenge the grand jury, which he did under protest. Upon examination each member of the panel that returned the indictment was excused upon defendant's challenge because of having formed an opinion, and, as each one was excused, the sheriff, in obedience to the order of the court, summoned qualified persons to fill the panel until the panel was complete. The grand jury thus selected being duly sworn and charged, the case against the defendant was submitted to it upon the papers returned by the justice of the peace. On March 3, 1891, said grand jury returned an indictment against the defendant for said offense, charging that he committed it on the 17th day of December, 1890. On May 19, 1891, appellant's motion to set aside said indictment because of the former indictment and proceedings being overruled, he pleaded not guilty, and also pleaded that he had been once in jeopardy on said charge, and acquitted because of the proceedings had on the first indictment. Appellee demurred to said last plea, and, the demurrer being sustained, the case was tried upon the issue of guilty or not guilty, and a verdict of guilty returned, upon which judgment was pronounced.

2. In this case we have the anomaly of a defendant insisting upon the sufficiency of an indictment against himself. Appellant contends that the first indictment returned against him was sufficient, and it was therefore error to discharge the trial jury to re-submit the case to the grand jury, and to put him upon trial a second time. The indictment returned February 24, 1891, charged the crime to have been committed on the 17th day of December, 1891. The time is nowhere else stated. Appellant's counsel contend that this allegation of time is immaterial; that the true time could be proven under the allegation, and therefore the indictment was sufficient. Such was certainly not the view entertained when the motion for a verdict was urged. Appellant cites section 4306 of the Code, which provides that no indictment is insufficient "for want of an allegation of the time or place of any material fact, when the time and place have once been stated." The section is inapplicable. This is not an omission to state the time when it had once been

stated, but stating an impossible time. He also cites section 4305, which provides that the indictment is sufficient if it can be understood therefrom "that the offense was committed some time prior to the finding of the indictment." It cannot be so understood from this indictment. It states but one date; a date not prior, but subsequent, to the finding of the indictment. If, as in *State v. Brooks*, (Iowa,) 52 N. W. Rep. 240, a date prior to the finding of the indictment had been once stated therein, the indictment might be held sufficient. *State v. Pierre*, 39 La. Ann., indexed as page 915, 3 South. Rep. 60, is cited. Because of an error in indexing we have been unable to find the case. The index states the point decided as follows: "An immaterial and impossible date in an indictment may be corrected at any time, particularly when the date is not of the essence of the offense charged." The statement of the date upon which an offense was committed is not an immaterial statement. The date is material, not only as information to the accused, but to show that the crime was committed prior to the finding of the indictment, and within the statute of limitations. *State v. Dominique*, 39 La. Ann. 324, 1 South. Rep. 665, also cited, is not applicable. In that case an amendment of an information for larceny was allowed under the statute as to the given name of the owner of the stolen property. In *Myers v. Com.*, 79 Pa. St. 308, referred to, an indictment was returned in December, 1874, charging the crime to have been committed on the 11th day of October, 1874. Under the statutes of that state the indictment was amended so as to read the 11th day of November. The case is not in point, for the reasons that the date alleged was not an impossible date, and that we have no such statute. No indictment is sufficient that does not state the time at or about which the offense was committed, and, if it states an impossible time, it fails to charge an offense. We are in no doubt but that the first indictment was insufficient. The power of the court to set aside the indictment if insufficient, and to resubmit the case to the grand jury, is not questioned.

3. Appellant's next complaint is of the manner in which the grand jury was selected that found and returned the second indictment. Section 4256 of the Code, after providing how the grand jury shall be selected from those summoned and appearing, and that those not selected "shall be discharged for the term," provides as follows: "If from any cause, either then or afterwards, the number of the panel be reduced to a less number than required, the court may order the sheriff of the county to summon a sufficient number of qualified persons to complete the panel." Because of appellant's challenges, the number of the panel was reduced to a less number than required. Those summoned, but not selected, at the first organization of the panel, could not be called,

for they had been "discharged for the term." It is to provide for just such a contingency as arose in this case that authority is given to summon a sufficient number of qualified persons to complete the panel. That is just what was done in this case, and the grand jury so called was selected as authorized by law.

4. Appellant's next contention is that the court erred in sustaining the demurrer to his plea of former jeopardy and acquittal, because of the proceedings had upon the first indictment. "In general, it may be said that jeopardy begins when a trial jury, upon a sufficient indictment in a court of competent jurisdiction, has been impaneled and sworn to try the case." *State v. Redman*, 17 Iowa, 329; 11 Amer. & Eng. Enc. Law, 930. The indictment not being sufficient, jeopardy did not begin with the impaneling of that jury. There was no trial or verdict, the case having been legally taken from the jury; and therefore no acquittal. The demurrer was properly sustained. Appellant's final contention is that upon the whole record no legal judgment could be pronounced. The only reasons indicated are those already considered. Entertaining the views we have expressed, we think the judgment of the district court is fully authorized by law, and it is therefore affirmed.

KINNE, J. took no part.

FAWKNER v. LEW SMITH WALL PAPER CO. et al.

(Supreme Court of Iowa. May 16, 1893.)

CONTRACT TO DELIVER GOODS — CONSTRUCTION — ACTION FOR NONDELIVERY — PAROL EVIDENCE OF PRICE.

1. A written contract reciting that "on demand I promise to deliver to the order of F. \$800 * * * in wall paper, at wholesale price, good, clean, assorted stock out of my store," is unambiguous, and means that such "wholesale price" is to be determined as of the time demand is made for the paper.

2. In an action for failure to deliver the paper at such price, parol evidence is inadmissible to show that at the time of making the contract the parties agreed that the wholesale price should be as stated on a printed card then delivered to the purchaser, since it changed the terms of the written contract. 49 N. W. Rep. 1003, reversed.

Appeal from district court, Polk county; M. Kavanaugh, Judge.

Action on a written contract for the delivery of wall paper. Verdict and judgment for defendants. Plaintiff appeals.

J. R. Barcroft and Crom Bowen, for appellant. P. F. Bartle, for appellees.

KINNE, J. 1. The question involved in this case was deemed of such importance that a rehearing was granted, and further argument had. The original opinion will be found in 49 N. W. Rep. 1003. Plaintiff declared upon the following written con-

tract: "Des Moines, Iowa, July 11, 1887. On demand I promise to deliver to the order of E. F. Fisher eight hundred dollars, (less 20 per cent. discount,) in wall paper, at wholesale price, good, clean, assorted stock out of my store on Fifth street, Des Moines, Iowa. No storage. Lew Smith Wall Paper Co." On the same day there was indorsed on the back of said contract a statement signed by Fisher that he had given Towne & McFarland an order for \$200 worth of said paper, and that it had been delivered to them; also, an assignment of the contract to the plaintiff. It was averred that demand had been made for the balance of the goods at the wholesale price, and that defendant refused to deliver the goods at said price. Judgment was asked for \$600 and interest. The defendant admitted the execution of the contract, the payment of the \$200, and denied all the other allegations in the petition. He also pleads that, at the date of making the order and of its acceptance by Fisher, the "wholesale price" for good, clean, assorted wall paper, and the price upon which said order was based, and at which said paper was to be delivered by defendant to and accepted by payee was agreed upon, and set forth on a card, then shown Fisher, and a copy of same is attached to the answer; that the schedule of prices printed upon the card were then agreed upon between the parties to said order as the then wholesale prices at which paper was to be delivered, and said card accompanied the order, as a part of it, and a part of the contract fixing the wholesale price for said paper. It is also averred that defendant has tendered the \$600 in paper to plaintiff, in accordance with the contract and terms of said card.

2. Defendant was permitted to prove that when the contract was made between the parties, he handed plaintiff's assignor a card, having printed thereon a price list of wall paper, and that he was to take the paper mentioned in the contract at the prices stated on the card. This evidence was objected to, as it tended to vary and contradict the written contract of the parties. Defendant claims the evidence was admissible as constituting a part of the contract; that though it was on a separate piece of paper, still it was in fact but a part of, and altogether constituted but, one contract. The rules of law touching the admission of parol, contemporaneous evidence, to add to, vary, or contradict the terms of a written contract, are well settled. The difficulty in these cases generally arises, not as to any doubt as to what the law is, but as to whether or not the case presented comes within the rules prohibiting the introduction of such evidence. We do not think the evidence was admissible. It tended to add to, vary, and contradict the written contract. By the terms of the contract defendant company bound itself to deliver to plaintiff, whenever

he demanded it, wall paper of the value of \$800, (less 20 per cent. discount,) and the price of the paper was by the very wording of the contract to be the wholesale price at the time of such delivery. The instrument, it occurs to us, was in no wise ambiguous or uncertain, so as to call for extrinsic evidence to render certain the meaning of language which, without it, would be obscure or unintelligible. It required no explanation as to what the "wholesale price" meant. The words "wholesale price" have a fixed, certain, and well-defined meaning in the mercantile world. They mean the price fixed on merchandise by one who buys in large quantities of the producer or manufacturer, and who sells the same to jobbers, or to retail dealers therein. Neither can it be successfully claimed that the written contract leaves it a matter of doubt or uncertainty as to what wholesale price should be used in determining the value of the paper. The plaintiff or his assignor, by the plain terms of the contract, had a right to demand its fulfillment whenever he chose so to do. The contract was by its terms to be satisfied by delivery of wall paper at wholesale price, the delivery to take place on demand. It was then a contract in all respects complete and perfect as to the parties, the subject-matter, and the delivery. There is no claim that the schedule of prices, as set forth on the card introduced in evidence, was to be a part of the written contract, and was omitted by accident, mistake, oversight, or fraud. No such issue is presented. The evidence objected to would work a material change in the terms of the contract. It shows that the paper was to be received at a price which was agreed upon when the contract was executed, and outside of the provision of the written contract. It measured the amount of paper that should be received under the written contract by the then wholesale market price, when the written contract measured the amount of paper to be delivered under it by the wholesale price at the time of demand made for the goods.

3. Another thing must be borne in mind in determining as to whether or not the written contract is such that it can be varied by parol evidence, and that is that the law raises certain implications from the terms used in the contract. That whatever the law thus implies from the language used in the writing is as much a part of the contract as that which is expressed therein. *Works v. Hershey*, 35 Iowa, 343; *Emigrant Co. v. Clark*, 47 Iowa, 673; *Lumber Co. v. Mead*, (Minn.) 44 N. W. Rep. 306. Hence, if the contract as expressed, or viewed in the light of what the law thus implies from the language used therein, is clear, definite, and complete, the rule applies that it cannot be added to, varied, or contradicted by extrinsic evidence. We have endeavored to show that this contract is complete in itself, and,

when construed in the light of its legal import, there can be no doubt as to its meaning, and it does not need the aid of extrinsic evidence. 2 Pars. Cont. (7th Ed.) pp. 683, 694.

4. It is said that a contract may rest partly in writing and partly in parol, and that in such cases extrinsic evidence is admissible to establish that part which is not written. This exception is as well settled as the rule itself. But extrinsic evidence in such cases is only admissible when that part of the contract sought to be thus established relates to some matter about which the writing is silent. If the proposed evidence is in any way inconsistent with the terms of the writing, such evidence is inadmissible. *Blair v. Buttolph*, 72 Iowa, 31, 33 N. W. Rep. 349; 17 Amer. & Eng. Enc. Law, pp. 443, 444; 7 Amer. & Eng. Enc. Law, p. 91; *Taylor v. Galland*, 3 G. Green, 22; *Annis v. Annis*, 61 Iowa, 220, 16 N. W. Rep. 97. In the case at bar the evidence introduced related to a matter as to which the contract itself speaks with certainty. The legal import of the contract determined that the wholesale price therein mentioned should be ascertained as of the date a demand and delivery of the goods was made. It was then impossible that in advance of that time, and at the time the contract was made, the parties could by parol ingraft upon it a provision inconsistent with the written contract as interpreted by the law. As we have said, the rule prohibiting the introduction of contemporaneous parol evidence to add to, change, or contradict a written contract is as clearly applicable when the effect of such evidence is to change the terms of the contract as interpreted by the law as when it contradicts or varies the expressed provisions of it.

5. The court instructed the jury that if they found that at the time the written contract was made a card containing a list of prices of wall paper was produced and shown to said Fisher, and it was agreed between him and the defendant that said card specified the wholesale price attached, and it was delivered to Fisher with the written contract as a part of it, and the goods were to be furnished under said contract, then the defendant had a right to charge for paper furnished to the plaintiff or his assignor the prices appearing on said card. For the reasons heretofore given, this instruction was erroneous.

6. While it is competent in construing a contract to show the situation of the parties, the subject-matter of the contract, and acts of the parties under the contract, as tending to show how they understood it, still this cannot be done to the extent of varying or contradicting a written contract, when such contract is certain, complete, and unambiguous. The case of *Thompson v. Locke*, 65 Iowa, 432, 21 N. W. Rep. 762, was one where the contract was not complete in all its parts. *Shuler v. Dutton*, 75 Iowa,

157, 39 N. W. Rep. 239; *Bigelow v. Wilson*, 77 Iowa, 603, 42 N. W. Rep. 501. For the reasons given the judgment of the district court is reversed.

WILLIAMS v. TSCHANTZ.

(Supreme Court of Iowa. May 16, 1893.)

ESTABLISHING LOST BOUNDARIES — ISSUES ON APPEAL—EVIDENCE.

1. On appeal from the commissioner's report in proceedings to settle disputed boundaries and lost corners, under Acts 15th Gen. Assem. c. 8, the appellee may, at the close of appellant's evidence in chief, file a reply to appellant's exceptions to the report, alleging that the line established by the commissioner, though different from the government line, is nevertheless the true line, because maintained and acquiesced in by appellant and those interested for more than 10 years. Given, J., dissenting.

2. On such appeal, it is proper to incorporate in the abstract the opinion of the lower court.

3. Such an appeal is not a trial de novo.

4. Evidence of corners recognized and acquiesced in by the adjoining owners for over 10 years was competent.

Appeal from district court, Henry county; Charles D. Leggett, Judge.

This is a special proceeding, by which it is sought to establish the corners and boundaries of certain real estate owned by the parties. A commissioner was appointed with the consent of the parties. The commissioner filed his report. Appellant excepted to the report, and the court, after the introduction of evidence by the respective parties, entered an order affirming the report, from which order the defendant, Tschantz, appealed.

W. S. Withrow, for appellant. Leggett & McKemey, for appellee.

ROTHROCK, J. 1. The proceeding is under chapter 8 of the Acts of the 15th General Assembly, and no complaint is made as to the application for the appointment of the commissioner. It appears from the answer of the appellant that he concurred with the plaintiff in the request that a commissioner should be appointed, and by his exceptions to the report of the commissioner it was claimed that the line was incorrectly established by the commissioner, and it was prayed that the report be disapproved, and that the "court hear testimony that the true line dividing said sections may be fixed, and defendants freed from further annoyance and loss." In pursuance of this demand, the court did hear the testimony of a large number of witnesses introduced by the respective parties, and made an order establishing the boundary line in accord with the report of the commissioner.

The first exception taken to the proceeding by the defendant was an exception to a reply to the exceptions to the report filed by the defendant. This reply was filed at the close of the introduction of the defendant's

evidence in chief. The reply was to the effect that the true line was the same as that reported by the commissioner, because the same was surveyed and established by the county surveyor at the instance of appellant and other parties in interest, and that said survey had been maintained and acquiesced in by defendant and the other parties in interest for more than 10 years by setting fences and making other improvements on the lines of that survey. That survey was made more than 10 years before the commencement of this proceeding. The ground of the objection to this reply, and to the evidence introduced to sustain its averments, is that it introduced a new element in the case, and that no such issue was involved in the proceeding, and that the only purpose of this proceeding is to ascertain where the original government lines and corners were located. In other words, it is claimed that where, in a proceeding like this, it appears from the evidence that the original government corners and lines have been legally changed by adverse possession, or by the acts and acquiescence of adjoining owners, the court must limit its inquiry to the proper location of the government lines and corners. It is apparent that such an inquiry would determine no right. The special proceedings would be a mere farce. It would be the finding of a fact which would in no manner determine the rights of the parties. It was no error to permit the reply to the exceptions to be filed. Indeed, no reply was necessary. The defendant requested the court to hear testimony and fix the true line. It was a request, not to hear a moot case, which would determine no right, but to take evidence, and determine the rights of the parties; and it was competent for the court to make a finding independent of that made by the commissioner, and especially is this so where the evidence is received at the request of the parties, as was done in this case.

2. The court filed its decision in writing, which was as follows: "The evidence seems to me to show that the corner as established by Mr. George C. Van Allen, as county surveyor, in 1864, is the original corner described in the field notes of the United States government survey. But it is also shown, particularly by the additional evidence offered on the second hearing, that the adjoining proprietors, including Mr. Tschantz, acquiesced in the subsequent survey which was made by Mr. Mann when he was county surveyor, and that they bought and sold, and set their fences and other improvements, on the lines of that survey. To permit any of them to insist upon the Van Allen survey now seems to my mind contrary to the intention of the statute as interpreted by the supreme court in *Davis v. Curtis*, 68 Iowa, 66, 25 N. W. Rep. 932. A motion was filed in this court to strike the decision or opinion from the abstract. The motion will be overruled. It is always desirable upon an exami-

nation of an appeal that this court should be advised of the reasoning upon which the trial court proceeded in determining a case.

3. This appeal is not triable anew in this court, and the evidence fully sustains the finding that the defendant was precluded from questioning what was known as the "Mann Survey," both by his acquiescence therein and by reason of the lapse of time.

4. And in our opinion the court correctly construed the case of Davis v. Curtis, 68 Iowa, 66, 25 N. W. Rep. 932. It is there held that where it appears that when corners are found which have been recognized and acquiesced in by the adjoining proprietors for 10 years, corners should not be established elsewhere. In the case at bar that fact was found by the court upon sufficient evidence, and appellant could not rightfully object to the evidence, because, whether the hearing is before the commissioner or the court, evidence of "corners that have been recognized as such by the adjoining proprietors for over 10 years" is by the statute made competent evidence. Section 4500, McClain's Code. The judgment and order of the district court are affirmed.

GIVEN, J., (dissenting.) I cannot concur in the conclusion that questions of title by adverse possession or occupancy may be tried in this proceeding. It seems to me that the necessity for and the language and purpose of chapter 8, Acts 15th Gen. Assem., under which this proceeding is had, forbids such a conclusion. I am clearly of the opinion that the sole purpose of that chapter is the permanent establishment of corners and boundaries to lands, and not the settlement of titles based upon any other facts. The provisions of law for settling titles based upon adverse possession or occupancy were ample. Such titles are not necessarily dependent upon, but often independent of, the true corners and boundaries, and rest upon questions of facts which it is the peculiar province of juries to determine. If we recall how the mythical John Doe and Richard Roe used to figure in the search for lost corners and boundaries, we will see something of the necessity of such a law as I maintain said chapter to be. The basis of all surveys of land in this state is the government survey. The lapse of time and improvement of the country has and will continue to obscure and destroy the monuments that mark these and later legal surveys. The preservation of these corners and boundaries is a matter of great importance, yet without a statute it could only be done by tedious and expensive litigation. The necessity for a plain, speedy, and inexpensive proceeding by which lost corners and boundaries can be established and perpetuated is beyond question. Chapter 8, as I construe it, meets this necessity. Under section 1, adjoining owners may, by agreeing upon a survey, and recording the plat thereof, per-

manently establish their corners and boundaries. Under the sections following, if they do not so agree, this proceeding may be had to permanently establish corners and boundaries that "are lost, destroyed, or are in dispute." With their corners and boundaries permanently and legally established, there is no room for further dispute as to rights resting thereon. The skill of the surveyor, rather than the judgment of courts and juries, is required in relocating lost corners and boundaries; hence the provision for appointing a commission of one or more surveyors. If it was a question of occupancy, the judgment of a court and jury, rather than the skill of the surveyor, would be required. Lost corners are relocated by measurements from recognized points; hence the commissioners are authorized to take evidence of persons able to identify any original government corner, or other legally established corner or corners, that have been recognized as such by the adjoining proprietors for over 10 years. Thus it is that the surveyor gets his starting points from which to relocate the lost corner. If a government corner is found, that is controlling; if not, then any legally established corner, or corner that has been acquiesced in as such for over 10 years. I fail to discern in all this how a question of adverse possession or occupancy is involved.

I would hesitate to dissent from the conclusion of the majority upon my own reasoning, but I am confirmed in my conclusion by former decisions of this court. In *Gates v. Brooks*, 59 Iowa, 510, 6 N. W. Rep. 595, and 13 N. W. Rep. 640, the dispute was substantially as in this case. The constitutionality of the law was questioned upon the grounds that it denied the right of trial by jury, and deprived the party of property without due process of law. In speaking of the nature of the proceedings, the court said: "The proceeding contemplated is a summary proceeding designed to determine and locate the true boundary line between landowners, without any issue made in court or trial by jury." After stating that there was no question of title, that it was only an attempt between the parties to apply their respective deeds to the face of the earth, and that defendant claimed the land in controversy on condition that it was within section 15, the court adds: "We find, it is true, some intimation that they claimed it absolutely by adverse possession. But with such claim we have nothing to do in this proceeding. Such a claim, if it is valid, is independent of the true location of the section line. We have to do with nothing except the conditional claim, which is dependent wholly upon the true location of the section line." In *Smith v. Scoles*, 65 Iowa, 733, 23 N. W. Rep. 146, the question was as to the sufficiency of the petition. This court held that where the dispute did not pertain to the question of original boundaries, but to the question of

boundaries as determined by the alleged adverse possession of one of the parties, a commission cannot properly be appointed. "Where the question in dispute is that of adverse possession, either party has a right to a jury." In *Mitchell v. Wilson*, 70 Iowa, 332, 30 N. W. Rep. 588, it was held that the filing of a supplemental pleading similar to the reply filed in this case was unnecessary to admit the evidence, and the rule that the question of adverse possession cannot be considered and determined in this kind of proceeding is recognized and followed. *King v. Brigham*, (Or.) 31 Pac. Rep. 601, is a well-considered case, and so directly in point as to be entitled to consideration. The holding on this question is sufficiently stated in the headnote thus: "(1) Act 1887, giving to courts of equity jurisdiction to try cases where a dispute exists between owners of adjoining lands concerning the boundaries thereof, confers on such courts authority to ascertain the true boundary lines between adjacent estates which have become confused or uncertain, but such authority cannot be extended to the determination of title." The learned judge of the district court* seems to have rested his conclusion upon *Davis v. Curtis*, 68 Iowa, 66, 25 N. W. Rep. 932, and counsel for appellee strongly urge that case as supporting the conclusion. There certainly are expressions found in that opinion that seem to support the conclusion of the lower court, but a careful examination of the case in the light of the questions presented and of the statute leads me to a different view. The dispute there, as here, was the true location of the lost section corner. In 1886, County Surveyor Blakeslee had relocated that corner as claimed by the defendants and adjoining proprietors, and the public had recognized it for many years, and improved by roads, fences, buildings, etc. Two reports were made, the majority fixing the corner as claimed by plaintiffs, the minority as established by Blakeslee, which was as claimed by defendants. The lower court approved the majority report, and this court reversed, saying: "Our conclusion is that the court should have held that the Blakeslee corner was the true one." The Blakeslee survey, and the long recognition of it, warranted the conclusion that it marked the true corner. The evidence of occupancy and recognition was not considered for any other purpose than to relocate the lost corner. It was claimed that, if defendants had "open, adverse possession under color of title or claim of right, they can hold the land without regard to the location of the corner." The court says: "Such a construction of the statute under which this proceeding is had, instead of simplifying these controversies, about boundary lines, which have always been a source of needless litigation, would make the statute a means of oppression." It is further said that if the proceeding "determines no

right, but merely the abstract question as to where the corner was established by the government survey, the statute is of no avail whatever." This is certainly true as to settling rights by adverse possession, and that is what is meant. It is available for relocating lost corners and boundaries upon which important interest may depend. As showing that the question under consideration was not decided as claimed in that case, we quote the following: "We incline to think that it was not the intention of the legislature to impose upon the commissioners the trial of the question of adverse possession to lands, and that, when they find no marked government corner, but do find one that has been acquiesced in by adjoining proprietors for ten years, they should report that fact to the court, and it should be an end of the proceedings." It is further said: "We are clearly of the opinion that the only evidence of a marked corner was that established by the Blakeslee survey, and we are unwilling to allow the plaintiffs, upon this record, to establish a corner elsewhere, which, if held to be the true corner, would produce so serious results as the making and improving of new roads, the destruction of hedges, the removal of fences and buildings." *Doolittle v. Bailey*, (Iowa), 52 N. W. Rep. 337, was a proceeding to establish a lost section corner. Defendants pleaded acquiescence in the point claimed by them and the statute of limitations. The commissioner recommended the point claimed by plaintiffs. The court rejected the report, and established the corner as claimed by defendants. The questions considered were whether there had been acquiescence for over 10 years, the statute of limitations, and whether the court erred in deciding contrary to recommendation, and in not re-referring the matter. The court says: "Regardless of the questions of acquiescence and of the statute of limitations, we think the decision of the court was fully justified by the evidence. In this case the question to be determined is not where the government corner ought to have been located, but where was it in fact located? Once found, or the place of its location identified, it must control, regardless of the fact that the actual location of the corner may result in deflecting the section line from a straight course between government corners located east and west of said supposed lost corner. This proceeding is not instituted for the purpose of straightening lines, thereby removing unsightly crooks in roads, no matter how desirable such a result might be, but it is to ascertain the location in fact of the government corner." It is further said: "We have no difficulty in finding from it [the evidence] that the corner in controversy, as established by the government survey, was at the place contended for by defendants." That was the place fixed by the court, and its judgment was affirmed. In *Davis v. Cur-*

tis, supra, as in this case, the lower court fixed a point other than that established by the government survey as the corner, and the case was reversed, and the corner re-established where it was found to have been established by the original survey. It is said that to limit the inquiry to the proper location of the government lines and corners would determine no right, and that the special proceeding would be a mere farce. I do not so view it. The proceeding may be had as to any lost, destroyed, or disputed corner and boundary, whether established by government or other legal survey. It often is a matter of importance to adjoining owners to know where the true corners and boundaries of their lands are, as their rights depend upon them. Neither may claim anything by adverse possession or occupancy, yet have important rights depending upon the re-establishment of a lost corner. It is certainly not an empty proceeding—a farce—to determine so important a matter as the true location of a lost corner and boundary to land. By this proceeding the true corners and boundaries are established, and, if either party claims rights beyond that boundary, by virtue of adverse possession or otherwise, let him go to the courts of law, where his rights can be passed upon as provided in the constitution, namely, by a jury.

CARR v. WHITEBREAST FUEL CO. et al.
(Supreme Court of Iowa. May 16, 1893.)

LEASE OF COAL LAND—CONSTRUCTION—FAILURE TO MINE AMOUNT SPECIFIED—MUTUAL MISTAKE AS TO AVAILABLE COAL—CHANGE OF SCREENS—ACTION FOR ROYALTIES.

1. A lease of land to a mining company, in consideration of the payment to the lessor of a specified royalty on merchantable coal "to be taken out" of such land, required the lessee to conduct thereon the principal mining business in the county, and take from such land a majority in bushels of all the coal mined by it in such county each year, except that the amount need not exceed 200,000 tons per annum. The lease was to continue until the lessee should remove all the "available, merchantable, and salable coal" on the land. On performance by the lessee, and on "condition that it shall have taken out all the available coal from said land, as contemplated," it was entitled to certain specified rights. *Held*, that the chief purpose of the lease was the mining of all available coal on the land, and the payment to the lessor of the specified royalty.

2. At the time such lease was executed, both the lessor and lessee believed that there was sufficient available merchantable coal on the land to enable the latter to take therefrom the amount required by such lease, but in a few years it transpired that the lessee could not take more than one-half of all the coal mined by it in such county without reducing the output from other land. *Held* that, where the lessee had mined all the available coal, and the lessor had received royalty on all the merchantable coal mined, the latter was not entitled to royalty on the difference between the amount actually mined and the amount required by the contract to be mined.

3. Where, by the terms of such lease, the lessee has no right to surrender the premises

until the available coal is exhausted, it is not required to surrender them to entitle it to exemption from payment of royalty on coal not mined therefrom.

4. Such lease provided for the payment of royalty on the lump coal. After it was executed the lessee changed the screens for others, having much wider spaces between the bars. Before the change the miners sent out quantities of slack, intended to be left in the mine, and which was carried over the screens into the cars designed for merchantable coal only, causing much complaint by the lessee's customers. *Held*, that the lessee was authorized to change the screens, since merchantable coal, contemplated by the lease, must be presumed to be of a quality to compete with the same grade taken from other mines.

5. Where, in an action to recover royalty on coal which passed through the new screen, there is evidence that as large a per cent. of the coal mined passed over the new as over the old screens, and was classed as lump coal, and plaintiff fails to show that he did not receive royalty on as large a proportion of the coal mined after the new screens were adopted as he did before, he is not entitled to recover.

Appeal from district court, Lucas county; W. I. Babb, Judge.

Action in equity for an accounting, and to recover amounts alleged to be due under the provisions of a mining lease. There was a hearing on the merits, and a decree for defendants. The plaintiff appeals.

C. C. Leech, for appellant. T. M. Stuart and Wm. McNett, for appellees.

ROBINSON, C. J. On the 13th day of June, 1874, the plaintiff leased 540 acres of land in Lucas county, which he then owned, to William Haven. The lease was for the term of five years, and gave to the lessee the right to prospect for, and mine and remove from the leased premises, coal and other minerals, together with certain privileges for the purpose of carrying on mining operations, which need not be enumerated. The right to purchase the leased premises at the end of 5 years, at a price to be then fixed, or to elect to extend the lease for a period of 20 years at a rate of royalty not exceeding one-half of one cent per bushel for merchantable coal mined, was given to the lessee. An undivided two-thirds of the rights conferred upon Haven by the lease were afterwards assigned to J. C. Osgood and L. R. Fix, and at a later time all the rights of the three persons last named, held under the lease, were transferred to the Whitebreast Coal & Mining Company. Coal was found on the leased premises, which are sometimes described as the "Carr Land," and in the year 1876 a shaft was sunk west of, and near to the west boundary line of, that land, entries were run into it, and the mining of coal therefrom was commenced in the summer of that year. Operations under the Haven lease were continued until the 17th day of February, 1880, when the one in controversy was executed by plaintiff to the Whitebreast Coal & Mining Company for the premises included in the first lease. A copy of the second lease is as follows:

"This memorandum of agreement, made and entered into on this 17th day of February, A. D. 1880, by and between Byron O. Carr, of Louisville, Ky., party of the first part, and the Whitebreast Coal & Mining Company, of Burlington, Iowa, party of the second part, witnesseth, that for and in consideration of the covenants and agreements hereinafter contained, to be performed by the party of the second part, and of the further sum of one (1) dollar in hand paid, the receipt whereof is hereby acknowledged, the party of the first part does hereby demise and lease unto the said party of the second part the following described real estate, situate and being in Lucas county, in the state of Iowa, to wit: The northwest quarter of the northeast quarter, the south half of the northeast quarter, the south half of the northwest quarter, the north half of the southwest quarter, the northeast quarter of the southeast quarter, the south half of the southeast quarter, in section eighteen, (18,) and also the northwest quarter of the northeast quarter, the south fractional part of the northeast quarter of the northwest quarter, in section nineteen, (19,) and also the southwest quarter of the northwest quarter, and the north fractional part of the northwest quarter of the southwest quarter, in section seventeen, (17,) all being in township seventy-two (72) north, and range twenty-two (22) west of the fifth principal meridian, and containing five hundred and forty (540) acres, more or less; to have and to hold the same for a term beginning the 1st day of January, A. D. 1880, and continuing until, in mining and operating its mining business with the diligence and in the manner hereinafter provided, the party of the second part shall be able to mine and remove all the available and merchantable and salable coal to be found therein, and for the said purpose of mining said land, and other purposes, and subject to the following terms, conditions, and provisions, as the same are hereinafter specified and set forth:

"Said party of the second part is hereby granted and invested with the exclusive right and privilege during the existence of this lease, and for the term or period hereinafter provided, of mining, taking out, and removing all the available coal in and under said lands, and the ownership and right to said coal when mined, and of removing from said lands said coals, and any other mineral that may be found thereunder, and to that end the said party of the second part shall also have the exclusive right to sink air, water, and hoisting shafts, and exclusive right of way for side tracks, and the right to cut, remove, and use the growing timber upon said lands, necessary for mining purposes, also the right to prospect for coal in the usual manner. In addition to said mining right and privilege, said party of the second part are hereby granted and invested with the actual possession and use of the surface of

all that portion of said lands which are situated north of the O. B. & Q. Railroad, as now located and constructed, during the term of this lease, and with the right to sublet the same in whole or in parts. Said party of the second part are also granted and invested with the actual use and possession of not to exceed four (4) acres at and around any shaft or shafts which said party may sink on any portion of said land south of said railroad track, and the right to sublet the same, in whole or in part, for dwelling and agricultural purposes, or for stores; and the limits and boundaries of said parcels are to be selected and designated by said party of the second part, in writing, to the party of the first part. Said party of the second part are also to have the right of way over and across said land south of said railroad to and from any shaft or shafts sunk on said lands, and the exclusive right of way for side tracks on said lands south of said railroad during the continuance hereof. It is further agreed and provided that said party of the second part shall have the exclusive right to move, transport, and carry over and across any of said lands thus leased, either upon the surface, on tracks, or right of way, or through the mines, on subterranean tracks, or otherwise, on said land, any coal owned by said company, taken and mined on other lands, or any material which may be necessary and useful in conducting the mining operations of said party of the second part, during the continuance of this lease. It is agreed and understood that said party of the second part shall not impair or injuriously affect the surface of said land south of said railroad, except as shall be necessary in the management and prosecution of their mining operations and business; it being expressly understood that said party of the first part reserves the right to use, occupy, and lease and sell subject to this lease, for agricultural purposes, all said lands south of the railroad, except such tracts as may be selected by the parties of the second part around the shafts. But it is expressly provided that neither said party of the first part, nor his heirs and assigns, shall interfere with or obstruct the working and operation of said mines by the party of the second part. Said party of the second part shall use the timber grown upon said lands for the building or covering of shafts, and other purposes connected with and incident to said mining, but not for the erection of buildings, ties for side tracks, or for general purposes. This right shall not extend to any timber planted and grown upon said premises hereafter. The provisions of this lease do not require the lessee to sink any shaft or shafts, but that is left to depend upon its own consideration.

"For and in consideration of the said premises, said party of the second part hereby covenants and agrees to pay to the said party of the first part, his heirs or assigns, in quarterly payments, a royalty of one-fourth

of one (1) cent per bushel of the same weight as paid for to miners, for all clean, merchantable coal, or for all salable coal, taken out the preceding quarter, but nut, pea, and slack coal to be free of royalty; said royalty to be payable at the First National Bank of Burlington, Iowa, or such other place in the city of Burlington, Iowa, as the said party of the first part shall indicate and request in writing. Said quarterly settlements shall occur at the close of the months of March, June, September, and December of each year, and the payment of said royalty on or before the fifteenth of the month following such quarterly settlement. It is further agreed, and this lease is upon this inducement, and of its essence, that the said party of the second part will, during the entire term of this lease, vigorously, diligently, and in good faith, without evasion, prosecute its mining and coal business in Lucas county so as to increase and promote that business as far as practicable; that it will faithfully, and without evasion, conduct the principal business of its mining in said county of Lucas on and from the lands herein mentioned and described, and that said party of the second part will take and mine from said land a majority in bushels and weight of all the coal that is by said party of the second part mined in said county of Lucas in each and every year; but, when the amount of coal taken from the lands herein described shall aggregate two hundred thousand (200,000) tons per annum, then, and so long as such quantity—two hundred thousand (200,000) tons—shall be mined from said land annually, said party of the second part's right to mine from other lands shall be unlimited. Nothing in this clause shall prevent or deprive the party of the second part from supplying their contracts and the market with coal from other lands during such time as the coal in the mines on the lands herein described shall be unavailable, in consequence of any unforeseen and unavoidable accident; but such rights shall only continue for a reasonable time, and until, with the exercise of proper diligence and care, such obstruction can be removed. But these provisions shall not in any degree relieve the company from the above provisions in regard to diligence, but shall not be held to require of said party of the second part that it shall take or mine any given quantity of coal from said land. When this lease shall have been performed by said party of the second part, and upon condition that it shall have taken out all the available coal from said lands as contemplated, then the expiration of the term shall not deprive said party of the second part of the right to the right of way, side tracks, shafts, and four (4) acres around each shaft, if it is desired to continue them in use in connection with the mines on other lands; and such right thereto shall continue free so long as they can be used by said party of the second part in connection with their general mining

operations. At the expiration of the term of this lease, or sooner, if the same shall be sooner terminated, the said party of the second part shall have the right to remove all machinery, trade fixtures, and improvements pertaining exclusively to the land for agricultural purposes, and said right of removal shall continue for a period of thirty days after such termination or expiration of this lease; but in exercising the right of removal of improvements, tracks, etc., it shall be done carefully and prudently, so as not unnecessarily to injure or impair the shaft, or other parts of said mine. The party of the second part hereby agree to pay all taxes levied upon so much of said lands as to which said party of the second part has control and possession of the surface.

"It is further agreed that if at any time the said party of the second part shall abandon, or willfully omit to carry on in good faith, the mining business and mining coal from said lands herein described, as provided in this lease, or if said party shall fail or neglect to pay the royalty, according to quarterly settlements, for any two (2) consecutive quarters, for a period of fifteen (15) days after the maturity of the last or second of such quarterly installments, then, in either of said contingencies, said party of the first part shall have the right, absolutely, to determine this lease by giving a written notice of his election so to terminate it. Such notice shall be given to the party of the second part at its office in the city of Burlington, and if, upon such notice, the payment, principal and interest, is not made within ten (10) days thereafter, said lease shall absolutely terminate; but no right so to surrender or abandon said lease is hereby given to the party of the second part. But temporary stoppage of mining, in consequence of strikes or accidents, or from other causes beyond the control of said party of the second part, or for other causes such as may occur in the legitimate business and good faith on the part of said party of the second part, without their intentional fault, shall not be deemed an abandonment or willful omission, within the meaning of this clause.

"Any installment of royalty remaining unpaid for a longer period than fifteen (15) days shall draw interest at the rate of ten (10) per cent. per annum after its maturity until paid. Said party of the second part is hereby required, within a reasonable time after each quarter, to furnish to said party of the first part, by mailing to his last known address, a correct statement of the amount of coal taken from said land during said preceding quarter. And said party of the first part shall have access at all reasonable times, and the right to inspect all books and papers pertaining to the quantity of coal mined during said quarter, and to examine said mines by himself or agent. The said party of the second part, so long as it

is in possession of said land, and not in arrears more than two (2) quarters, shall have, and is hereby invested with, the right and option of purchasing said lands herein described at any time within the period of ten (10) years from January first, (1st), 1880, at the agreed price of forty-five thousand dollars, (\$45,000,) said right to be exercised by giving to the party of the first part, or to his heirs, a written notice of such election to purchase said lands; and in case the residence and address of said party of the first part, or his heirs, is not known to the party of the second part, then said notice of election to purchase may be made by publishing the same in some newspaper published at Burlington, Iowa, for a period of ten (10) days, and upon making said election it shall be, and it is hereby made, the duty of the party of the first part to make, execute, and deliver, without delay, to said party of the second part, a good and sufficient warranty deed in which his or their wives shall join, conveying said real estate to said party of the second part, its successors or assigns, in fee simple, upon the receipt of the purchase money, but the exercise of this election shall not release said party of the second part from payment of any royalty in arrears.

"In witness whereof, we, the parties hereto, have hereunto set our hands this seventeenth (17th) day of February, 1880. This contract executed in duplicate. Byron O. Carr. Whitebreast Coal & Mining Co. By J. C. Osgood, President; C. M. Schenck, Secretary. [Seal.]"

In May, 1886, the lessee assigned its interest in the lease to the Whitebreast Coal Company, and in June, 1887, that company assigned the interest thus acquired to the Whitebreast Fuel Company. The three companies named are made parties defendant, but it is agreed that, if plaintiff is entitled to recover in this action against any of the companies, judgment for the entire amount found to be due shall be rendered against the Whitebreast Fuel Company. J. C. Osgood and C. M. Schenck were also made parties defendant, but subsequently the action as to them was dismissed. Soon after the second lease was executed the lessee sunk a shaft known as "Shaft No. 2" in the Carr land, at the most available place from which to reach all that land as quickly as possible, and commenced running entries in various directions for the purpose of taking out coal. During the years 1880 and 1881 more than one-half the coal mined by the company in Lucas county was taken from the Carr land, but after those years the amount taken from the land each year was less than the quantity so taken from other land in Lucas county. The amount taken from the Carr land did not equal 130,000 tons in any year. It was largest in the year 1883, and diminished rapidly from that time, until, during the seven months of 1889 preceding the com-

mencement of this action, the amount so taken was but 875 tons. A few hundred tons have been mined since that time. When the second lease was made the lessee was using at shaft No. 1, for the purpose of separating lump coal from other grades, a screen of diamond-shaped bars, separated by spaces of one inch in width, known as a "Diamond Screen." In May, 1883, screens made of bars placed $1\frac{1}{2}$ inches apart were substituted for the screens first used. The plaintiff seeks to recover royalty for coal alleged to have been mined from his land, on account of which he has not been paid, for coal which was not mined, but which he claims was required by the lease to be mined, and for coal which he alleges passed through the screens adopted in 1883, which would have been left in the coal for which he was entitled to a royalty by the screens first used. Plaintiff has received, under the lease in suit, royalty to the amount of \$52,588.47. He claims, in addition, \$34,629.46 on account of coal not mined, and \$3,509.94 on account of lump coal alleged to have passed through the enlarged screens, with interest on both sums. The defendants claim that they have mined all the coal which the lease required them to mine, for the reason that the supply of available coal has been exhausted, and that they have fully paid all royalty due for coal actually taken out of plaintiff's land.

1. It is shown that plaintiff has been fully paid for all coal mined in his land, which actually passed over the screens used by defendants, and, as he does not seriously contend that the evidence justifies any other conclusion in regard to that branch of the case, it will not be further noticed. The evidence also satisfies us that the available coal deposits in plaintiff's land have been exhausted. Soon after the new lease was made the lessee proceeded, with due diligence, to take out the coal which was available for mining. In some portions of the leased premises, coal was found in a condition to mine, and was taken out; but other portions, comprising about 170 acres, were found to contain no coal, or to contain only coal which was not available for mining, for want of a suitable roof, or because the vein was too thin, or because of other reasons which made the mining of it impracticable. In its fruitless search for coal the lessee run expensive entries, and sunk numerous test holes, on plaintiff's land, and on other land in that immediate vicinity at an expense of from \$20,000 to \$25,000. One-half of that amount, at least, was spent in direct tests of the Carr land. While engaged in mining and testing for coal in that land the company employed as many men as it could use, both day and night, in prosecuting its work; and it cannot be charged with any failure to use due diligence in finding and removing all the available coal which the land contained. Therefore, we are re-

quired to determine whether the lease in suit made the lessee and its assigns liable for coal not mined, and which did not exist. The appellant insists that it does, for the reason that the lease was an entirety; that it was not merely a lease for coal, but for all minerals, and for other purposes; that it gave to the lessee the actual use and occupancy of 250 acres of the surface; that portions of it contained a good, workable vein of coal, and that the rent to be paid for the rights conferred by the lease was one-fourth of one cent per bushel for all lump coal mined, which was to be more than one-half of all the coal mined by the company in Lucas county; that he has not been paid a royalty for a "majority," or more than one-half, of all the coal mined by the defendants in that county during the term of the lease; therefore, that he is entitled to the difference between the amount of royalty at the rate specified on more than one-half of all the coal mined, and the amount of royalty actually received.

It is claimed by the defendants that the parties to the lease executed it under a mutual mistake of fact in regard to the amount of coal contained in the land, and that defendants are not liable on account of coal erroneously believed by both parties to be available for mining when the lease was made. Plaintiff denies the alleged mistake. It is clear that the lessee believed, when it executed the lease, that the deposits of available coal in the Carr land were ample to enable it to fulfill all conditions required of it by the lease. It knew that there were some defects in the veins of coal in that locality, but such defects exist in most beds of coal, and those known to the lessee were not sufficient to charge it with notice of the entire absence of available coal in a large portion of the land. It is true the lessee had been in possession of the land under the Haven lease, and that it might have made exhaustive tests to ascertain where available coal could be found before executing the second lease, but it was not negligent in not doing so. It had found an abundance of coal while operating under the first lease, and had no reason to believe that available coal would be found in but little more than one-half of the land. It is true plaintiff had less actual knowledge of the land than that possessed by the lessee. He was a non-resident of the state, visited the land rarely, and derived his knowledge of it largely from the reports of his lessees. But it is clear that he shared in the belief of the lessee that there was an abundance of coal for the purposes of the lease. He was told by Haven and Osgood, or other experts, that in their opinion it would require 30 years to exhaust the available coal on the lands, and says, "My belief was that my entire tract was underlain with coal." The source of the information on which his belief rested is immaterial. The lessee manifested its be-

lief that available coal existed in all the land by locating shaft No. 2 in the best place from which to reach all parts of it, and by driving expensive entries for that purpose. The lease itself contains evidence that it was based upon the assumption and belief that the land contained an abundance of coal. It provides for a royalty to be paid on coal to be "taken out" of the leased land. It recites as a part of its inducement, and essence, that the lessee will, during the entire term of the lease, "vigorously, diligently, and in good faith, without evasion, prosecute its mining and coal business in Lucas county so as to increase and promote that business so far as practicable; that it will faithfully, and without evasion, conduct the principal business of mining in said county of Lucas on and from the lands herein mentioned and described, and that the said party of the second part will take and mine from said land a majority, in bushels and weight, of all the coal that is by said party of the second part mined in said county of Lucas in each and every year; but, when the amount of coal taken from the lands herein described shall aggregate 200,000 tons per annum, then, and so long as such quantity—200,000 tons—shall be mined from said land annually, said party of the second part's right to mine from the other land shall be unlimited." The evident purpose of these provisions was to require the lessee so to conduct its business as to make the quantity of coal taken from the land of plaintiff during the term of the lease as large, at least, as reasonable diligence would make it, not exceeding 200,000 tons annually, in order that plaintiffs should receive a large amount of royalty. He would not have been benefited in any other manner by the mining of his coal, for it was the intent that the royalty paid should be computed on coal in his land, and not on that in the land of another. The lease was to continue until the lessee, with the use of due diligence, should be able to mine and remove from the leased premises "all the available merchantable and salable coal to be found therein." The lease provided that when it "shall have been performed by said party of the second part, and upon condition that it shall have taken out all the available coal from said lands, as contemplated," the lessee should be entitled to certain rights in connection with its general mining operations. It is clear that the chief purpose to be accomplished by the lease was the mining from the leased premises of all the available merchantable coal, and the payment to plaintiff therefor of the royalty specified. As the supply of coal became less, fewer men could be employed in mining it, and as a consequence the quantity mined diminished from year to year after 1885. When that condition of affairs was reached, the only method of complying strictly with the terms of the lease, left to defendants, was to re-

duce their output from land not included in the Carr lease. An agreement which required such a course would have been of no benefit to plaintiff, and therefore would have been unreasonable, and contrary to public policy. *Arnot v. Coal Co.*, 68 N. Y. 559; *Navigation Co. v. Winsor*, 20 Wall. 64; *Mandeville v. Harman*, (N. J. Ch.) 7 Atl. Rep. 37. It may be said that for all practical purposes it became impossible for the lessee to comply with the terms of the lease, in consequence of the exhaustion of the coal deposits. The inability of defendants to carry out their agreement was not due to any fault on their part, but to a mistake of fact, shared by plaintiff, in regard to the extent of the deposits. The equities in favor of plaintiff are not persuasive. He has been paid for all the available coal which his land contained, at the agreed price, and the lease contemplated nothing more. He seeks to take advantage of the fact that as his coal became exhausted the defendants did not reduce their mining operations elsewhere, although no possible benefit could have resulted to him, had they done so. He complained in the year 1884 that the amount of coal mined from his land by defendants was not as great as that they were mining from other lands in Lucas county. In consequence of his complaint a meeting was held in Burlington, in July of that year, which was attended by the plaintiff and his attorney, and by representatives of the lessee. It was then known that the supply of available coal was not so great as the parties had believed it was, and the mining operations and prospects were fully discussed. Plaintiff then expressed the belief that the lessee was doing all that it could be asked to do to comply with the terms of the lease. He has received about \$8,000, in royalties, in excess of the amount, fixed in the lease, for which defendant could have purchased the land. In addition he has received \$2,000 for an 80-acre tract of the land, sold to defendants in January, 1889. The plaintiff insists that defendants should have surrendered the premises, in order to be exempt from paying royalty on the larger part of the coal they mined each year in Lucas county. But they had no right to do so until the coal was exhausted. They made little or no use of the surface of the land, excepting to carry on their mining operations, and the value of such use for general purposes was not greater than the taxes they were required to pay. It is not claimed that defendants removed any mineral from the land, excepting coal. We are of the opinion that defendants are not liable for coal not contained in the leased premises. Our conclusion finds support in the following authorities: *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. Rep. 61; *Gibben v. Atkinson*, (Mich.) 31 N. W. Rep. 570; *Dexter v. Norton*, 47 N. Y. 62; *Muhlenberg v. Henning*, (Pa. Sup.) 9 Atl. Rep. 144; *Mc-*

Cahan v. Wharton, (Pa. Sup.) 15 Atl. Rep. 615; *Walker v. Tucker*, 70 Ill. 528; *Brick Co. v. Pond*, 38 Ohio St. 66; *Cook v. Andrews*, 36 Ohio St. 175; *Clifford v. Walls*, 18 Wkly. Rep. 925; *Bish. Cont. § 588*. It is said that the doctrine of the authorities cited is applicable to cases where no mineral exists in the leased premises when the lease is made, and not to cases like this, where mineral exists, but not in sufficient quantities to meet the requirements of the lease. We are of the opinion that the rule is applicable to both classes of cases. So far as a failure of consideration is involved, this case is governed by section 2114 of the Code, which provides that "the want or failure, in the whole or in part, of the consideration of a written contract, may be shown as a defense, total or partial, as the case may be. * * *" It is claimed that what we have said is in conflict with the rule announced in *Flynn v. Mining Co.*, 72 Iowa, 742, 32 N. W. Rep. 471, where a lease similar in many respects to that involved in this case was construed. But in that case no question based upon a failure of the coal deposits was determined.

3. The plaintiff claims that the terms "merchantable coal" and "salable coal," as used in the lease, were so used with reference to the screen used at the time the lease was made, and that it was understood and intended by the parties to the lease that all coal which would pass over such a screen should be regarded as coal upon which plaintiff should be entitled to a royalty. The facts appear to be that before the new screens were adopted the miners were required to clean the coal in the mines by using forks, rakes, and riddles, and that it was intended that all coal which would pass through such implements should be left in the mine. But some of the miners performed that part of their work carelessly, and sent out quantities of slack, pea, and nut coal. In many cases the inferior coal sent out was so loaded in the mine cars that it was carried by the lump coal in large quantities, over the screens, and into the railway cars which were designed for the merchantable or salable coal, commonly known as "lump coal." The coal taken out of the Carr land, and from other land in that vicinity, was easily reduced to the inferior grades by careless handling. As a result of the character of the coal, and the manner in which it was delivered in the railway cars, much complaint was made by the buyers of coal, and in order to obviate some of the difficulties specified, and to prevent the loss of its best customers, the lessee adopted its new screens. We think they were authorized to do so by the facts stated. It must be presumed that the merchantable and salable coal contemplated by the lease was to be of a quality to compete with the same grade placed upon the market from other mines. Moreover, plain-

tiff has failed to show that he has not received royalty on as large a proportion of the coal mined since the new screens were adopted as he did before. While lumps of coal of larger size will undoubtedly pass through the new screens than would have passed through the old ones, yet the evidence shows that under the old method of cleaning considerable quantities of coal were left in the mines which would not have passed through either screen, and that under the new method all coal is brought out, and thrown onto the screens. Several practical miners testify that as large a percentage of the coal mined passed over the new as over the old screens, and was classed as lump coal. If their testimony is reliable,—and we cannot say that it is not,—plaintiff was not affected injuriously by the change of screens, even if such change was unauthorized. The conclusions announced dispose of the controlling questions in the case.

The decree of the district court is affirmed.

OMAHA COAL, COKE & LIME CO. v. FAY et al.

(Supreme Court of Nebraska. May 16, 1893.)
APPEAL FROM INFERIOR COURT—DISMISSAL—SALE
—WARRANTY—DAMAGES—INSTRUCTIONS.

1. A defeated party to an action in the county court, who promptly orders a transcript of the proceedings to be prepared for the purpose of appealing the case, will not be denied the right of appeal because the county judge fails to prepare the transcript within 30 days after the rendition of judgment.

2. Where a transcript, for the purpose of appealing a case to the district court, is filed after the statutory period has elapsed, the appellee, by filing pleadings, and contesting the case on its merits, waives his right to object to the delay, even though this action be taken after the overruling of a motion by him made, challenging the validity of the appeal.

3. Where one contracts to supply a commodity in which he deals, to be applied to a particular purpose, of which he is aware, under such circumstances that the buyer necessarily trusts to the judgment of the vendor, there is an implied warranty that the commodity shall be reasonably fit for the purpose to which it is to be applied.

4. Where the law provides a definite measure of damages the court should instruct the jury, specifically, how the damages should be assessed, and an instruction stating a general principle in the admeasurement of damages, broader than is applicable to the particular case presented, and not qualified by other instructions, is erroneous.

5. Where only consequential damages are claimed, they must be specially pleaded, and in such cases the jury should be confined by the instructions, in assessing the amount of recovery, to the consideration of such damages as are so pleaded.

6. Consequential damages from breach of warranty in the sale of chattels cannot be recovered where the vendee, by exercising ordinary prudence and judgment, could have avoided the consequences complained of.

7. A. sold lime to B. for the purpose of plastering a building, the circumstances justifying a finding that A. impliedly warranted the lime to be reasonably fit for the purpose intended. The lime was used by B. in plastering the building. The work proved defective,

and the evidence sustained a finding that the defect was in the quality of the lime. B. thereupon papered the side walls, and replastered the ceilings with another material. He then brought suit against A. to recover the cost of such papering and replastering. *Held*, that in such case this expense could not be recovered unless it was shown—First, that the defect in the lime could not, by a person accustomed to use such materials, have been discovered before it was used in making plaster, and applied to the walls; and, secondly, that the mode of remedying the defect was reasonable and did not exceed in cost that of replastering with the same kind of material, of good quality.

8. In the sale of a special kind of a known general material for a particular purpose, the circumstances implying a warranty that the material is reasonably fit for the purpose intended, if the special material sold requires a different manner of use or treatment in applying it to the purpose intended than that required in the use or treatment of the same general material of other kinds, and this different requirement is known to the vendor, and not to the vendee, the warranty is broken if the vendee uses and treats the material as similar material is customarily treated, and if, so used, it does not prove reasonably fit for the purpose.

9. An instruction is erroneous which states the foregoing rule, but omits the requirement of a warranty in the sale, the fact of such warranty being in issue, and leaves the jury to infer that there may in such case be a recovery, in the absence of a warranty.

10. The trial court may, in its discretion, require offers of evidence objected to to be made in such a manner as not to reach the ears of the jury, and should adopt this course where the offer to be made threatens to prejudice the party objecting, if heard by the jury. A verdict will not, however, be disturbed because of the refusal of the trial court to so order, unless it is apparent from the record that there was an abuse of discretion.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Ferguson, Judge.

Action by Patrick H. Fay and Charles S. Byrne against the Omaha Coal, Coke & Lime Company. Plaintiffs had judgment, and defendant brings error. Reversed.

Howard B. Smith and Clinton N. Powell, for plaintiff in error. Brome, Andrews & Sheean, for defendants in error.

IRVINE, C. The defendants in error sued the plaintiff in error in the county court of Douglas county, asking judgment on account of an alleged breach of warranty in the sale of lime by plaintiff in error to defendants in error. Judgment was rendered December 30, 1889, in favor of defendants in error. An appeal bond was filed and approved within the time limited by law, but no transcript was filed by plaintiff in error until February 3, 1890. Upon the filing of that transcript the defendants in error moved for judgment in the district court. The motion does not appear in the transcript, but from the statements of counsel, and the orders made, it appears to have been a motion made under section 1011 of the Code. This motion was heard upon affidavits which are incorporated in a bill of exceptions, and on March 8, 1890, the motion was by the district court overruled. Thereupon the de-

fendants in error filed their petition in the district court. Issues were joined and the case tried on its merits, resulting in a verdict for defendants in error in the sum of \$756.96. The plaintiff in error seeks in this proceeding to reverse that judgment.

The greater part of the argument on behalf of defendants in error is devoted to questions arising out of the state of facts above set forth. While no proceedings in error were instituted by the defendants in error here, the plaintiffs below, for the purpose of reviewing the action of the district court in refusing to enter judgment in their favor on account of the delay in filing the transcript in the district court, they contend that that action of the district court was erroneous, and that, inasmuch as it presented a question of jurisdiction, the plaintiff in error cannot complain of the final judgment against it, because, upon the face of the record, the defendants in error were entitled to have entered in the district court a larger judgment. The question thus raised, we do not deem it necessary to consider, and this for two reasons: In the first place, we cannot say that the court erred in overruling the motion for judgment. While the affidavits used upon the hearing of the motion were conflicting, the preponderance of the evidence contained therein was to the effect that the attorney for plaintiff in error, immediately upon the rendition of judgment in the county court, ordered a transcript of the proceedings, for the purpose of appeal, to be prepared for his use; that the clerk having charge of that business overlooked this request, and neglected to prepare the transcript until February 3d; that on January 28th the attorney referred to was taken ill, and was confined to his house until after the expiration of the time limited by law for perfecting his appeal. While we do not decide that the illness of a party or his attorney is sufficient excuse for failing to perfect an appeal within the time limited by law, the case of *Cheney v. Buckmaster*, 29 Neb. 420, 45 N. W. Rep. 640, is authority for holding that where a transcript was ordered promptly a party intending to appeal is justified in relying upon the presumption that it will be prepared within a proper period, and that he cannot be deprived of his appeal by the failure of the county judge to so prepare it. The plaintiff in error ordered the transcript immediately upon the rendition of judgment, and he was not required by law to procure it, and file it in the district court, within any shorter time than 30 days after the rendition of judgment. The transcript was not prepared within the time, and, even had the attorney not been ill, had he gone to the county judge to request the transcript upon the thirtieth day, it would not have been ready. We think, therefore, that the district judge was justified by the evidence in overruling the motion for judgment.

The second reason why the defendants in error cannot now complain of the delay is found in the fact that they did not rest upon their motion, but proceeded to file pleadings, and to try the case upon its merits. In so doing they waived their rights to object to the delay. *Goodrich v. City of Omaha*, 11 Neb. 204, 7 N. W. Rep. 442; *Steven v. Insurance Co.*, 29 Neb. 187, 45 N. W. Rep. 284. It is true that in the cases just cited a general appearance had been entered before any action was asked, seeking to dismiss the appellate proceedings; but these cases establish the general proposition that the district courts have jurisdiction of the subject-matter of such appeals, and that a failure to perfect the appeal within the time merely goes to the jurisdiction of the court over the persons of the appellees. Upon this general principle it is clear that a defect in the proceedings requisite to give jurisdiction is cured by a subsequent general appearance. In *Bazzo v. Wallace*, 16 Neb. 290, 20 N. W. Rep. 315, a motion was filed in this court to dismiss an appeal, and it was held that a stipulation filed subsequently constituted a general appearance, and a waiver of rights under the motion. It is clear from the foregoing considerations that the defendants in error cannot, upon the grounds urged by them, preclude the court from examining the questions raised upon the trial of the case, and presented in the petition in error.

In order to properly present the views of the court upon the merits of the case, a more specific statement of the facts will be of assistance. The defendants in error were engaged as partners, under the name of *Fay & Byrne*, in the business of plastering buildings. The plaintiff in error was a dealer in coal, lime, and other materials. About the 1st of July, 1889, *Fay & Byrne* contracted with the plaintiff in error for the purchase of lime to be used in plastering a building known as the "Merchants' Hotel," making known to the plaintiff in error the purpose for which they desired the lime. The first of this lime was delivered July 5th, and the plaintiff in error continued to deliver it at intervals, and *Fay & Byrne* used it in making mortar with which they placed the "brown coat" on three floors of the hotel. After this brown coat had been applied, and as *Fay & Byrne* were proceeding to apply the finishing coat, the plastering already applied began to drop from the walls and ceiling. *Fay & Byrne* finally covered the side walls of these three stories with paper in order to prevent the falling of the plaster, and replastered the ceiling with a material known as "adamant." They then brought suit against the plaintiff in error, alleging a warranty in the sale of the plaster, to the effect that it was of first-class and best quality, and fit and proper for use in plastering the hotel. In a second count of the petition they alleged the warranty to be that it was reasonably fit and proper

for the purpose aforesaid. They further alleged that the lime was not of the quality warranted, and that by reason thereof the plaster upon the building was not good, and that they were compelled to replaster the ceilings and paper the walls, as before stated. They pray damages for the cost of this work. The answer admitted the sale of the lime, and denied the other allegations of the petition. It further pleads a set-off, which was admitted in the reply, and need not be further noticed. It is urged that there is no evidence at all to show a warranty in the sale of the lime. The evidence offered by Fay & Byrne lacks much of being conclusive upon this point, but we think there is sufficient to sustain the verdict. Fay testifies that he made the contract for the lime. That Mr Hill, an officer of the company, asked him (Fay) if his firm was going to do the plastering on the Merchants' Hotel, and, being informed that they were, Hill said they had lime that was far superior to anything on the market, and spoke of its good qualities. Fay said he was timid about experimenting on any new lime, and Hill said it would be no experiment; that the lime was guaranteed to every man they sold it to, and if plaintiffs bought it they would guaranty it to them. That he had not at the time used any of this lime. That after this conversation with Hill he consulted his partner, and some time later told the officers of the company that, if they would guaranty the lime, plaintiffs would take it, and they said, "All right." It appeared on cross-examination that, before work began on the Merchants' Hotel, Fay & Byrne had used some of the lime in question upon another building, and plaintiff in error contends that the conversation narrated by Fay referred to this purchase, and not to the lime purchased for the hotel. Fay explains that he had the first conversation with Hill before buying the lime for the other house, but did not complete the purchase until the other house was finished. Mr. Byrne testifies that he talked with Hill before the purchase, and Hill said the lime would do better work than any in the market, and that he would guaranty it to do as he said. It also appears in evidence that a portion, at least, of the lime used in the hotel, was not shipped to Omaha until after the contract was made; and as to this portion, at least, Fay & Byrne had no opportunities for inspection. Whether this testimony is sufficient to establish an express warranty, we need not determine. Where there is no opportunity to inspect the commodity, the rule of caveat emptor does not apply. When one contracts to supply an article in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the vendor, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied: and the

better doctrine is that this rule applies to dealers as well as to manufacturers, and not to manufacturers alone, as the plaintiff in error contends. There is certainly sufficient testimony to warrant the jury in finding that Fay & Byrne justifiably relied upon the coal company to furnish lime suitable for the purpose to which they intended to apply it. The second count of the petition seems to have been framed very carefully in order to apply to this view of the case. There were no exceptions taken to the instructions given by the court upon the question of warranty, and the finding of the jury upon the evidence and these instructions cannot be disturbed.

It is also contended that conceding the existence of a warranty, as claimed, there is no evidence that the lime failed to comply therewith. Without reviewing the evidence, which is very voluminous, upon this subject, we will say that we deem it sufficient to sustain the verdict, although the writer, were he called upon to find the facts in the first instance, would very likely have found them for the plaintiff in error.

The court, of its own motion, instructed the jury as follows: "If you find for the plaintiffs, you will assess such damages as the evidence convinces you is just, deducting therefrom the amount of \$208.87 admitted to be due defendant, with interest at 7 per cent. per annum from February 6, 1890, up to the 9th day of February, 1891." At the request of the defendants in error, the following instruction was given: "When two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such a breach of contract should be either such as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. And if you find from the evidence in this case that defendant knew the purpose for which the lime sold plaintiffs was to be used, and warranted the same to be good lime, suitable for the purpose for which he knew it was to be used, and you further find from the evidence that the lime in question was not good lime, and was not suitable for the purpose for which defendant knew it was to be used, then your verdict will be for the plaintiffs, and you will determine from the evidence what damages plaintiffs have sustained, and allow plaintiffs, by your verdict, such sum as the evidence shows the damages they have sustained amount to, bearing in mind that plaintiffs are entitled to recover. In that event, only such damages as may reasonably be supposed to have been contemplated by plaintiffs and defendant at the time the lime in question was sold." Both of these instructions were excepted to by plaintiff in

error, and they are the only instructions given on the measure of damages. In giving the instruction last quoted the court stated the rule in *Hadley v. Baxendale*, 9 Exch. 341. This has been approved in *Sycamore, etc., Co. v. Sturm*, 13 Neb. 210, 13 N. W. Rep. 202, and is undoubtedly correct, as a statement of a general proposition of law. But we do not think it should have been given in this case without further instructions, confining the jury to such damages as, under the pleadings and evidence, would come within the rule. The damages claimed were consequential in their nature, and only such damages of that character could be recovered as were expressly pleaded; that is, the cost of replastering the ceiling and repapering the walls. In cases of this character the rule of avoidable consequences applies. The defendants in error could not recover these items of expense if the defects in the lime might, by persons accustomed to the use of such articles, have been discovered before the lime was made into mortar, and placed upon the walls. If *Fay & Byrne* did discover, or should have discovered, the defect before plastering the walls, they should not have proceeded to use the lime, and they could not hold the plaintiff in error liable for damages consequent upon the use of the lime after such discovery. This rule certainly applies in the case of articles readily purchasable in the market, where the vendee is not, by force of circumstances, compelled to proceed with the imperfect article delivered. Furthermore, in cases of this character where consequential damages are recoverable, the ordinary measure of those damages would be the cost of replacing the defective work with other material of the character and quality which should have been furnished in the first instance,—in this case, the cost of replastering the walls and ceilings with plaster. Another method was here pursued,—the side walls were papered; and it is fairly inferable from the evidence that the cost of papering was less than that of replastering. But the ceilings were replastered with adamant, which is shown by the evidence to be more expensive than plaster. The cost of repairing the damage in this way would be a fair measure of damages, provided the method pursued was a reasonable method, and did not exceed in cost that of replacing the defective work with proper material of like character. These are matters of law, which should have been stated to the jury, in order that they might ascertain from the evidence whether or not the circumstances existed which would justify the allowance of such damages, and also to give them a definite rule for ascertaining the amount. The instruction given by the court of its own motion was so general that it gave the jury no rule of damages whatever. That given at the request of the defendants in error did not restrict the jury to the damages pleaded, and did not state with sufficient cer-

tainty the rule for assessing the amount thereof, or the conditions of recovery.

The errors above referred to require that the case should be reversed, but as a new trial will be necessary it will be proper to consider some of the other questions presented, which will probably recur upon a further hearing.

At the request of defendants in error the following instruction was given: "You are instructed that plaintiffs were bound only to use the lime in question in the ordinary and usual manner; and the fact, if it be a fact, that the lime in question, in order to be properly prepared for plastering, required a different process with respect to the slacking and mixing thereof from the process and method ordinarily and usually used in slacking and mixing lime for such purpose, and if you further find from the evidence that plaintiffs did not know of the peculiar quality of such lime, and could not be reasonably supposed to have possessed such knowledge, and you further find from the evidence that defendant did not communicate to plaintiffs the fact that the lime in question was of a peculiar quality, other and different from ordinary lime, and that its successful use for the purpose of plastering required that it be slacked and mixed in a manner other and different from the method usually employed with ordinary lime, and you further find from the evidence that plaintiffs did slack and mix the lime in question in the usual and ordinary manner, and exercised ordinary care and skill in and about the slacking and mixing thereof, then and in that event plaintiffs would be entitled to recover in this action, even though you should believe from the evidence that the lime in question was good lime, if you further find that plaintiffs sustained damages by reason of the use of such lime in the usual and ordinary manner for the purpose for which it was purchased, providing you find from the evidence that the defendant knew at the time of sale that the lime required a different process in respect to the slacking and mixing thereof." It is urged that there was no evidence to which this instruction was applicable. We find, however, in the record, evidence tending to show that the lime sold required a great deal of water in the process of slacking, and that, when slacked with the amount of water customary with other limes, it became very hot, and burned, and that lime used after being so burned impairs the quality of the plaster. We think this evidence justified an instruction of this general character, and that the instruction, correctly states the law, except that, by omitting all references to the warranty, it might leave the jury to infer that under the state of facts proposed there might be a recovery in the absence of any warranty, expressed or implied.

The plaintiff in error requested the following instruction: "You are instructed that if you find from the evidence that any lime

which slacks well will make good plaster, if properly mixed with other good materials, in right proportion, and if you further find that the lime in question slacked well, you must find for the defendant." This instruction was properly refused. So far as it was a statement of law it was equivalent to telling the jury that if the lime, when properly used, was fit for the purpose intended, there could be no recovery. This had already been covered in the court's instructions. So far as the instruction refers to specific facts, it relates purely to an inference of fact, and not of law.

Objection is also made to the court's permitting counsel for defendants in error to make proffers of evidence in the hearing of the jury. By a long line of decisions it is established that the defendants in error, in order to preserve for review the rulings of the court in excluding evidence by them offered, were compelled to make proffer of the evidence. This rule may undoubtedly be used by designing attorneys for the purpose of making unfair and prejudicial statements in the hearing of the jury. The trial court undoubtedly may—and, when such an abuse is threatened, should—require the offer to be reduced to writing, or to be made in some manner so as not to reach the jury. Whether the occasion demands this must generally be left to the discretion of the trial court, and we do not find in this record anything to warrant us in determining that the learned judge improperly exercised his discretion in permitting the offers to be made orally. Reversed and remanded. The other commissioners concur.

CAMPBELL v. BROSIUS.

(Supreme Court of Nebraska. April 26, 1893.)
ACTION FOR WAGES—QUANTUM MERUIT—PLEADINGS—QUESTION FOR JURY.

Allegations of value in a pleading are not to be taken as true by a failure to deny them; and in all cases founded upon a quantum meruit, where the value of the services is not expressly admitted, the question of value is in issue, and must be proved, and submitted to the jury.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Cass county; Chapman, Judge.

Assumpsit by Frank Brosius against Thomas L. Campbell. Plaintiff had judgment, and defendant brings error. Reversed.

Byron Clark, for plaintiff in error. Beeson & Root, for defendant in error.

IRVINE, C. This action was brought by the defendant in error against the plaintiff in error to recover upon a quantum meruit for digging two wells for the plaintiff in error. The petition alleged that the reasonable value of digging the first well was \$75; and, of the second, \$35. The answer

did not deny these allegations of value, and the only evidence in any way relating to the value of the work is found in the testimony of the defendant in error, where he states that a fair compensation for the first well would be 75 cents a foot,—the well being 100 feet deep. The evidence shows that this well was dug with a spade, while the second was bored with a machine, and there is no testimony at all as to the value of the work on the second well. The court instructed the jury, stating the elements necessary for them to find in order to return a verdict for the plaintiff, and that, if they so found, their verdict should be for the sum of \$110, less what they might find plaintiff had received or had damaged the defendant in and about the work; there being a counterclaim for damages, and a plea of payment. Section 134 of the Code of Civil Procedure provides that allegations of value or of amount of damage shall not be considered as true by failure to controvert them. It therefore became necessary for the plaintiff, notwithstanding the answer contained no denial of his allegations as to the value of the work performed, to prove the reasonable value thereof, and it was error for the court to instruct the jury that they should assume the amount alleged as the value of the work.

The plaintiff in error contends that the court erred in several other particulars. In view of the conclusion above stated, it is not now necessary to pass upon the other assignments of error, but, as the case must be remanded for a new trial, it is proper to say that upon the principal questions in dispute in the case the rulings of the trial court were substantially correct. Reversed and remanded. The other commissioners concur.

McCord-Brady Co. v. Krause.

(Supreme Court of Nebraska. April 26, 1893.)
DISSOLVING ATTACHMENT—CHATTEL MORTGAGE—QUESTIONING VALIDITY.

1. In the action of an attaching creditor against the debtor, the validity of chattel mortgages made by the debtor to other parties cannot, as against such mortgagees, be adjudicated.

2. As between plaintiff and defendant alone, upon motion to dissolve an attachment of the chattels mortgaged, the defendant can be heard only because of his residuary, contingent interest which may remain after the said mortgages are satisfied.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Cass county; Samuel M. Chapman, Judge.

Action in attachment by the McCord-Brady Company against Philip Krause. Defendant had judgment, and plaintiff brings error. Reversed.

Jeffrey & Rich, for plaintiff in error. Byron Clark, for defendant in error.

RYAN, C. On August 14, 1891, Philip Krause, a merchant at Plattsmouth, Neb., made the first mortgage hereinafter referred to, and on the 15th day of August, 1891, made the other chattel mortgages, in the order given, upon the entire merchandise composing his stock of goods, to secure severally the parties and amounts following, to wit: Bank of Cass County, \$1,000; Meyer & Raapke, \$330.73; Tootle, Hosea & Co., \$677.82; D. M. Steele & Co., \$311.37; McCord-Brady Company, \$331.67; Kasper Bros., \$354.35. These mortgages practically covered all the possessions of defendant, Krause, and each provided that it was "lawful for the mortgagee to take immediate possession of said goods and chattels wherever found, the possession of these presents being his sufficient authority therefor, and to sell the same at public auction or private sale, or so much thereof as shall be sufficient to pay the amount due or to become due," etc. After reciting the statutory provision for advertising the sale, each mortgage provided for sale without notice at continuous private sale, at option of the mortgagee. Each mortgagee, through W. H. Miller as agent, upon the making and filing of said mortgages, went into possession, and private sales of the stock began under the provisions aforesaid. It is a disputed proposition whether or not the plaintiff in error, the McCord-Brady Company, accepted the mortgage in favor of that firm. Certain it is, however, that on August 24th, immediately following the making of said mortgage, the plaintiff in error repudiated the same, by attaching the mortgaged property in this suit brought in the district court of Cass county. The petition and affidavit for an attachment were in due form for the indebtedness not yet due, (as well as for a part already due), and there was on the same day made by the presiding judge of said district court the following order: "On application of the plaintiff, and it appearing from the affidavit of the plaintiff that the claim is just, and that there is cause for granting an attachment, an order of attachment in the sum of \$396.56, and \$50.00 probable costs of the action, is therefore allowed to issue in this case, upon the plaintiff giving an undertaking in the sum of \$800.00, with approved security as required by law. [Signed] Samuel M. Chapman, Judge of the District Court." An undertaking was filed as required by this order, and duly approved, whereupon an order of attachment issued against the property of defendant, Krause, and was at once levied on the mortgaged property by the sheriff of said county, in whose possession said property remained, at least until after the dissolution of the attachment. W. H. Miller, on the hearing and determination of the motion hereinafter referred to for the dissolution of the attachment, in his affidavit stated that on August 15th he was by the mort-

gagees put in possession of the mortgaged property, with instructions to remain in possession of said goods for all of said parties until their respective claims were paid out according to the priority just stated, and accordingly proceeded to sell the mortgaged property at retail without advertising; that at the time of the levy he had collected on the books of account, and so sold, goods to the aggregate amount of \$447.83, to apply on the mortgage of the Bank of Cass County. This agent, W. H. Miller, further stated that at the time the said goods were attached he informed the sheriff prior to the levy that he was in possession of said mortgaged property for the mortgagees, giving him a list of the names hereinbefore set forth, and surrendered said goods and chattels under protest. Neither of the mortgagees has in any way attempted further to assert the right to the possession of the property levied upon, and to this action neither has been a party or in privity, so far as the record discloses, with the defendant in resisting the attachment upon these goods. This is very important, for our consideration of this case is thus limited exclusively to a determination of the rights and remedies proper as between plaintiff and defendant as debtor and creditor. Whatever rights or remedies the mortgagees may have in respect to the mortgaged property are in no way determined in this proceeding, because impossible in the absence as parties, and upon the record unnecessary.

On August 29, 1891, the defendant in said attachment proceedings filed in said court a motion to vacate and discharge said attachment on various grounds, only two of which are deemed important to the proper decision of the matters presented for review. This motion was presented upon affidavits of various parties, with which were presented the several chattel mortgages containing the provisions above recited. A clear preponderance of the evidence showed that these mortgages covered all of Krause's property, and that he admitted to plaintiff's agent and to plaintiff's attorney that these mortgages were given to satisfy his largest creditors so they would not attach, that the smaller ones would not attach, and that he intended to settle with his creditors, though the defendant denies making the statements. Upon this motion the following order was made: "And now on this 7th day of November, 1891, this cause came on for hearing upon the motion of the defendant to vacate and discharge the attachment heretofore granted in this cause, and was submitted to the court. On consideration thereof, it is ordered that the attachment heretofore granted in this action be and the same is vacated and discharged, and the sheriff is required to return to the defendant all the property taken by him under said order of attachment; to all of which the said plaintiff duly excepts, and

plaintiff is granted twenty days in which to perfect exceptions and prepare and file petition in error in supreme court." As between plaintiff and defendant,—the only parties to this litigation,—the learned district judge erred in making the above order dissolving the attachment, and returning the property attached to the defendant, Krause. The question was simply whether or not sufficient grounds of attachment existed as against Krause. He had disposed of all the property, and, as he admits in his own affidavit, was slightly insolvent, the parties to whom his property was turned out were authorized to and in pursuance of this authority in fact were disposing of Krause's property at retail by private sales. Chapter 12 of the Compiled Statutes of Nebraska prescribes the manner in which chattel mortgages may be foreclosed. It is not deemed necessary to decide at present whether an advertisement and public sale is absolutely essential to a foreclosure as against creditors of the mortgagor. Suffice it to say that a mortgagor who consents to a private sale of all his property, though under the guise of a chattel mortgage, to prevent large claim holders from bringing suit, with a view to settling with his creditors, is not in a position to insist that said property shall not be attached at the suit of one of his creditors. *Wyman v. Mathews*, 53 Fed. Rep. 678. His interest in the attached property is limited to such residue as may remain after the mortgages are fully satisfied, and as to such interest defendant's conduct and standing are not such that upon his application the attachment should have been dissolved. The order of dissolution of the attachment is therefore vacated, and this cause is remanded for further proceedings. The other commissioners concur.

JOHNSON v. JOHNSON.

(Supreme Court of Nebraska. April 26, 1893.)

CREDITOR'S BILL—EVIDENCE.

1. The testimony tends to show that in 1882 one C., then worth at least \$5,000, erected a house and made improvements on the land of his mother, which cost to exceed \$2,000. He continued to assist her in a limited degree until 1886, when he died insolvent. In an action by a creditor, whose claim had nearly all been contracted after 1882, and who received payment of her share of the assets of the estate of C. pro rata with other creditors to subject the estate of the mother to the payment of the residue of her claim, *held*, that the proof failed to show that C. was insolvent when he assisted his mother, or that his assisting her caused his insolvency, and that the mother's estate was not liable.

2. There is proof that would warrant the court in finding that his mother, about 1880, loaned C. \$1,050.

(Syllabus by the Court.)

Appeal from district court, Howard county; Coffin, Judge.

Action by Josie Johnson against Jonas P.

Johnson, administrator of the estate of Sarah C. Johnson, deceased. Defendant had a decree, and plaintiff appeals. Affirmed.

O. A. Abbott and A. A. Kendall, for appellant. Paul & Templin, for appellee.

MAXWELL, C. J. This is an action to subject certain real estate to the payment of the claims of the plaintiff. The testimony shows that Chris Johnson died in the year 1880. At that time he was indebted to the plaintiff in the sum of \$922.50, which was allowed against his estate. The estate proved to be insolvent, and the plaintiff only received the sum of \$577.31, leaving due to her on said claim \$453.60, for which it is sought to subject the real estate in question. On the trial of the cause in the court below the issues were found in favor of the defendant, and the action dismissed. The testimony tends to show that one Sarah C. Johnson, the mother of Chris Johnson and Jonas P. Johnson, removed to this state about the year 1881, and settled upon government land, and that Jonas P. Johnson had removed to this state one or two years before that time; that his mother's claim was near his; that Chris Johnson, who had been doing business in Illinois, commenced the erection of a house and other improvements on the land for his mother; that the value of the house and other improvements exceeded \$2,000; that the house and improvements were made in 1882 and 1883. There is some proof, however, that Chris continued, in a limited degree, to assist his mother up to the time of his death, in 1886. There is also proof tending to show that, prior to 1880, Chris had been conducting a grocery, and failed in business; that afterwards he obtained \$1,050 from his mother, and started a saloon in Quincy, Ill. In this he succeeded, and sold out in 1882 for \$5,000. The plaintiff's claim is for service and keeping house for Chris, and began about 1882, and continued up to the time of his death. She claims that Chris put his money into the estate of his mother, and thereby became insolvent; that the mother's estate is liable for her claim.

The proof fails to show that Chris Johnson was insolvent when he made the improvements in question for his mother, or that he made the improvements in contemplation of insolvency. A person who is apparently able to pay his debts, and believes himself to be so, and has no design to defraud his creditors, may make a valid gift to a relative. The gift, however, must not be disproportionate to his means, nor such as will produce insolvency. The proof fails to show that this gift, if such it was, produced the insolvency of Chris Johnson. The proof is meager upon this point, and very unsatisfactory. The right of the plaintiff to reach the assets in the hands of a fraudulent grantee is undoubted, but the proof fails

to sustain the charge. This is upon the theory that Chris made a gift of the house and improvements to his mother, but, as heretofore stated, the court would be justified in finding that Chris was indebted to her for \$1,050. In any view of the case, therefore, the judgment is right, and is affirmed. The other judges concur.

LINCOLN NAT. BANK v. VIRGIN et al.
(Supreme Court of Nebraska. April 26, 1893.)
MORTGAGE FORECLOSURE—DECREE BY DEFAULT—EFFECT OF.

1. The rule is that a default by a party defendant is a confession only of such matters as are properly alleged in the petition or complaint. But a recognized exception to that rule is that where in a foreclosure or other kindred proceeding a defendant, who is called upon to disclose and set up his supposed but unknown interest in the subject of the action, makes default, he will be held to have admitted that his interest therein is subject to that of the plaintiff.

2. A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity.

3. In a foreclosure proceeding by N. against the M. Bank, a subsequent mortgagee, and V., their common mortgagor, it was alleged that "the M. Bank claims some interest in the premises, the nature and extent of which is to the plaintiff unknown, but is subordinate to plaintiff's claim, wherefore plaintiff asks that it be compelled to set the same up or be forever barred." The defendants all having made default, a decree of foreclosure was entered, in which it was found that the M. Bank had "no right, title, or interest" in the mortgaged property. In a subsequent action by the M. Bank to foreclose its mortgage, *held*, that the former decree cannot be pleaded as a bar by V. or his grantees.

(Syllabus by the Court.)

Appeal from district court, Seward county; Bates, Judge.

Action by the Lincoln National Bank against A. C. Virgin and others to foreclose two mortgages. From the decree entered, plaintiff appeals. Reversed.

Norval Bros. & Lowley, for appellant. Colman & Colman, George B. France, and D. C. McKillip, for appellees.

POST, J. This action was commenced in the district court of Seward county to foreclose two mortgages executed by A. C. Virgin and wife on the 24th day of September, 1888, to the Merchants' Bank of Utica, to secure payment of a note of the mortgagors of that date for \$2,500, due six months after date. It is alleged in the petition that said note and mortgages were assigned by the Merchants' Bank to the plaintiff for value before maturity. Upon a hearing before the district court, all of the defendants being in default except Severen & Schrack, a decree of foreclosure was entered as prayed upon the mortgage described in the second cause of action, but as to the first cause of action,

viz. the mortgage covering the W. ½ of the S. W. ¼ of section 20, township 11, range 1 E., there was a finding for the answering defendants, and a decree dismissing the petition, from which the plaintiff has appealed. The execution of the mortgage for the consideration alleged by Virgin and wife, who were at the time the legal and equitable owners of the property, is not denied. The defendants above named by their answer deny the assignment of the note and mortgage to the plaintiff, and allege that the Merchants' Bank is still the owner and holder thereof. They further allege that they are the owners in fee simple of said property by deed from Virgin and wife bearing date of August, 1889. That on the 16th day of March, 1889, one Neir, the holder of a prior mortgage upon said premises which was executed March 12, 1887, commenced thereon an action of foreclosure in the district court of Seward county, to which the Merchants' Bank of Utica, while still owning and holding the note and mortgage in controversy, was made a party defendant, but made default. That upon a final hearing in said action there was a finding and decree for the defendants Virgin and wife against the Merchants' Bank as to the mortgage now in question, and a decree declaring it void as to the land in controversy, by reason of which the Merchants' Bank and the plaintiff, as its assignee, are now estopped as against them to assert any claim under or by reason of the mortgage described in the petition. For a second defense it is alleged that the defendants purchased for value in good faith, relying upon the representation of the Merchants' Bank that it claimed no interest in or lien upon the land in controversy by virtue of the mortgage upon which this action is based. The reply is, in effect, a general denial. The evidence with respect to the date of the assignment of the note and mortgage is voluminous and conflicting, but, in view of our conclusion upon the other propositions, it is unnecessary to critically examine that question. The plea of *res judicata* is clearly insufficient as a defense. The decree relied on, assuming that it is a determination in favor of Virgin and wife that the mortgage under consideration is not a lien upon the premises, is not responsive to any claim or allegation in any pleading before the court, and is for that reason *coram non judice*. The petition filed by Neir contained the following allegation only with reference to the Merchants' Bank: "The defendant the Merchants' Bank of Utica has or claims to have some lien or interest in said premises, the nature of which is to plaintiff unknown, but plaintiff avers that the same is subordinate and junior to plaintiff's claim, and plaintiff asks that it may be compelled to set the same up, or be forever barred from asserting the same." The foregoing allegation is followed by a prayer for an accounting, order of sale, and deficiency judgment. In that proceeding, as already said, Virgin

and wife, as well as the Merchants' Bank, made default. In the decree, which is in the ordinary form, immediately following the finding for the plaintiff therein, is the entry upon which defendants rely, viz.: "The court further finds that the defendant the Merchants' Bank of Utica has no right, title, or interest in the land in controversy herein."

This case rests upon an entirely different principle from those cases in which the court had acquired jurisdiction over the subject of the judgment or decree. In such cases the determination of the court, however erroneous, can be called in question only by direct proceedings. We are aware that Mr. Freeman, in his work on Judgments, (section 135a,) expresses a preference for the view that a judgment is erroneous merely, and not necessarily void, although not responsive to any issue of law or fact. We are, however, unable to perceive wherein a judgment entered by a court confessedly outside of the issues submitted for its determination can be said to rest upon any other or different principle than one in which the subject-matter is entirely foreign to the jurisdiction conferred upon it. In the language of the supreme court of Ohio, in *Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. Rep. 132: "A judgment by a court of competent jurisdiction in a case before it, however erroneously that jurisdiction may have been exercised, is one thing, and a judgment by a court of like jurisdiction in a case not before it is another and quite a different thing." In *Sheldon v. Newton*, 3 Ohio St. 494, Judge Ranney uses this language: "It is coram judice whenever a cause is presented that brings this power into action. But before the power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred," etc. The distinction above noted is abundantly sustained by authority. See, in addition to cases cited: *Strobe v. Downer*, 13 Wis. 11; *Straight v. Harris*, 14 Wis. 509; *Lewis v. Smith*, 9 N. Y. 502; *Williamson v. Probasco*, 8 N. J. Eq. 571; *Steel v. Palmer*, 41 Miss. 89; 1 Black, Judgm. 183, 184.

There is no doubt of the jurisdiction of a court of equity, upon proper pleadings in a foreclosure proceeding, to determine the rights of all parties thereto with respect to the subject of the controversy, whether plaintiffs or defendants. But the power to conclude parties not claiming adversely to the plaintiff, whether subsequent mortgagees, or mortgagor and mortgagee, so as to prevent them from afterwards asserting their rights as against each other, depends upon whether such power has been invoked by one or more of the parties thus interested. In the judgment pleaded as a bar in this case, the only relief sought was the foreclosure of the Neir mortgage. In his petition the plaintiff therein alleged in effect that his

mortgage was the prior lien. That was a proposition which the Merchants' Bank could not controvert. It is true it might have answered, (assuming that it was still the owner of the mortgage,) and by cross bill secured an accounting and decree against the mortgagors, and an order for payment from the proceeds of the mortgaged property after the satisfaction of the prior lien. The general rule is that a default is an admission of such facts only as are properly alleged in the petition or complaint. *Herm. Estop.* §53. A recognized exception, however, is that where in a foreclosure or other kludged proceeding a defendant, who is called upon to disclose his supposed but unknown interest in the subject of the action, makes default, he will be held thereby to have admitted that his interest therein is subordinate to that of the plaintiff. *Barton v. Anderson*, 104 Ind. 578, 4 N. E. Rep. 420. The Merchants' Bank by its default must be held to have confessed the cause of action of the plaintiff therein, and to that extent the decree is conclusive. But the question of the validity of the mortgage now under consideration as a second lien was not presented by the petition, and the bank as a defendant in that action was justified in assuming that Neir, the plaintiff, was merely seeking to assert his own lien. The judgment described in the answer not being conclusive as against the Merchants' Bank, it follows that the question of the good faith of the assignment of the mortgage to the plaintiff is not material. *McWilliams v. Bridges*, 7 Neb. 419.

2. The plea of estoppel in pais is not sustained by the proofs. Not only was the mortgage to the Merchants' Bank of record and unsatisfied in Seward county, but the answering defendants are conclusively shown to have had actual notice of it, and to have taken counsel as to its validity. One of them, Mr. Severen, on his cross-examination, admits that previous to the purchase of the land he had a conversation with reference to the mortgage in question with Mr. Hurlburt, president of the bank, in which he was informed by the latter that said note and mortgage had been pledged to the plaintiff herein for money advanced by it. He testifies, among other things, as follows: "Question. You knew at the time you bought the land that he had put up these notes at the Lincoln National Bank, before you took the deed and paid the money? Answer. The abstract showed the mortgage on it. Q. Notwithstanding that decree Mr. Hurlburt told you that he had put that mortgage up at the Lincoln National Bank? A. He said he had put it up as collateral security. Q. You knew that when you bought the land? A. Yes, sir." It is very evident that the defendants were fully aware of the facts with reference to the mortgage, and purchased the property in the mistaken belief that, by reason of the decree above referred to, it was

no longer a lien thereon,—a claim which, so far as the record discloses, had never been made by their grantors. The court therefore erred in dismissing the petition of the plaintiff.

The decree of the district court will be reversed, and the case remanded, with instructions to enter a decree of foreclosure in accordance with the prayer of the petition. Judgment accordingly. The other judges concur.

OBERNALTE v. JOHNSON.

(Supreme Court of Nebraska. April 26, 1893.)

MALICIOUS PROSECUTION — PROBABLE CAUSE — PLEADINGS—EVIDENCE—HARMLESS ERROR.

1. O. charged J. before a justice of the peace with the commission of a criminal offense. The jury found J. not guilty, and made a special finding in these words: "and that the complaint was made without probable cause." J. then sued O. for damages, alleging that the prosecution was malicious and without probable cause, and set out in his petition the special finding of the jury. *Held*, that it was error to overrule O.'s motion to strike such special finding out of the petition.

2. On the trial, J. offered in evidence the verdict of the jury acquitting him of the offense with which O. charged him before the justice of the peace. *Held*, that that part of the verdict acquitting him was competent, although O.'s answer admitted that J. had been tried and acquitted. *Held*, further, that it was error to permit the said special finding to be read in evidence to the jury.

3. The foregoing errors were, however, cured by the instructions of the court, and in this case were *held* to be without prejudice. (Syllabus by the Court.)

Commissioners' decision. Error to district court, Cass county; Chapman, Judge.

Action for malicious prosecution by James Johnson against Simon Obernalte. Plaintiff had judgment, and defendant brings error. Affirmed.

J. H. Haldeman, for plaintiff in error.
Wooley & Gibson, for defendant in error.

RAGAN, C. James Johnson sued Simon Obernalte in the district court of Cass county for damages for malicious prosecution, alleging that on the 2d day of September, 1889, Obernalte falsely and maliciously, and without any probable cause, charged the plaintiff before a justice of the peace with a crime, and caused said justice to make out a warrant and arrest the plaintiff, by which he was deprived of his liberty; that on the 5th of September, 1889, the plaintiff was tried on the charge before said justice of the peace and acquitted, and that said prosecution is now ended and wholly determined; that by means of said false arrest, trial, and imprisonment, the plaintiff had been damaged. Petition also contained this clause: "And the jury in said cause found the complaint was made without any probable cause." To this petition the defendant below filed a motion to strike out

the words "and the jury in said cause found said complaint was without any probable cause." This motion the court overruled. The defendant then answered, admitting that he made the complaint before the justice of the peace, had the plaintiff arrested as alleged in the petition, and averred that the charges made against the plaintiff were true; that in the month of August or September, 1889, he was reliably informed that plaintiff was guilty of the offense with which he charged him before the justice of the peace; that he consulted the county attorney, and truthfully laid all the facts before him, and thereupon caused the plaintiff to be arrested; and denied "that such arrest was made through malice or without probable cause, and denied that plaintiff had been damaged thereby." There was a trial to a jury, with a verdict and judgment for Johnson, and Obernalte brings the case here for review.

There are only three assignments of error which we notice:

1. The overruling of the motion of the defendant below to strike out of plaintiff's petition the words: "And the jury in said cause found said complaint was made without any probable cause." This motion should have been sustained. It was not a material allegation in the petition, and no evidence could be adduced on the trial in support of such an allegation.

2. The introduction in evidence of the verdict of the jury in the criminal trial before the justice of the peace. This verdict was in these words: "In justice court. Before L. C. Stiles, justice of the peace. The State of Nebraska vs. James Johnson, Chris Nelson. Verdict. We, the jury, duly impaneled and sworn in the above-entitled cause, do find the defendants not guilty, and that the complaint was made without probable cause. C. H. Smith, Foreman." It is true the answer of the defendant admitted that he had caused Johnson's arrest; that he had been tried, and acquitted. Nevertheless, that part of this verdict finding Johnson not guilty was competent evidence, but the words, "and the jury in said cause found said complaint was made without any probable cause," were clearly incompetent. The very question the jury, to whom this verdict was read in evidence, was sitting to determine, was whether Obernalte, in the prosecution of Johnson in the case wherein the jury had acquitted him, had probable cause to believe him guilty of the offense with which he charged him before the justice of the peace, or whether his prosecution of Johnson was malicious and without probable cause. To permit this part of the verdict to be read was in effect to put in evidence against Obernalte the opinion of the jurymen in the state case that in causing Johnson's arrest Obernalte was actuated by malicious motives. We know of no rule of evidence under which that part of the ver-

dict was competent, and it should have been excluded. *Sweeney v. Perney*, 40 Kan. 192. 19 Pac. Rep. 328.

2. The giving of instruction No. 8 by the court. That instruction is as follows: "The record and verdict of the criminal trial had before Justice Stiles, and which has been received in evidence before you, are proper to be considered by the jury only so far as they tend to show the institution and final determination of said criminal prosecution in the court below." We do not think there was any error in this instruction. On the contrary, if it was out of the record, the case would have to be reversed. The court, by giving it, cured the other errors complained of and reviewed herein.

The plaintiff in error assigns as error the giving of other instructions by the court, but these are not insisted on in the brief of counsel. We have, however, carefully examined them, and think the plaintiff in error has nothing of which to complain. The trial judge seems to have taken great pains to fully, fairly, and carefully instruct the jury on all the points in the case. The judgment of the court below is affirmed. The other commissioners concur.

OGDEN et al. v. WARREN et al.

(Supreme Court of Nebraska. April 26, 1893.)

REPLEVIN—TITLE TO SUPPORT—WHEN DEMAND UNNECESSARY—PARTIES.

1. Contract set out in the opinion construed, and *held*, that W. & Co. had a lien upon the corn for the purchase money and their share of the profits, and were entitled to immediate possession.

2. Where a defendant lawfully in the possession of property denies the title and right of possession of the owners, no demand is necessary.

3. A receiver appointed by a court of record of another state to take charge of a business of a partnership there, and to wind up its affairs, may take charge of property of the firm in this state; but in such case there is a mere substitution of parties, and the receiver has no greater rights in such property than the parties themselves.

(Syllabus by the Court.)

Error to district court, Adams county; Gaslin, Judge.

Replevin by Nathan H. Warren and others, composing the firm of N. H. Warren & Co., against Albert B. Ogden and others. Plaintiffs had judgment, and defendants bring error. Affirmed.

Teller & Orahood and Batty, Casto & Dungan, for plaintiffs in error. Sedgwick & Power, for defendants in error.

MAXWELL, C. J. This is an action of replevin brought by Warren & Co. against Ogden, etc., to recover the possession of 14,998 bushels of ear corn of the value of \$5,248.60, or, in case said property cannot be returned, the value of the same. In answer to the petition Robert E. Foot, one of

the defendants, denies "that the plaintiffs, or either of them, were at the time of the commencement of this action, or at any time, the owners of the property set out in the complaint or petition, to wit, about 14,998 bushels of ear corn, more or less, and being all the corn in the cribs numbered 1, 2, 3, 4, situated near the B. & M. R. R. track in the town of Brickton, in said Adams county, Neb. That the plaintiffs, or either of them, were, at the time of the commencement of this action, or at any time, entitled to the immediate possession of said above-described property. That at the time of the commencement of this action, or at any time, he wrongfully detained said property from the possession of the plaintiffs, or either of them, for 15 days, or for any time. That plaintiffs, or either of them, have been damaged in the sum of \$500, or any sum whatever. That on the 10th day of May, 1890, the district court of the state of Colorado, sitting in and for the county of Arapahoe, the same being a court of record, and duly established under the laws of said state, entered of record in said court on said day, the same being one of the judicial days of the April term, 1890, thereof, a decree in the suit of one Albert B. Ogden, plaintiff, against Lorin Butterfield, defendant, wherein and whereby, among other things, it was adjudged and decreed by said court that the plaintiff and defendant in said action had been partners in business under the firm name of L. Butterfield & Co., and that said partnership from and after said date was dissolved, and further did adjudge and decree that this defendant, Robert E. Foot, be, and he was appointed by said decree, receiver of the partnership, stock, premises, outstanding debts, and effects thereof, and did duly qualify as such receiver. That the defendant Robert E. Foot, as he was in duty bound as such receiver, did enter upon his duties, and take into possession all the property of the said firm of L. Butterfield & Co., and did on or about the 12th day of May, 1890, in the town of Brickton, in the county of Adams, in the state of Nebraska, find in the lawful possession of L. Butterfield & Co. the property mentioned herein and in said petition, and did then and there take possession of said property, and was as such receiver in the peaceful, quiet, and lawful possession thereof at the time of the commencement of this action, and entitled at all times to retain possession thereof and protect said possession in the discharge of his duties as such receiver. That said property was in the possession of L. Butterfield & Co. as aforesaid under and by virtue of a contract in writing, wherein and whereby the plaintiffs and said L. Butterfield & Co. owned said property in common, and passed to the defendant as receiver as aforesaid. That the defendants F. H. Felt and C. J. Barnes were acting under instructions of this defendant,

as receiver aforesaid, in maintaining and protecting said possession at the time of the commencement of this action. Wherefore defendant prays that this action may be dismissed at plaintiffs' cost, and that he be decreed entitled to the return of said property as such receiver, and, upon the failure of plaintiffs to return the same, that he may have judgment for the full value thereof." Albert B. Ogden, one of the defendants, filed an answer, in which he denies that Warren & Co., or either of them, at the commencement of the action, was the owner of the property or entitled to the possession thereof, or that the property was wrongfully detained from said party. He also alleges the dissolution of the firm of L. Butterfield & Co., and the appointment of Foot as receiver, and that the acts done by the defendants below were to protect the possession of the receiver against the unlawful attempts of the plaintiffs below forcibly to take possession of the corn. Warren & Co. in their reply, in effect, deny all the facts in the foregoing answers. On the trial of the cause the jury found that Warren & Co. were at the commencement of the action the owners of and entitled to the immediate possession of the corn, and, a motion for a new trial having been overruled, judgment was entered on the verdict. The corn was purchased under the following agreement: "Memorandum of agreement, made this 6th day of November, 1880, between Nathan H., Cyrus I., and Chas. C. Warren, composing the firm of N. H. Warren & Co., of Chicago, Ill., party of the first part, and L. Butterfield & Co., of Denver, Colo., party of the second part, witnesseth: The party of the second part agrees to buy and store in cribs belonging to them at Inland, Savonville, and Brickton, Neb., ear corn to the amount of 50,000 bus., more or less, and to pay the expense of cribbing, insurance, shelling, and other necessary expenses, to the time of shipment of said corn. The party of the second part further agrees to put a sign bearing the name of the first party (N. H. Warren & Co.) on each crib of 5,000 bushels, and to shell and ship said corn only by and under the direction of said first party. They also agree to furnish the use of said cribs free of charge; it being understood that the meaning of their contract is that the party of the first part shall furnish the money free of interest to pay for the corn, and the party of the second part shall furnish the cribs and labor and expense of buying, cribbing, shelling, preparing for market, if needed, loading on the cars, and insuring the corn, which is to be the property of N. H. Warren & Co., and at all times under their control and direction. Furthermore, that all profits and losses arising from the handling and sale of the corn are to be equally divided between the parties of the first and second part, after the parties of the first part have received the

amount furnished to pay for the corn, without interest. It is further agreed that the party of the second part shall furnish crib receipts. [Signed] N. H. Warren & Co. L. Butterfield & Co." It will be observed that Warren & Co. were to furnish the money to purchase the corn, and Butterfield & Co. were to purchase the same, place it in cribs, insure it, and incur all lawful expenses of buying, cribbing, shelling, and preparing for market. It is provided, however, that the corn was to be the property of Warren & Co.,—at all times under their control; the profits above the actual cost of the corn and expenses to be equally divided. A fair construction of this contract gave Warren & Co. a lien upon the corn for the purchase money and one-half of the profits. To that extent, without doubt, they were the owners, and entitled to the possession. Had the answer of Foot been of such a character as to show the exact interest of Butterfield & Co. in the corn in dispute, it is probable that the whole controversy might have been adjusted in this action. The answer, however, simply puts in issue the rights of Warren & Co. to either the title or possession of the property. Therefore, it will be necessary for the receiver to bring an action against Warren & Co. The defendant in error insists that the receiver has no jurisdiction in this state, having been appointed by a district court in Colorado. We think differently, however; but he simply steps into the shoes of Butterfield & Co., and has no greater rights than they possess. The plaintiffs in error contend that there was no demand before bringing the suit, and therefore replevin will not lie. In their answer, however, they deny the right and title of Warren & Co., and claim that they are in the receiver. In such case no demand is necessary. *Homan v. Laboo*, 1 Neb. 204. Upon the whole case it is apparent that the judgment is right, and it is affirmed. The other judges concur.

PARRISH et al. v. McNEAL.

(Supreme Court of Nebraska. April 23, 1893.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED—CONVERSION—EVIDENCE.

1. A person having a direct legal interest in the result of an action in which the adverse party is an administrator of a deceased person is not precluded by section 329 of the Code from testifying to a transaction between himself and such deceased person in case such administrator has first introduced a witness who has testified in regard to the same transaction.

2. When a person who is precluded by the provisions of said section from testifying against the representative of a deceased person is permitted, without objection, to testify to a conversation or transaction had with such deceased person, it is a waiver of the benefit of the statute.

3. *Held*, the verdict is sufficient, both in form and substance.

(Syllabus by the Court.)

Error to district court, Pawnee county; Appelget, Judge.

Action for conversion by James R. McNeal against Joseph Parrish and another. Plaintiff had judgment, and defendants bring error. Affirmed.

J. L. Edwards, for plaintiffs in error. W. W. Giffen and J. K. Goudy, for defendant in error.

NORVAL, J. This is an action brought by James R. McNeal against Joseph Parrish to recover for the alleged conversion of a mule. The suit was commenced in justice court. From a judgment in favor of the defendant, plaintiff appealed to the district court, where, after plaintiff had introduced his testimony in chief, and a portion of the testimony for the defense had been received, on motion of the defendant, and over the objection of the plaintiff, the court permitted C. J. Morton, administrator of the estate of Joseph B. Morton, deceased, to be made a party defendant. The jury returned a verdict for the plaintiff for the sum of \$87.50, upon which judgment was rendered. Defendants bring the case to this court for review on error. It appears from the bill of exceptions that on the 25th day of January, 1880, James R. McNeal gave a chattel mortgage upon the mule in dispute to Joseph B. Morton to secure the payment of a promissory note for \$60, due on the 25th day of January, 1880. Afterwards, but before the maturity of the note, the payee thereof, J. B. Morton, died. Subsequently, C. J. Morton was appointed administrator of his estate. The note and mortgage came into the hands of the administrator as a part of the assets of the estate, without any credits or other evidence of the same having been paid. The mortgage was placed in the hands of Parrish by the administrator, with instructions to take the property therein described and sell the same. Plaintiff claims, and upon the trial he introduced evidence tending to show, that the note and mortgage had been paid to J. B. Morton in his lifetime; that the last payment was made in July or August, 1880, and that the note and mortgage were not delivered up, for the reason that the payee and mortgagee did not have them with him at the time the last payment was made. This evidence was contradicted by the defendants. It is unnecessary to give a detailed statement of the testimony. There was sufficient evidence, given by disinterested witnesses, if believed by the jury, to justify them in finding that the mortgage debt had been fully paid before the property was seized.

It is urged that the trial court erred in permitting the plaintiff below, McNeal, to testify that he had paid the note in full to J. B. Morton. This testimony was objected to at the time it was given on the ground that the adverse party is a repre-

sentative of a deceased person. Under the provisions of section 329 of the Code, a person having a direct legal interest in the result of a suit in which the adverse party is a representative of a deceased person is precluded from testifying to any transaction or conversation had between himself and such deceased person, unless the evidence of the deceased person, relating to such conversation or transaction, has been taken and read on the trial by the adverse party, or unless such representative has produced a witness who had testified in regard to such transaction or conversation. This case falls within the exception of the statute. The administrator introduced evidence on the trial to show that McNeal had never paid the note. He even proved statements made by his intestate, in his lifetime, after the date of the alleged payment, and not in the hearing of the plaintiff, that the note was unpaid. It was not until after such evidence had been received that the plaintiff was allowed to give the testimony complained of. It related to the identical transaction had with the deceased, which the witness for the administrator had testified in regard to, and was therefore competent.

The next error relied upon for a reversal is the permitting of the witness Ben Hur, who was a surety on the appeal bond given by the plaintiff in the justice court, to testify as to a conversation had by the witness with J. B. Morton, relating to plaintiff's indebtedness to him. A sufficient answer to this contention is that no objection was made in the trial court to the competency of the witness. The protection of the statute was therefore waived. *Bartlett v. Bartlett*, 15 Neb. 593, 19 N. W. Rep. 691.

Objection was made to the form of the verdict. It reads as follows: "State of Nebraska, Pawnee county—ss.: November term, A. D. 1890, to wit, November 15, 1890. James R. McNeal, Plaintiff, vs. Joseph Parrish, Defendant. We, the jury in this case, being duly sworn, do find for the plaintiff, and assess the amount of his recovery at \$87.50. J. W. Hoig, Foreman." The only criticism upon the verdict, urged by counsel, relates to the title of the cause. No such objection was called to the attention of the court at the time the verdict was returned into court. Had it been, the defect, if any, doubtless, would have been corrected before the jury were discharged. The title of the cause was not changed by permitting the administrator to appear and defend. The verdict was returned and filed in the proper action, and the title was sufficient to identify the verdict with the case. The omission of the name of the administrator as a defendant from the title was not such a defect as to prevent the entry of a judgment on the verdict. *Morrissey v. Schindler*, 18 Neb. 672, 26 N. W. Rep. 476. Finding no error in the record, the judgment of the court below is affirmed. The other judges concur.

KRIESEL v. EDDY et al.

(Supreme Court of Nebraska. May 16, 1893.)

**EXEMPTIONS FROM EXECUTION—CLAIM OF DEBTOR
—DUTY OF OFFICER.**

1. A judgment debtor's right to exemption under sections 522 and 523 of the Code of Civil Procedure is in no way dependent upon the mere intent with which the exemption is claimed, provided that in making his claim for exemption the execution debtor complied strictly with the statute conferring his right thereto.

2. An affidavit filed as required by section 522 of the Code of Civil Procedure, which states that the affiant has certain enumerated property, of the value therein detailed, which value, in the aggregate, is less than \$500, and that the affiant has no other property, sufficiently complies with the requirements as to enumeration and value of said execution debtor's property to entitle him to the benefit of the said section of the statute.

3. Where a sufficient inventory has been filed to entitle an execution debtor to the exemptions provided in sections 522 and 523 of the Code of Civil Procedure, it is the duty of the officer to proceed further only as provided in said sections, and if, notwithstanding the due filing of the inventory, the officer holding an execution, without compliance with the statute in such cases made and provided, sells the property held by him under his execution, he is liable on his bond for the value of the property so sold, at least to the limit of \$500.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Clarkson, Judge.

Action on a bond by Carl Kriesel against Martin Eddy, John F. Doyd, and Daniel Rafferty. Defendants had judgment by direction, and plaintiff brings error. Reversed.

Charles W. Haller, for plaintiff in error.
Chas. B. Keller, for defendants in error.

RYAN, C. This action was brought by Carl Kriesel against Martin Eddy, a constable, and said constable's bondsmen, to recover the value of certain goods taken under an execution by said constable, which goods, notwithstanding said Kriesel had in the mean time filed an affidavit claiming his exemptions, the said constable sold for the satisfaction of the execution in his hands. The answer admitted that Eddy, at the time of the occurrence of the transaction complained of, was a constable, and that the sureties on his bond were as alleged in said petition. Defendants also admitted that the goods were levied on and sold under the execution in the hands of said constable. Each other allegation in the petition was denied. The jury returned a verdict for the defendants, as directed by the court.

There was introduced upon the trial a certified copy of the affidavit for exemption, which was in the following language, omitting the title of the case, and the court in which it was filed: "Affidavit for Exemption. State of Nebraska, Douglas county—**ss:** Carl Kriesel states on oath that he is one of the defendants in the above-entitled action; that the said Kriesel is the head of a family, for that he, the said Kriesel, has dependent upon him for support, and the

said Kriesel does support, his two minor daughters, Elizabeth Kriesel, aged 11 years, and Margareta Kriesel, aged 8 years; also his, said Kriesel's, aged mother. Said Kriesel owns, besides the tools and instruments kept by him, the said Kriesel, for the purpose of carrying on his trade of shoemaker, (said tools and instruments are to be found at 1503 Howard street, Omaha, Nebraska, and are not worth more than \$15.00,) and besides his, said Kriesel's, necessary clothing, worth only \$75.00, and to be found at said No. 1503 Howard street, and on said Kriesel's back, nothing besides the goods which have been seized in this action, which are described as follows: Four dozen (4) pairs men's slippers, seven (7) dozen pairs men's shoes, and one dozen (1) pairs boys' shoes. The said shoes are not worth more than \$203.00. None of the said property above named is due or owing for clerks', laborers', or mechanics' wages, or for money due and owing from said Kriesel, as attorney at law, for money or other valuable considerations received by said Kriesel for any person or persons. Said Kriesel hereby claims all of said property as exempt." This was subscribed and sworn to by said Carl Kriesel. There was other evidence submitted to the jury to establish the claim made that Kriesel was a citizen of Germany, was not in fact the head of a family; that he had been divorced; that he had corresponded very little with his relatives in Germany, etc. This was met with other evidence of an opposite tendency. The presiding judge, however, seems to have acted upon the theory that the sufficiency of the affidavit filed by Kriesel determined the rights of the parties. He therefore simply instructed the jury to find for the defendants, which was accordingly done. In argument the defendants in error insist that the evidence showed that Kriesel had agreed with Hermerdinger & Co. that the avails of his exemptions would be paid to said firm, and that, therefore, the claim of exemption was simply an attempt on Kriesel's part to take the goods levied upon by one of his creditors, and give them to another. It has been held by this court in Gillespie v. Brown, 16 Neb. 457, 20 N. W. Rep. 632, that the right to sell property exempt from execution is a personal privilege, and that such property as the law exempts from execution sale can be mortgaged, and that the right of such mortgagee would prevail over that of a judgment creditor whose execution, after the making of the mortgage, had been levied upon the said mortgaged property. It results, therefore, that the agreement of Kriesel to convey the exempt property, as soon as he obtained dominion over it, to Hermerdinger & Co., would not, even if proved, defeat or qualify his right to such exemption as the statute gave him.

The only other question discussed by defendants in error is the sufficiency of the affidavit filed to entitle Kriesel to the statutory

exemption to an amount in value of \$500 of the property levied upon. The criticism on this score is thus stated: "This affidavit does not state that he is a citizen or resident of the state of Nebraska; does not state that he owns neither lands, town lots, nor houses subject to exemption under the laws of this state." Let us see how correct this is, as a matter of fact, tested by the affidavit itself. Its language is as follows: "Said Kriesel owns, besides the tools and instruments kept and used by him, said Kriesel, for the purpose of carrying on his trade of shoemaker, (said tools and instruments are to be found at No. 1503 Howard street, Omaha, Nebraska, and are not worth more than \$15.00,) and besides this, said Kriesel's, necessary clothing, worth only \$75, to be found at said No. 1503 Howard street, and on said Kriesel's back, nothing besides the goods which have been seized in this action, which are described as follows, to wit: Four (4) dozen pairs men's slippers, seven (7) dozen pairs men's shoes, and one (1) dozen pairs boys' shoes. The said shoes are all not worth more than \$203.00." In this excerpt the affiant states that besides his clothing and tools, of the aggregate value of \$90, the affiant owns nothing but certain shoes and slippers, of the value of \$203. If the affidavit, under the statute, should have shown that the affiant owned neither lands, town lots, nor houses,—which we do not now determine,—such requirement was fully met by the above language.

This statute providing for exemptions, under consideration, does not require the affiant to state whether or not he is a resident or citizen of the state of Nebraska. The evidence adduced on the trial of this case shows that, without question, Kriesel was a resident of Omaha, even if that was necessary. Such statement in the affidavit for exemption is nowhere required. The affidavit, which contained the inventory, was amply sufficient to meet all requirements of the statute, and entitle Kriesel to the exemption contemplated by sections 522 and 523 of the Code of Civil Procedure. Upon the filing of such an affidavit containing an inventory of all the property owned by Kriesel, the law devolved upon the constable holding the execution but one course of action, and that consisted in his calling three disinterested freeholders of Douglas county to appraise said property levied upon at its cash value, after which the execution debtor was entitled to make selection from the property appraised, as provided by statute. In this case the constable ignored the affidavit containing the inventory, and sold all the property which he held under his execution. This rendered him liable for the fair value of said property,—at least to the amount of \$500,—and there was no issue in the district court, properly triable, except such value. Officers holding executions should act under the statute, as well to protect the judgment debtor

in the enjoyment of the exemption provided by statute, as to collect the judgment upon which the execution issued. Such officers may, by arbitrarily overriding the statute, prevent the beneficent operation of the exemption law in favor of the debtor. This is but one species of oppression in office, for which such officers as are guilty will be held to strict accountability, if their victims are able to apply to the courts for redress. The district court acted upon an erroneous presumption as to the affidavit for exemption, and its judgment is reversed. The other commissioners concur.

EMERY v. JOHNSON.

(Supreme Court of Nebraska. May 16, 1893.)

EJECTMENT—EQUITABLE TITLE IN DEFENDANT—EVIDENCE.

Upon appeal, as to equitable issues, the decree of the district court will be reversed when it is clearly against the preponderance of the evidence upon which such issues were determined.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Douglas county; Groff, Judge.

Petition in ejectment by Elias L. Emery against Samuel R. Johnson. Plaintiff had decree, and defendant appeals. Reversed.

Scott & Scott and Cavanagh, Atwell & Thomas, for appellant. Hall, McCulloch & English, for appellee.

RYAN, C. On the 2d day of November, 1887, Elias L. Emery filed in the district court of Douglas county, Neb., his petition in ejectment for the possession of a strip of land which the plaintiff alleged had been wrongfully withheld from him by the defendant, Samuel R. Johnson, since June 1, 1878. The said defendant answered December 3, 1887, denying the ownership, right of possession, and every other right of plaintiff as to the strip of land in controversy, and admitting that defendant had been in possession thereof since June 1, 1878, but denying that said possession was wrongful. The answer further alleged that defendant had been in the lawful, peaceful, and uninterrupted possession since November 7, 1877, of the following described premises, situate in the city of Omaha, county of Douglas, state of Nebraska, to wit: The west part of lot 2, in Capital addition to the city of Omaha, commencing at the northwest corner of said lot, running thence south on its west line 332 feet to the north line of Douglas street, thence east 83½ feet, thence north 332 feet to the south line of Dodge street, thence west 83½ feet to the place of beginning; said premises including the premises described in the petition of plaintiff. That plaintiff and Mary E. Emery, who is the wife of the plaintiff, claim and pretend to be possessed of an estate or interest in the south

14 feet, more or less, of said premises, but that said claim and pretense is without any right whatever, and that said Emerys have of right no estate or interest whatever in said property, or any part thereof. The defendant further alleged that on or about November 1, 1877, the said Emerys sold to defendant the premises above described, and that on November 7, 1877, the said Emerys executed and delivered to defendant a deed wherein the premises so sold and conveyed were by mistake described as "the west part of lot 2, Capital addition to Omaha city, commencing at the northwest corner of said lot 2, running thence south to the west line of said lot 318 feet, thence east $83\frac{1}{2}$ feet, thence north 318 feet to the south line of Dodge street, thence east $83\frac{1}{2}$ feet to the place of beginning; whereas it was the understanding, contract, and agreement by and between the said parties that the said property so purchased by defendant should include all that part of said lot 2 extending from the northwest corner thereof to such a distance south as that when Douglas street should be opened in front of said premises the south end of the property so conveyed should extend to and constitute the north line of said Douglas street." The answer further alleged that at the time of the aforesaid purchase the said Douglas street had been opened up to a width of 80 feet to the east line of the property above described, but that immediately in front of said premises said Douglas street has since been opened up to a width of but 66 feet; that the defendant and the above-named vendors all supposed that when said street was opened up it would be 80 feet in width in front of said premises, but, as above stated, the property conveyed was to extend to the north line of Douglas street, whether the same should be 80 feet, more or less, in width. The answer closed with a prayer for the relief consistent with the above averments of the answer. There was a reply denying the above averments, upon which the defendant based his claim for the relief prayed in his answer. On February 23, 1889, a decree was entered in favor of the plaintiff, in which it was ordered and adjudged that the defendant, as against the Emerys, had no equitable title to the 14 feet in the answer described, and that the equitable claim made by defendant thereto be dismissed. An appeal from this decree brings this case before us for review.

* The contention is as to a strip of land 14 feet wide across the front of lot 2, above described. At the time of the conveyance to Johnson, Douglas street had not been laid out in front of lot 2, aforesaid, but for the distance it had been laid out its width was 80 feet. It was subsequently laid out and opened in front of said lot with a width of but 66 feet, and the difference between said 80 feet and 66 feet—that is, 14 feet—is the subject-matter of this appeal. The

evidence of Johnson was to the effect above set out in his answer. He distinctly stated in his testimony that the plaintiff in express terms represented that Douglas street would be 80 feet in width along the front of said lot 2, and that he relied upon said representation in his purchase, and that, as said purchase was only of a part of said lot 2, it was necessary to describe the tract purchased by metes and bounds, and that the distance southward from the place of beginning was described by such number of feet as would reach the north line of Douglas street when it should be extended from its then terminus. In favor of the reasonableness of this testimony it is impossible to ignore the fact that, if the grantor is allowed to retain the 14 feet in dispute, the property of the defendant will, by that strip, be cut off from Douglas street. The defendant, in testifying, remarked that he would not have purchased the property with the right of ingress and egress upon Douglas street cut off, and that seems very probable. The testimony of the defendant was clear, candid, and convincing. On the other hand, the evidence of the plaintiff, as well as his version of the facts, showed nothing but a disposition to rely solely upon the description embodied in the deed of conveyance. For instance, he was asked: "What was the talk, if any, at the time that purchase was made? State to the court the full particulars. Answer. I did not have any talk. I sold him 318 feet of ground long and $83\frac{1}{2}$ feet wide." The court said: "Let him state what was said and done at the time the deal was made." The plaintiff thereupon answered: "I made Mr. Johnson a deed to the piece of ground,—described it in the deed. I gave him the numbers." On his cross-examination he admitted that he expected Douglas street would be 80 feet wide; indeed, he favored its being 100 feet in width; supposed it would be 100 feet wide, and that 20 feet would be taken off the 318 he sold to Johnson. There was no evidence whatever that would tend to show that Johnson did not take possession of the whole tract sold him, inclusive of the 14 feet in dispute, when the deed was made to him in 1877, until a year or two before the trial, when plaintiff put a fence along the strip in dispute. As plaintiff in his petition alleged that the defendant had been in possession of the strip in dispute since June 1, 1878, and as plaintiff's evidence founds no right upon the existence of this fence, its existence has no significance in favor of the plaintiff. It is not, therefore, an assumption unfounded in the pleadings and evidence that from the date upon which the deed from the Emerys to Johnson was recorded—November 8, 1877—until November 2, 1887, a period of almost 10 years, Johnson had been in the occupancy and possession of the strip in dispute. While this lacks six days of the full period necessary by possession to acquire ti-

tle, and therefore the statute of limitations had not, when this suit was commenced, barred plaintiff's right of action, yet this condition of affairs, unquestioned for so long, militates very seriously against plaintiff's technical assertion of title. Upon full consideration of the evidence and pleadings, the judgment of the district court is reversed. A decree will be entered in this court in accordance with the prayer of defendant's answer. Judgment accordingly. The other commissioners concur.

WHIPPLE v. HILL

(Supreme Court of Nebraska. April 28, 1893.)

ATTACHMENT—AFFIDAVIT FOR—DISSOLVING ATTACHMENT—HOLIDAYS.

1. The affidavit upon which the attachment in this case was issued examined, and held sufficient.

2. Where a motion to discharge an attachment, on the ground that the facts stated in the affidavit are untrue, is heard upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence.

3. Section 38, c. 19, Comp. St., providing that "no court can be opened nor any judicial business be transacted on Sunday, or any legal holiday," etc., does not prohibit a county judge from issuing, on a legal holiday, an order of attachment on a debt past due, since that is purely a ministerial, and not a judicial, act.

(Syllabus by the Court.)

Error to district court, Greeley county; Coffin, Judge.

Action in attachment by Pauline A. Hill against John F. Whipple. Plaintiff had judgment, and defendant brings error. Affirmed.

Henry Nunn, for plaintiff in error. T. J. Doyle, for defendant in error.

NORVAL, J. The defendant in error commenced an action by attachment, in the county court of Greeley county, against plaintiff in error, to recover the sum of \$205.95 on a promissory note. The affidavit for the attachment was filed and the writ issued on the 1st day of September, 1890. Service was had on the following day. Subsequently defendant filed a motion in the county court to discharge the attachment upon the following grounds: "(1) Because the allegations in plaintiff's affidavit are insufficient to sustain the attachment. (2) Because the allegations in said affidavit are untrue. (3) Because the writ of attachment was issued and served on the 1st day of September, 1890, which was a legal holiday." This motion was overruled by the county court, and the attachment sustained. Thereupon the defendant prosecuted error to the district court to reverse said ruling, which resulted in affirming the decision of the county court. The objections urged by the plaintiff in error, in his motion for a dissolution of the attachment, will be noticed in the order in which they are stated therein.

The first point made is that the allega-

tions in the attachment affidavit are insufficient to sustain the attachment. The following is a copy of the affidavit upon which the attachment was granted, omitting caption and title of the cause: "State of Nebraska, Greeley county—ss.: Henry A. Hill, being duly sworn, says he is the duly-authorized agent of plaintiff. The said plaintiff makes oath that the claim in this action is for two hundred and five and 95-100 dollars, due under contract on promissory notes; and the said Henry A. Hill also makes oath that said claim is just, and that Paulina A. Hill, plaintiff, ought, as he believes, to recover thereon two hundred and five and 95-100 dollars. He also makes oath that said defendant, John F. Whipple, is about to remove his property, or a part thereof, out of the jurisdiction of the court, with the intent to defraud his creditors, and is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; that the said John F. Whipple has property and rights in action which he conceals, and has assigned, removed, and disposed of, and is about to dispose of his property, or a part thereof, with the intent to defraud his creditors; and fraudulently contracted the debt for which suit is brought. H. A. Hill. Subscribed in my presence, and sworn to before me, this 1st day of September, A. D. 1890. H. H. Parks, Co. Judge." It is contended that the affidavit is insufficient, because the allegation therein as to plaintiff's claim is not sworn to either by the plaintiff or her agent. The objection is not good. True, the affidavit states, "The said plaintiff makes oath that the claim in this action is for two hundred and five and 95-100 dollars, due under a contract on promissory notes." But immediately following said averment, the affidavit contains this language: "And the said Henry A. Hill also makes oath that said claim is just, and that Paulina A. Hill, plaintiff, ought, as he believes, to recover thereon two hundred and five and 95-100 dollars;" from which it sufficiently appears that the affiant, H. A. Hill, makes oath to the statement in the affidavit relating to the nature of the plaintiff's claim. A printed form was used in preparing the affidavit, and manifestly it was an oversight on the part of the draughtsman in not erasing the printed word "plaintiff," and inserting the word "affiant." But the affidavit is not for that reason defective. We think it sufficient to support the attachment. In *Jansen v. Mundt*, 20 Neb. 320, 30 N. W. Rep. 53, an affidavit for an attachment was made by plaintiff's attorney, wherein he swears "that he is the authorized attorney of the plaintiff in the above-entitled action; that he has commenced an action," etc. It was ruled that the defect in omitting to state that plaintiff commenced the action did not render the affidavit void, inasmuch as it appeared from the whole affidavit that the suit was brought by the plaintiff. In princi-

ple, the case at bar is not distinguishable from the case cited.

The second objection is that the facts stated in the affidavit for the attachment are untrue. The defendant filed an affidavit denying the grounds of the attachment, and, on the hearing of the motion to dissolve, numerous affidavits were filed in support of, and in resistance of, said motion. From an examination of the several affidavits it appears that there is a sharp conflict of evidence, but we are convinced that a preponderance thereof supports the original affidavit for the attachment. The rule long adhered to in this court is that where a motion to discharge an attachment, on the ground that the allegations in the affidavit are not true, is decided upon conflicting testimony, this court will not disturb the ruling unless the preponderance of the evidence against it is clear and decisive. *Mayer v. Zingre*, 18 Neb. 458, 25 N. W. Rep. 727; *Grimes v. Farrington*, 19 Neb. 44, 26 N. W. Rep. 618; *Holland v. Bank*, 22 Neb. 571, 36 N. W. Rep. 113; *Johnson v. Steele*, 23 Neb. 82, 36 N. W. Rep. 358.

The remaining question to be considered is whether or not the attachment is void because the order was issued on a legal holiday. The solution of the question necessitates an examination of two sections of the statute. By section 9, c. 41, Comp. St., it is provided that "the first Monday in the month of September in each year shall hereafter be known as 'Labor Day,' and shall be deemed a public holiday in like manner and to the same extent as holidays provided for in section eight (8) of chapter forty-one (41) of the Compiled Statutes of 1887." A reference to the calendar will disclose that the 1st day of September, 1890, on which date the attachment in question was issued, was Monday; therefore, under the foregoing provision, was a public or legal holiday. The objection to the issuance of the writ of attachment in this case on Labor day is based upon section 38, c. 19, Comp. St., which declares that: "No court can be opened, nor can any judicial business be transacted, on Sunday or any legal holiday, except—First, to give instructions to a jury then deliberating on their verdict; second, to receive a verdict or discharge a jury; third, to exercise the powers of a single magistrate in a criminal proceeding; fourth, to grant or refuse a temporary injunction or restraining order." The legislature by the section quoted has prohibited the courts of the state from being opened and from the transaction of any judicial business, with certain well-defined exceptions, on any day declared by statute to be a public or legal holiday. It will be observed that the prohibition of the statute, so far as the transaction of business on holidays is concerned, relates to acts which in their nature are purely judicial, and does not apply to such as are merely ministerial. The language of

the section is plain and unambiguous, and should not be extended by judicial interpretation beyond the plain import of the words used. Had the legislature intended to debar courts or court officers from performing ministerial acts upon holidays, words suitable to express such an intention would have been employed. If the transaction of all legal business was forbidden on such days, as is the case in some of the states, we would grant that the order in question would be void; but the statute fails to so provide. It is the opening of courts and the transaction of judicial business on legal holidays which the law forbids. This intent is clearly manifest. We search in vain for any words which indicate a different purpose. The issuance or service of legal process, such as a summons, execution, or writ of attachment, is merely a ministerial act, and therefore is not within the inhibition of the above section of the statute, and is valid, although done on a legal holiday. *Glenn v. Eddy*, (N. J. Sup.) 17 Atl. Rep. 145; *Kinney v. Emery*, 37 N. J. Eq. 339; *In re Worthington*, 7 Biss. 455; *Weil v. Geier*, 61 Wis. 414, 21 N. W. Rep. 248; *Smith v. Ihling*, 47 Mich. 614, 11 N. W. Rep. 408; *Hadley v. Musselman*, 104 Ind. 459, 3 N. E. Rep. 122; *Whitney v. Blackburn*, 17 Or. 564, 21 Pac. Rep. 874. The supreme court of New Jersey, in *Glenn v. Eddy*, supra, under a statute quite similar to our own, held that a summons might be legally issued and served on the day of a general election, which day is by law made a legal holiday. *Magie, J.*, in delivering the opinion of the court, says: "When the statute declares them to be legal holidays, it does not permit a reference to the legal status of Sunday to discover its meaning, for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the statute, therefore, is to free all persons, upon the days named, from compulsory labor, and from compulsory attendance upon courts, as officers, suitors, or witnesses. Its true interpretation will limit the prohibition, with respect to the courts, to such actual sessions thereof as would require such attendance." In *Weil v. Geier*, supra, the supreme court of Wisconsin, in construing a statute almost identical with the one under consideration, held that the issuance of a summons by a justice of the peace on a legal holiday is permissible, because a ministerial act. To the same effect is *Smith v. Ihling*, 47 Mich. 614, 11 N. W. Rep. 408. We are convinced that a county judge in issuing an attachment exercises no judicial functions, and such a writ is not void because issued on a legal holiday. The conclusion reached does not conflict with the case of *Bank v. Jaffray*, (Neb.) 54 N. W. Rep. 258. It was there held that

an order made by a district or county judge on a legal holiday, allowing an attachment in an action on a debt not due, is void. That decision was placed upon the ground that the granting of such an order is a judicial act. As was said by Judge Post in his opinion in that case: "When the application is made, the court or judge must determine judicially that the action is one of those contemplated by the statute, and that the showing is sufficient to entitle the plaintiff to an attachment." The issuance of a writ of attachment on a debt past due, as already stated, is a purely ministerial act. When the proper affidavit and bond are filed, it is the imperative duty of the county judge to issue the attachment. He has no discretion in the matter. The judgment of the district court is right, and is affirmed. The other judges concur.

CONNELL v. GALLIGHER et al.

(Supreme Court of Nebraska. April 26, 1893.)

DEED—DEFECTIVE CERTIFICATE—EFFECT BETWEEN PARTIES—WRITS—IMPEACHING RETURN—BURDEN OF PROOF—POWER OF ATTORNEY.

1. A deed, in other respects sufficient and regular, is effective, as between the grantor and grantee therein, to pass complete title, even though, executed in a foreign state, it is there acknowledged before only a purported justice of the peace, as to whose genuine signature, official character, and power, there is no accompanying certificate of a proper officer having a seal.

2. A decree obtained for the purpose of obviating the objection that the acknowledgment of a deed was not shown to have been proved by the certificate of a duly-authorized officer is operative only against parties to the action, and others in privity with such parties. Whatever rights are held by a stranger to such a suit are unaffected by such a decree.

3. To impeach the return of an officer of the due service by him of a summons, the evidence must be clear and satisfactory.

4. Where want of authority to appear for a defendant against whom judgment has been rendered is alleged, to invalidate such judgment, the burden of proof of such want of authority is upon the party asserting the same.

5. In a power of attorney to convey real property, the true function of the description is not necessarily to identify the land, but may be only to furnish the necessary means of identification. If such description can be made complete by an examination of the public records, and the records of judicial proceedings clearly indicated in such description, it is a sufficient identification of the subject-matter of such power of attorney.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Douglas county; Tiffany, Judge.

Ejectment by William J. Connell against Elizabeth Galligher and others. Plaintiff had judgment, and defendants appeal. Affirmed.

Gregory, Day & Day and George M. O'Brien, for appellants. Connell & Ives, for appellee.

RYAN, C. The real property which is the subject-matter of this action is lot 6

in Smith & Griffin's addition to the city of Omaha. This lot is a part of the N. W. $\frac{1}{4}$ of section 28, in township 15 N., range 13 E. of the sixth P. M. The opinion of the supreme court in O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. Rep. 274, settled several questions as to lots 8, 9, and 12, in this same addition, thereby eliminating similar questions from this action. In the case just cited will be found an abstract of the title of the above-described 80-acre tract, covering many of the conveyances hereinafter discussed, which it is not deemed necessary now to reproduce. To the understanding of the discussions hereinafter, it is believed that, supplementary to the reference to the above plat, it will be sufficient to give the following description of the parties, their interests, the source of their claims, and their several contentions: Augustus Graeter, Jr., was the owner of the whole 80-acre tract on October 20, 1857. On that day he conveyed the undivided one-half of said property to James E. North, and the other undivided one-half he conveyed to Augustus Graeter, Sr. Each conveyance was by warranty deed, which deeds were recorded on the last date above named. James E. North, by warranty deed, on January 9, 1858, conveyed back to Augustus Graeter, Jr., the undivided one-half of said property of which he had been vested with title as above stated. On January 12, 1858, Augustus Graeter, Sr., executed a warranty deed to Augustus Graeter, Jr., for the undivided one-half of said property which he held by virtue of the conveyance aforesaid. This deed was executed in Ohio, and acknowledged before a purported justice of the peace, and did not have a certificate of the proper certifying officer of the county where the acknowledgment was taken, under seal of his office, showing that the officer who took the acknowledgment was in fact the officer he assumed to be; that such certifying officer was acquainted with the handwriting of said justice of the peace, and believed his signature to be genuine; and that the execution and acknowledgment were according to the laws of the state wherein the execution thereof took place. A decree was relied upon to obviate these objections, to which further reference will be made hereafter. In the suit of Wood v. Baugh, Dawkins, and Graeter, a judgment was recovered against each of the defendants, including Augustus Graeter, Jr., upon alleged personal service of summons upon him, and the appearance of George B. Lake as attorney for the defendants. Under this judgment a sale of the premises was made to J. M. Woolworth, by whom a deed of the entire property was executed to Robert K. Woods, who, by power of attorney, authorized said J. M. Woolworth to convey the property therein irregularly described. There arises upon this power of attorney a serious contention as to the sufficiency of the de-

scription of the property in respect of which the attorney in fact was authorized to make conveyance. Under this power of attorney, J. M. Woolworth made conveyance of the entire property, whereunder, by mesne conveyances, the appellee, W. J. Connell, derives his title. By reason of the defective proof of the power of the justice of the peace to take the acknowledgment, as above noted, the appellants claim that Graeter, Jr., at the time of said sheriff's sale, owned only an undivided one-half of the property described in the sheriff's deed. The other half, (as to which, as appellants insist, the defective acknowledgment avoided the deed,) appellants maintain, is held by the grantees of Graeter, Jr., by an equitable title, whatever may be held as to their other points upon which they rely. The appellants further contend that the court obtained no jurisdiction of Graeter, Jr., in the case of *Woods v. Baugh, Dawkins, and Graeter*, for that no summons therein was ever served on said Graeter, Jr., and because the appearance of Judge Lake for defendants in said cause was without authority from Augustus Graeter, Jr. As the result of these contentions, appellants assert that the title to the whole property was held by Graeter, Jr., on December 9, 1874, by whom, on that date, it was, by quitclaim deed, conveyed to James E. North, from whom, by quitclaim deed of date March 16, 1886, Elizabeth Galligher derives whatever title she has to the premises aforesaid, and that by reason of the defects hereinafter to be considered, in appellee's chain of title, her title is unaffected by appellee's claim of title. To the proper settlement of these contentions, it will be necessary to consider the following questions: First. What was the effect of the failure to show the due execution of the certificate of acknowledgment of the deed of Augustus Graeter, Sr., to Augustus Graeter, Jr., and how far was this irregularity cured by decree? Second. What jurisdiction had the court of Augustus Graeter, Jr., personally, when it rendered judgment in favor of *Wood v. Baugh, Dawkins, and Graeter*? Third. Was the subject-matter of the power of attorney of Robert K. Wood to J. M. Woolworth so defectively described that thereunder said attorney in fact could convey no title?

1. The first question was in fact considered in *O'Brien v. Gaslin*, supra, which was an action of ejectment brought by Gaslin against the other parties to the suit. Plaintiff's chain of title, and consequent right of possession, in that case, could be made complete only by introducing in evidence the record of the deed, as to which there was no proof that the acknowledgment was taken by a justice of the peace authorized to take such acknowledgments. It was therefore held that as the record of the deed, under such circumstances, was a nullity and inadmissible against a subsequent purchaser

of the land, it devolved upon the plaintiff to offer a deed properly certified as part of his chain of title, and until he did this the adverse party might rely upon his possession alone as a defense. Like the above, the case at bar was begun by ejectment simply for the possession of the property in dispute. On motion of the appellants it was upon equitable issues, which involved as well the title as the right of possession, tried as an equitable action. It well might be that under such circumstances the want of certification noticed would be of different effect in a cause wherein all questions of title were at issue, as compared with one wherein was involved only the right of possession, such right depending upon the introduction in evidence of a deed imperfectly proved as such. The decision of this case, however, does not require us to determine what, if any, difference should be observed, and no such determination will be attempted.

Appellants contend that, at least, the defect in the proof of due acknowledgment of the deed from Graeter, Sr., to Graeter, Jr., was to vest in Graeter, Jr., a mere equitable title, and that such a title could not be divested by the sheriff's sale made under the judgment rendered in the case of *Wood v. Baugh et al.* This, it is claimed, results from the holding of this court that a judgment lien cannot attach to a mere equity. *Nessler v. Neher*, 18 Neb. 649, 26 N. W. Rep. 471. In *Rosenfield v. Chada*, 12 Neb. 25, 10 N. W. Rep. 465, it was held, however, that an equitable interest in real estate, coupled with actual possession, could be sold under an ordinary execution; and from the proofs adduced as to possession in this case by appellants, it would not be wholly without warrant to find such possession as would be necessary to bring this case within the rule in the last-cited case, upon appellants' own theory. But it is not believed correct to assume that by reason of the defective proof of the powers and acts of one who assumed to take, as an officer, the grantor's acknowledgment of the deed in question, an equitable interest in any way resulted by operation of this deed. An equitable interest is one that can be made available, effective, or sustained in a court of equity,—is the definition given by Webster and Abbott. In *Harrison v. McWhirter*, 12 Neb. 155, 10 N. W. Rep. 545, it was held that neither acknowledgment nor recording is necessary to pass the title from the grantor to the grantee. As between Graeter, Sr., and Graeter, Jr., therefore, the deed as to which there was defective proof of acknowledgment operated to vest in the grantee whatever title was held by the grantor,—in this case, an undivided one-half of the real property in the deed described. The defect was simply as to proof of an incident to the due acknowledgment of a deed executed in another state. As between the grantor and grantee, the contract of

conveyance was complete when the deed was signed and delivered. Section 50, c. 73, Comp. St., provides that "every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." The deed under consideration was in form a warranty deed, from which no intent other than to convey all the interest of the grantor could be inferred. Therefore it necessarily follows that no mere equitable interest, as distinguished from the legal title, passed by operation of this deed.

To obviate the want of proof of the official capacity of the person who, as justice of the peace, made the certificate of acknowledgment of the Graeter, Sr., deed, and of the due execution of such certificate, the appellee on December 3, 1886, filed his petition in the district court of Douglas county against the heirs of Augustus Graeter, Sr., who had meantime died, in which petition the appellee set forth the history of the execution of the deed from Graeter, Sr., to Graeter, Jr., with the failure properly to prove the facts necessary to render valid the acts of the alleged officer who certified to such acknowledgment, and after describing the mesne conveyances by which the title, as alleged, had vested in him, the appellee prayed that he be decreed the legal and equitable owner of the real estate involved, and that within a time to be fixed by the court the defendant be decreed to convey such real estate to him; that, in default of such conveyance within the time required, the clerk of said court make such deed, with the same effect as though executed by the defendants. Service by publication was duly had upon all the defendants who were nonresidents of Nebraska, and in due time a decree by default was taken against each of them as prayed. The appellants contend that this decree and deed are not operative as to their rights, for the decree was against parties other than appellants, and with whom appellants were not in privity as to the property affected. The appellee insists that the decree was but a link in his chain of title, admissible as against a stranger, and that it cannot be attacked collaterally. In support of his contention the appellee cites *Barr v. Gratz*, 4 Wheat. 220; *Lessee of Buckingham v. Hanna*, 2 Ohio St. 551; *Den v. Hamilton*, 12 N. J. Law, 109; *Baylor's Lessee v. Dejamette*, 13 Grat. 152; *Barney v. Patterson*, 6 Har. & J. 182; *Secrist v. Green*, 3 Wall. 351; *Gregg v. Forsyth*, 24 How. 180; *Freydenhall v. Baldwin*, 103 Ill. 325; *Lathrop v. Emigrant Co.*, 41 Iowa, 549; and *Freem. Judgm.* § 416. Each of these cases merely recognizes the principle that, where the decree formed a link in the chain of title, it was neither more nor less *res inter alios acta* as to third parties than would be a deed supplying the necessary link. The deed under which appellant Elizabeth Gal-

liger claims title was dated March 16, 1886, and was filed for record the same day. Let us suppose, now, that on the date when the above petition was filed,—December 3, 1886,—or on the day when the decree thereon was obtained,—March 18, 1887,—all the heirs of Augustus Graeter, Sr., had joined in a deed of the property to appellee. Upon what principle could it be claimed that such deed would affect the rights of said appellant? And yet the authorities cited only sustain the proposition that the decree would operate to the same extent as would a deed, as furnishing a necessary link in the chain of title. In either case, as against whatever rights appellant Elizabeth Galligher then held, a decree or deed, under the circumstances, was not binding. If the action had been one to establish appellee's title as against Elizabeth Galligher, and incidentally to prove the qualification of the alleged justice of the peace to certify an acknowledgment of the deed, another question would have been presented. But to allow proof of title, so as to affect the existing rights of one not a defendant, or in privity with a defendant, would be fraught with serious danger of rank injustice perpetrated under the forms of law. The case at bar is, however, in effect, an equitable action to quiet, as against the appellants, the legal title, which, as between the grantor and grantee, was vested in the grantee under whom appellee claims his title. The judgment in the case of *Woods v. Baugh, Dawkins, and Graeter*, was rendered on the 1st day of November, 1859, from which date, if the court had jurisdiction to render such judgment, it became a lien upon the property under consideration. Under this judgment there were two sheriff's deeds,—one of date August 14, 1861, the other of date January 22, 1870,—each founded on the sheriff's sale made on March 15, 1861. The first of these sheriff's deeds was recorded on August 14, 1861; the last, on January 22, 1870. As against the title derived through these sheriff's deeds, appellants claim by virtue of a deed executed by Augustus Graeter, Jr., to James E. North, December 9, 1874, who conveyed to Elizabeth Galligher March 16, 1886. Each of these conveyances was by quitclaim deed. The holder of a title under a quitclaim deed is not a bona fide purchaser. *Lavender v. Holmes*, 23 Neb. 345, 36 N. W. Rep. 516. The effect of a quitclaim deed is only to pass the naked legal title of the grantor. It changes no equities. *Association v. Hass*, 10 Neb. 581, 7 N. W. Rep. 327. Elizabeth Galligher is entitled to assert only such rights as Graeter, Jr., could, if he had not conveyed; and it therefore results, if the execution sale aforesaid was effective to vest J. M. Woolworth with the title which we have already found was in Graeter, Jr., that, in the absence of any defect in his chain of title from Woolworth, ap-

pellee's title must be held superior to that of appellants.

2. This leads to the consideration of the objections urged as to the binding force of the judgment in favor of Woods as against Augustus Graeter, Jr., one of the defendants. The district court found that "in the action of Woods et al. v. Dawkins, Graeter et al., referred to in the defendants' answer and cross bill, A. F. Graeter was duly served with summons in said action, and appeared in the court, and that the court had jurisdiction in the action of the said parties thereto, and the subject-matter thereof." This finding of fact might be sustained upon the presumption in its favor equally with that in favor of the special verdict of the jury, yet, as it is earnestly combated, it will not be amiss, upon appellants' invitation, to examine fully the objections urged: The summons in the case of Woods et al. v. Baugh, Dawkins, and Graeter was introduced in evidence, indorsed as served upon Baugh, Dawkins, and Graeter by delivering to each of them, personally, a true copy thereof, on the 5th day of March, 1859. It was signed: "J. O. Reeves, Sheriff. By R. Kimball." It was shown by extraneous evidence that at that time R. Kimball was deputy sheriff of Douglas county, Neb. The appellants introduced the testimony of Graeter, taken by deposition June 20, 1889, to the effect that he had never been served with summons in the case last named, and had never employed, or authorized the employment of, an attorney to appear in said cause in his behalf. The testimony of six other witnesses, with more or less directness, is to the effect that, at the time of said purported service, Graeter was at or on his way to Pike's Peak; at any rate, he was not in Douglas county. In addition to this, there was given the testimony of one or more witnesses that Kimball, upon the above return being shown him, had said that the signature thereto was not his signature. In passing, it may not be amiss to remark that this is not shown to be admissible as evidence by the authorities cited by appellants, and we believe that it was inadmissible for lack of the very essential element that it was against Kimball's interest at the time he made the statement. On the other hand, the return itself was relied upon as the foundation for the judgment rendered about 30 years before, supplemented by the evidence of competent experts, who each swore, unhesitatingly, that the signature was that of Richard Kimball. In addition to this, George B. Lake testified that he was duly employed on behalf of the defendants to appear for them in said suit, and that he did so for the purpose of delay, there being no meritorious defense. He did not undertake to say that he was specially employed by Graeter, but that the other defendants were copartners with Graeter, and he could say no more than that he was employed by some member of the firm. He could not say which. The judgment was

rendered November 1, 1859, and thereunder an execution sale was had, which was duly confirmed, and sheriff's deeds were issued pursuant thereto; and no question has been made as to the regularity and effectiveness of any of these proceedings until the lapse of over 30 years, and even now it is in a purely collateral proceeding. A careful examination and consideration of the adjudged cases satisfy us that this attempt should not be successful. In one of them, cited by appellants in support of their contention, (*Murphy v. Lyons*, 19 Neb. 689, 28 N. W. Rep. 328,) the rule is laid down that the decrees and judgments of a court of general jurisdiction and power are presumed to have been made in causes in which the court had jurisdiction, until the contrary is proved. In *Wyland v. Frost*, 75 Iowa, 209, 39 N. W. Rep. 241, *Rothrock, J.*, delivering the opinion of the court, said: "The return shows that the notice was personally served on the plaintiff and her husband on the 26th day of July, 1882, at Harlan, in Shelby county. The plaintiff and her husband, and others, testify that neither the plaintiff nor her husband were at Harlan on that day. None of the witnesses produced any record, memorandum, or circumstance tending to verify or support their testimony. Their statements are founded upon mere recollection, and suit was not commenced until about three years and a half after the judgment was rendered. On the other hand, we have the return of the constable who made the service, and his testimony, in which he states positively that he made the service at the house of the plaintiff and her husband, at Harlan, on the day named in the return. He is corroborated by evidence that the notice was actually delivered to him for service on the morning of that day, and that plaintiff and her husband are contradicted in reference to incidental facts which tend to show that the claimed absence on the day of service was a mistake. A careful examination of the whole evidence in the case leads us to the conclusion that the district court correctly found that the evidence introduced by the plaintiff is not of that clear, conclusive, and satisfactory character required to overthrow the return of the officer. It has been held in some jurisdictions that the only remedy for a false return of service is an action upon the bond of the officer claiming to have made the service. *Slayton v. Chester*, 4 Mass. 478; *Bott v. Burnell*, 9 Mass. 96; *Messer v. Bailey*, 31 N. H. 9; *Bank v. Downer*, 29 Vt. 332. But conceding the rule to be otherwise, for the purposes of this case, we think that the evidence of the plaintiff falls far short of establishing the falsity of the return. Upon grounds of public policy, the return of the officer, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof. *Jensen v. Crevier*, 33

Minn. 372, 23 N. W. Rep. 541; Starkweather v. Morgan, 15 Kan. 274; Wade, Notice, § 1380." In *Randall v. Collins*, 58 Tex., this language occurs on page 232: "But assuredly, if equity will allow one who has been guilty of no fault or negligence to contradict the sheriff's return by parol evidence, for the purpose of having an unjust judgment by default set aside, we are of opinion that it should require the evidence to be clear and satisfactory. It is not, like an ordinary issue of fact, to be determined by a mere preponderance of testimony." As to the effect of the appearance by Judge Lake, the following language, quoted from *Winters v. Means*, 25 Neb. 242, 41 N. W. Rep. 157, is applicable: "Where the court acquires jurisdiction solely by the appearance of an attorney, the party for whom the appearance was made may, no doubt, deny the authority of such an attorney, and, if the appearance was unauthorized, vacate the judgment. The want of authority, however, should be clearly made to appear, and particularly is this the case where the action is against a firm, one of whose members long afterwards seeks to escape liability on the ground of want of such authority. The proof on this point is not satisfactory, and does not clearly show want of authority." An abundance of authorities could be cited in support of this proposition stated by the present chief justice, but, in the same measure as that statement is authoritative, it is conclusive. The conclusions inevitably resulting in respect to the jurisdiction of the court are: First, that, as opposed to the recitations of an officer as to the time and mode of service of summons, the evidence to overcome the same must be clear and convincing; second, that, where want of authority to appear is alleged as against such appearance by attorney, the burden of proof of such want of authority is upon the party asserting the same. In this case, neither of these requirements were satisfactorily met, and it therefore results that, after the lapse of these many years, Augustus Graeter, Jr., and those claiming title under him, must be held concluded by the judgment of the court against him, and by such proceedings thereunder as were duly had.

3. In the order of discussion laid down in the earlier part of this opinion, the next question for consideration is whether or not the power of attorney from Robert K. Wood to J. M. Woolworth so defectively described the subject-matter thereof, that, thereunder, said attorney in fact could convey no title. In said power of attorney said subject-matter was described as follows: "Sixty-three acres of land near Omaha, in Douglas county, in said territory, title to which was by said Woods acquired by sale thereof on execution against one Augustus Graeter and others." The deed executed by Sheriff Grebe to J. M. Woolworth described the property as "the west half of the northwest quarter of section twenty-eight, (28,) in township

fifteen (15) north, range thirteen (13) east of the sixth principal meridian, situate in said county of Douglas, excepting therefrom 17 acres of said land, title to which never was in said defendants." Appellants insist that the power to convey land must possess the same requisites as are necessary in the deed directly conveying the land, citing *Clark v. Graham*, 6 Wheat. 577, in support of this view. This principle is therefore accepted as correct, and we shall now examine the adjudicated cases, confined, as they are, to deeds: In *Devlin on Deeds*, (section 1012,) it is said that "the rule may be stated to be that the deed will be sustained, if possible, from the whole description, to ascertain and identify the land intended to be conveyed." Where the description alludes to facts beyond the deed, parol evidence may be offered, not to contradict the deed, but to locate the deed upon the land. *Eggleston v. Bradford*, 10 Ohio, 318. It is undoubtedly essential to the validity of a conveyance that the thing conveyed must be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence. *Stanley v. Green*, 12 Cal. 166. As illustrative of the application of the principles above enunciated, the following descriptions, and the opinions in which they have been approved, are set out: "All my right, title, and interest in and to any lands and tenements, the title to which is in the said S. D. Munger, and in which I have any interest as being the wife of him, the said S. D. Munger." *Munger v. Baldrige*, 41 Kan. 236, 21 Pac. Rep. 159. "Also 960 acres of land, being the divided one-half of two tracts of land of 960 acres, out of patents 278, 279, granted by the state of Texas to A. B. Watrous, assignee of A. McDonald and J. Wishart, situate in Navarro county, Texas, on Richland creek, and set apart to George Butler by commissioners appointed by the district court of Navarro county, March 19th, 1869, recorded in County Records, book D, p. 352." *Harvey v. Edens*, 69 Tex. 420, 6 S. W. Rep. 306. "That certain piece or parcel of timber land lying and being about forty-five miles in a northerly direction from the town of Eureka, * * * and the said timber land being known as 'McLeod Wood Ranch,' and containing about 500 acres, more or less." *Paroni v. Ellison*, 14 Nev. 60. "One hundred acres lying in Carrituck township, near the head of Smith creek; it being the easternmost portion of the farm purchased from my brother, and known as the 'Russel Land.'" *Warren v. Makely*, 85 N. C. 12. "All right, title, interest, and claim of the grantor in and to the farm of J. A., deceased, in W. township." *Bailey v. Bank*, 104 Pa. St. 425. "All my right, title, and interest in Sacramento city, Upper California, consisting of town lots and buildings thereon." *Frey v. Clifford*, 44

Cal. 342. "All our right, title, and interest, and all real estate which we own or have claim to, situate in Belfast, situated in said county of Waldo, and particularly all that belongs to us as the heirs or legal representatives of Andrew Bird, formerly of Belfast, now deceased." Bird v. Bird, 40 Me. 398. As was said in Works v. State, 120 Ind. 119, 22 N. E. Rep. 127, the true function of the description is not to identify the land, but to furnish the means of identification, and this is done by the description here challenged. It furnishes the means of making the description certain, and that which can be made certain is certain. No question is raised as to the sufficiency of the description adopted by the attorney in fact in the deed by him, as such, executed. It therefore results from the foregoing considerations that the description of the subject-matter of said power of attorney must be deemed sufficient, the recital that the title to the land had been by said Woods acquired by sale thereof not being so misleading as to render inapplicable the principles above discussed.

The foregoing discussion covers all the questions which arose upon the record claim of title of each of the parties to this action. There was a large amount of evidence directed to the appellants' claims founded upon the occupancy, cultivation, use, and possession of the premises in dispute; but as these questions were settled as facts by the findings of the district court, upon conflicting testimony, they must stand, as should the special verdict of the jury on the same propositions. They, therefore, will not be inquired into in this court. In the district court the appellants were found entitled to one undivided fourteenth part of the lot in controversy, as to which finding no complaint is made by appellee. It was rendered unnecessary, therefore, to inquire into the derivation or history of this fractional interest. Hence, it has not before been referred to, or commented upon. From the foregoing considerations it results that the judgment of the district court is in all respects affirmed.

RAGAN, C., concurs. IRVINE, C., as district judge, having passed upon another branch of this controversy, took no part in the consideration or decision of this case.

WOOD RIVER BANK v. DODGE et al.
(Supreme Court of Nebraska. April 26, 1893.)

ASSUMPSIT—EVIDENCE—MISCONDUCT OF JURY.

1. Where from an examination of the evidence it is apparent that the verdict is wrong, it will be set aside.

2. A juror will not be permitted to state to his fellow jurors, while they are considering their verdict, facts in the case within his own personal knowledge, but not given in evidence. He should make the same known during the

trial, and, if desired, testify as a witness in the case.

(Syllabus by the Court.)

Error to district court, Hall county; Harrison, Judge.

Action by the Wood River Bank against Freeman C. Dodge and George F. Dodge. Defendants had judgment, and plaintiff brings error. Reversed.

James H. Woolley and Thompson Bros., for plaintiff in error. Thummel & Platt, for defendants in error.

MAXWELL, C. J. The plaintiff brought an action against the defendants to recover the sum of \$1,884.25, with interest. To the petition the defendants filed an answer, as follows: "Comes now the above defendants, and for answer to the petition of plaintiff say that they formed a limited partnership in the transaction of purchasing and selling hogs, and conducted said business in the name of Dodge Bros.; that they kept the account with the said plaintiff in all the transactions done, and banked with this plaintiff as Dodge Bros. for this business; that Freeman C. Dodge had a personal account with said bank, so did the said George F. Dodge, for their own personal transaction of business which had no connection whatever with the said Dodge Bros. business; that these defendants made all deposits done under the business in the name of Dodge Bros., and drew on the said plaintiff all the checks on the said plaintiff bank in the name of Dodge Bros. and none other; that George F. Dodge did all the business transactions for the said firm, and deposited all the funds for the sale of the property, and drew all the checks and money from the plaintiff in the name of Dodge Bros., and none other; that these defendants admit they drew from the said plaintiff the said sum of \$21,993.21, and no more; they also admit they deposited the sum of \$20,103.26 as credited to them in the petition, and also claim the fact to be that they paid or deposited the additional sum of \$7,832.47 to the said plaintiff, which the said plaintiff has neglected and refused to give them credit for as follows: On or about June 30, 1887, the United States National Bank deposited or paid to the plaintiff, to be placed to the credit of Dodge Bros., the sum of \$5,812.89; that on the 18th day of July, 1887, the said Dodge Bros. deposited or paid into plaintiff bank, to be credited to the said Dodge Bros., the sum of \$600; on September 5th, \$789.23; and September 9th, \$629.65; that the said defendants are not indebted to said plaintiff in any sum whatever, but that the plaintiff was indebted at the commencement of this action on the said account the sum of \$5,812.89, which sum the defendant claims justly due and wholly unpaid. Therefore prays judgment against said plaintiff in the said sum of \$5,812.89, over and above all claims so as aforesaid mentioned in plain-

diff's petition, with interest thereon at 7 per cent. per annum from the 18th day of January, 1888, and costs." The plaintiff filed the following reply: "Now comes the above-named plaintiff, and for reply states: That it denies that the said defendants or either of them are entitled to the credit of \$7,012.89, the same being the \$5,812.89 and \$1,200 mentioned in said defendant's answer, or any other or different amount than as mentioned in the said plaintiff's petition, or that the said plaintiff received the said amounts, or either of them, except in said petition mentioned and herein stated; and as further reply states that the \$5,812.89 was received by the said plaintiff in draft in favor of said Dodge Bros. at the time in said answer mentioned, but that the same was claimed by the said Freeman C. Dodge to be his property, or mostly so, and the said Freeman C. Dodge then and there ordered the same placed to his credit on his individual account with the said bank, which the said bank then and there did; that the same was done by and with the knowledge and consent of the said George F. Dodge, and was afterwards by him ratified and adopted with the full knowledge of all of the foregoing facts; that the plaintiff has since the said time made and effected a settlement with the said Freeman C. Dodge, and by and with the consent of the said George F. Dodge allowed and given the said Freeman C. Dodge entire and full credit for the said sum of \$5,812.89, and that neither of said defendants are entitled to the said credit of the said amount on the account sued on in this case; that as to the fact as to whether or not the said defendants are partners, or were at the time the said account was made and business transacted, this plaintiff has neither knowledge nor information sufficient to form a belief, and therefore denies the same, and puts said defendants upon their proof. Wherefore the said plaintiff demands judgment against the said defendants as in its petition prayed." On the trial of the cause the jury returned a verdict for the defendants for the sum of \$4,719.71, upon which judgment was rendered.

Two errors are relied upon for a reversal of the judgment—First, that the verdict is against the weight of evidence; and, second, misconduct of certain jurors.

The testimony is undisputed that about the first of July, 1887, a large number of hogs were shipped in the name of Dodge Bros. to South Omaha; that the amount realized from these hogs was \$5,812.89, which was placed to the credit of the Wood River Bank in the United States National Bank of Omaha. Up to this point there is no dispute. It is claimed on behalf of plaintiff that the hogs in question were the property of Freeman C. Dodge, and paid for by him out of money obtained from the plaintiff, and that he directed the plaintiff to place the same to the credit of his individual account, which

was done. This is denied by the defendants. Both of the defendants testify that the money was deposited to the credit of Dodge Bros., and not to the credit of Freeman. All the officers of the bank, some of whom appear to be disinterested, testify that the credit was given to Freeman. We also find that in the bank book of George Dodge with the plaintiff, which is here in the record, these hogs were not credited to Dodge Bros. The officers of the bank testify that this book was delivered to George Dodge a few weeks after the transaction; that he returned, and stated that he and his wife had looked over it, and found it correct, except an item of \$20. George denies receiving the book until about the month of January after the transaction. He, in effect, admits the \$20 mistake. The mode of doing business with the bank seems to have been as follows: When a shipment of hogs was about to be made, the defendants would receive credit for the supposed value of the hogs, and were permitted to check the same out. It appears that about the 5th of September of that year Dodge Bros. made or were about to make a shipment of hogs to South Omaha, and received credit at the bank for \$600, a duplicate deposit slip being made. It is claimed by the plaintiff that on the same day a second duplicate deposit for \$600 was made. The defendant George Dodge testifies, in effect, that this was a second deposit, and that it was received from a second shipment of hogs. On the other hand, the cashier testifies that original credit was given in the morning, and the duplicate slip given to the defendant; that in the afternoon he came into the bank, and stated that he had not received a duplicate in the morning, and that thereupon the cashier issued a second duplicate slip for \$600, and wrote the abbreviated word "dupl." instead of "triplicate" on it. The agent of the railway company at Wood River was called, and stated in substance that a record was kept in his office of all shipments made from there, and but one car of hogs was shipped by Dodge Bros. at the time stated, and he in effect corroborates the testimony of the cashier. It is very evident, therefore, that Dodge is mistaken in his testimony, and that the cashier's testimony on that point is correct, and the verdict is against the weight of evidence.

2. The affidavit of one of the jurors was filed in support of one of the grounds of the motion for a new trial for the misconduct of certain jurors. It is as follows: "P. F. McCullough, being first duly sworn, deposes and says that he was a member of the jury to whom the above case was tried on Febr. 15th, 1890; that during the discussion of the case in the jury room the question came up as to whether Freeman C. Dodge did authorize the Wood River Bank to place the said \$5,812.89 to his own individual credit, when Mr. Hollister and Hockenberger both

swore he did so authorize, and F. C. Dodge swore he was not in Wood River, Neb., on July 2nd, 1887, the date of said credit, but was in Omaha, Neb.; that many of the jury were in doubt as to who was mistaken on this point, and so expressed themselves; that thereupon one C. C. Robinson, a member of said jury, stated that he knew Mr. Hollister and Mr. Hockenberger were mistaken as to that point, for he was in Omaha, Neb., and saw the said Freeman C. Dodge there himself on July 2, 1887, and he could not have been present in Wood River, Neb., on that day and ordered said credit; that many of said jury, and especially this affiant, having confidence in and relying upon the statement of said C. C. Robinson, became satisfied that said Hollister and Hockenberger were mistaken on this point, and so may be mistaken on other points, and thereupon he changed his vote from the plaintiff's favor to and for a verdict for this defendant." There is also an affidavit of W. H. Thompson to the same effect. There is also an affidavit of J. H. Wooley that the jury were sent out Saturday evening; that a number of them resided in the western part of the county, and were very anxious to return home; that they inquired of the bailiff the time when the last train would be due going west, and having ascertained the time the verdict was returned before that hour, and presumably without proper deliberation. The counter affidavit of Robinson is in the record as follows: "Chan C. Robinson, being sworn, deposes and says that he was one of the panel in the case of the Wood River Bank of Nebraska against Freeman C. Dodge and George F. Dodge, which case was tried and submitted to the jury on the 15th day of February, 1890; that affiant has heard read the affidavit of P. F. McCullough filed in and attached to the motion in this case for a new trial; that the matter in said affidavit, wherein said McCullough swore that this affiant said in the jury room while deliberating on their verdict that he, Freeman C. Dodge, could not have been at Wood River on the 2d day of July, as he, Chan Robinson, saw him in Omaha on that day, is wholly without foundation, and untrue; that this affiant did not say he saw said Dodge on the 2d day of July as aforesaid in Omaha; all affiant did say on this subject in the deliberation of said jury was wholly in regard to the evidence introduced on the trial. Affiant further says that the jury and each of them, so far as he knows and was informed, tried all honest means to impress others differing with them as to their views in the evidence and the instructions of the court; that after deliberating several hours on the matter they finally agreed upon their verdict in the case, and that he did nothing in any way attempt (except by argument) to convince others differing with him as to what he thought was right on the evidence in the case." It will be observed that Mr.

Robinson does not make a full, unequivocal denial of the charge against him. The affidavit, in fact, is a skillful evasion of the matter in issue. His statement that what he said was wholly in relation to the evidence in the case, and that he did nothing in any way, except by argument, to convince others differing from him, falls far short of a denial of the charge. In *Richards v. State*, (Neb.) 53 N. W. Rep. 1028, it was held that a juror will not be permitted to state to his fellow jurors, while they are considering their verdict, facts in the case within his own personal knowledge. He should make the same known during the trial, and testify as a witness in the case. It is for the court to say what evidence is admissible in a case, and the adverse party may desire to cross-examine him. In any event, it is his duty to be governed by the evidence introduced on the trial, and the instructions of the court. Otherwise, in case of an erroneous verdict, it would be impossible to review the same. The judgment of the district court is reserved, and the cause remanded for further proceedings. The other judges concur.

ROCKFORD WATCH CO. et al. v. MANIFOLD et al.

(Supreme Court of Nebraska. April 26, 1893.)

CHATTEL MORTGAGES—PRIORITY—FORECLOSURE—SETTING ASIDE SALE—FRAUD—PLEADINGS.

1. A junior mortgagee of chattels, who agrees with the senior mortgagee and the mortgagor that the goods mortgaged may be sold and the proceeds applied to the payment of the mortgages in the order of their priority as disclosed by the records, cannot, after such sale and appropriation of the proceeds, maintain an action to avoid the senior mortgage for fraud in its inception, without proof that the facts constituting the fraud were discovered after the agreement and sale.

2. In an action to avoid a conveyance or mortgage for fraud, the facts constituting the fraud must be specifically pleaded; a general allegation of fraud is insufficient.

3. An agent for the purpose of selling goods will not be permitted to sell to himself even though the sale be public, and no actual fraud appear. In case he do so, he will be required to account to his principals for any profit he may have realized.

4. The findings and judgment in a case must be based upon the pleadings. A decree in an action between a mortgagor and certain mortgagees of chattels, whereby a mortgage not attacked by the pleadings, and the holder whereof is not a party to the action, is declared void, is erroneous.

5. Unsecured creditors of a mortgagor of chattels are entitled to have the mortgages foreclosed as required by law, and a sale otherwise than as the law provides, although in accordance with an agreement between the mortgagor and mortgagees, is no protection to those participating in the proceeds of the sale. They are liable to account to such creditors for the value of the goods, less the valid liens thereon.

6. A mortgage upon a stock of merchandise, under that general description, attaches only to such merchandise as was in the stock when the mortgage was executed, and not to any afterwards purchased.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Gage county; Appelget, Judge.

Action by the Rockford Watch Company against William C. Manifold and others. From the decree entered, plaintiff and others appeal. Reversed.

C. S. Otis, E. O. Kretsinger, and A. D. McCandless, for appellants. Hazlett & Le Hane, Griggs, Rinaker & Bibb, T. F. Burke, and Winter & Kaufman, for appellees.

IRVINE, C. William Manifold and Charles B. Helstand were engaged in the jewelry business in Wymore, and on the 17th day of June, 1889, executed a chattel mortgage upon their stock of merchandise, tools, and fixtures, in favor of the Citizens' Bank of Wymore, to secure a note of \$600. This mortgage was in the ordinary form, and was filed for record on the 18th day of June, 1889. The mortgagors were, however, permitted to remain in possession, and to deal with the stock of goods mortgaged in the ordinary course of business until February, 1890. On the 23d day of February, according to the parol evidence, chattel mortgages were executed bearing date the 24th day of February, and recorded on that date, in favor of the following persons and in the order stated, for divers amounts: N. G. Levinson & Co., William Helstand, Max Meyer & Bros., Baldwin & Co., and J. A. Norton & Son. At about this time the defendant Newbranch took possession of the stock of goods, tools, and fixtures on behalf of the Citizens' Bank, and proceeded to advertise the same for sale. On the 29th day of March a public sale was had of the goods. Prior thereto, however, an agreement in writing was entered into on behalf of Levinson & Co., Baldwin & Co., Max Meyer & Bros., and the Citizens' Bank by their respective attorneys, and also by Manifold & Helstand and by William Helstand, through C. B. Helstand, whereby it was agreed among them that the entire stock of goods and fixtures conveyed to the different mortgagees should be sold under the advertisement of the Citizens' Bank, and the proceeds paid to said mortgagees in the order of their priority, as shown by the records in the county clerk's office, and that said goods should be sold in bulk. There was also a separate agreement signed for Norton & Son by their attorney, similar to the above, except that it contained no provision for a sale in bulk. These agreements were handed to Newbranch, who, at the time and place advertised, offered the property for sale. After several bids had been received, Newbranch stepped from the chair upon which he stood to cry the goods, and negotiated a purchase for himself of the Levinson mortgage from the agent of Levinson & Co., who was present. This mortgage was to secure a debt of \$345, and was purchased by Newbranch for \$275. The sale was then resumed,

the bidders thereafter being Newbranch and one Bromwell. Newbranch became the purchaser. He drew his check for the purchase price, and gave it to the cashier of the First National Bank of Wymore, who also seems to have been acting for the Citizens' Bank in the matter, and the cashier, after deducting the expense of foreclosure and the amount of the Citizens' Bank debt, paid to the agent of Levinson & Co. the amount of its mortgage, and the agent then deducted the \$275, which Newbranch had agreed to pay for the mortgage, and paid the balance remaining to Newbranch. There then remained of the purchase money \$150, which was paid to C. B. Helstand, ostensibly towards the satisfaction of the William Helstand mortgage. Newbranch, a few days after the sale, disposed of the property to Bromwell at a profit of some \$275. Some days afterwards the plaintiff obtained judgment against Manifold & Helstand upon an account for goods sold, and, execution having been returned unsatisfied, commenced this action to declare the mortgages void, and compel an accounting. William Manifold, Charles B. Helstand, the partners who composed the firm doing business as the Citizens' Bank, the First National Bank of Wymore, Newbranch, Baldwin & Co., Norton & Son, and Max Meyer & Bros. were made defendants. Cross petitions were filed by Baldwin & Co. and Norton & Son. Upon trial a decree was entered establishing the liens of the Citizens' Bank, of Levinson & Co., of Baldwin & Co., and of Norton & Son, in the order named; also finding that the William Helstand mortgage was fraudulent and void, and the Max Meyer & Bros. mortgage paid. There was also a finding generally in favor of Newbranch, Bromwell, and the First National Bank. The decree ordered the payment by the Citizens' Bank of the \$150 paid upon the Helstand mortgage, to apply upon the Baldwin claim. The Citizens' Bank, Norton & Son, Baldwin & Co., and the plaintiff, all appealed.

The appeals of Baldwin & Co. and Norton & Son will be first considered. Their cross petitions are substantially alike, and are based upon the allegations that they signed the agreements in regard to the sale of the goods believing the mortgage of the Citizens' Bank a bona fide mortgage, but they have since ascertained it to be fraudulent. The cross petitions contain no allegations of fraud, except that they charge, upon information and belief, that the bank's mortgage "was fraudulent and void." This is not a sufficient pleading of fraud. It is too well settled to require any reference to authorities that a general allegation of fraud is insufficient. The facts constituting the fraud must be specifically pleaded. Furthermore, the evidence shows that no facts were discovered after signing the agreement, and whatever is now known to these cross petitioners was known at that

time. Their agreement expressly recognized the validity of the bank's mortgage, and provided for its payment, and estops them from now attacking it. The cross petitions of these appellants also attack the sale, alleging that Newbranch acted as the agent of all the mortgagees, and, while sustaining that relationship, bid the property in himself, and resold at a profit. Newbranch denies that he acted as agent for any others than the Citizens' Bank, but this denial is, for the most part, merely his own conclusion as to the legal effect of his acts. There is some contradictory evidence as to certain conversations alleged to have taken place between him and the attorneys for these appellants, but we do not think these conversations very material. It clearly appears that Newbranch was in possession of the stock of goods on behalf of the Citizens' Bank when the agreements above referred to were made, that these agreements came to his notice, and that he proceeded to sell the property, and dispose of the proceeds with knowledge, and with the purpose of complying with the terms of the agreements. If he was not acting under these agreements, he had no authority from any one to dispose of more of the stock than would be sufficient to satisfy the bank's mortgage. Whatever his own understanding may have been, the undisputed evidence as to his acts places him in a fiduciary relationship to all the mortgagees, including the appellants. He not only cried the sale, but he assumed its conduct absolutely, including the care of the property beforehand, the direction of the sale, and looking after the proceeds thereof. He did bid the property in for himself, and he did resell, after a very few days, at a considerable profit. The evidence does not disclose any fraud or even unfairness in his conduct, but such transactions upon the part of an agent are voidable at the option of the principal, without regard to the existence of actual fraud. They are voidable, not because there was fraud, but because there might be, and because the law, upon grounds of public policy, will not permit an agent to assume a position where conflicting interest will expose him to the danger of sacrificing his principal to himself. The doctrine extends to all cases of agency with almost the same force as to cases of trusts, and has been applied in every adjudicated case, so far as we are aware, to agents for the purpose of selling goods or land. It has been held to apply to public sales as well as private, and even to an agent empowered to sell at a stipulated price. The principle is well stated in *Pomeroy's Equity Jurisprudence*, (2d Ed.) § 959, where a vast number of authorities are collated. Among the numerous cases, some of those presenting features similar to those of the case at bar, are as follows: *Davoue v. Fanning*, 2 Johns. Ch. 252; *Brock v. Rice*, 27 Gratt. 812; *Ruck-*

man v. Bergholz, 37 N. J. Law, 437; *Bain v. Brown*, 56 N. Y. 285; *White v. Ward*, 26 Ark. 445; *Newcomb v. Brooks*, 16 W. Va. 32; *Martin v. Wyncoop*, 12 Ind. 266; *Mason v. Martin*, 4 Md. 124; *Brothers v. Brothers*, 7 Ired. Eq. 150; *Patton v. Thompson*, 2 Jones, Eq. 285. In all such cases the agent will not be permitted to realize for himself a profit, and must account to his principals for all profits realized. The district court erred in not so holding.

The Citizens' Bank bases its appeal upon that part of the decree which directs it to pay over the \$150 paid upon the Helstand mortgage. In none of the pleadings is the Helstand mortgage attacked, and, while the evidence was certainly sufficient to justify the finding of the court that this mortgage was void, such a finding cannot be sustained, as it is irrelevant to any issues in the case. The validity of the Helstand mortgage was not in issue, and William Helstand was not a party to the suit. The finding and judgment of the court in that respect was erroneous.

The plaintiff stands in an attitude different from that of the mortgagees, and attacks both the mortgages and the sale. It is unnecessary to refer to the grounds upon which the validity of the bank's mortgage is attacked. We have held that the parties to the agreements in regard to the sale are bound by those agreements. The plaintiff was not a party to them, and had a right to insist that the mortgages should be foreclosed as the law requires. Unless the sale was made in accordance with law, it amounted to a conversion of the goods. So far as the bank is concerned, the sale was properly advertised and publicly held, but it had no right to proceed beyond the satisfaction of its own mortgage. Moreover, the bank's mortgage was upon the stock of goods as it existed at the time the mortgage was given. It did not and could not attach to after-acquired property, and did not, upon its face, purport to do so. The plaintiff offered to prove that the bank seized and sold goods purchased by the mortgagors from the plaintiff after the mortgage was given. This evidence was excluded, and in this we think the court erred. It is probable that the court's action was based upon the theory that the other mortgages did cover the property acquired by the firm in the period intervening after the execution of the mortgage to the bank. But there was no valid foreclosure of these later mortgages, and as to all property not covered by the bank's mortgage, and as to all property covered by that mortgage beyond such as would be sufficient to discharge the debt secured thereby, the plaintiff has the right to insist upon foreclosure by prior mortgagees in accordance with law, and to hold the recipients of the proceeds of an unlawful sale responsible for the value of the goods. In view of the conclusion reached, no decree can be rendered in this court

which we can be assured will do justice to the parties. The case is, therefore, reversed, and remanded for further proceedings in accordance with this opinion. The other commissioners concur.

**WOOD RIVER BANK v. FIRST NAT.
BANK OF OMAHA.**

(Supreme Court of Nebraska. April 26, 1893.)

NEGOTIABLE INSTRUMENTS — LIABILITY OF INDORSER FOR COLLECTION FOR FAILURE TO PROTEST.

1. The term "protest," as applied to inland bills of exchange, includes only the steps essential to charge the drawer and indorsers.

2. Bank checks, in this country, are regarded as inland bills of exchange, for the purpose of presentment and demand and notice of dishonor, and do not require a formal protest in order to charge the indorsers.

3. They are also due upon presentation, and not entitled to days of grace.

4. A bank receiving for collection, from a correspondent, checks drawn upon it by a customer, with instructions to protest in case of nonpayment, is required, in case payment is refused for want of funds, to give notice to the bank from which they were received not later than the next day after dishonor; and when they are held for two days in order to enable the drawer to provide funds for payment thereof a jury will be warranted in finding that the bank intended to accept them, and become liable thereon.

5. The general rule is that where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter.

6. But where such bill remains in the bank to be protested for nonpayment by the president and manager thereof, a notary public, and who, although aware of the instructions to the contrary, delays noting for protest or giving notice, in consequence of which the indorsers are discharged, such notary will be held to be the agent of the bank, and the latter will be liable for his negligence.

(Syllabus by the Court.)

Error to district court, Hall county; Harrison, Judge.

Action by the First National Bank of Omaha against the Wood River Bank. Plaintiff had judgment, and defendant brings error. Affirmed.

James H. Woolley, for plaintiff in error.
W. H. Thompson, for defendant in error.

POST, J. This was an action in the district court of Hall county to recover for the failure of the defendant below, plaintiff in error, to give notice of the dishonor of certain checks received by it for collection from the plaintiff below, by reason of which certain indorsers thereon were discharged, to the damage of the latter. The facts, as they appear from the pleadings and proofs, are substantially as follows: About the 11th day of January, 1887, at Ravenna, in Buffalo county, one Hildebrandt drew 11 checks, to the order of as many different payees, upon the defendant, the Wood River Bank, doing business at Wood River, Hall county, amounting, in the aggregate, to \$737.28. The checks aforesaid were all cashed by the Farmers'

Bank of Ravenna upon the indorsement of the several payees, and upon the day above named were transmitted by it, with proper indorsements, for collection, to the First National Bank of Omaha. On the evening of the next day, January 12th, the last-named bank forwarded them by mail, properly indorsed, for collection, to the defendant bank, at Wood River, with instructions to protest unless promptly paid. The evidence is conflicting with respect to the time of the receipt of the checks by the defendant. If we regarded that question as decisive of the case, we would feel constrained to resolve it in favor of the defendant, notwithstanding the finding of the jury that they were received by it on the evening of the 13th. Both Hockenberger, the cashier, and Hallister, the president, testify positively that the checks were received by the bank on the afternoon of the 14th. But the judgment is right, nevertheless. It is evident from their testimony that the checks were received at the bank before the close of its business on the 14th; that they were opened and examined by the witnesses, who were both aware that there were no funds to the credit of the drawer, and who delayed giving notice or taking any steps for the protection of the plaintiff below, in order to enable Hildebrandt to provide funds to balance his account the next day. It is admitted, also, that the defendant bank continued to pay Hildebrandt's checks in favor of home customers, although no entries appear to his credit on its books subsequent to the 13th. The jury were warranted, upon the admitted facts, in finding that the bank intended to accept the bills, and that by its delay it became liable thereon. *Bank v. McMichael*, 106 Pa. St. 460.

Checks like those in question are to be regarded as inland bills of exchange. Therefore, protest is not essential in order to preserve the rights of antecedent parties. (*Hughes v. Kellogg*, 3 Neb. 194; *Daniel, Neg. Inst.* 926; *Chit. Bills*, [8th Ed.] 500, 501,) although the holder is required to exercise the same degree of diligence in giving notice of dishonor as in cases where a formal protest is necessary. The term "protest," as applied to inland bills, is used in its popular sense, and means the steps essential in order to charge the drawer and indorsers. *Daniel, Neg. Inst.* 929; *Ayrault v. Bank*, 47 N. Y. 570. It was the duty of the defendant bank to promptly give notice of the nonpayment of the checks, either directly to the bank from which they were received, or to place them in the hands of a notary public for protest and notice. Bank checks, unlike bills of exchange, are due on the day they are presented for payment, and not entitled to days of grace. *Boone, Banking*, 165, 250; *Morrison v. Bailey*, 5 Ohio St. 13; *Champion v. Gordon*, 70 Pa. St. 474; *Fletcher v. Thompson*, 55 N. H. 308; 2 *Amer. & Eng. Enc. Law*, 398. The checks in question were dishonored on the 14th, when received through the mail, and pay-

ment refused for want of funds. Both the president and cashier, the only managing officers of the bank, knew that Hildebrandt's account was overdrawn. There was, therefore, no occasion for time to examine their books. It is said by Chancellor Kent, (3 Kent, Comm. 105:) "According to modern doctrine, the notice must be given by the first direct and regular conveyance. This means the first mail that goes after the day next to the third day of grace, so that if the third day of grace be on Thursday, and the drawer and indorser reside out of town, the notice may be sent on Thursday, but must be put into the post office or mailed on Friday, so as to be forwarded as soon as possible thereafter."

The next inquiry is whether by delivering the checks to the notary public on the 15th for protest, the defendant discharged its duty to the plaintiff, for it is clear, upon authority, that that was the latest day on which notice could have been given in order to charge the indorsers. The rule sanctioned by the weight of authority is conceded to be that a bank which places paper in the hands of a notary public, with directions to proceed in such manner as to protect the rights of the beneficial owner and indorsers, will not be held liable for the failure of the notary to discharge his duty. See Boone, Banking, 205; 2 Amer. & Eng. Enc. Law, 113. But this case cannot be held to be within the rule just stated. Here the notary was the president and managing officer of the bank, and who, being aware of the dishonor of the checks on the 14th, did not protest them for nonpayment, or notify the plaintiff or other indorsers of that fact, until the 17th. It is evident, too, that the cashier was aware of the dereliction of the president, for the checks appear to have remained in the bank during all the time, and whatever was done by the latter by way of noting protest, giving notice, etc., was with the knowledge of the former. It is true the 16th was Sunday, but the default occurred on the 15th. It was the duty of the notary, on that day, to notify the plaintiff, by mail, of the dishonor of the paper. The failure to protect the plaintiff as an indorser is directly attributable to the fault of the managers of the bank, and it will not be permitted to take refuge behind the notary, and to interpose his negligence as a defense. Upon the facts of this case the notary will not be held to be the agent of the plaintiff, but rather of the defendant. Bank v. Barksdale, 36 Mo. 563.

2. The plaintiff below assumed the burden of proving the solvency of the first indorsers, the payees of the several checks. For that purpose, Mr. Davis, the cashier of the Farmers' Bank of Ravenna, was called as a witness, and testified that he was acquainted with the financial standing of the parties named, and that he considered them good for the amounts named in the checks bearing their respective indorsements. From his

cross-examination it appeared that one or more of them were somewhat embarrassed financially. It is now urged that there is not sufficient evidence of the solvency of the indorsers, hence it cannot be said that the plaintiff has been damaged. This argument is fully answered by the opinion of Judge Lake in Steele v. Russell, 5 Neb. 211. The fact that the indorsers may have been unable to meet all obligations at maturity does not conclusively establish their insolvency, such as to constitute a defense in this action. The judgment of the district court is right, and is affirmed. The other judges concur.

WAGNER v. HAINES.

(Supreme Court of Nebraska. April 26, 1893.)

FORCIBLE ENTRY AND DETAINER — INSTRUCTIONS.

In an action for the recovery of possession of farm lands and a dwelling house from defendant's alleged forcible detention of both conjunctively, plaintiff's request for an instruction which defined the rights of defendant to the whole subject of controversy as though to be tested by his right to the possession of the dwelling house alone, was properly refused.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Gage county; Broady, Judge.

Action by Isabel Wagner against B. B. Haines. Defendant had judgment, and plaintiff brings error. Affirmed.

Griggs & Rinaker, for plaintiff in error. R. S. Bibb, for defendant in error.

RYAN, C. The plaintiff in error brought an action before a justice of the peace of Gage county against the defendant in error, alleging plaintiff's present right of possession as against the defendant, who unlawfully, as plaintiff alleged, held possession of certain real property. Upon appeal to the district court of that county a verdict was returned, and judgment rendered in favor of the defendant. There was not much conflict as to the facts, though not all detailed by one witness. About August 30, 1889, plaintiff agreed to lease the real property in question to the defendant for a term of three years. Afterwards, in October, defendant, with his family, at the suggestion of plaintiff, moved into the dwelling house occupied by plaintiff, and began preparation for cropping next year the land of which the right of possession was litigated afterwards. For this purpose the defendant plowed from 12 to 14 acres some time in the fall of 1889. No attempt was made to reduce the terms of the lease to writing until December of that year, when the plaintiff caused a draft of the lease, as she understood it, to be prepared. The defendant refused to sign this, because its terms were not in all respects as he understood those agreed upon in August preceding, and the parties were never able to formulate in writing a common understanding of the terms of

the lease. In March following, this action was begun. The theory of the plaintiff was that the transaction had in August was merely an agreement to execute a lease at a subsequent date, while defendant just as strenuously insisted that it was a lease in praesenti, the requirement of a writing for a term of more than one year to be met by subsequently reducing to writing and signing the terms agreed upon.

The necessity of considering the merits of these claims arises only upon the instructions given and refused. The court instructed the jury that a parol lease for more than one year is not good for more than one year, but is good for one year; also, as follows: "(3) An agreement to enter into a written contract of lease is not a lease; but a parol lease, with a further agreement to reduce the terms of the parol lease to writing, is a lease so far as it is competent to make a parol lease. This is a distinction you will bear in mind in considering this case. The defendant claims under a parol lease; the plaintiff claims that there was no parol lease. This is a controlling question of fact for you to determine; that is, whether or not the defendant was in possession of the premises under and by virtue of a parol lease from the plaintiff at the commencement of this action." Plaintiff in error does not question the correctness of this instruction, so far as it goes, but insists that the following instruction upon her request should have been given the jury: "(2) You are instructed that if you find from the evidence that it was agreed between the parties that a lease should be executed to commence March 1st, following, and that plaintiff allowed the defendant to go into a part of the house prior to said March 1st, then the plaintiff had a right to make defendant vacate said premises at any time prior to said March 1st, and recover possession thereof; and after the defendant had been notified to leave said premises he was a wrongdoer, as he had no right to remain there after such notification." This instruction by its terms was limited to "a part of the house" as "the premises" in regard to which alone the right of possession was to be determined by the jury. The petition upon which the cause was tried claimed the right of immediate possession of the northwest quarter of section 18, town 4, range 6, conjunctively with the dwelling house; its prayer was for the restitution of said premises. Manifestly, this instruction, which ignored the rights of the defendant as to the tillable land of which he had already plowed 12 or 14 acres for the following year's crop, was, in an action of this character, too restricted in its scope, and plaintiff's request to so instruct was therefore properly denied. The record presents no other question than upon the instructions. It therefore results that the judgment of the district court is affirmed. The other commissioners concur.

BAILEY v. STATE.

(Supreme Court of Nebraska. April 26, 1893.)

ADULTERY — EVIDENCE — PROOF OF MARRIAGE — NEW TRIAL — INFORMATION — WAIVER OF DEFECT.

1. A defect in the verification of an information is waived by pleading to the information.

2. Marriage is a civil contract requiring in all cases for its validity only the consent of parties capable of contracting. The fact of marriage may be proved by the testimony of one of the parties.

3. Where a defendant is charged with adulterous cohabitation while living with his wife, proof of such adulterous cohabitation during any portion of the period laid in the information is sufficient to sustain the charge.

4. A single act of adultery at a time outside of the period of adulterous cohabitation thus proved is a separate offense, for which the defendant may be punished, although committed within the period of adulterous cohabitation laid in the information.

5. In a prosecution for adultery the only evidence of defendant's marriage was that of the complaining witness, the woman alleged to be defendant's wife. The marriage relied upon was by words of consent without the presence of a solemnizing officer or of witnesses. A new trial was asked on the ground of newly-discovered evidence: the affidavits removing every question of negligence in procuring the evidence. The newly-discovered evidence alleged consisted of the declaration of the complaining witness contradicting the testimony as to the marriage. *Held*, that under these circumstances the motion should have been sustained.

6. A motion for a new trial should be granted on the ground of newly-discovered evidence tending to impeach a witness by showing declarations contradicting his testimony, where such evidence is of so controlling a character that it would probably change the verdict.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Seward county; Norval, Judge.

Thomas Bailey, having been convicted of adultery, and of wantonly cohabiting with a woman in a state of adultery while being with his wife, prosecutes error. Reversed.

Norval Bros. & Lowley, for plaintiff in error. Geo. H. Hastings, Atty. Gen., for the State.

IRVINE, C. The plaintiff in error was informed against in three counts, the first charging him with deserting his wife, Matilda Bailey, on the 1st day of January, 1887, and from that day until March 1, 1888, living and cohabiting with one Della Brong in a state of adultery. The second count charged him with committing adultery with Della Brong on February 18, 1888; the third, with keeping Della Brong and wantonly cohabiting with her in a state of adultery from November 7, 1886, to March 1, 1888, while being with his lawful wife, Matilda Bailey. He was acquitted upon the first count, and found guilty upon the second and third. The sentence was that the plaintiff in error should pay a fine of \$200, and be committed to the county jail for a period of three months, upon the second count, and also that he pay a fine of \$200, and be

committed for a like period upon the third count.

1. The first question presented relates to the sufficiency of the information, which was verified by the oath of Matilda Bailey before a notary public in Lancaster county. It is urged that a valid oath is essential to an information, and that the district court acquired no jurisdiction under an information not verified before a magistrate. There can be no doubt that a verification before a notary public is insufficient. *Richards v. State*, 22 Neb. 145, 34 N. W. Rep. 346. But this was a defect open merely to a motion to quash, and was waived by pleading to the information. It was not jurisdictional. *Davis v. State*, 31 Neb. 252, 47 N. W. Rep. 851.

2. The next point urged is that there was not sufficient evidence to establish a marriage between plaintiff in error and Matilda Bailey, who is alleged in each count to be his lawful wife. It appears that plaintiff in error and Matilda Bailey, then known as Mrs. Tyson, met at Lyons, Iowa, in 1866. plaintiff in error going to the house of Mrs. Tyson to board. They lived together in Lyons until about 1869, when they came to Nebraska together, and soon after took up a home-stead. They seem to have lived together until 1887, when Matilda left him. One child, still living, was born to them. Matilda testifies in one place that plaintiff in error came to board, and "promised that he would be my husband and I should be his wife as long as we lived. He promised to be true to me." Again: "He said he would be true to me; that if he married me he couldn't be truer to no one than he would be to me; and that it was just as good as to go and get married." Again: "Question. Will you state to the jury how you were married? Answer. Yes, sir. Q. How? A. Why he promised that he would be my husband and I promised to be his wife. Q. Is that all of it? A. Yes, sir. We talked together. Q. You talked together? A. Yes, sir. Q. And you thought you were married? A. Yes, sir." Further: "He said it was a mere matter of form, getting married; and if I would live with him he would live with me, and I told him I would, I guess. Yes, sir; I told him I would." This conversation, she says, occurred upon a Sunday afternoon about the middle of August, 1866. She also says that their relations were kept secret in Iowa, because of the opposition of her older children. They certainly lived from that time until the separation in 1887 as man and wife, and she has been known to neighbors and friends as Mrs. Bailey ever since coming to Nebraska. There is also some evidence of Bailey's introducing her to strangers as his wife. It cannot be denied that there are many things in her own testimony and elsewhere in the record tending to discredit her story, but it is the province of the jury to pass upon the credibility of witnesses, and, if her testimony above quoted establishes a marriage, the

verdict cannot be disturbed on the ground of insufficient evidence. *Dutcher v. State*, 16 Neb. 30, 19 N. W. Rep. 612. Marriage is in Nebraska a civil contract, to which the consent of parties capable of contracting is essential. Comp. St. c. 52, § 1; *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. Rep. 450. When contracted in another state a marriage must here be held valid if valid by the laws of the state where contracted. Comp. St. c. 52, § 17. There was no proof of the law of Iowa, and in absence of proof it will be presumed to be in accord with our own. *Lord v. State*, 17 Neb. 526, 23 N. W. Rep. 507. Wherever treated as a civil contract, it is sufficient to constitute a marriage that the minds of the parties meet in a common consent at the same time. No particular form of expression is required. It is claimed that in cases like that at bar there must be direct evidence of the marriage. This may be true, but Mrs. Bailey's testimony is direct evidence of the fact. The rule, when examined in the light of the authorities, only forbids in such cases the establishing of a marriage by proof of cohabitation, reputation, and "holding out." The reason is that while ordinarily such evidence is sufficient, because the law places that interpretation upon ambiguous acts which favors innocence, and will not assume that a cohabitation is illicit if by presuming marriage it would be lawful, yet, in a prosecution for adultery, this presumption conflicts with the presumed innocence of the prisoner of the crime of which he is charged, and therefore such evidence in such cases cannot alone establish a marriage. The essentials of a valid marriage are in all cases the same, the distinction being in the mode of proof alone. Mrs. Bailey's testimony is direct and competent evidence in this case, and if believed establishes a contract as binding for all purposes as if made in the presence of chosen witnesses at the altar.

3. Plaintiff in error contends that there was no evidence of his cohabiting with Della Brong until after Matilda Bailey ceased to live with him, and that therefore no conviction could be had on the third count. Matilda Bailey testified that she left him in February, 1887; that "he went with Della Brong, and stayed there the winter before I left him; from November until I left him in February he frequently stayed at their house three days in the week." This, together with the other evidence as to the relations between plaintiff in error and Della Brong, was sufficient to justify the jury in finding an adulterous cohabitation before Matilda left, and within the period laid in the information. Time is not of the essence of the offense, and proof of adulterous cohabitation during any portion of the period charged is sufficient. *State v. Way*, 5 Neb. 283.

4. It is further contended that the second count, alleging a single act of adultery, was founded upon a portion of the offense charged in the third count, and that therefore a con-

violation and sentence upon each count would amount to a double punishment for the same offense. We need not inquire whether or not this point would be well taken, provided the single act of adultery were within the period of adulterous cohabitation proved. It is not contended that two such counts may not be joined in one information, and a conviction had upon either according to the evidence. As already said, the evidence shows, and without contradiction, that plaintiff in error and Matilda Bailey have not lived together since February, 1887. The offense charged in the third count—keeping another woman, and cohabiting with her in a state of adultery while living with one's wife—must therefore have been complete at that time, and an act of adultery later would constitute a distinct and separate offense under another clause of section 208, Crim. Code.

5. A motion for a new trial was overruled, and sentence passed December 5, 1889, and on January 13, 1890, a supplemental motion for a new trial was filed, supported by affidavits of newly-discovered evidence. The affidavit of R. H. Woodward is to the effect that he met Matilda Bailey at the state fair grounds, in Lincoln, in 1887, and in a conversation, narrated at length in the affidavits, she declared that she had come to Nebraska with Bailey, and had here lived with him; that after some time they had discussed the matter of marriage, and decided that, having lived so long together without being married, they might still continue in the same course. The affidavits of defendant and of each of his counsel show that this evidence was not known to any of them until after the sentence was imposed, when it was disclosed by Woodward in the course of a casual conversation with one of the attorneys upon a railway train. This supplemental motion was overruled, and in this we think the court erred. There was no laches in failing to produce the testimony upon the trial. While the general rule is established that a new trial will not be granted because of newly-discovered evidence impeaching a witness, the rule has its limitations. This court has stated the doctrine as to cumulative evidence to be that a new trial will not be granted unless such evidence be of so controlling a character as to probably change the verdict. *Flannagan v. Heath*, 31 Neb. 776, 48 N. W. Rep. 904; *Kelser v. Decker*, 29 Neb. 92, 45 N. W. Rep. 272. The same principle should apply here. The only direct evidence of the fact of marriage was the testimony of the prosecuting witness. While the jury was justified in believing it, there are many facts tending to its discredit. The evidence of Woodward as to a contrary statement made to him before this prosecution was begun would be a very material fact for the consideration of the jury in weighing her testimony, and would very probably have led to a different result. Moreover, this testimony would not be entirely in the nature of im-

peachment. The question of marriage depended largely upon the intention of the parties, and this testimony tends to show that Mrs. Bailey had not in fact regarded their relations as those of husband and wife. Under the circumstances of this case a new trial should have been allowed. Reversed and remanded. The other commissioners concur.

RODGERS v. GRAHAM.

(Supreme Court of Nebraska. April 26, 1893.)

REPLEVIN BY MORTGAGEE—PETITION—RIGHT TO COSTS—USURY—DEMAND FOR POSSESSION.

1. The petition examined, and held sufficient; also, that it is not objectionable because it fails to allege that the note, for the payment of which the mortgage set forth in the petition was given to secure, was due, since it states the date the note matured, which was prior to bringing of the suit.

2. When the defendant in an action of replevin contests the case in the trial court on the merits, wholly on an affirmative claim of ownership and right of possession of the property in himself, no proof of demand and refusal is necessary to entitle the plaintiff to recover costs, in case the verdict is in his favor.

3. Where, in an action by a mortgagee against the mortgagor to recover the mortgaged chattels, it is established that the mortgage was given to secure a usurious loan of money, the defendant is entitled to recover costs, although the verdict is in favor of the plaintiff.

(Syllabus by the Court.)

Error to district court, Adams county; Gaslin, Judge.

Action by J. H. Graham against Alexander Rodgers. Judgment for plaintiff. Defendant prosecutes error.

Bowen & Hoeppner, for plaintiff in error. Capps, McCreary & Stevens, for defendant in error.

NORVAL, J. This is an action brought by J. H. Graham in a justice's court for the recovery of possession of specific personal property in the hands of Alexander Rodgers. The appraised value of the property taken under the replevin writ being in excess of \$200, the justice certified the proceedings to the district court, where the case was tried without the intervention of a jury, which resulted in a judgment in favor of the plaintiff. The defendant prosecutes error.

The first ground urged for reversal is that the petition fails to state facts sufficient to constitute a cause of action. The petition is as follows: "The plaintiff complains of the defendant for that on the 19th day of October, 1888, the defendant made, executed, and delivered to the plaintiff a chattel mortgage in words and figures following, to wit: 'Know all men by these presents, that Alexander Rodgers, of Adams county, Nebraska, for the consideration of five hundred and fifteen dollars, have mortgaged to J. H. Graham the following chattel property, to wit: * * * This mortgage is intended to secure the payment of one promis-

sory note of even date herewith, made by the said Alexander Rodgers, and payable to the said J. H. Graham or order, as follows: One for \$515.00, due the 19th day of December, 1888. And it is hereby agreed that if default be made in the payment of any part of said debt when due, or in case of an illegal removal or disposal of any of said property, then the whole hereby secured shall at once become due; and if default shall be made in the payment of any part of said debt when due, or if the holder thereof shall at any time feel insecure, he may take possession of said property, sell the same according to law, and apply the proceeds thereof on said debt. Such sale shall be held in —, Nebraska, in Adams county. Signed this 19th day of October, 1888. Alexander Rodgers. Attest: J. A. Townsend.' (2) That no part of the debt secured by said chattel mortgage has been paid. (3) That affiant has especial ownership in the above-described property, and is entitled to the immediate possession of the same. That said goods and chattels are wrongfully detained from him by said defendant, and that said goods and chattels were not taken in execution, or on any order of judgment against plaintiff, or for the payment of any tax, fine, or amercement issued against him, or by virtue of any order of delivery issued under the chapter of the Code of Civil Procedure providing for the replevin of property, or any other mesne or final process issued against said plaintiff. Wherefore the plaintiff prays for judgment against the defendant for the possession of the said property, or, in case possession thereof cannot be had, for a judgment against the defendant for the value thereof, and for the costs herein expended." Counsel insists that the petition does not allege any breach of the conditions of the mortgage, and that it does not state that the indebtedness secured by the mortgage was due. The petition charges, in effect, that the note, which the mortgage was given to secure, matured on the 19th day of December, 1888, and that no part of the mortgage debt has been paid. The action was instituted on the 13th day of February, 1889, which was nearly two months after the note had matured. It was unnecessary to allege specifically, in the petition, a breach of the conditions in the mortgage, inasmuch as it fully appears from the facts contained in the pleading that at least one of the conditions in the mortgage had been broken, by the mortgagor making default in the payment of the note. Nor was it necessary that the petition should state specifically that the note was due, since it fully appears from the record that the same had matured long prior to the commencement of the action. The petition discloses that the plaintiff below, by the terms of his mortgage, was entitled to the immediate possession of the property in controversy when the suit was instituted, and that the defendant wrongfully

withheld possession of the same. Therefore, the petition is sufficient.

It is urged that judgment for costs should not have been rendered against the defendant below because no demand for possession of the property was made before the suit was commenced. The evidence establishes that a demand was made before the replevin writ was served, but after it was issued. Whether a demand for the property after the issuance of the writ is sufficient, the authorities are conflicting. We are satisfied the better rule is that where the defendant refuses to surrender the property the demand of the plaintiff, made after the bringing of the action, but prior to the execution of the writ, is a good demand. It is convincing proof that, had a demand been seasonably made, it would have been unavailing. *Badger v. Phinney*, 15 Mass. 364; *Grimes v. Briggs*, 110 Mass. 446; *O'Neil v. Bailey*, 68 Me. 429. Had the defendant surrendered the property when demand therefor was made, it would have prevented the rendering of a judgment against him for costs. This he failed to do, but contested the case, through the entire trial in the lower court, upon the theory that the plaintiff had no right to the property, and that the defendant's possession was rightful. Such being the case, it was unnecessary to prove a demand and refusal. *Homan v. Laboo*, 1 Neb. 209; *Aultman v. Steiman*, 8 Neb. 109. The case of *Peters v. Parsons*, 18 Neb. 191, 24 N. W. Rep. 687, cited in brief of plaintiff in error, is not in conflict with the conclusion reached. It was in that case decided that an answer in an action of replevin, which is a mere general denial of the facts stated in the petition, is not a waiver of a demand for the property by the plaintiff before bringing the action. Such an answer puts in issue every fact necessary to be established by the plaintiff, including a demand, and under it the defendant may prove any matter which tends to defeat the cause of action. He may offer evidence to establish ownership and right of possession of the property in himself, and if he tried the case upon that theory he ought not, on a review of the case in the appellate court, to be heard to say that the plaintiff never demanded the property. Had Rodgers, in the case at bar, offered no testimony under the general denial for the purpose of establishing property in himself, the case cited would be on all fours with this, but as he contested the case on the claim that he had a right to detain the property the decision in 18 Neb. and 24 N. W. Rep. lacks analogy.

It is finally insisted that the plaintiff was not entitled to a judgment for costs, for the reason that the mortgage was given to secure a usurious loan of money. The uncontradicted evidence shows that the note for which the mortgage was given to secure was usurious to the extent at least of \$15. The plaintiff having planted his right to recover upon a contract confessedly usurious, the de-

defendant was entitled to recover his costs. See *Storage Co. v. Rogers*, (Neb.) 52 N. W. Rep. 826. The judgment of the district court is affirmed, except as to costs, which is reversed, and judgment for defendant below for his costs in both courts will be rendered against the plaintiff. Judgment accordingly. The other judges concur.

SMITH et al. v. GARDNER.

(Supreme Court of Nebraska. April 26, 1903.)

NOTE — POSSESSION BY MAKER AFTER MATURITY — PRESUMPTION OF PAYMENT.

1. The possession of a promissory note by the maker after maturity thereof is *prima facie* evidence of payment.

2. But the force of the presumption of payment from the possession of a note by the maker depends upon the circumstances of the particular case. It is error, therefore, to instruct the jury that possession of a note raises a strong presumption of payment, or is a strong circumstance to prove payment.

(Syllabus by the Court.)

Error to district court, Greeley county; Harrison, Judge.

Action by S. S. Smith and George W. Smith, copartners doing business as Smith Bros., against Margaret Green and Benjamin Gardner, individually, and, on the death of Margaret Green, as her administrator. Judgment for defendant. Plaintiffs bring error. Reversed.

T. J. Doyle, for plaintiffs in error. G. O. & E. E. Wright, for defendant in error.

POST, J. This action was commenced in the county court of Greeley county by the plaintiffs in error to recover on a note for \$75 executed by Margaret Green and Benjamin Gardner, payable to the order of E. D. Barrett, and taken to the district court of said county by appeal. Mrs. Green having died in the mean time, the action was revived in the name of the other defendant, as her executor. There are two defenses suggested by the answer—First, failure of consideration; and, second, payment. But, inasmuch as the first defense was abandoned at the trial, it does not call for further notice in this connection. A trial in the district court resulted in a verdict and judgment for the defendant, which it is sought to reverse by petition in error to this court.

The first contention of the plaintiffs in error is that there is no sufficient allegation of payment in the answer, which is as follows: "And the defendants, as a separate defense, say that the note declared upon has been fully satisfied and delivered to the defendants for collection." It must be confessed that the foregoing allegation is exceedingly indefinite and ambiguous, when construed as a plea of payment. The statement that the note has been fully satisfied is certainly a conclusion of law, but we think, from the allegation that it was de-

livered up to defendants for cancellation, the inference of payment is warranted. The proof relied upon to sustain the claim of payment is the fact that after the death of Mrs. Green the note in suit was found among her papers, while Mr. Smith, one of the plaintiffs, testified positively that the note had never been paid, but that the deceased obtained it from his possession on the pretense that she wished to examine it, and fraudulently refused to surrender it. Upon the introduction of the foregoing evidence the court, among others, gave the following instruction, to which exception was taken: "You are further instructed that the possession of the note by Margaret Green is a strong circumstance to show payment, unless explained by the plaintiffs in the action." We think the giving of the above instruction was error. We do not question the soundness of the proposition that possession of a note by the maker thereof, after maturity, is *prima facie* evidence of payment. But what is denominated a presumption of payment in such case is a mere logical inference from the fact of possession, and may be strong or weak, according to the circumstances of the particular case. Wharton defines a "presumption of fact" as "a logical argument from fact to fact." 2 Whart. Ev. § 1226. And in the same volume (section 1234) the author, in defining "presumption of law," as distinguished from "presumption of fact," uses this language: "The conditions to which are attached presumptions of law are fixed and uniform. Those which give rise to presumptions of fact are, inconstant and fluctuating." "Prima facie evidence" is defined by Starkie (1 Starkie, Ev. 479) as "that which, being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail, if it be credited by the jury, unless rebutted, or the contrary proved." Possession of the note by the deceased at the time of her death is not only a circumstance tending to prove payment, but from which payment would ordinarily be the logical inference. It is therefore proper, in such a case, to instruct the jury that possession is presumptive or *prima facie* evidence of payment, which will, if uncontradicted or unexplained, warrant a verdict in favor of the party alleging it. But the force of such presumption must always depend upon the circumstances of the case. *Larimore v. Wells*, 29 Ohio St. 19. It is error, therefore, to advise the jury that possession of a note by the maker raises a strong presumption of payment, or is a strong circumstance to prove payment.

An important question presented by the record is not discussed in the briefs of counsel, and is for that reason not determined, viz. whether the identification of the note by executor, and its introduction in evidence for the purpose of proving payment by deceased to the plaintiff, is such a foundation

as will qualify the latter, under section 329 of the Code, to testify as a witness, and to explain the means by which the deceased obtained possession of the note.

Reversed. The other judges concur.

STATE ex rel. MAIN v. CROUNSE, Governor.

(Supreme Court of Nebraska. May 1, 1893.)

LAWS—ENACTMENT—APPROVAL OF GOVERNOR.

The governor is a part of the lawmaking power of the state, and every bill, before it becomes a law, even if passed by a two-thirds majority of each house, must be approved by him, passed over his veto, or remain in his hands more than five days, Sundays excepted.

(Syllabus by the Court.)

Original action in mandamus, brought on relation of L. P. Main, in the name of the state, against Lorenzo D. Crouse, governor, to compel the governor to appoint an additional judge.

L. P. Main and R. A. Moore, for relator. Geo. H. Hastings, Atty. Gen., for respondent.

MAXWELL, C. J. This is an action to compel the governor to appoint an additional judge in the twelfth district, notwithstanding his veto of the bill providing for such additional judge, and failure of the legislature to pass the bill over the veto. It is alleged in the petition that "the relator, L. P. Main, represents to the court that he is a citizen of the United States, and of the state of Nebraska, and a resident of Buffalo county, in said state; that the defendant, Lorenzo Crouse, is the governor of the said state of Nebraska, duly elected and qualified; that the 12th judicial district in said state comprises the counties of Buffalo, Custer, Dawson, and Sherman; that on or about the 1st day of March, 1893, a bill dividing the said state of Nebraska into judicial districts, and providing for the appointment of an additional judge in said 12th district, was pending in the lower house of the state legislature of Nebraska, which was then in regular session, and on or about the date aforesaid was passed by said house; that thereafter, and about the 8th day of March, 1893, said bill was passed by the senate of the state of Nebraska; that upon the passage of said bill in each house of the state legislature the yeas and nays were entered on the journal, and said bill received the affirmative vote of more than two-thirds of the members elected to each house, as required by the constitution of said state; that said bill contained a provision whereby it became affirmative immediately upon its passage by said state legislature, and also contained a provision requiring the governor of said state to appoint said additional judge immediately after the passage of said act; that the defendant has failed, neglected, and refused, and does still refuse, to appoint said additional judge in said 12th judicial dis-

trict, though often requested to do so; that relator has requested Geo. H. Hastings, attorney general of said state, to bring this action, or allow it to be brought in his name, and he has refused so to do. Wherefore, relator prays for a writ of mandamus requiring said defendant, as governor of the state of Nebraska, to appoint some legally-qualified person to serve as judge in said 12th judicial district." To this petition the governor filed an answer as follows: "Comes now Lorenzo Crouse, and, answering the petition for mandamus filed in the above-entitled cause, says: (1) He admits the relator, L. P. Main, is a citizen of the United States, of the state of Nebraska, and a resident of Buffalo county. (2) That Lorenzo Crouse is the duly elected, qualified, and acting governor of the state of Nebraska. (3) That the 12th judicial district in the state of Nebraska comprises the counties of Buffalo, Custer, Dawson, and Sherman. That on or about January 21, 1893, a bill known as 'House Roll No. 172,' for an act to amend section 226 of chapter 3 of the Consolidated Statutes of Nebraska by providing for an additional judge in the 12th judicial district of said state was duly introduced in the lower house of the 23d legislative assembly of Nebraska, which 23d legislative assembly was then in regular session. That on February 28, 1893, said bill, entitled 'House Roll No. 172,' passed the lower house of the said 23d legislative assembly of Nebraska. That thereafter, and on or about March 9, 1893, the said bill known as the 'House Roll 172' passed the upper house or senate of the 23d legislative assembly. That said bill was duly presented to the governor of the state of Nebraska on or about the 10th day of March, 1893, and that after careful consideration this respondent, as the said governor of the said state, did, for good and sufficient reasons, veto said bill known as 'House Roll No. 172,' and that on said 13th day of March, 1893, said bill known as 'House Roll No. 172,' together with the veto message containing the objections of this respondent to the said bill, was duly returned to the lower house of the 23d legislative assembly of said state. That thereupon, and in the manner provided by law, the said bill known as 'House Roll No. 172,' was duly considered by said lower house of the 23d legislative assembly of Nebraska, and the said veto of the said governor was by said body sustained; and thereupon, and for said reasons, said bill failed to become a law, and failed to pass the legislature in the manner as provided by the constitution and laws of the state of Nebraska. And that it is true that this respondent has failed and refused to appoint an additional judge in the 12th judicial district of the state of Nebraska for the reason that there is no vacancy in said office, and no law authorizing or empowering this respondent to make such appointment; and this respondent denies that he has any right or

authority whatever for making such an appointment." The relator demurred to the answer on the ground that the facts stated therein did not constitute a defense to the action.

Section 15, art. 5, of the constitution, provides: "Every bill passed by the legislature, before it becomes a law, and every order, resolution, or vote to which the concurrence of both houses may be necessary, except on questions of adjournment, shall be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but, if he do not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider the bill. If, then, three-fifths of the members elected agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by three-fifths of the members elected to that house, it shall become a law, notwithstanding the objections of the governor. In all such cases the vote of each house shall be determined by yeas and nays, to be entered upon the journal." Section 11, art. 6, provides: "The legislature, whenever two-thirds of the members elected to each house shall concur therein, may, in or after the year 1880, and not oftener than once in every four years, increase the number of judges of the district courts and the judicial districts of the state. Such districts shall be formed of compact territory, and bounded by county lines; and such increase, or any change in the boundaries of a district, shall not vacate the office of any judge." The relator's position is that the language of the section providing that the legislature may do that which in this case they have sought to do whenever two-thirds of the members elected to each house concur therein is inconsistent with the provision requiring the executive approval of all laws, and that, therefore, a law of this kind can become operative upon its passage by both houses by a two-thirds majority. It is contended by him that not only would this seem to be in accordance with the constitution, but it is supported by reason, and whenever a reason for a rule ceases the rule also ceases, and certainly there can be no reason for submitting to the governor, for his approval, an act which, to secure its original passage, requires a larger number of votes than are required to pass any bill over the executive veto, nor are we without authority in this position. In *Hall v. City of Racine*, 50 N. W. Rep. 1084, the supreme court of Wisconsin discussed this question. The case arose over a municipal ordinance, which, from its peculiar nature, required a three-fourths vote of all the members elected to the council; and the court held that, inasmuch as two-thirds of the members elected to the council

were sufficient to pass the ordinance over the veto of the mayor, the ordinance, having necessarily received a larger number of votes than were necessary to pass it over the veto of the mayor, became operative without submission to the mayor, and in discussing the question the court held that a similar provision in the state constitution will be similarly construed, saying the approved rules both of statutory and constitutional construction require that the special provision should be given full force whenever it is inconsistent with the general provision, and that the law would not require a useless thing, namely, the submission of a bill of this kind to the governor of a state or the mayor of a city. We have great respect for the decisions of the supreme court of Wisconsin, and find frequent occasion to quote from and approve the same; but in the case cited it seems to us that the court overlooked an important fact, viz. that the officer whose approval is necessary in the first instance, and who has authority to veto any measure which it is proposed to enact into a general or local law, is a part of the lawmaking power. To him, as well as the deliberative body passing the law, is confided the duty of scrutinizing its details, and considering the effect it may have. Particularly is this true as applied to the governor of a state. To him, as well as to the legislature, is confided the business of making laws. He is elected by the electors of the entire state, and is presumed to have been chosen because of his fitness for the position. He represents the people of the state at large, and not particularly those of any locality. He is in a position, therefore, to judge impartially as to the necessity or expediency of creating additional judges of the district court. While it is true that the bill providing for such judges must be approved by two-thirds of the members elected to each house, while three-fifths may pass the bill over the governor's veto, yet, when the governor returns a bill to the legislature without his approval, he is required to state his reasons for not approving the same. These reasons are presumably valid, and may, and probably will, have the effect, as in this case, to convince a sufficient number of members who may have voted for it at first to refuse to vote for it against the governor's objections, in which case it would fail to become a law. An act which is demanded by the public will no doubt receive the necessary votes, while, if not so required, it is best that it should fail. The signature of the governor was necessary, therefore, to the bill in question, or that it should pass over his objections. The bill, therefore, did not become a law, and the writ must be denied.

2. It is alleged that there is a very large amount of business in the twelfth district, and that another judge is necessary therein to dispose of the same. The governor, in

his veto message returning the bill without his signature, calls attention to the fact that there are more judges in some of the districts than the business demands, and that the law authorizes judges of one district to hold court in another district. He also calls attention to the late case of *Tippey v. State*, (Neb.) 53 N. W. Rep. 208, in which it was held that different judges could hold court in the several counties of the judicial district at the same time. Our constitution and statutes place but few restrictions upon this right. There are four counties in the twelfth district. The judge of that district, therefore, may call to his aid three other judges from districts where the business is disposed of, and it is perhaps probable that the governor has power to require them to perform such duties. No doubt a request would be all that would be necessary.

JONES et al. v. BIVIN.

(Supreme Court of Nebraska. May 1, 1893.)

DISCHARGE OF ATTACHMENT—REVERSAL—WEIGHT OF EVIDENCE.

Where an order discharging an attachment is against the clear weight of evidence, it will be reversed, and the attachment sustained.

(Syllabus by the Court.)

Error to district court, Seward county; Bates, Judge.

Proceeding in attachment brought by Harry T. Jones and Shadrick C. Burlingim against Theodore O. Bivin. Order discharging the attachment. Plaintiffs bring error. Reversed.

Edw. C. Biggs and D. C. McKillip, for plaintiffs in error. R. P. Anderson and Geo. H. Terwilliger, for defendant in error.

MAXWELL, C. J. The plaintiffs began an action by attachment against the defendant, and levied upon lots 9 and 10, in block 67, in Harris, Moffitt & Roberts' addition to Seward. There were three grounds of attachment, namely: (1) That the defendant is about to convert a part of his property into money, for the purpose of placing it beyond the reach of his creditors. (2) The defendant has property and rights in action which he conceals. (3) The defendant has disposed of part of his property, with the intent to defraud his creditors. The defendant denies the facts stated in the affidavit for attachment; thereupon a large number of affidavits in support of and opposed to the attachment were filed. It is conceded that the defendant conveyed the lots in question to his brother John Bascolm Bivin on or about the 30th day of June, 1891, and the question presented is, was the latter a bona fide purchaser? A number of witnesses filed affidavits stating that the defendant had said to them that there was no consideration for the conveyance to his brother, but that he

had placed the property in his hands so that creditors could not reach it. This he denies, and claims that the sale to his brother was a bona fide transaction. There is also an affidavit of the brother, wherein he says: "That on the 12th day of July, 1888, said Theodore O. Bivin became indebted to this affiant in the sum of \$1,000 for money loaned by this affiant to said Theodore O. Bivin at his request, for which said Theodore O. Bivin made, executed, and delivered to this affiant his promissory note of that date for the sum of \$1,000, a copy of which, with all the indorsements thereon, is hereto attached, marked 'Exhibit A,' and made a part of this affidavit; that on the 30th day of June, 1891, this affiant purchased of said Theodore O. Bivin certain real property described as follows, to wit: Lots 9 and 10, block 67, Harris, Moffitt & Roberts' addition to the original town, now the city, of Seward, Nebraska; that this affiant paid said Theodore O. Bivin, as consideration of and as payment for said premises, the sum of \$800, by giving said Theodore O. Bivin, at his request, credit on said note for said \$800, and by indorsing thereon as paid the sum of \$800, as shown by the indorsement on the back of said exhibit A, hereto attached, said indorsement being marked 'Exhibit B,' and made a part of this affidavit; that the said indorsement on the back of said note was made in consideration of and in payment to said Theodore O. Bivin for the above-described premises, and for no other purpose whatever." It will be seen that there is no statement of the amount of money he loaned his brother, or that he desired a conveyance; and the suggestion in the affidavit that the credit was given at the request of the defendant is very suggestive. The case is very similar in some of its features to that of *Hardware Co. v. Duncan*, (Neb.) 47 N. W. Rep. 847. In that case the mortgagors, after denying the fraud, stated "that on the 2d day of October, 1889, they made and executed and delivered a certain chattel mortgage to W. R. Butler and Edmund Jeffries on the stock of goods contained in the store building situate on lot 15, block 3, in Pauline, Adams Co., Neb., being the same stock of goods taken under an order of attachment issued in this cause; that said mortgage was given to secure a valid indebtedness from these defendants to said W. H. Butler and Edmund Jeffries of \$2,217.82, and that it is provided in said chattel mortgage that these affiants were to remain in possession of said goods and sell the same at public or private sale, and apply the proceeds of said sales to liquidation of said sum of \$2,217.82 so secured; that said mortgage was filed in the office of the county clerk of Adams county, Neb., on the 2d day of October, 1889, and these defendants have in all respects fulfilled the conditions of said chattel mortgage." This, it is said, is substantially all the testimony upon the hearing for dissolu-

tion of the attachment, and it was insufficient for that purpose. The chattel mortgage, if valid, withdrew the property of the defendants from levy and sale upon either an attachment or execution. The circumstances under which this mortgage was made were such as to require proof from the mortgagees as to the actual consideration paid by them to the defendants. In other words, how was the debt incurred, and for what? These questions are not answered by the general allegations of the defendants that the debts were bona fide. They should have stated the acts in regard to the creation of the debt, and the consequent giving of security for the same, and the court would have drawn conclusions of law from such facts. On the face of the papers, therefore, unless this mortgage was a bona fide transaction, there was an attempt on the part of the defendants to place their property beyond the reach of their creditors, which would fully justify an attachment. In our view, there is a failure to establish the bona fides of the conveyance to the brother. The judgment is clearly against the weight of evidence. The judgment is reversed, and the cause remanded for further proceedings. The other judges concur.

REED v. SNELL et ux.

(Supreme Court of Nebraska. May 1, 1893.)

PARTITION—PARTIES.

In an action for partition the defendant alleged a partnership between himself and one R., who had conveyed to the plaintiff. The court below found such partnership to exist, and that the plaintiff had no rights in the premises, and that one R., husband of the plaintiff, was a necessary party for an accounting. *Held*, that the testimony failed to show a partnership in the land, but merely in the stock and improvements, and that the plaintiff could maintain the action subject to the payment of the improvements made by the firm.

(Syllabus by the Court.)

Appeal from district court, Howard county; Tiffany, Judge.

Action by Helen F. Reed against John N. Snell and Isabel Snell. Judgment for defendants. Plaintiff appeals. Reversed.

T. R. Wallace and Darnall & Babcock, for appellant. A. A. Kendall and Paul & Tempelin, for appellees.

MAXWELL, C. J. This action was brought by the plaintiff against Snell and wife for a partition of certain real estate in Howard county. The defendants answered separately, that of John Snell being as follows: "Comes now John N. Snell, and for himself, answering plaintiff's petition in this behalf, says: (1) He denies each and every allegation in said petition contained, except such as may herein be explained or expressly admitted or denied. (2) Defendants admit that Isabel Snell is the wife of this defendant, and that

J. E. Reed is the husband of the plaintiff. (3) Denies that plaintiff is the joint owner with this defendant in the real estate described in plaintiff's petition, or that she has any interest therein whatever against this defendant as owner or purchaser thereof. (4) And, further answering, this defendant avers that on or about the 30th day of August, 1883, the said J. E. Reed, husband of plaintiff, being then and there the owner of certain real estate described in plaintiff's petition, as well as the growing crops thereon, and of certain cattle, horses, and other live stock on said premises, and other personal property thereon used in and upon said lands, represented to this defendant John N. Snell that the business of stock growing and raising in Nebraska was very profitable; that this business was prosperous and productive; and said J. E. Reed then and there solicited defendant John N. Snell to enter into a copartnership with the said J. E. Reed for the purpose of buying, raising, breeding, feeding, and selling cattle, horses, and hogs, and the raising of hay and grain, and said J. E. Reed represented that his profits were large in said business. (5) That, by reason of said representations of said J. E. Reed to this defendant, this defendant was induced to and did enter into a copartnership with said J. E. Reed, by the terms of which it was mutually agreed to and with each other by verbal contract of partnership that the said firm should be composed of J. E. Reed and said John N. Snell, under the firm name of Reed & Snell, and that said partners should share alike in all expenses of said business, and also should share and share alike in the profits and losses of said business aforesaid. (6) And defendant avers that he was unacquainted with the said business, and, relying solely upon the representations aforesaid of said J. E. Reed, this defendant entered into the agreement of copartnership aforesaid. (7) That in pursuance of their agreement made and entered into, and for the purpose of carrying the same into effect, said J. E. Reed sold and conveyed to this defendant a one-half interest in the real estate described in plaintiff's petition, in consideration whereof this defendant then and there paid said J. E. Reed the sum of \$5,300, and also, in consideration of the sum of \$3,212, said J. E. Reed sold and delivered to this defendant a one-half interest in all crops then growing on said real estate in plaintiff's petition described, and a like interest in 166 head of cows, heifers, steers, and bulls; and it was mutually agreed and understood by and between said J. E. Reed and this defendant that all of said property, real and personal, and the increase thereof, should be and constitute the assets and capital of said firm, with the further agreement that said capital might be added to at any time, as said J. E. Reed and this defendant might agree. (8) That after-

wards, to wit, on or about the — day of —, 1883, there was added to the stock of said firm one boar pig and ten brood sows, of the aggregate value of \$100, of which sum this defendant paid \$65, an excess of \$15 over and above the legitimate and proper share of this defendant in pursuance of said partnership agreement, which said sum of \$15 has not been returned or paid to this defendant by said firm of Reed & Snell. (9) That, before said partnership was formed, said J. E. Reed purchased a part of said real estate from one C. H. Houghton, and thereafter added to his property the purchase of certain cattle, until there were 166 head as aforesaid; and subsequently, and after forming said partnership by said J. E. Reed and defendant J. N. Snell, an agreement was entered into by and between said firm of Reed & Snell and one P. R. Granger, by which said Granger was to have charge of said property, and to keep the same at his own expense, under a written contract by and between said Granger and one C. H. Houghton, and by said Houghton duly assigned to the said firm of Reed & Snell, a copy whereof is hereto attached as part hereof, marked 'Exhibit A.' (10) And it was mutually agreed and understood by and between the said P. R. Granger and the said Reed & Snell that no part of said personal property should be sold, except certain fat cattle then being fed by said Granger under said agreement with Houghton last aforesaid. (11) That said plaintiff, Helen F. Reed, had actual notice of, all and singular, facts and circumstances set out and detailed in paragraphs 4, 5, 6, 7, 8, 9, and 10 hereof, and of the partnership rights and interests of this defendant in and to the real estate, in her said petition set out and described, as well of the engagements of said J. E. Reed as to the payments of the several sums of money by defendant for a half interest in said property, real and personal, as of the terms of said copartnership and the agreements referred to with said Houghton and Granger. (12) That contrary to the terms of said several agreements, as well the agreements of copartnership between J. E. Reed and this defendant as that with said Granger, said J. E. Reed entered upon said land, and did unlawfully and fraudulently sell all cattle, horses, hogs, and other personal property heretofore referred to and described as the property of said firm of Reed & Snell, and the increase of said property aforesaid, and received therefor large sums of money, the exact amount whereof is unknown to this defendant, and that said Reed wrongfully and fraudulently, and with intent to cheat, wrong, and defraud this defendant, refused to account to said firm of Reed & Snell for the proceeds of said personal property so as aforesaid sold; that said personal property constituted a large part of the assets of said firm of

Reed & Snell, of all which said plaintiff, Helen F. Reed, had actual knowledge. Wherefore this defendant prays that said J. E. Reed and Helen F. Reed be made a party defendant to this cross petition, and be required to answer the same; that an account may be taken of the partnership affairs between J. E. Reed and this defendant John N. Snell, under the direction and decree of this court; that the said J. E. Reed be decreed to pay to this defendant John N. Snell such sums as he may be entitled to receive of said partnership assets; that the action of Helen F. Reed v. John N. Snell and Isabel Snell be consolidated with this bill; and that it may be declared that said deed from J. E. Reed for a pretended interest in the lands described in plaintiff's petition be declared null and void, and held for naught; that said partnership be dissolved between J. E. Reed and John N. Snell, and that said real estate of said firm be sold, and upon an accounting that the proceeds of the assets of said firm be equally divided, and that said J. E. Reed be required to account for all property and money of said firm which he has had and received; that should it appear that said J. E. Reed has received all of his share of the property of said firm, being the same described in plaintiff's petition as the property of this defendant John N. Snell, that the title thereof be quieted in him, and, for the purpose of clearing the cloud from the title of said lands, that said Helen F. Reed be required to reconvey said real estate, its tenements and hereditaments, to J. E. Reed, as a member of said firm of Reed & Snell, and, in case she shall fail or refuse to so convey for a period of 20 days after such order, then that a commissioner be appointed by this court to make such conveyance for her; and for such other, full, and complete relief in the premises as equity and good conscience may require." The answer of Isabel Snell need not be noticed. The reply of the plaintiff is a general denial. On the trial of the cause the court found the issues in favor of the defendant; that a partnership had existed between Snell and J. E. Reed, and that he was a necessary party to the action; and that the plaintiff, having purchased the land from her husband with the notice of these contracts, acquires no title or interest in the property, and the action was dismissed as to her. From the judgment an appeal was taken.

It appears from the testimony that in 1883 one Houghton leased of P. R. Granger 314 acres of land in Howard county for five years; that he was to furnish to Granger 100 head of cows, helpers, steers, and bulls, etc., and Granger was to care for the same for 5 years at his own expense, at the end of which time Houghton was to receive the same number and kind of cattle he had delivered to Granger, and one-half the increase, and Granger to have the residue.

Soon after this contract was made, J. B. Reed, husband of the appellant, purchased of Houghton the land he leased to Granger and Houghton's interest in the cattle contract. Several months afterwards, Reed sold the undivided one-half of the land in controversy, and one-half interest in the cattle and the Granger lease. Soon afterwards, Reed sold and conveyed to Snell an undivided one-half of an additional 160 acres of land now in controversy. In February, 1885, Snell and wife gave a mortgage on the undivided one-half interest of the land purchased of Reed. Three months later, Reed conveyed an undivided one-half interest in the land, of which Snell had purchased the one-half interest, to the plaintiff, and she claims title. The testimony tends to show that the conveyance from Reed to his wife was made in good faith, as the land originally had been paid for with her money. The testimony also tends to show that Reed & Snell were in partnership, at least, in the buying and selling of stock, and of the improvements made on the land. There is no partnership shown in the land itself. As to the land they seem to be joint owners. There are some charges of fraudulent misrepresentations on the part of Reed to induce Snell to enter into the contract, but so far as we can see the representations were made in good faith, but colored with the enthusiasm which is sometimes indulged in by those who have no experience in the business in which they are about to engage, and reason from mere theory colored by bright anticipations. Both parties seem to have been ignorant of the business. No losses or reverses were expected by either party, hence no precautions taken to guard against the same. Snell was upon the ground, saw the land and the stock, and evidently was not deceived by the representations of Reed. It is evident that there must be an accounting between Reed and Snell, and that Reed is a proper party to be made a defendant. It is also apparent that the plaintiff is entitled to a subdivision of the land, but that any partnership improvements made thereon should be deducted and paid for by her. The judgment is therefore reversed, and the cause remanded for further proceedings. The other judges concur.

JONES v. STEVENS.

(Supreme Court of Nebraska. May 2, 1893.

REAL-ESTATE BROKER—COMPENSATION—LIMITING CROSS-EXAMINATION OF WITNESS—EXCEPTION.

1. When a real-estate broker is employed to produce a purchaser of real property he is entitled to compensation when he has secured a proposed purchaser, ready, able, and willing to buy the property on the terms and conditions upon which the said broker was authorized to procure such purchaser. This right to compensation will not be impaired by the subsequent inability or unwillingness of the owner

to consummate such sale on the terms prescribed.

2. The presiding judge, of necessity, is vested with a sound judicial discretion as to limiting the cross-examination of a witness; and where the same question has been three times propounded it is not error to prohibit a like question to be again asked, under penalty of forbidding further cross-examination. No exception thereto having been taken, there is in this court no reviewable question presented.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Davis, Judge.

Action by Grover Stevens against A. D. Jones. Judgment for plaintiff. Defendant brings error. Affirmed.

C. A. Baldwin, for plaintiff in error. Switzer & McIntosh, for defendant in error.

RYAN, C. This was an action brought by Grover Stevens against A. D. Jones for the sum of \$1,400 and interest thereon, alleged to have become due the said Stevens as compensation for having procured for Jones a purchaser for lot 8, in block 140, in the city of Omaha. The petition also alleges that said property was listed by Jones with Stevens, who was a real-estate broker in Omaha, at the price of \$70,000, of which \$20,000 was to be paid in cash, the balance to be allowed to run at the option of the purchaser, but to draw 7 per cent. interest per annum. It was also averred that Jones agreed that, if Stevens would procure him a purchaser for said lot on said terms, Jones would pay Stevens \$1,400 for such services, and that, as required, he, the said Stevens, did procure a purchaser ready, able, and willing to take the lot on the terms proposed. The answer admitted that, at the time alleged, Stevens was a real-estate broker, and denied each other averment made in the petition, and denied that Jones ever employed Stevens to procure a purchaser, and denied that Stevens ever did procure a purchaser able, ready, and willing to purchase on the terms for which Jones would sell. There was a reply in general denial of the averments of the answer.

The examination of this case has been much simplified by the admission at the close of Mr. Sweezy's testimony, as follows: "It is agreed that Mr. Sweezy was ready and able to make the bargain." As the gentleman last named was the proposed purchaser of said lot, who had been procured by Stevens to agree to take the same, there was thus admitted a compliance with two of the conditions necessary to a recovery, upon the theory of the plaintiff, in the district court. The other condition was whether Mr. Sweezy was willing to take the property on the terms proposed. In relation to this requirement, counsel for plaintiff in error vigorously insists that the lot was incumbered to a large amount by reason of a general judgment against Jones, and on account of specific liens decreed against the property, and contends, therefore, that Sweezy refused to con-

summate the purchase. Upon this contention there was contradictory evidence. There was, however, a preponderance sufficient to establish the facts that these incumbrances were talked over by Jones with Stevens, and also with Sweezy, and that Jones insisted that these would not prevent the consummation of the sale, for that Jones would use the avails of the sale to place the title in a condition satisfactory to Sweezy. The manner in which this was to be accomplished was by Jones stated to Sweezy, and by him approved, upon which Sweezy offered to arrange the matter at once, but Jones deferred further action until he should see his counsel. It is also established by a preponderance of the evidence that Jones stated to Sweezy that the lot was Sweezy's, immediately thereafter saying to defendant in error that he (Jones) would close up the matter, and that he (Stevens) was entitled to his commission. Undoubtedly, it was thereafter found more impracticable to arrange as to the liens than Mr. Jones had anticipated, but that does not abridge Mr. Stevens' right to a commission, if he had already earned it. The instructions very aptly stated the issues, and the law applicable thereto. True, the plaintiff in error criticised these instructions, and requested others, on the theory that it was necessary for Stevens to have accomplished a sale of the lot; to secure a proposed purchaser, ready, able, and willing to buy on the prescribed terms not being, in his view, sufficient in law, or within the averments of the petition. It will be observed that, as to the allegations of the petition, this criticism is not well founded. As to the law applicable, it is equally at fault. *Vide Potvin v. Curran*, 13 Neb. 302, 14 N. W. Rep. 400.

2. Complaint is made that the court improperly limited plaintiff in error's cross-examination of the defendant in error. The bill of exception shows that counsel for plaintiff in error asked this question, "When did you make this contract with Mr. Jones to sell this property?" which was answered, "When he listed the property." The question was immediately repeated, and an objection thereto was sustained, and an exception taken. Very soon thereafter this question was again repeated, whereupon the presiding judge said, after an objection and exception had again been noted, "If you ask another question of that kind, I will stop the cross-examination of this witness." No exception was taken to this announcement, and the cross-examination thenceforward proceeded in an orderly manner. There is, therefore, no question for review properly presented by the record, nor does the plaintiff in error show that this announcement of a future intention, upon the happening of an event which in fact never did happen, prejudiced his rights in any manner or degree whatever. The presiding judge must be allowed a certain discretion in the limitation of the right

of cross-examination, and we fail to see that this discretion has in any manner been abused. The verdict is fully sustained by the evidence. There was no error in the rulings of the court, and the judgment of the district court is affirmed. The other commissioners concur.

HEWITT v. EISENBART.

(Supreme Court of Nebraska. May 2, 1893.)

MALPRACTICE — EXPERT TESTIMONY — HYPOTHETICAL QUESTIONS — DECLARATIONS OF PARTY — PHYSICAL CONDITION — TREATMENT — DEGREE OF SKILL.

1. A judgment will not be set aside because an expert witness was permitted to answer a hypothetical question assuming a fact unsupported by the evidence, where such fact was the only hypothesis of the question, not combined with others based upon evidence, and the answer could not mislead the jury.

2. It is not prejudicial error to permit an expert to state what steps he would take in a given case, if the question does not refer to any matter in dispute, but is merely introductory in its character.

3. Declarations of a party to the suit, explanatory of his physical condition at the time the declarations are made, are admissible, where the circumstances warrant the inference that they were made spontaneously, and not with a view to their effect upon the controversy. Whether or not they fall within this rule must be left largely to the discretion of the trial court.

4. Testimony as to the physical condition of a plaintiff in a malpractice case, just before the trial, and two or more years after undergoing the treatment complained of, is competent, where such condition is shown to be the result of the injury in question, and is of a permanent nature.

5. The law requires of the surgeon, in the treatment of his patient, the exercise of that degree of knowledge and skill ordinarily possessed by members of the medical profession.

6. In a malpractice case it is not necessary, to sustain a verdict for the plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper, nor will the fact that all such witnesses agree that a portion of such treatment is proper under some circumstances, in itself, defeat a recovery.

7. There can be no recovery for expense incurred in efforts to cure an injury unless it be shown that the expense so incurred was reasonably necessary.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Saline county; Morris, Judge.

Action by John Eisenbart against Hamilton W. Hewitt. Judgment for plaintiff. Defendant brings error. Affirmed.

Robert Ryan and F. I. Foss, for plaintiff in error. J. D. Pope and Hastings & McGintie, for defendant in error.

IRVINE, C. This action was begun by defendant in error against plaintiff in error to recover damages on account of the alleged negligent and unskillful setting, dressing, and caring for of a broken leg of defendant in error by plaintiff in error, a physician and surgeon. The answer admitted the treatment of the broken leg, but denied

negligence and want of skill, and alleged that any injury sustained by defendant in error was due to his own negligence and disobedience of plaintiff in error's instructions. This the reply denied. A verdict was found and judgment rendered for defendant in error.

It appeared that defendant in error suffered an oblique fracture of both tibia and fibula at the junction of the middle and lower third of those bones. The accident occurred in the country, at night, and plaintiff in error called the following morning. He reduced the fracture, having the assistance of defendant in error's son, at least. There is some testimony that another person also assisted. He then placed the limb in splints made at the time from pieces of light packing box. A posterior splint was used, extending from about six or eight inches above the knee to below the heel. This was padded with cotton, and wrapped with cloth. To this splint was attached, at right angles, a footboard. Two lateral splints were used, extending from below the knee to the ankle. Bandages were placed around all these splints, including one binding the foot to the footboard. A space seems to have been left at the seat of fracture, whereby some local treatment was thereafter applied without removing the splints. The splints were not removed until about the third week after the injury. On the thirty-second day the splints were finally removed, and a plaster of Paris dressing applied, which was renewed once or twice thereafter. After the first plaster of Paris dressing was applied, Eisenbart got crutches, and moved about somewhat. The final result was a shortening of the leg about one inch and a half, caused by a displacement of the fragments of the bones, the lower pieces extending up alongside the upper, and all four ends uniting laterally. This tendency towards shortening seems to have been first observed when the first plaster of Paris dressing was removed. When it was renewed a weight was attached, apparently to the lower part of the new dressing, by means of a cord and pulley. Upon all other points at all material to the case there is a marked conflict of evidence. A great deal of expert testimony was taken, which, as seems to be usual in such cases, is bewilderingly inharmonious. A great many exceptions were taken to the admission and rejection of testimony. We shall notice only those specifically referred to in the briefs, simply observing that the other exceptions are of minor importance, and not well founded.

Dr. Beghtol, a witness for defendant in error, was asked: "Can a limb be extended in the kind of a fracture we speak of, and properly set, without the assistance of some other than the surgeon." This was not founded upon any evidence in the case, all the witnesses agreeing that Dr. Hewitt had some assistance. If this element had been

interjected in a question containing any other elements founded upon the evidence, the overruling of an objection thereto would certainly be prejudicial error. We cannot see, however, how, standing alone, its answer could prejudice plaintiff in error. If an element not within the evidence be combined with others, supported by evidence, an answer to the question might be founded, in part or entirely, upon the hypothesis improperly assumed, and be referred by the jury to the proper hypothesis. But where the improper hypothesis stands alone no such result can follow. The objection should have been sustained, but the error was without prejudice. Similar questions were put to the other witnesses without objection.

Dr. Beghtol was also asked, in effect, what would be the result of a proper reduction and improper dressing of such a fracture, and complaint is made of the admission of his answer, on the ground that it assumed facts not proved. There is testimony in the record tending to show an improper dressing, and the overruling of the objection was right.

Dr. Watson was asked: "What would be your first steps in a fracture of that character, if it was at the juncture of the lower and middle third of the tibia and fibula, or both bones of the leg?" Other similar questions were put, but called forth no answer, except in accordance with the steps actually taken by Dr. Hewitt. These questions were introductory, and when the witnesses were called upon for a professional opinion upon the case the form of the interrogatory was changed so as to call for a description of "what would be proper" treatment. What course a particular surgeon would take would not be competent evidence upon an issue in the case, but such questions, when purely of a preliminary character, and not calling forth evidence upon contested points, are not prejudicially erroneous.

A witness called to show the extent of Eisenbart's injuries testified that he employed Eisenbart to work for him, and directed him to do some spading; that Eisenbart failed to make proper progress with this work, and, on witness' asking him the reason, Eisenbart explained that his inability to use the spade was due to the then condition of his leg. The admission of this declaration is assigned as error. There can be no doubt that the declarations of a party as to a past occurrence would be inadmissible, unless in the nature of admissions, but here the question under investigation was the physical condition of the plaintiff at the time the declarations were made. Statements made to physicians called upon for treatment have been held admissible even when they referred to past occurrences, and declarations to others are admissible when confined to present feelings or conditions. They may, of course, in some cases, be simulated; but they must, from necessity, be admitted in evi-

dence, especially where, as in this case, there are no grounds shown for believing they were made for an ulterior purpose. The trial court must be permitted to exercise its discretion very largely in determining whether the declarations were made under such circumstances as to permit the inference that they were genuine expressions, and the jury must be left to determine whether or not such inference shall be drawn. *Greenl. Ev. 102; Turnpike Co. v. Andrews, 102 Ind. 138, 1 N. E. Rep. 304; Railroad Co. v. Newell, 104 Ind. 264, 3 N. E. Rep. 836; Blair v. Madison Co., (Iowa,) 40 N. W. Rep. 1093; Eckles v. Bates, 26 Ala. 655; Howe v. Plainfield, 41 N. H. 135; Towle v. Blake, 48 N. H. 92; Kennard v. Burton, 25 Me. 39; Elliott v. Van Buren, 33 Mich. 49.*

Complaint is made, in a general manner, of the court's allowing the general result of the injury to be shown, instead of confining the proof to the excess of injury and suffering beyond that necessarily entailed by such an accident. There was evidence as to the extent of shortening ordinarily to be expected in such cases, and as to the length of time usually occupied in the healing process. In such cases the exact quantum of damages is not susceptible of direct and exact proof, but must be left for the jury to admeasure, under appropriate instructions. By an instruction correct in its terms, and not excepted to by plaintiff in error, the jury was limited, in admeasuring damages, to the pain, suffering, and injury caused by the negligence of plaintiff in error.

It is also contended that testimony of surgeons as to the condition of Elsenbart's leg shortly before the trial was improperly admitted. This testimony relates to the length and shape of the leg, and it was shown that this condition was due to the position in which the bones had united after the fracture. The condition of the leg at the trial was thus clearly connected with the injury, and the testimony was properly admitted.

It is urged that the eighth instruction was misleading as to the onus probandi. The giving of this instruction was not objected to in the motion for a new trial, nor is it assigned as error. Errors in the giving of instructions will not be considered unless specifically assigned. This has been repeatedly decided. *Russel v. Rosenbaum, 24 Neb. 769, 40 N. W. Rep. 287.*

The errors specifically assigned in the giving and refusing of instructions relate only to those requested by the parties. The transcript of the record fails to group the instructions in such a manner as to distinguish very clearly those given by the court of its own motion, and those requested by the parties. Objection is made to the giving of those numbered 1, 2, and 3 asked by defendant in error. Nos. 2 and 3 appear from the record to have been refused. No. 1 is as follows: "When a surgeon undertakes a

case of a fracture or broken limb, the implied contract on his part is that he possesses the ordinary skill and ability in his profession, and that he will use that skill and ability with diligence in and about the cure of his patients, such as surgeons ordinarily employ." While the language of this instruction is not so well chosen as might be desired, it fairly states the rule governing such cases, and is not erroneous.

The refusal to give a number of instructions asked by plaintiff in error is assigned as error. The law is, for the most part, stated correctly in these instructions, but the points covered were all substantially embraced in the instructions given by the court of its own motion. There was no error in refusing them.

It is urged that the evidence is not sufficient to sustain the verdict. It is not contended that Dr. Hewitt's treatment of the injury, as enlightened by the testimony of some of the experts, would not amount to negligence, but the point urged seems to be that, the experts disagreeing among themselves, and all of them indorsing a portion of the treatment pursued as proper under some circumstances, it cannot be said that Dr. Hewitt failed to exercise that degree of skill ordinarily possessed and exercised by members of his profession. In other words, that if, in such cases, the testimony shows that some surgeons consider the treatment adopted as proper, there can be no recovery. The adoption of this view would be to change the rule of liability so as to hold a surgeon responsible only when his acts evidence a want of skill below that of the most unskillful surgeon whom the defendant might be able to produce. The jury must judge of the skill and qualifications of the expert witnesses, as well as of the defendant in the action, and it is for the jury to say upon all the evidence, what treatment amounted to negligence, under the rule of skill required.

Only one other question remains for consideration. The petition alleges, in laying the damages, that, by reason of the wrong complained of, defendant in error had unnecessarily incurred great expense in endeavoring to be cured of the defect. This was undoubtedly a clerical error in drawing the petition, and, did the evidence sustain any claim for damages of that character, an amendment might at this time be permitted. *Homan v. Steele, 18 Neb. 652, 28 N. W. Rep. 472.* The only testimony upon this point is as follows: "Were you at any expense for medicine and treatment?" "Only a doctor's bill." "How much was that?" (Objected to as immaterial and irrelevant. Overruled, and defense excepts.) "About \$85." There is nothing to show when or how this expense was incurred; whether it was due to injuries produced by defendant's negligence; whether the expense was necessary, or the amount of the bill reasonable. No

recovery could be based on such evidence, and, as it was probably considered by the jury in estimating the amount of damages sustained, the case should be reversed and remanded, unless within 30 days defendant in error file a remittitur to the amount of \$85, and interest at 7 per cent. from the date of the judgment. Should this be done, the judgment will be affirmed. Judgment accordingly.

RAGAN, C., concurs. RYAN, C., took no part in the decision.

GRAY v. DISBROW et al.

(Supreme Court of Nebraska. May 2, 1893.)

EQUITY—REVIEW—MOTION FOR NEW TRIAL.

In order to review the proceedings in the trial of an equity case by a petition in error a motion for a new trial must be filed, as in an action at law. *Carlow v. C. Aultman & Co.*, 44 N. W. Rep. 873, 28 Neb. 672.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Wakeley, Judge.

Action by M. A. Disbrow & Co. against C. E. Gard & Bro. and Adolph H. Gladstone,—Fred W. Gray intervening. Decree for plaintiffs. The intervenor, Gray, brings error. Affirmed.

Wharton & Baird, for plaintiff in error. Montgomery, Charlton & Hall, for defendants in error.

RAGAN, C. The decree which is sought to be reviewed in this case was rendered in the court below on the 14th of January, 1891, and a transcript of the evidence and the proceedings of the court below was filed in this court August 21, 1891. More than six months having elapsed between the date of the rendition of said decree and the filing in this court of the transcript of the proceedings and evidence, this case cannot be tried here as an appeal. It appears, also, from looking into the record, that no motion for a new trial was filed in the court below. We are therefore precluded from examining the testimony to see if the decree is supported by the evidence. *Carlow v. C. Aultman & Co.*, 28 Neb. 672, 44 N. W. Rep. 873. The judgment of the district court is therefore, in all things, affirmed. The other commissioners concur.

RIVERSIDE COAL CO. v. HOLMES.

(Supreme Court of Nebraska. May 2, 1893.)

CONTRACT OF SALE—BREACH—ALLEGATION OF MARKET VALUE—ASSIGNMENT OF ERRORS.

1. The statutory assignment, in a motion for a new trial, of "errors of law occurring at the trial, and duly excepted to," is sufficient to present for review the ruling of the court upon a demurrer, *ore tenus*, interposed before the introduction of any evidence.

2. In an action for damages for refusing to deliver goods in pursuance of a contract of sale, where no consequential damages are

claimed, it is not necessary to allege the market value of the goods.

3. The failure of a jury, in assessing the amount of recovery, to allow interest upon a sum due upon contract, is not presented for review by the assignment, in a motion for a new trial, that the verdict is not supported by sufficient evidence.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Tibbets, Judge.

Action by the Riverside Coal Company against Leonidas K. Holmes. Judgment for defendant. Plaintiff brings error. Affirmed.

W. B. Comstock, for plaintiff in error. H. J. Whitmore, for defendant in error.

IRVINE, C. The plaintiff in error began this action to recover the sum of \$68.86, with interest, for coal sold and delivered by plaintiff to defendant. The defendant, by answer, admitted his indebtedness to plaintiff as alleged in the petition, and counter-claimed for damages, alleging that in April, 1888, a contract was entered into between the parties, whereby the plaintiff agreed to furnish to defendant all coal that defendant should require in his brick yards during the season of 1888 at an agreed price of \$3 per ton; that plaintiff failed and refused to furnish such coal, and that defendant was unable to obtain the same except at a much higher price; that by reason of the failure of the plaintiff to comply with his contract the defendant was compelled to pay a much greater sum for the coal required by him in his business during said year, to his damage in the sum of \$200. A reply was filed, which it is not necessary to set forth in order to an understanding of the questions presented for review. There was a verdict finding due the plaintiff, upon its cause of action, \$68.86, and to the defendant, upon his counterclaim, \$105.25, and a general finding for the defendant of the difference between these sums,—\$36.30.

The admission in evidence of the deposition of John Weihe is assigned as error. Objection was made to the reading of this deposition when offered, whereupon a witness was called for the purpose of proving Weihe's inability to be present at the trial. After this testimony was taken, there was no further objection to the reading of the deposition. Upon the contrary, the attorney for the plaintiff said, "I suppose, if that is the fact, and he is unable to come, we will have to allow his deposition in." Thereupon the deposition was read, without further objection or exception. This court cannot, therefore, pass upon the admissibility of this evidence.

The giving of certain instructions by the court of its own motion, and the refusal to give certain instructions asked by the plaintiff, is also assigned as error; but these questions were not presented to the trial court in the motion for a new trial, and therefore cannot be here considered.

Upon the opening of the trial the plaintiff objected to the introduction of any evidence in support of the counterclaim, for the reason that the answer did not contain sufficient facts to constitute a defense to plaintiff's action, or a cross action against it. This objection was overruled, and this action of the trial court is assigned as error. It is urged by defendant that the motion for a new trial is not sufficient to present this question; but by section 317 of the Code, as amended in 1881, it is sufficient, in assigning the grounds of a motion for a new trial, to state the same in the language of the statute, without further particularity. If the ruling of the court was erroneous, it was an error of law occurring at the trial,—an assignment which does appear in the motion for a new trial. Upon this point the plaintiff contends that the answer was insufficient, in not alleging the market value of the coal at the time and place when and where it should have been delivered. *Railroad Co. v. Hutchins*, 31 Neb. 372, 48 N. W. Rep. 398, is cited in support of that view. That case was, however, based upon a failure to deliver goods purchased for the purpose of resale, and the damages sought to be recovered consisted of loss of profits. The attempt was to hold the vendor liable for consequential damages, and the court held that the counterclaim, in failing to allege the contract price and the market value, was insufficient to support such damages. At the common law, general damages, such as the law presumes to arise, as being the natural and necessary result of the wrong complained of, were not required to be pleaded. Damages for breach of contract to buy or sell goods were within this rule. *Boorman v. Nash*, 9 Barn. & C. 145, (by Lord Tenterden); 1 Chit. Pl. 336. The forms of declarations on such causes of action contained no averment of market value. 2 Chit. Pl. 269. The Code has not changed the rules of pleading in this regard. *Maxw. Code* Pl. pp. 79, 113. Even if the counterclaim had been insufficient to justify the admission of evidence as to the actual damage, it very clearly alleged a breach of contract, for which defendant would be entitled to nominal damages, at least; and the demurrer, *ore tenus*, should have been overruled for that reason.

It is argued that the verdict cannot be sustained for the reason that the jury failed to allow interest in computing the amount due the plaintiff on its petition. The only assignment of error, either in the motion for a new trial, or in the petition on error, which by any possible construction could be made to cover this point, is that the verdict is not supported by sufficient evidence. We do not think this assignment sufficient. It is true that in the case of *Burkholder v. Burkholder*, 25 Neb. 270, 41 N. W. Rep. 145, it is said that it is probable that the assignment that the verdict is not sustained by

sufficient evidence, liberally construed, will cover the point that the verdict is excessive. But in *Volker v. Bank*, 28 Neb. 602, 42 N. W. Rep. 732, and in *Everett v. Tidball*, 34 Neb. 803, 52 N. W. Rep. 816, it is distinctly held that errors in assessment of damages must be assigned in the motion for a new trial. Section 314 of the Code, providing grounds for a new trial, gives, in the fifth subdivision, "error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property." Here is a special ground assigned, evidently not meant to be included within the others; and, where the error complained of was the failure to allow interest, it is very clear that such error should have been called by this appropriate assignment to the attention of the trial court, where it could have been readily corrected. Great injustice would be done by permitting the very general assignment of insufficiency of evidence to cover such a point, and lead to the reversal of a judgment in this court without requiring the precise question to be called to the attention of the trial judge. Affirmed. The other commissioners concur.

PALMER et al. v. RICE.

(Supreme Court of Nebraska. May 2, 1893.)

CREDIT—LIABILITY—COMPLIANCE WITH CONDITIONS.

1. A contract to accept drafts thereafter to be drawn upon certain conditions can be made the basis of a recovery by the payee of such drafts only upon showing full and exact compliance with each of said conditions.

2. A party who contracts in writing to accept and pay such drafts as shall be drawn by a party named, in favor of another party also named, upon compliance with certain conditions, is absolutely liable upon drafts drawn as contemplated, irrespective of the condition of the general account between the drawer and drawee at the time such draft is made.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; George W. Doane, Judge.

Suit by Charles B. Rice against Palmer, Richman & Co. on a letter of credit. Judgment for plaintiff. Defendants bring error. Affirmed.

Chas. Offutt, for plaintiffs in error. Charles B. Rice and Gregory, Day & Day, for defendant in error.

RYAN, C. On the date therein named, the plaintiffs in error executed the following instrument in writing: "South Omaha, Neb., April 19th, 1888. Chas. B. Rice, Endicott, Neb.: Until further notice we will pay H. O. Dawson's drafts for cost of stock consigned to us, bill of lading attached when presented. Yours, truly, Palmer, Richman & Co. Blanchard." The evidence shows that,

anterior to the above date, Palmer, Richman & Co. had given a more unlimited letter of credit to the Endicott Bank in favor of H. C. Dawson, which was superseded by that above set out, upon the suggestion of Mr. Blanchard, a member of said firm, upon its date; that after April 19, 1888, H. C. Dawson bought and shipped cattle and hogs to Palmer, Richman & Co., a live-stock commission firm doing business at South Omaha, Neb.; that the Endicott Bank, which was but another name for Charles B. Rice, advanced the money to pay checks issued by H. C. Dawson for stock purchased by him; that the commission upon handling said stock at South Omaha was divided between said firm and H. C. Dawson; that upon the purchases being completed it was usual for H. C. Dawson to draw upon Palmer, Richman & Co. for the amounts expended to make such purchases for each shipment, in favor of the Endicott Bank, by which such drafts were forwarded, accompanied by a bill of lading, upon which the same were paid by Palmer, Richman & Co.; that upon one occasion the bill of lading was omitted, whereupon Palmer, Richman & Co. expostulated with said bank in respect to said omission. These shipments were continued until August 13, 1888, when there was drawn a draft as follows: "\$1,400.00. The Endicott Bank. Endicott, Neb., Aug. 13th, 1888. Pay to the order of the Endicott Bank fourteen hundred and no-100 dollars. H. C. Dawson. To Palmer, Richman & Co., South Omaha, Neb." The advances covered by the above draft, it is claimed by defendant in error, were made previous to and ending with August 10, 1888. It is certain that the car of cattle and car of hogs shipped on August 10, 1888, were received by the plaintiffs in error at 6 o'clock in the forenoon of the next day, and were sold the same day for \$1,604.45, net. The proceeds of this sale the plaintiffs in error applied towards the payment of a draft for \$1,700, drawn upon them by H. C. Dawson, of date August 6, 1888, and accepted August 8th. This draft is marked "Paid," August 11, 1888. To this draft no bill of lading was attached. When this application of the net proceeds of the sale of the cattle and hogs had been made, it left Dawson overdrawn with plaintiffs in error \$656, according to the evidence of Mr. Blanchard. About the 13th day of August, 1888, the defendant in error procured from the agent of the railroad company, over whose line the above two cars of stock had been shipped, a bill of lading for the same, which, with the aforesaid draft for \$1,400, was forwarded to South Omaha. On the 15th day of August, 1888, the said draft, accompanied by said bill of lading, was presented to the plaintiffs in error for payment, and payment was refused; whereupon suit was brought upon the letter of credit aforesaid for the amount of said draft and protest fees. On the 22d day of May, 1890, a verdict was found by the jury in favor of

the defendant in error, for the sum of \$1,573.49, upon which judgment was duly rendered.

Plaintiffs in error contend that, as this suit was in effect upon an agreement to accept drafts to be drawn on certain conditions, it must be shown as a condition precedent to the right of recovery that said conditions have been fully and exactly complied with by the party claiming its benefits. Without doubt this position is correct. To entitle plaintiff to recover upon an agreement to accept future drafts for stock purchased with bill of lading attached, it was incumbent upon the plaintiff to show affirmatively that the draft was for stock purchased, and such draft must have been accompanied by a bill of lading. The contract of the parties required the concurrence of these conditions, nothing could dispense with either of them, and the jury was so informed in the instructions of the court. There was evidence sufficient to sustain the verdict of the jury as to these conditions precedent; their finding, therefore, settled this fact in favor of the defendant in error. Plaintiffs in error, however, strenuously insisted that, having paid the draft of \$1,700 drawn by H. C. Dawson on August 6th, they should be protected as against the draft of the date of August 13th, even though the latter draft alone was accompanied by a bill of lading. It is also contended that plaintiffs in error should have been permitted to show what was the state of the account between Palmer, Richman & Co. and Dawson just prior to the receipt of the two car loads of stock on the morning of August 11th, as to which party was owing the other. These contentions lose sight of the fact that the rights and liabilities of all the parties to the letter of credit are to be measured strictly by its terms. As counsel for plaintiffs in error has justly insisted, the plaintiff in the district court was entitled to recover only upon a strict compliance with the terms of the instrument upon which suit was brought. It devolved upon him to show affirmatively that the draft was for the cost of the stock shipped to Palmer, Richman & Co., and that a bill of lading accompanied the same. On the other hand, there was by the same agreement devolved upon plaintiffs in error the correlative duty of providing for payment of such drafts as should be drawn upon them within the strict terms of the letter of credit. The acceptance of all such drafts in advance was burdened with only two conditions; one, that the draft should be for the cost of the stock shipped to Palmer, Richman & Co., the other was that a bill of lading should accompany this draft. Upon the one hand, plaintiffs in error could not be held to payment without strict compliance with each condition; on the other hand, upon compliance with said conditions by the defendant in error, the liability of the plaintiffs in error for the amount of the draft became absolute. If they paid a draft without requiring the

bill of lading, they did not release themselves from one accompanied by such bill, if it was for the cost of the stock shipped to them. Any other rule would ingraft upon the letter of credit another condition. In the case at bar the ingrafted condition which must of necessity be implied from the proof offered to be made as to the condition of the accounts on August 11th, just before these two cars were received, was that Dawson would not, on a general balance of account, be found owing plaintiffs in error. The same condition must be implied if the draft for \$1,700, drawn by H. C. Dawson on the 6th day of August, 1888, should have been taken into account by the jury to postpone the rights of defendant in error upon the draft of \$1,400 for the cost of stock, accompanied as it was by a bill of lading. The district court properly held that the terms of the letter of credit should alone determine the rights of the parties thereto, as between themselves, regardless of whatever advances plaintiffs in error may have made to Dawson, independently of compliance with such conditions precedent as they themselves had prescribed. These considerations meet the contentions of the plaintiffs in error, without cumbering the record with details which would merely serve to show how the questions arose, rather than what they were. It follows that the judgment of the district court must be and is affirmed. The other commissioners concur.

BATES et al. v. DIAMOND CRYSTAL SALT CO.

(Supreme Court of Nebraska. May 2, 1893.)

CONTRACT—VIOLATION—MEASURE OF DAMAGES.

In a suit for violation of a contract, the courts will not, for the measure of the damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Hopewell, Judge.

Suit by the Diamond Crystal Salt Company against Bates, Wilcox & Streeter. Judgment for plaintiff. Defendants bring error. Affirmed.

Fawcett, Churchill & Sturdevant, for plaintiffs in error. Leavitt Burnham and Kennedy & Learned, for defendant in error.

RAGAN, C. The Diamond Crystal Salt Company sued Bates, Wilcox & Streeter. The petition alleged that the salt company sold and delivered to Bates, Wilcox & Streeter, at their request, 375 cases of Diamond Crystal salt, at an agreed price of 85 cents per case, amounting to \$318.75, and that the defendants were entitled to a credit of \$45, commission earned by them on the sale of salt, and prayed judgment for \$273.75, with 7 per cent interest from the 30th day

of August, 1887, the day of the sale and delivery of the salt. Bates, Wilcox & Streeter answered this petition, admitting the purchase and price of the salt, but alleged that the sale of the salt sued for was made by one Canan, the agent of the salt company, who, as an inducement for the defendants to purchase said salt, then and there gave them, Bates, Wilcox & Streeter, the exclusive agency for the sale of the plaintiff's salt in the state of Iowa, and in all the states and territories in the United States west of the Missouri river, and then and there agreed to allow the defendants a commission of \$45 per car load on all of said salt sold by them, Bates, Wilcox & Streeter, within said territory; that said agency should continue as long as the defendants, Bates, Wilcox & Streeter, faithfully represented the plaintiff, and endeavored to sell its salt. The defendants also alleged that the said Canan assured them that their commissions on the sale of salt would pay for the car load purchased long before the same would be due and payable; and that they, Bates, Wilcox & Streeter, relying upon the assurances and promises of the said agent, bought the car load of salt sued for, accepted the agency, and at once commenced a canvass for the sale of salt, and spent 23 days' time, paying their own expenses, and that they made sale of three car loads of salt,—one to Witner Bros., one to Shenkberg & Co., and one to Warfield, Howell & Co.,—and had arrangements almost completed for the sale of seven other car loads of salt; that the salt company failed and refused to fill the orders for salt sold to Shenkberg & Co. and Warfield, Howell & Co., and, without any notice to the defendants, refused longer to recognize them as agents; and that by reason of the salt company's failure to deliver the car load of salt sold by plaintiffs in error to Warfield, Howell & Co., that firm lost confidence in plaintiffs in error, and countermanded an order which they had given them for a car load of starch, on which the plaintiffs in error would have realized a profit of \$60. The plaintiffs in error counterclaimed under said contract, as follows:

Commission on sale of car load of salt to Witner Bros.....	\$ 45 00
Commission on sale of car load of salt to Shenkberg & Co.....	45 00
Commission on sale of car load of salt to Warfield, Howell & Co.....	45 00
To time and expenses in soliciting orders for salt for plaintiff for 23 days, at \$10 per day.....	230 00
To loss of profit on car of starch sold to Warfield, Howell & Co., said sale having been countermanded on account of failure of plaintiff to ship salt as agreed.....	60 00
	\$425 00

—And prayed that the \$318.75 due to the salt company from them for the car load of salt purchased and sued for might be deducted from the counterclaim of \$425, and they, Bates, Wilcox & Streeter, have judgment for

the difference. To this answer there was a reply filed, consisting of a general denial.

It appears from the briefs on file that this action was originally brought in the county court, and then taken by appeal to the district court, where, on the issues stated above, trial was had, the jury finding a verdict for the defendant in error for the sum of \$183.75, and \$34.29 interest, or a total of \$218.05. Bates, Wilcox & Streeter bring the case here on error. There is no error in this case of which the plaintiffs in error should complain. If there is any error, it is to the prejudice of the defendant in error. The jury by its verdict allowed the plaintiffs in error a commission for the sale of three car loads of salt at \$45 per car. This was all the salt that they had sold, and, under the contract they pleaded, they were only to have commissions on the amount of salt actually sold by them. There was no error in the court's refusing to permit the plaintiffs in error to put in testimony to prove their counterclaim for hotel bills, traveling expenses, time spent in canvassing, and profits on the car load of starch. If the contract which they plead was made as they claim, they were not entitled under that to anything but commissions on sales actually made; they were not entitled to commission, and time and traveling expenses, too. To measure the plaintiffs in error's damages by the rule contended for by them, would be to give a plaintiff who sued for a breach of contract a greater compensation than he would have received had the contract been performed.

We do not assent to the contention of the plaintiffs in error that the consideration for the purchase by them of the car load of salt sued for was that they were to be appointed the agents of the salt company. In fact, the plaintiffs in error did not so plead it. It is very likely that Canan's representations to plaintiffs in error in regard to the agency was one of the motives that influenced them to purchase, but we do not think the evidence shows that that was the consideration.

Complaint is made because the court gave instructions Nos. 6, 7, and 8. Instruction No. 6 told the jury that, under the evidence, Canan had no authority to appoint the plaintiffs in error agents for the sale of the salt company's salt in the state of Iowa. There was no error in giving this instruction; it was conceded by plaintiffs in error that Canan had no such authority. The seventh instruction told the jury that the salt company's shipping a car load of salt sold by plaintiffs in error to Wiltner Bros. was a ratification of that sale by the salt company, and that they were liable for the commissions on that sale. The instruction also left it to the jury to say whether, from all the testimony, the salt company, by any word or act, had recognized the defendants as their agents in the sale of the other two

car loads of salt, and, if they found it had, the plaintiffs in error should be allowed commissions for them. There was nothing in this instruction to the prejudice of the plaintiffs in error. The eighth instruction complained of told the jury that their verdict must, in any event, be for the salt company for something, as none of the set-off pleaded by the plaintiffs in error could be considered, except those in regard to the commissions on the sales of salt. There was no error in this instruction.

Plaintiffs in error also complain that there was error in the court's allowing the salt company to recover their costs. In order for the plaintiffs in error to have that reviewed here, they must file in the court below a motion to retax the costs, and bring the ruling of the court on that motion up. The judgment of the district court is in all things affirmed. The other commissioners concur.

PHILLIPS v. McKAIG et al.

(Supreme Court of Nebraska. May 2, 1893.)

BONA FIDE PURCHASERS—NOTICE—RECORDS.

1. The party's true name was Mary Ann Allely, and she held her real estate by conveyance of record under the name of Mary A. Allely. Held, that a judgment against her, indexed and docketed in the office of the clerk of the district court, "McKaig & Company vs. May Alley," was not constructive notice to a purchaser of the real estate from Mary Ann Allely.

2. The indexes in the office of the register of deeds disclosed conveyances as follows: "— to Mary A. Allely, deed. Mary A. Allely to Hooper, mortgage. Mary A. Allely to Vickers, mortgage." Held, that Vickers, by taking a deed of the real estate from Mary A. Allely, so described in body and acknowledgment of the deed, but signed "Mary A. Alley," was not thereby charged with notice that a judgment indexed in the office of the clerk of the district court against May Alley was against Mary A. Allely.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Lancaster county; Field, Judge.

Action by Jacob H. Phillips against McKaig & Co. and others to restrain a sale of land on execution. Defendants had a decree, and plaintiff appeals. Reversed.

J. A. Marshall, for appellant. H. J. Whitmore, for appellees.

RAGAN, C. This case was tried in the court below on an agreed statement of facts, as follows: "On the 24th day of September, 1887, a person whose correct name is Mary Ann Allely became seised in fee simple of lot eight, (8,) in block one, (1,) in East Park addition to the city of Lincoln, located in Lancaster county, in the state of Nebraska. The deed conveying said lot to Mary Ann Allely described her by the name of Mary A. Allely. On the 4th day of January, 1888, the said Mary Ann Allely made, executed, and

delivered a mortgage on said lot to C. L. Hooper, in which she signed the instrument as Mary A. Allely, and she is described in the body of the instrument, and in the acknowledgment thereof, as Mary A. Allely. On the 11th of April, 1888, the said Mary Ann Allely executed and delivered a mortgage on said lot to Edwin L. Vickars, which she signed by the name of Mary A. Allely, and is by that name so described in the body of the instrument, and in the acknowledgment thereof. On the 3d of August, 1888, the said Mary Ann Allely made, executed, and delivered to the said Edwin L. Vickars a warranty deed conveying said lot to said Vickars, which deed she signed by the name of Mary A. Alley, but in the body of the instrument, and in the acknowledgment of said deed, she is described as Mary A. Allely. On the 11th of August, 1888, the said Edwin L. Vickars and wife, by warranty deed, duly conveyed said lot to Henry D. Pierson. On the 13th of December, 1888, the said Henry D. Pierson and wife, by warranty deed, duly conveyed said lot to the plaintiff, who hath ever since been, and still is, the owner and in possession of said lot. Neither the said Edwin L. Vickars, Henry D. Pierson, or this plaintiff ever had any knowledge of any judgment in favor of McKaig & Co., and against the said Mary Ann Allely, except such constructive notice as they were charged with by the judgment records and index of the clerk of the district court of Lancaster county, Neb., nor did either of them know that the said Mary Ann Allely ever signed her name May Alley, except such constructive notice as they may be charged with by the public records of Lancaster county, Neb. The said Mary Ann Allely, when she executed said instruments, was a woman between sixty and seventy years of age. Her eyesight was poor, her hand trembled, and she wrote with difficulty, and was quite illiterate. On the — day of April, 1888, the defendants, McKaig & Co., sued the said Mary Ann Allely, by the name of May Alley, on a note alleged to have been signed by her, 'May Alley,' and on April 16, 1888, obtained a judgment against her by default for \$46.64, and \$2.75 costs, before S. T. Cochran, Esq., J. P., Lancaster county, Neb., of which judgment a transcript was duly filed in the office of the clerk of the district court of Lancaster county, Neb., on the 21st day of May, 1888, which judgment appears recorded and indexed only as a judgment against May Alley, and in favor of McKaig & Co., in the records of the clerk of the district court of the said Lancaster county, Neb., and on the same page of the judgment index in said office of the clerk of the district court, and on the next line above, appears a satisfied judgment in favor of Thomas Allely, and against the said Mary Ann Allely, by those names so described, but in this action she signed the petition for alimony as 'May A. Alley.' On

the — day of January, 1891, the defendants McKaig & Co., by their attorney, H. J. Whitmore, caused a writ of execution to issue out of the said district court of Lancaster county, Neb., upon said judgment in favor of McKaig & Co. and against May Alley, and placed said writ in the hands of Sam McClay, sheriff of said Lancaster county, Neb., and caused him to levy upon said lot eight, (S.) block one, (1,) East Park addition to Lincoln, and to proceed to sell the same to satisfy their said judgment and execution, as provided by law for the sale of real estate upon execution, and are now only restrained from so doing by the restraint of the court in this action, alleging and claiming their said judgment is a lien prior and adverse to any title of the plaintiff to the said real estate." The court rendered a decree dissolving the temporary injunction, and dismissing the appellant's cause of action, who brings the case here on appeal. The questions, then, are:

1. What notice of a judgment against Mary Ann Allely did the indexing of the judgment in favor of McKaig & Co. against May Alley afford Vickars, the intending purchaser of this property? We answer, none.

2. What notice did the records in the office of the register of deeds impart to Vickars, the intending purchaser of this property, that Mary Ann Allely was May Alley? (a) — to Mary A. Allely, a deed. (b) Mary A. Allely to Hooper, a mortgage. (c) Mary A. Allely to Edwin L. Vickars, a mortgage. "The purport of the decisions appears to be that the sufficient degree of accuracy is attained if an intending purchaser, exercising a reasonable degree of care, and a reasonable amount of intelligence, in making a search, could not fail to be apprised of the existence and character of the judgment." Black, Judgm. 406. In *Metz v. Bank*, 7 Neb. 165, the present chief justice, speaking for this court says: "The subsequent purchaser is affected with such notice as the index entries afford; and, if they are of such a character as would induce a cautious and prudent man to make an examination of the title, he must make such investigation." Applying the rule above laid down to the facts in this case, it appears to us that Vickars, intending to buy this property, and examining the records, would find nothing of such a character as would arouse the suspicions of a cautious and prudent man that Mary Ann Allely and May Alley were the same person; and the fact that the deed by which she finally conveyed him the property was signed by her, "Mary A. Alley," instead of Mary A. Allely or Mary Ann Allely,—she being then between 60 and 70 years of age, her eyesight poor, her hand trembling, writing with difficulty, and being quite illiterate,—was not, of itself, sufficient to put Vickars upon further inquiry. It follows, therefore, that the decree of the district court must be reversed, and this case remanded thereto, with instructions to enter

a decree in favor of the appellant, as prayed for in his petition. It is so ordered. The other commissioners concur.

HENRY & COATSWORTH CO. v. McCURDY et al.

(Supreme Court of Nebraska. May 2, 1893.)

MECHANICS' LIENS—PRIORITY—PLEADINGS.

1. In a suit to foreclose a mechanic's lien, where other incumbrancers by answer deny the facts necessary to create the lien, it is necessary for the mechanic's lienor, in order to establish his lien as prior to such other incumbrances, to prove such facts, including the time of commencing labor or of furnishing material.

2. An objection to the omission, in a petition to foreclose a mortgage, of the averment that no proceedings have been had at law for the collection of the debt secured thereby must be made prior to the rendition of a decree, as it relates to matters in abatement, and not to a fact affecting the validity of the mortgage.

3. Whether a petition may at any time be attacked because of the omission of such averment by another incumbrancer, seeking to foreclose his lien in the same action, *quaere*.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Lancaster county; Chapman, Judge.

Action to foreclose a mechanic's lien by the Henry & Coatsworth Company against D. R. McCurdy and others. From the decree entered, plaintiff appeals. Affirmed.

Samuel J. Tuttle, for appellant. Atkinson & Doty and Leese & Stewart, for appellees.

IRVINE, C. The plaintiff commenced this action for the purpose of foreclosing a mechanic's lien which it claims upon lots 6 and 7 in block 101, of University Place, Lancaster county. The defendant the Building & Loan Association of Dakota filed its answer, setting up a mortgage upon the same property, executed to it by the defendant Starr, to secure a loan from the association to Starr. The defendant the Wesleyan University filed an answer and cross petition, setting up a mortgage to it to secure unpaid purchase money upon the property, and praying for a foreclosure. The defendant Starr seems to have filed an answer, but by leave of the court withdrew it before trial. The other defendants seem not to have appeared. The decree adjudges the mortgage of the building association to be a first lien upon the premises, that of the Wesleyan University a second lien, and establishes the lien claimed by plaintiff as a third lien. The plaintiff appeals, and the only questions presented relate to the priorities of these three incumbrances.

A number of questions are presented in the arguments of the parties, but a consideration of two of them disposes of the case. The existence of the lien claimed by plaintiff was denied by the answers of both the building and loan association and the university. The answer of the building and

loan association denies generally every allegation in the petition not in the answer expressly admitted, and makes no admission upon the subject except an argumentative admission that some lumber was furnished at some time for the erection of a building upon the lots described. The answer of the university in terms denies each averment of the petition in regard to the selling, furnishing, and delivery of material by the plaintiff. The facts constituting a lien in favor of plaintiff were therefore put in issue by both these defendants, and it devolved upon the plaintiff to establish, among other things, that it furnished the material described in its petition, or at least some portion thereof, for the erection of the house upon the premises described, and that it furnished such material, or began to furnish the same, at such a time as to entitle it to the priority claimed by it over the mortgages of the answering defendants. Mr. Doolittle, the manager of plaintiff company, testified in direct examination that plaintiff furnished lumber to Starr and McCurdy for building houses upon the lots mentioned; that this was done during the season of 1889, "something previous to January 1st. I do not remember the exact date, but I think in September, and about the commencement of the account;" that this lumber was furnished according to the days and dates of the itemized account. On cross-examination he states: "I know the lumber was delivered there. Question. Delivered where? Answer. At the houses. Q. At these three houses? A. Yes, sir. Q. How do you know that fact? A. I know from our teamsters' and delivery tickets, etc. Q. Did you have no personal knowledge about it? A. No, sir; no further than that. Q. So that, so far as this material is concerned, as to its getting into these houses, you have no knowledge on the subject? A. No personal knowledge." Again: "Q. I believe you testified in your cross-examination that you had no personal knowledge of any of this material being delivered to this property to be put into these houses? A. I did not go with the material. Q. You do not know whether it was taken there or not, of your own knowledge? A. No, sir; not of my own knowledge. Q. Did you keep the books of the Henry & Coatsworth Co.? A. No, sir. Q. Have you any personal knowledge as to whether this account, as to the items, and as to the time they purport to have been delivered,—whether it is correct? A. Nothing only as comes from my books. Q. And you do not know whether they are kept correct or not? You did not keep them? A. No, sir; I didn't keep them. Q. Then, as a matter of fact, you don't know whether these items were furnished at the time the lien indicates or not? A. Only what the books indicate. Q. Only as you hear from others. You can't testify as to the correctness of the books? A. No, sir. I have a

bookkeeper, and that is his business. Q. Did you make out these accounts? A. No, sir; they are made out by the bookkeeper. That is supposed to be a copy of our book. Q. Do you know whether it is a copy of your books or not, of your own knowledge? A. I do not. I could not swear that it was." At a later point in the trial, certain books were produced by Doolittle, and, after some preliminary testimony, offered in evidence. They were excluded, and properly excluded, and no exception taken. There was also testimony from Mr. Doolittle, showing the method of keeping the books, and disclosing the fact that the plaintiff did have in its possession delivery tickets, which might at least have been used as memoranda to refresh the memory of the proper witnesses had they been called. Mr. Gascoigne was called, and testified that it was his business to superintend all the loading and making out the dray tickets, and to watch the men, and to make entries in the books of original entries as to the lumber that goes out. His examination stops at that point, and no facts relating to this transaction were sought to be elicited from him. The defendant Starr was called by the plaintiff, he being one of the persons who contracted for the lumber and built the houses. He testifies that the plaintiff rendered an account of the lumber, but that it was not correct; that it was figured too high, and there were mistakes in the items amounting in all to three or four hundred dollars. He further testifies that he is not able to state when the lumber was delivered, or whether any of the items were correct, because lumber was being furnished for a number of houses, and the plaintiff was constantly delivering lumber to houses other than that for which it was ordered, requiring frequent interchanges of lumber delivered at one place to another. McCurdy corroborates Starr as to mistakes in the account. The foregoing is the substance of all the testimony upon the subject. It will be seen that Mr. Doolittle's testimony was the purest hearsay, and cannot be considered; and the only other testimony tends to discredit, instead of to support, the bill of items attached to the petition. There is an absolute and total failure of evidence to show that any particular item of material was ever furnished for this house, to say nothing of the time of delivery. The mortgages became liens upon the property upon the 6th of December, 1889, at the latest, and it was necessary for the plaintiff to prove that material was furnished before these liens were filed for record.

Another point suggested in the briefs perhaps requires notice. The cross petition of the Wesleyan University contains no averment as to whether any proceedings had been had at law for the recovery of the

debt. Such an averment is required by section 850 of the Code. No objection was raised to the cross petition in the court below upon this ground, so far as the record discloses, and it cannot for the first time be raised here. If there was a failure to allege a fact essential to this defendant's case, an exception to the rendition of judgment upon its cross petition might present the question for review, but we do not regard this allegation so essential as to invalidate a judgment rendered upon a petition not containing it. In *Carlson v. C. Aultman & Co.*, 28 Neb. 672, 44 N. W. Rep. 873, it was held that the omission of this allegation was not sufficient ground to authorize the district court to open up a judgment after the term at which it was rendered. This conclusion could hardly have been reached had the court considered the averment in question one necessary to the support of the judgment. The pendency of proceedings at law to recover the debt secured by mortgage is under our law, in fact, merely matter in abatement, which the Code requires to be negatived in the petition. It is not matter in bar, and does not affect the validity of the mortgage. It may indeed be questioned whether an incumbrancer seeking to establish and foreclose his incumbrance in the same action could at any time raise the question; the provision being for the benefit of the mortgagor. The lien of plaintiff stood confessed by the failure of the owners of the property to answer the petition, and there was some evidence tending to show that they had admitted the amount claimed to be correct. While these admissions could not be received as against the mortgagees, and do not affect the question first discussed in this opinion, they were sufficient to ascertain the amount due as against the owners, and the lien was therefore properly allowed as one junior to the mortgages. The decree of the district court was right, and is affirmed. The other commissioners concur.

HENRY & COATSWORTH CO. v. STARR et al., (two cases.)

(Supreme Court of Nebraska. May 2, 1893.)

Commissioners' decision. Appeals from district court, Lancaster county; Chapman, Judge. Two actions to foreclose mechanics' liens by the Henry & Coatsworth Company against Edward I. Starr and others. From the decrees entered, plaintiff appeals in each case. Affirmed.

Samuel J. Tuttle, for appellant. Atkinson & Doty and Stewart & Rose, for appellees.

BY THE COMMISSION. These two cases present precisely the same questions, and were submitted upon the same bill of exceptions and briefs, as the case of *Henry & Coatsworth Co. v. McCurdy*, 55 N. W. Rep. 261, and are affirmed for the same reasons.

MAGGARD v. VAN DUYN et al.

(Supreme Court of Nebraska. May 2, 1893.)

APPEAL FROM INFERIOR COURT — DISMISSING APPEAL—RECORD.

1. An appeal from the county court to the district court should be dismissed, upon proper motion, when the transcript was not filed within 30 days from the date of the judgment, and no reason is shown for the delay.

2. Affidavits used on the hearing of a motion in the district court cannot be considered in the supreme court unless embodied in a bill of exceptions.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Field, Judge.

Action by Charles R. Van Duyn and another, as Van Duyn Bros., against Oliver Maggard. Plaintiffs had judgment, and defendant appealed to the district court. On a judgment dismissing the appeal, defendant brings error. Affirmed.

Edson Rich, for plaintiff in error. Chas. E. Magoon, for defendants in error.

IRVINE, C. This was a case begun in the county court. A transcript for the purpose of an appeal was filed in the district court more than 30 days after judgment below. The only error assigned is the action of the district court in dismissing the appeal. According to repeated decisions of this court, this action was right. An affidavit appears in the transcript, seeking to excuse the delay, but, by still more numerous decisions, it cannot be here considered, because not preserved in a bill of exceptions. Affirmed. The other commissioners concur.

BEDFORD v. STATE.

(Supreme Court of Nebraska. April 26, 1893.)

CRIMINAL LAW—EVIDENCE CLEARLY INCOMPETENT—ADMISSION—SUBSEQUENT STRIKING OUT—LETTERS OF THIRD PERSONS.

1. In a criminal prosecution, evidence which on its face is clearly incompetent and prejudicial to the accused should not be introduced; and if the prosecution, without a promise to prove other facts to render it competent, is permitted to introduce such evidence, and it is thus placed before the jury, an order of the court, afterwards made, to strike it out, does not wholly cure the wrong, and may be cause for reversing the judgment.

2. Letters written by third parties in another state to third parties in this, but not in answer to letters written by the accused, nor connected therewith, are not admissible in evidence against the accused to prove a material fact in the case.

(Syllabus by the Court.)

Error to district court, Hall county; Harrison, Judge.

George Bedford, having been convicted of attempting to corrupt and influence a witness in a certain action, brings error. Reversed.

W. A. Prince, for plaintiff in error. Geo. H. Hastings, Atty. Gen., for the State.

MAXWELL, C. J. The plaintiff in error was informed against under section 164 of the Criminal Code upon the charge that "on the 14th day of May, 1891, in the county of Hall, and the state of Nebraska, aforesaid, did then and there unlawfully, willfully, and maliciously attempt to corrupt and influence one Clara Bedford, a material and important witness in an action pending in the district court of Hall county, Nebraska, wherein the state of Nebraska was plaintiff and one Hezekiah Bedford defendant, charged with incest committed with his daughter, the said Clara Bedford, in said county, and she, the said Clara Bedford, was a material and important witness for the state of Nebraska in said case against the said Hezekiah Bedford, as he, the said George Bedford, then and there well knew. And he, the said George Bedford, did, in said county and state, then and there attempt to corrupt and influence the said Clara Bedford, witness, as aforesaid, by offering to buy her clothes, pay her traveling expenses to the state of Illinois, and to keep her there, if she, the said Clara Bedford, would leave the said county of Hall, and state of Nebraska, and go to the state of Illinois, and secrete herself, so she could not be procured as a witness on the part of the state of Nebraska in the said action against the said Hezekiah Bedford,—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska." The plaintiff in error (defendant below) pleaded not guilty, whereupon a jury was impaneled, and he was found guilty as charged, and sentenced to imprisonment in the county jail for seven days, and to pay a fine of \$50 and costs. Three errors are assigned which will be noticed in their order.

The testimony tends to show that on the 30th day of December, 1890, one Clara Bedford, a girl 14 years of age, filed a complaint before a justice of the peace of Hall county, in which she charged her father, Hezekiah Bedford, with the crime of incest; that an examination was had on the charge, and the justice found probable cause to hold the accused to answer to the district court; that thereupon the bail was fixed at \$500, which the accused was unable to furnish, and he was therefore imprisoned in the jail of Hall county. It also appears that Hezekiah Bedford is very poor, and that upon his imprisonment, if not before, his family received aid from Hall county. It also appears that the plaintiff is a resident of Decatur county, Ill., and appears to be in prosperous circumstances; that he owned one or more farms about nine miles northwest of Grand Island, near Abbott station, and Hezekiah Bedford and his family resided on one of his farms. It also appears that the plaintiff in error had, before the difficulty spoken of, assisted his brother's family in a limited degree by providing clothing for them; that in the spring of 1891 he came to this state to look after his

farms, and perhaps assist his brother, although the proof upon that point is very meager. It does appear, however, that his brother was then in jail, and that the family had been receiving aid from the county; that he carried some clothing to the house for the younger children, but that he carried the complaining witness to Grand Island, as he alleges, that she might procure some clothing for herself. Headmits having taken her to a certain store (naming it) to procure certain needed articles of clothing, for which he was to pay. This girl appears to be the oldest child, and the reason he gives for not taking clothing for her to the house is, in effect, that it was difficult to procure the proper size. No one seems to have seen Clara Bedford leave Grand Island, although, as will presently be seen, parties were watching the trains, to see that she did not leave. The plaintiff in error seems to have expressed considerable anxiety about his brother, and had a conversation with several persons in regard to the same, among others, Daniel Ramsa, called as a witness on behalf of the state, and, after testifying to various conversations he had with the plaintiff in error, he was permitted to testify as follows, against the objections of the plaintiff in error: "Question. Dan, do you remember coming to my [the prosecuting officer's] room one morning early, about 5 or 6 o'clock, and telling me to watch the trains; that George Bedford was going to run the girl out of the country? (Objected to as immaterial, calling for a conclusion of the witness, and for the further reason that there is no proper foundation laid. Overruled, and exception taken.) Q. Can you remember doing that,—yes or no,—can you remember? Answer. It was later than that. Q. I want to know if you can remember that occurrence. A. Yes. Q. You remember that occurrence? A. I don't remember stating it just like that. Q. You remember coming to my room that morning? A. Yes, sir. Q. When was that in relation to the conversation you had with George Bedford at Whitney's stairs? Before or after? (Objected to as immaterial. Overruled, and exception taken.) A. Mr. Ryan had notified me that they were attempting to run the girl out of the country,—trying to do so; and he wanted me to—if I knew anything about it, found out anything about it at all—to let him know; and I merely mistrusted that evening from my conversation with Mr. Bedford— (Objected to as immaterial. Overruled, and exception taken.) A. I went and told Mr. Ryan that I thought— (Objected to as immaterial.) A. That I thought that they was going to. I didn't know for certain, but I thought they was going to. If they hadn't, I thought they would that day. Q. Who do you mean by 'they'? (Objected to, as calling for an opinion of the witness, and no foundation laid. Overruled, and exception taken.) A. Mr. Bedford's folks. Q. What Bedford's folks? A. Well, Mr. George Bed-

ford, and the family up there, I suppose. Q. Now, Dan, what county and state did these conversations that you have just related take place in? A. This county,—Grand Island, Hall county, Nebraska. Cross-examination: Q. You expected to be a witness in the case of the state of Nebraska against Hezekiah Bedford, didn't you? A. I did. Q. And have you ever told Mr. Bedford and myself that you didn't think there was any case there? A. I might have said so. Q. You told us that you thought you could bring evidence that would acquit Mr. Hezekiah Bedford, didn't you? A. I have said lots of times, and would say now, that I think there can be evidence fetched to impeach what evidence has been given. Q. And that you thought— Court: This part of Mr. Ramsa's testimony with regard to his going and telling Mr. Ryan, unless there is some further foundation for it than has been given, may be stricken out."

We know of no rule that will permit the admission of evidence plainly incompetent on its face over the objection of the party accused, where there is no promise by the party offering it to connect it with other evidence, so as to render it competent, and, after it is before the jury, strike it out. The court may be deceived as to the effect of certain evidence offered, or may believe that it is properly admissible, and, after it is before the jury, see that it is not, and therefore order it stricken out; but a court cannot deliberately permit a large amount of damaging evidence to be admitted, and have its effect on the jury, and then cure the wrong by merely striking out the testimony improperly received. The state should not resort to questionable practices to secure a conviction. Constitutional guaranties of a fair trial before an impartial jury amount to but little if tricks are sanctioned in the progress of a trial. It is very evident that merely withdrawing the evidence from the jury did not remedy the wrong.

2. A letter from the wife of the plaintiff in error to the wife of Hezekiah Bedford, and also from the daughter to her mother, were offered and introduced in evidence against the objection of the plaintiff in error. These letters were not written to the plaintiff in error, nor in answer to letters sent by him, nor are they in any way connected with this case. Upon what theory they were admitted we are at a loss to know. Letters of third persons are receivable in evidence as merely collateral, introductory, or incidental to or in illustration of the testimony which the witness gives, (1 Chit. Crim. Law, 368, 369; 1 Phil. Ev. [4th Amer. Ed.] 170;) as, where a witness testified that he was induced to institute proceedings by letters of a third party, (Lewis v. Manly, 2 Yeates, 200.) But the letters could not be received as evidence of the facts stated in them. In re Finnerstein's Champagne, 5 Amer. Law Reg. (N. S.) 468. "All acts, declarations, etc., made by third

persons are obnoxious to two objections: (1) That they are res inter alios acta, and therefore irrelevant; (2) that they are mere hearsay, the assertions of parties without the sanction of an oath and an opportunity for cross-examination. But entries against interest and in the course of business have always been considered as limitations of the rule excluding the first, and they are admitted, not because the acts or admissions of third parties can bind others, but because they are evidence, just as the same parties' oath would be, of the facts therein stated. The peculiar circumstances under which they are made are considered quite as efficient a safeguard against falsehood as an oath; and when the opportunity for cross-examination is forever lost by the party's death, such entries and declarations are freely admitted in evidence in suits between other parties." Letters of third parties in a foreign country, in the ordinary course of business, offering to sell goods of a certain grade for a price named, have been received in evidence. In *re Fennerstein's Champagne*, 5 Amer. Law Reg. (N. S.) 464, and cases cited. The case cited was decided by a divided court, three of the judges dissenting. No case has been cited, however, and we have been unable, after a pretty thorough search, to find one, where letters of third parties addressed to third parties, and having no connection with the accused, were admissible in evidence to prove an essential fact in the prosecution of the case. It is very evident that these letters were improperly admitted, and that the court erred in its ruling thereon.

3. As there must be a new trial, we will not discuss the evidence. It rests largely in inferences. The judgment of the district court is reversed, and the cause remanded for further proceedings. The other judges concur.

CREWS et al. v. COFFMAN et al.

(Supreme Court of Nebraska. May 1, 1893.)

COUNTY SEAT—PETITION FOR REMOVAL—EXAMINATION—HEARING OF OBJECTIONS.

1. To entitle a county board to call an election for the removal of a county seat, a petition must be presented to it by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election.

2. The petition must show the section, township, and range on which, or the town or city in which, a petitioner resides, together with his age, and time of residence in the county.

3. Where objections are made by any resident elector on oath, charging that a certain number of the petitioners are minors, a certain other number are not electors, certain names are fictitious, a certain number have been bribed, the aggregate of which will reduce the number of petitioners below three-fifths of the votes cast at the preceding general election, it is the duty of the board to set a reasonable time for a hearing of said objections, to enable parties to offer proof in support of their charges.

4. Parties interested in the matter are entitled to examine the original petition in the office of the county clerk before the election is called, and should have a reasonable time for that purpose. It is not sufficient to furnish a certified copy, as such parties have the right to see the purported signatures of the petitioners.

(Syllabus by the Court.)

Error to district court, Hitchcock county; Welty, Judge.

Petition by S. E. Coffman and others against Charles G. Crews and others. Judgment granting the relief sought. Defendants bring error. Reversed.

J. W. Cole and Reese & Gilkeson, for plaintiffs in error. R. O. Adams, F. M. Flansburg, and W. S. Morlan, for defendants in error.

MAXWELL, C. J. This is a proceeding in error from the district court of Hitchcock county, to reverse the judgment of that court affirming the action of the board of county commissioners calling an election for the re-location of the county seat. It appears from the record that on the 23d of June, 1892, at 9 o'clock A. M., a petition for the relocation of the county seat was presented to the board of county commissioners of that county; that G. V. Hunter, an elector and resident of that county, protested against calling an election until an opportunity could be given to examine the petition. The protest was overruled. Various motions were made on behalf of the plaintiff for an opportunity to examine the petition away from the crowd that seems to have filled the room where the board was sitting. These were overruled. Whereupon J. W. Cole, one of the attorneys for the plaintiff, filed an affidavit as follows: "In the matter of the petition to call an election to vote to remove the county seat. John W. Cole, being first duly sworn, on his oath says: That he is one of the attorneys for the defendants in this case; that he has urgently and persistently sought by every reasonable means made known to him to procure a full, free, and complete examination of the plaintiff's petition herein; that in addition to asking this court and the plaintiff's attorneys for this privilege of examining said petition privately, as shown by the records of this court, affiant and his associate counsel and defendants, all of whom are resident electors and qualified voters of Culbertson, Hitchcock county, Nebraska, asked this court for the privilege of taking the said petition to some quiet part of the court room for inspection and examination, all of which was refused by this board at the request of the petitioners; that whereas, this board ruled and refused to allow this affiant, his associates, or their clients to use, inspect, or examine said petition, except in the presence of this board, or of the petitioners and their attorneys, the defendants

have been unable to carefully inspect said petition or prepare a full defense thereto; that affiant, so far as his trammelled position would permit, made examination of said petition, and has compared what the petitioners pretend to be a copy of said petition with the original, and affiant says that said copy is not a true copy of the original; that even if said copy was a true copy, defendants could not determine from it whether the petition had been properly signed or not; that among other discoveries of irregularities, it is apparent that a large list of the names signed to said petition are fraudulent and forged, and that this, with many other facts, cannot be fully determined from the petition itself. This affiant, for himself and his associates, says that in view of the above facts, and in view of the character and nature of the case, the time granted for the inspection of said petition and in which to prepare a defense thereto is wholly inadequate. Wherefore affiant, for himself and on behalf of his associates and clients, now moves the court that further time be given them in which to examine said petition and prepare their defense thereto, and they be allowed full, free, and untrammelled use of said petition for such purpose." The other attorneys for the plaintiff also swore that the facts stated in the affidavit of Cole are true. There is no contradiction of this in the record, so that it will be regarded as true. Being unable to obtain time to examine the names on the petition, the plaintiff filed the following answer: "In the matter of the petition of S. E. Coffman et al., praying for a calling of a special election to vote upon the question of removing and locating the county seat of Hitchcock county, Nebraska. Comes now Charles G. Crews, a resident elector and taxpayer of said Hitchcock county, Nebraska, for himself, and on behalf of 500 other resident taxpayers and duly-qualified voters of said Hitchcock county, and objects and remonstrates against this honorable board calling or proceeding to call an election upon the petition herein filed, and for cause assigns the following grounds of objection and remonstrance: (1) Because the pretended petition is insufficient in law to authorize the calling of an election as prayed for therein. (2) Said pretended petition is not signed by the requisite number of qualified resident voters of Hitchcock county, Nebraska, to authorize the calling of said election. (3) That a large number, to wit, 111, of said pretended petitioners are minors, persons under the age of 21 years. (4) Because a large number, to wit, 358, of said pretended petitioners are and were nonresidents of the county of Hitchcock, state of Nebraska. (5) Because a large number of said pretended petitioners, to wit, 600, were procured to sign said pretended petition by being misled, and on account of facts having been misrepresented to them, and by unlawful and undue

influences. (6) Because 351 of said pretended petitioners were induced to sign said pretended petition by bribery, in this, to wit, that the residents and property holders of Trenton represented that they would build a courthouse free of expense to the petitioners of the county. (7) Because a large number, to wit, 350, of said petitioners desire to withdraw their names from said pretended petition. (8) Because there is now pending in the supreme court of the state of Nebraska another action between substantially the same parties, and upon the same cause of action as the cause attempted to be set up in the petition herein, and the said cause of action pending is still undetermined and undecided. (9) And these remonstrators deny that any of said pretended petitioners are resident electors and qualified voters of Hitchcock county, Nebraska; deny that said pretended petitioners, or any of them, reside at or upon the lands as described in said pretended petition; deny that the age of, residence, and time of residence in the county is correctly given; and especially deny that said pretended petition is signed by a number of qualified voters, electors, equal to three-fifths of the vote of Hitchcock county cast at the last general election. (10) These remonstrators allege that a large number of said pretended petitioners, to wit, 328, are fictitious names, and that no such persons reside, live, or exist in Hitchcock county. (11) These remonstrators further allege that a large number of said pretended petitioners, to wit, 178, are foreigners who have never become citizens of the United States, nor have they declared their intention to become citizens as by law required. (12) That a large number, to wit, 130, of said names that appear upon said petition were not signed by the persons themselves, nor were they signed to said pretended petition with their knowledge or consent, and were forged thereto. These defendants especially deny that the pretended certified copy of said petition tendered defendants' attorneys is a true copy, and allege the fact to be that, upon such comparison as the defendants were able to make, it was evident said pretended copy was not a true copy of said petition. All of which could have been proven had this board allowed the said pretended copy to be filed as part of the record. And these defendants say that by reason of the facts that this court refused to allow them or their attorneys sufficient time to examine said petition, and in view of the further fact that the only examination that these defendants have been permitted to make of said petition was in the presence of the petitioners and their attorneys and this board, on account of the amount of matter contained in said petition, it is beyond the power of the defendants to make this answer more specific, definite, and certain. Wherefore, your remonstrators pray that a time be set for hearing the issues raised by

the remonstrance herein to said pretended petition; that a reasonable time be given these remonstrators to prepare their defense, and procure their evidence to sustain the same; that upon the final hearing of said issue said pretended petition and the prayer thereof be overruled; and that said pretended petition be dismissed." This was duly verified. The answer was overruled, and the election called. The case was taken on error to the district court, where a large amount of testimony was taken by the defendant in error, and the action of the county commissioners affirmed.

Section 1, art. 3, c. 17, Comp. St., provides: "Whenever the inhabitants of any county are desirous of changing their county seat, and upon petitions therefor being presented to the county commissioners, signed by resident electors of said county equal in number to three-fifths of all the votes cast in said county at the last general election held therein, said petition shall contain, in addition to the names of the petitioners, the section, township, and range on which, or town or city in which, the petitioners reside, their age, and time of residence in the county. It shall be the duty of such board of commissioners to forthwith call a special election in said county for the purpose of submitting to the qualified electors thereof the question of the relocation of the county seat. Notice of the time and the places of holding said election shall be given in the same manner, and said election shall be conducted in all respects the same, as is provided by law relating to general elections for county purposes. The electors at said election shall designate on their ballots what city, town, or place they desire said county seat located at or in, and any place receiving three-fifths of all the votes cast shall become and remain, from and after the first day of the third month next succeeding such election, the county seat of said county." It will be observed that the petition is to be signed by "resident electors," and in order to show that they are such the locality where each one resides must be stated in the petition. A petition signed by three-fifths of the resident electors of the county, therefore, is essential to give the county board jurisdiction. To be an elector of the county is not enough; he must be a resident elector. The object of this provision, no doubt, was to prevent any action being taken on a petition signed by persons temporarily residing in a county, such as persons engaged in constructing a railroad, and who would leave as soon as the work was finished. *Ayres v. Moan*, 34 Neb. 210, 51 N. W. Rep. 830. To ascertain if the signers or any considerable part of them are resident electors, where that fact is denied, may require a reasonable time to examine the names, and make inquiry in regard to the same. The presentation of a petition signed by the requisite number of names where no objec-

tion is made, no doubt will be sufficient to justify the board in calling an election. Where, however, an answer is filed containing charges of fraud, that many of the names are fictitious, forged, or those of minors, or persons not electors, time must be given to produce evidence of those charges. In *State v. Nemaha Co.*, 10 Neb. 35, 4 N. W. Rep. 873, it is said: "If parties have been induced by misrepresentation to sign such petition, they may undoubtedly go before the board and state the facts as to such misrepresentations, and demand that their names be stricken from the petition, or not counted as petitioners. The commissioners should not call an election for such purpose unless they find, at the time of calling said election, that more than three-fifths of the voters, as shown by the return of the last general election, are then petitioners in favor of such election. It is not the intention of the law to subject the people of a county to expense, annoyance, and animosities not unfrequently attending an election for the relocation of a county seat, unless it shall appear that the requisite number of voters at the time of calling the same are in favor of such election. The petition is only a means of determining that at least three-fifths of the legal voters of a county are in favor of the relocation of a county seat, and that an election called for the purpose of submitting such question to the people of the county will, in all probability, result in a relocation of the county seat." What is said in that case is applicable in this. If there are in fact more than three-fifths of the resident electors in favor of removing the county seat, and have signed a petition for that purpose, there will be no occasion for undue haste in acting upon the petition. It will bear the closest scrutiny, and, when an election is called in pursuance thereof, the result will not be uncertain. On the other hand, if the petition is signed by persons who are not resident electors, or minors, and names of fictitious persons added, it may be expected that those presenting the petition will urge haste in acting upon it, so that the names cannot be scrutinized, and false, fictitious, and fraudulent names, if such there be, stricken out. If the position contended for by the defendants' attorneys should be established as the law, viz. that there is no authority to sift out the spurious names on the petition, then it would be possible for one person to fill a petition for the removal of a county seat with fictitious names and imaginary places of residence, and file the same with the county board, whose duty it would thereupon be to call an election for the purpose indicated. No one will contend that such a petition would not be open to examination; yet, suppose that one-half, one-fourth, or any other number was fraudulent or fictitious, the right and duty to strike them from the petition must exist as a

means of protecting the county board from being imposed upon, and the people of a county from the animosities, strife, and expense of a needless county seat election. This examination is to be made before the county board. In *Ellis v. Karl*, 7 Neb. 388, Judge Lake, in speaking for the court, says: "It appears that, in the exercise of the jurisdiction thus conferred, the commissioners received the petition for relocation, and, adjudging it in all respects sufficient, made and entered of record this order: 'Whereas, on the 20th day of August, 1877, was presented by Samuel Windrom to the board of county commissioners of Saline county a petition for the relocation of the county seat, which said petition was signed in manner required by law by citizens of said county in number more than three-fifths of the votes cast at the last general election.' Thereupon at the same time they ordered in due form the calling of the first election on this question to be held on the 4th of September, 1877. It does not appear that either the genuineness or the sufficiency of the petition was questioned before the commissioners, but it is alleged that all of the defects complained of were fully known to them when they made the order for the election. And it is further alleged that the plaintiffs were wholly ignorant concerning them until more than 20 days had elapsed after the decision had been made, which seems to be thought a sufficient excuse for not moving earlier in this attack upon the action of the board. We are of the opinion that under this statute the proper place to have raised these questions concerning the petition was before the commissioners themselves, and that after having failed to make the objections there, and no sufficient reason for the failure being shown, the plaintiffs are in no situation to ask the aid of a court of equity." Any resident elector of a county has a right to examine a petition filed with the county clerk which purports to contain the names and places of residence of a sufficient number of resident electors to require the county board to call an election for the removal of the county seat. This, by the act of filing, becomes a public document, and is open to inspection, and a reasonable time must be given, when desired, for that purpose. The petition is in the care of the county clerk, and he is responsible for its safekeeping, but the instrument may be examined in his office at any or all times during business hours, and five days, on the showing made by the plaintiff, would not seem an unreasonable time to make a thorough examination of 860 names, scattered, as they purport to be, over all parts of the county.

Considerable stress is laid upon the offer to furnish a certified copy of the petition to the plaintiff, but that is not sufficient. The

party has the right to inspect the original,—to observe the several signatures, and see if they purport to have been signed by each individual; in other words, if they appear to be genuine, or are in the handwriting of a few interested persons. This is one of the means of detecting spurious signatures, and a certified copy is not sufficient.

In *State v. Nelson*, 21 Neb. 572, 32 N. W. Rep. 589, a petition purporting to contain the names of 644 resident electors was presented to the county board, asking them to call a special election for the relocation of the county seat; the whole number of votes cast in said county at the preceding election was 729. A remonstrance against calling such election, signed by a very large number of persons purporting to be electors of said county, was presented to the county board in which it was alleged that the petition was signed by nonresidents, minors, and other persons not authorized to sign the same. The board thereupon investigated the matter, and found that many persons who did not possess the necessary qualifications had signed said petition, and the number of resident electors who had signed the same was less than three-fifths of all the votes cast at the preceding election, and therefore refused to call the election, and this court sustained the order. The case at bar, in many of its features, is like that of *Ayres v. Moan*, 34 Neb. 210, 51 N. W. Rep. 830. In that case the same undue haste was shown by the county board as in this, and a refusal of such board to permit electors to examine the petition and sift out the illegal names. The remonstrators thereupon filed an answer, similar in many respects to that in this case. The county board overruled the answer, and called an election, and the action of the board was sustained by the district court, but this court reversed all the proceedings, and set the election aside. The same rule will be applied in this case. To justify a county board in calling an election for the relocation of the county seat, it must clearly appear that the petition for such election is signed by at least three-fifths of the resident electors in the county, as shown by the votes cast at the preceding election. Good faith on the part of the county board requires it to act as an impartial tribunal, to be governed by the evidence in the case, and to give all the resident electors in the county a reasonable opportunity to show that names signed to the petition are forgeries, fraudulent, or fictitious; or that they are those of bona fide resident electors of said county. The judgment of the district court, and also of the county commissioners, is reversed, and the cause remanded to the county board of Hitchcock county for further proceedings in accordance with this opinion. Judgment accordingly. The other judges concur.

ARNOLD v. BADGER LUMBER CO. et al.
(Supreme Court of Nebraska. May 2, 1893.)
PLEADINGS—CROSS PETITION—JUDGMENT BY DEF-
AULT.

After answer day, if a defendant files a pleading, in the nature of a cross petition, against his codefendants who have not appeared in the action, such codefendants can be concluded in respect thereto only by their appearance, or after the service on them of a notice, in the nature of a summons, as to such pleading.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Field, Judge.

Action by the Badger Lumber Company against Edna C. Arnold and others to enforce a mechanic's lien. On the judgment entered, defendant Arnold brings error. Reversed in part.

Ores M. Quackenbush and J. E. Philpott, for plaintiff in error. B. F. Johnson, for defendant in error.

RYAN, C. On December 26, 1889, the Badger Lumber Company filed in the district court of Lancaster county its petition for the foreclosure of its claim for a mechanic's lien on lot 10, block 5, in Sunnyside addition to the city of Lincoln. Edna C. Arnold was made defendant, as the owner of said lot, while W. H. Tyler, F. W. Kent, S. J. Kent, George R. Miller, John Smith Sperry, B. G. Wright, and R. S. Young were joined as defendants, by reason of being claimants of liens on the same property. A summons was issued requiring the defendants to answer by the 22d day of April, 1889, which was in due time served on each of the defendants. Edna C. Arnold made no appearance, and the decree complained of was rendered against her upon her default. On April 24, 1889, W. H. Tyler filed his answer, claiming the foreclosure of a mechanic's lien on the property described. On April 24, 1889, R. S. Young also answered the petition, asking the enforcement of his claim to a like lien. B. G. Wright and F. W. Kent filed a like answer, each for himself, on May 27, 1889. George R. Miller filed an answer of like purport on May 23, 1889; and on June 4, 1889, an answer and cross petition, with the same purpose, was filed by J. S. Sperry. Finally, on November 21, 1889, the date of the decree, there was filed on behalf of S. J. Kent an answer and cross petition for the same relief as had been asked by the other defendants as against Edna C. Arnold. Except as to the claim of the Badger Lumber Company, no summons was issued, nor was notice of any kind served upon Edna C. Arnold, the owner of the property; neither did she in any manner appear for any purpose.

The summons issued as to the petition of the Badger Lumber Company required the defendants, and each of them, to answer by April 22, 1889. The first answer was filed two days afterwards. From thenceforward they were dropped in until November 21st following. A decree was, on the date last named, entered in favor of each of the parties, who, as above, claimed liens against the lot in question. The judgment, in so far as it was in favor of each of the codefendants of Edna C. Arnold, must be reversed for reasons which will now be briefly stated.

In Hapgood v. Ellis, 11 Neb. 131, 7 N. W. Rep. 845, the rule was broadly stated that any defendant, regularly served with process, who fails to answer any material allegation contained in the answer of his codefendant, is bound thereby, as well as by the decree founded thereon; and, unless he appeals therefrom, the same becomes as to him res adjudicata. In Manufacturing Co. v. Clark, 23 Neb. 702, 37 N. W. Rep. 628, this broad statement was qualified thus: While all parties to an action are bound to take notice of pleadings properly filed within the time required by law, yet, where a party in default obtains leave of court to file a pleading affecting other parties, the parties so affected should be notified of the filing of such pleading, unless such persons or their attorneys are present when the order is made. The decree which had been taken, as between the codefendants, upon the answer of a codefendant filed after the time when answers were required by law to be filed, and as to which no notice had been served or appearance made, was held properly to have been set aside in the district court. As between codefendants, therefore, the rule is established that each is bound to take notice of such pleadings as shall be filed on or before the answer day named in the summons issued upon the original petitions. After answer day, if a defendant files a pleading in the nature of a cross petition against his codefendants who have made no appearance, such codefendants can only be thereby affected by their appearance as to such pleading, or after the service of a notice upon them, in the nature of a summons, as to such pleading. By the decree under consideration the codefendants of Edna C. Arnold obtained affirmative relief as against herself and her property, after answer day, without her appearance, and without notice to her of the filing of the several answers asking such affirmative relief. It follows, therefore, that such part of the judgment must be, and is, reversed. No objection having been made or discovered as to that part of the decree which enforces the right of the Badger Lumber Company to relief, it is affirmed. Judgment accordingly. The other commissioners concur.

SPELLMAN v. LINCOLN RAPID TRANSIT CO.

(Supreme Court of Nebraska. May 3, 1893.)

STREET-RAILWAY COMPANIES — INJURIES TO PASSENGERS — PRESUMPTION OF NEGLIGENCE — BURDEN OF PROOF.

1. Street-railway companies are common carriers of passengers, and are liable as other common carriers upon common-law principles.

2. Common carriers, for the protection of their passengers, are bound to the exercise of more than ordinary care; they are bound to exercise extraordinary care and the utmost skill, diligence, and human foresight, and are liable for the slightest negligence.

3. Where a street-railway car is derailed, and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption.

4. Where a passenger, without negligence on his part, is injured by the derailment of the car in which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that, by the exercise of the utmost human care, diligence, and foresight, the casualty could not have been prevented.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Tibbets, Judge.

Action for personal injuries by Thomas Spellman against the Lincoln Rapid Transit Company. Defendant had judgment, and plaintiff brings error. Reversed.

Charles A. Burke and Stearns & Strode, for plaintiff in error. Webster, Rose & Fisher, for defendant in error.

RAGAN, C. Thomas Spellman brought suit in the district court of Lancaster county, Neb., against the Lincoln Rapid Transit Company, alleging that it was a corporation owning and operating a street railroad in the city of Lincoln, and that on the 23d of May, 1890, while he, Spellman, was a passenger upon one of the transit company's cars, the defendant, its agents, and servants so negligently and carelessly used, managed, and controlled the said car and engine by which it was drawn, and so negligently and carelessly managed, used, looked after, and repaired said road, and the tracks and switches connected therewith, that the car in which the plaintiff was carried and the engine drawing the same were allowed to run off the track; that, in consequence of the car running off the track, plaintiff was thrown with great force and violence against the seat, and the railing thereof in front of him, and then back on the seat and edges thereof behind him, and was thereby permanently injured, and that the plaintiff was careful, and did not contribute to the injury in any degree whatever; and prayed for damages against the transit company. The answer of the defendant denied all negligence of itself or servants; admitted that

the car was derailed, as claimed by the plaintiff; denied that the plaintiff's injuries were permanent; and alleged that the plaintiff was suffering from a rupture of old and long standing. To this there was a reply, consisting of a general denial, by the plaintiff. There was a trial to a jury, and a verdict for the transit company, and Spellman brings the case here on error. On the trial it was admitted that the transit company was a corporation, and engaged in the carrying of passengers for hire. There was no pleading or proof that Spellman was guilty of any contributory negligence whatever. The motive power of the cars was a dummy steam engine. The evidence in the record does not afford any precise explanation for the cause of the car's leaving the track. The trial judge, at the request of the transit company, gave the jury the following instruction: "While it is the duty of the defendant, as a carrier of passengers, to exercise proper care for their safety, yet the defendant is not an insurer of the safety of its passengers, and not liable to them for injuries resulting from such defects in its means of transportation as could not have been guarded against by the exercise of care on its part, and which are not due in any way to negligence on its part." "The test of negligence in such cases is whether the defect ought to have been observed practically, and by the use of ordinary and reasonable care."

The giving of this instruction is here assigned for error. It will be observed that the test submitted by the learned judge to the jury was whether the transit company used ordinary and reasonable care. The defendant in error was a common carrier of passengers for hire, and the question to be determined in passing upon the correctness of this instruction is, what degree of care is due from a common carrier of passengers to its passengers? In *Rorer on Railroads*, (volume 2, p. 1434,) it is said: "For injuries occasioned by negligence, street railways are liable, as others are, upon common-law principles, and no more so." And on page 1436, the same authority says: "The company is bound to the highest degree of care and utmost diligence to prevent their [passengers'] injury." To the same effect, see *Shear & R. Neg. § 226*. In *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. Rep. 827, the court say: "Street-railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence." In *Sales v. Stage Co.*, 4 Iowa, 546, the rule is thus laid down: "Carriers of passengers for hire are bound to exercise the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants." See also, *Bonce v. Railway Co.*, (Iowa,) 5 N. W. Rep. 177. In *Derwort v. Loomer*, 21

Conn. 245, the supreme court of that state laid down the rule thus: "In the case of common carriers of passengers, the highest degree of care which a reasonable man would use is required by law." This is also the doctrine of the supreme court of California. See *Wheaton v. Railroad Co.*, 36 Cal. 590, where it is said: "Passenger carriers by their contract bind themselves to carry safely those whom they take into their coaches or cars, as far as human foresight will go; that is, for the utmost care and diligence of very cautious persons." This is also the rule in New York. See *Maverick v. Railroad Co.*, 36 N. Y. 378, where it is said: "Passenger carriers bind themselves to carry safely those whom they take into their coaches, to the utmost care and diligence of very cautious persons." See, also, *Carroll v. Railroad Co.*, 58 N. Y. 126. This is also the doctrine of the supreme court of Colorado. See *Railway Co. v. Woodward*, 4 Colo. 1. This is the doctrine of the supreme court of the United States. In *Railroad Co. v. Derby*, 14 How. 485, it is said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence." This doctrine is reaffirmed by the same court in *The New World v. King*, 16 How. 469. See these cases cited and approved in *Railroad Co. v. Hurst*, 98 U. S. 291, where the court say, in reviewing the cases cited above: "We desire to reaffirm the doctrine, not only as resting on public policy, but on sound principles of law." They also cite *Railroad Co. v. Lockwood*, 17 Wall. 357, and quote and affirm that case as saying: "The highest degree of carefulness and diligence is expressly exacted." Continuing, the court say: "The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business; but it does emphatically require everything necessary to the security of the passenger, and reasonably consistent with the business of the carrier and the means of conveyance employed." The rule, as gathered from the foregoing authorities, requires that a common carrier of passengers shall exercise more than ordinary care; it requires the exercise of extraordinary care; the exercise of the utmost skill, diligence, and human foresight. It makes the carrier liable for the slightest negligence. It follows from the foregoing that the giving of the instruction complained of was error.

Spellman also assigns as error the giving by the court below, at the request of the transit company, instructions Nos. 2 and 3. They are as follows: "(2) If the jury find from the evidence that the defendant constructed and laid its track in a proper manner, and had the same made safe and in good condition at the place of the accident complained of, before it was put into use, and from time to time since, at reasonably short intervals, had the same inspected and repaired by competent track men, especially employed for that purpose, and that the car upon which the plaintiff was riding at the time of the accident was derailed without any fault or neglect of the person or persons in charge thereof for defendant, and the same is not shown to have been caused by any defect in said road or car, then the plaintiff could not recover for any injuries caused thereby, and the jury should find for the defendant. (3) Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engines, or cars, or negligence on the part of defendant's employes in operating the same, and could have been avoided by the exercise of proper care in inspection and repair and operation, then the jury will find for the defendant. The mere fact that the defendant's car left the track, and that the plaintiff thereby sustained injury, is not sufficient to sustain a verdict for the plaintiff. To find a verdict for the plaintiff, the jury must find that the defendant was in some way negligent in the care of its track or the running of its train, and the accident was caused by such negligence." We shall consider these two instructions together. The court, in effect, told the jury by these instructions that, though Spellman might have been injured by the derailling of the car, that fact did not raise a presumption of negligence against the transit company; and, further, it put the burden on Spellman of proving the particular cause of the derailling of the car. In 2 Rorer, R. R. p. 1434, it is said: "In actions against * * * [street railways] for personal injuries caused by the cars leaving the track, the burden of proof is on the company to show that there was no fault or want of care on its part." See the same doctrine in *Patt. Ry. Acc. Law*, § 439. The supreme court of the United States in *Stokes v. Saltonstall*, 13 Pet. 181, decided: "In an action against the owner of a stage coach used for carrying passengers, for an injury sustained by one of the passengers by the upsetting of the coach, the owner is not liable, unless the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage. * * * The fact that the carriage was upset * * * is prima facie evidence that there was carelessness or negligence or want of skill on the part of the driver, and casts upon the defendant the burden of proving that the

injury was not occasioned by the driver's fault." This case was affirmed by the same court in *Railroad Co. v. Pollard*, 22 Wall. 341. In *Railroad Co. v. Walrath*, 38 Ohio St. 461, the supreme court of Ohio thus announces the rule: "On proof of injury sustained by a passenger on a railroad train by the falling of a berth in a sleeping car, and that the passenger was without fault, a presumption arises, in the absence of other proof, that the railroad company is liable;" citing and affirming *Railroad Co. v. Mowery*, 36 Ohio St. 418. The supreme court of Colorado, in *Railway Co. v. Woodward*, 4 Colo. 1, adopted the rule in this language: "If a passenger is killed in consequence of the overturning of a car, a presumption arises that the casualty was the result of negligence, but such presumption may be rebutted." The supreme court of Minnesota, in *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. Rep. 827, formulates the rule as follows: "Where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of the plaintiff's own case." In the course of the opinion the learned judge who delivered it said: "The severe rule which enjoins upon the carrier such extraordinary care and diligence is intended, for reasons of public policy, to secure the safe carriage of passengers, in so far as human skill and foresight can effect such result. From the application of this strict rule to carriers, it naturally follows that where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises. The rule is therefore frequently stated, in general terms, that negligence on the part of the carrier may be presumed from the mere happening of the accident. The reason of the rule seems to be that from the very nature of things the means of proving the specific facts are more in the power of the carrier. The latter, owning the property and controlling the agencies, is presumed to have peculiarly within his own knowledge the cause of the accident, which he might be interested to withhold, and might himself be unable to prove." Such is the doctrine of the supreme court of Illinois, as expressed by that court in *Railroad Co. v. Reynolds*, 88 Ill. 418, where it is said: "Where a railway car is thrown from the track, whereby a passenger for hire is injured, the presumption is that the accident resulted either from the fact that the track

was out of order, or the train badly managed, or both combined, and the burden is on the company to show it was not negligent in any respect." This is also the rule in Indiana. See *Railroad Co. v. Williams*, 74 Ind. 462. It is also the rule in New York. See *Seybolt v. Railroad Co.*, 96 N. Y. 562. In *Feltal v. Railroad Co.*, 109 Mass. 398, the action was against a street-railway company for injuries resulting to plaintiff from an accident that happened while she was traveling on one of the defendant's cars. The plaintiff, to prove her case against the street-car company, called the conductor and the driver of the car as witnesses, and they testified that the car ran off the track, one wheel inside and one outside the track; that they, with others, left the car in question; that there was no defect in the car, the wheels, or the track; that the car was going about five miles an hour; that when they lifted the fore wheels on the track everything was right, and the car went on; that the cars went over this place just before and just afterwards without trouble, and they did not know what made the car run off. At the close of plaintiff's case, defendant requested a ruling that the plaintiff could not recover, because she had failed to show negligence on the part of the street-railway company. This motion was overruled. The railway company then introduced evidence that the road where the accident occurred had been gone over by their superintendent the day before the accident, and that there was no defect in it; that the day after the accident he saw the place where it occurred, and that there was nothing the matter with the road then, and had not been since. The railway company then requested the court to instruct the jury as follows: "The plaintiff received her accident from the fact of the car's running off the track while traveling at a moderate rate. There is no evidence that the car was out of order. It is not claimed that the driver did anything wrong, or that the rails were before or then or afterwards out of order. * * * Under these circumstances, the plaintiff cannot recover. That there was no evidence of any negligence on the part of the railroad company; that the burden of proof is upon the plaintiff to show how the accident happened, and what was the particular negligence that caused the same; and that, unless the plaintiffs had done so, they could not recover." The trial court refused to so instruct, and this refusal was assigned as error. On appeal to the supreme court, it said: "On the trial of an action against a street-railway corporation for injuring a passenger, proof that the injury was caused by a car's running off the track at a place where the track and the car were under the exclusive control of the defendants is sufficient to charge them with negligence, in the absence of any evidence that the accident happened without their fault."

In the light of the foregoing authorities, the court erred in giving the instructions complained of.

In our review of this case we have not been unmindful of the suggestion of the counsel for defendant in error that the trial court cured instruction No. 3 complained of by instructing the jury, of his own motion: "A train of cars similar to that operated by the defendant is presumed to stay upon the track, and if such train should, for any reason, leave the track, the presumption is that it left the track through some fault of the defendants." It is not necessary to determine now whether this instruction conflicted with the ones complained of, nor whether one cured the other. The greatest difficulty with the instruction complained of lies in this: "Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engine, or cars, or negligence on the part of the defendant's employes in operating the same, and could have been avoided by the exercise of proper care in inspection, repairing, and operation, then the jury will find for the defendant." Here the jury were told, in effect, that the burden was on the plaintiff below to prove the cause of the derailment. This is not the rule. There is no claim by any one, nor is there a word of evidence, that Spellman was guilty of any negligence whatever. The transit company was a common carrier of passengers. Spellman was a passenger on its train. The car on which he was riding was derailed. He alleged he was injured thereby, and there was evidence to support the allegation. He alleged that the derailment of the car was through the carrier's negligence. The law by presumption supplied that proof for him. This was enough. The burden was then on the carrier to rebut this presumption of negligence by showing that it was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that, by the exercise of the utmost human care, diligence, and foresight, the casualty could not have been prevented. The judgment of the district court is reversed, and the cause remanded, with instructions to the court below to grant the plaintiff in error a new trial. The other commissioners concur.

FRIEBERG et al. v. TREITSCHKE et al.
(Supreme Court of Nebraska. May 3, 1893.)

ACTION ON NOTE—EVIDENCE—INSTRUCTIONS.

The main issue in this case being whether the note sued upon was given by the defendant as payment for the other 50 per cent. due from defendant to plaintiffs, (50 per cent. having already been paid upon a general composition agreement of Treitschke with his creditors,) or whether said note was given plaintiffs for services by plaintiffs' agent rendered for defendant, independently of such agency, it was proper to instruct the jury: (1) That if plain-

tiffs, with Treitschke, entered into such a composition agreement, a note taken for the 50 per cent. by said composition rebated would be a fraud upon the rights of the other compounding creditors, and that payment thereof would not therefore be enforced. (2) Instructions as to the rights of plaintiffs, upon plaintiffs' theory of the transaction, properly required upon the evidence adduced that the jury should "believe from the testimony that such transaction was made in good faith, and not as a device to evade the effect of a payment to the plaintiff directly."

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Doane, Judge.

Action on a promissory note by Julius Frieberg and others against Julius Treitschke and others. Defendants had judgment, and plaintiffs bring error. Affirmed.

Charles Ogden, for plaintiffs in error.
Howard B. Smith and Clinton N. Powell, for defendants in error.

RYAN, C. On the 5th day of January, 1889, the plaintiffs in error filed in the district court of Douglas county a petition for the recovery of the amount, with interest and protest fees thereon, of the following promissory note: "\$1,162.80. Omaha, Nebraska, March 11th, 1884. Four months after date I promise to pay to the order of Mess. Frieberg & Workum, eleven hundred sixty-two, 80-100 dollars, at the United States National Bank; value received. Julius Treitschke." This note was indorsed in blank by August Doll. The defendants admit the making and indorsement of the note, but claim that the same was given under an agreement for a settlement with the defendant Treitschke with all his creditors upon the basis of a certain percentage, which is hereafter detailed in the testimony; that under such agreement the plaintiffs had bound themselves, ostensibly, to accept 50 per cent. of the amount of their claim; and that the agent of the plaintiffs, with full authority to act in the premises, and for the purpose of securing the claim of the plaintiffs in full, agreed, without the knowledge of the other creditors of Treitschke, to procure a settlement and release from all of his creditors of their claims against him upon the basis of a certain percentage of their claims, but that in consideration thereof the plaintiffs should be paid in full of their claim; and that the plaintiffs were paid 50 per cent. of their claim in cash, and that the note in suit was given for the remaining 50 per cent. in pursuance of a secret agreement made between the agent of plaintiffs and the defendant Treitschke, and for no other consideration. The plaintiffs denied that Mr. Brecher, the alleged agent, had any authority from them to enter into negotiations with the defendant Treitschke towards compromising their claim, except as contained in their written agreement to compromise, which was introduced in evidence, and is hereinafter referred to. They also denied that they knew of any arrangement

being entered into between the said Brecher and the defendant Treitschke for the purpose of compounding with his creditors, except as shown by the agreement for compromise; and they averred that whatever Brecher did beyond that was without the knowledge, authority, or consent of plaintiffs. They also denied that they had ever received any amount of money from Treitschke upon their claim, and averred that no part of the one-half of their claim, provided for by the compromise agreement, had ever been paid to them. The evidence was mainly directed to the terms of the arrangement entered into at the date of the above-copied note. The testimony of Treitschke was that Arnold Brecher, the agent of plaintiffs sold him the goods from which arose his indebtedness to plaintiffs, to the amount of \$2,325.62; that afterwards, to wit, in December, 1883, the witness became financially embarrassed, his creditors commencing attachment suits against him at that time; that among these attaching creditors were the plaintiffs; that in December, 1883, Arnold Brecher came to Omaha with reference to the attachment suit of plaintiffs against the witness then pending, and had a conversation with the defendant Treitschke with reference to compounding with Treitschke's creditors; this conversation, Treitschke testifies, was to the effect that Brecher thought he could get all the creditors who had made attachments on the stock of goods to settle at 50 cents on the dollar, and that he could make settlement with those who had no attachments at 25 cents on the dollar. With reference to the claim of plaintiffs, as testified to by Treitschke, it was agreed that Treitschke should pay their claim in full if Brecher brought about settlements with the other creditors of Treitschke on the terms above talked of, and that this part of the agreement was made a secret,—that no one was to know that plaintiffs got their full amount, while the other ones got but a half and a fourth. Brecher was advanced \$200 for the expenses of the trip which he was to make for the above purpose, and for his hotel bills, etc. The amount owing by Treitschke at that time was between nine and ten thousand dollars. On the other hand, Arnold Brecher testified, as to the above conversation, that Treitschke told him that it was a ploy to see all these goods go; he would be ruined, and have nothing any more; that his wife would not consent that the creditors should get the money from these attachment suits; that he would fight them, and it would take a year or so to determine whether they would be entitled to the money or the attaching creditors should, and he asked witness whether something could not be done whereby he could make a settlement with the creditors. Witness Brecher testified that he answered that he thought something might be done; that he would think it over, and let him (Treitschke) know in the afternoon. The conversation

which accordingly took place that afternoon was detailed by Mr. Brecher in the following language: "Question. You went up there in the afternoon; what did you then say to Treitschke? Answer. I told him (Treitschke) I thought I would be able to secure him a settlement with his creditors on the basis of fifty cents on the dollar with those which were secured by the attachments, and about forty with those that did not have security,—that were simply suing without an attachment. That I had to go and see these parties personally in order to get a settlement with them. For that purpose he employed me to do so. Q. What did you tell him would be your compensation, if anything, for the work you were to do? A. I asked him to pay me one-half of the claim of Frieberg & Workum. Q. What did you say in regard to your claim of Frieberg & Workum; in regard to the claim? A. I told him at the time we had the conversation that he knew that I had guaranteed his account, and that I would be loser in that proportion. If he wanted me to get him a settlement I would undertake to get it, provided he paid me for my services fifty per cent. of their claim, because they would agree to take fifty per cent. of the other creditors. Q. What did he say to that? A. He accepted it very cheerfully. Q. What else did he pay you? A. He was to pay my traveling expenses, and he did pay me \$200."

The above was the only evidence which presented direct contradictions. There was no dispute that at the time there was prepared, in writing, a form of composition agreement to be entered into by the creditors of Treitschke, which agreement was afterwards signed by the greater part of his creditors, both in number and amount. This agreement, omitting the preamble, was as follows: "In consideration of the premises, and for the purpose of saving litigation and expense, said Julius Treitschke purposes, and hereby agrees to and with all his said creditors, to pay his said creditors and compromise their attachments and claims as follows, to wit: To such creditors as are secured by attachment or otherwise, fifty cents for and upon the dollar of their respective claims; to such creditors as are unsecured, forty cents upon the dollar of their respective claims; said amounts to be paid in two installments, for which the said Treitschke is to give good, bankable notes, to wit, one-half in sixty days, and one-half in four months, with approved security: provided, however, that upon the execution and delivery to each creditor according thereto by said Treitschke of the notes hereinbefore referred to for the amount to be paid said creditor under this agreement, if said note shall be accepted as good and bankable, then said creditors shall in writing release and discharge said Treitschke from any and all attachments or claims of every nature, except said note. We, the undersigned cred-

itors of said Julius Treitschke, hereby accept the above proposition, and agree to settle and compromise our respective claims on the terms and in the manner herein set forth." It does not clearly appear why the percentage was fixed at 40 as to the creditors who had not attached, instead of 25 per cent., as testified to by Treitschke, but that figure was acquiesced in by him without demur, so far as the evidence shows. On March 11, 1894, the composition agreement having been secured by Brecher to the satisfaction of Treitschke, the note in suit was by Treitschke made and by August Doll indorsed, for an amount equal to one-half of the claim of plaintiffs against the defendant Treitschke; the other one-half was remitted by draft to plaintiffs. One of the plaintiffs testified that this note and remittance were forwarded by Brecher in discharge of his liability as guarantor,—a liability to which Brecher referred in his testimony, as will be seen by the quotation above made. Upon the issues made up, and in the light of the above evidence, for none other of special importance was given, the court instructed the jury as follows: "First, that the issue for you to pass upon in this case is, did the plaintiffs agree with the defendant Treitschke and with his other creditors that they, the plaintiffs, would with the other creditors accept one-half of the amount of their claims in full, and would upon the receipt of such proportion of their claim release Treitschke from his obligation thereon, and at the same time have a secret agreement with Treitschke that they, the plaintiffs, should be repaid in full? If you find that such arrangements were made between the plaintiffs and Treitschke, that the plaintiffs received from Treitschke the one-half of their claim, and that the note in suit was given by the defendant for the other one-half at the time said compromise was made, then and in that case your verdict should be for the defendants, for the law will not permit a recovery to be had upon an obligation given under such circumstances. Second. If, however, you find from the testimony that the plaintiffs did not make, or authorize to be made in their name or on their behalf, any agreement by which they were to receive anything more than the proportion provided for by the compromise agreement, and that they have received nothing upon their claims but the note in suit, and that said note was given by the defendants and accepted by the plaintiffs in compliance with the agreement for compromise, then the plaintiffs are entitled to your verdict for the amount due on the note. Third. The plaintiffs are bound by the acts of their agent, Brecher, only so far as such acts were within the general scope of his authority as such agent, or were afterwards ratified and adopted by the plaintiffs. If, therefore, the plaintiffs, after hearing what had been done by Brecher in regard to the settlement of their claim against Treitschke, accepted the

benefits of such settlement without objection; if you find that they did afterwards learn of the action of Brecher, and that with such knowledge they accepted the benefits of such action,—they thereby adopted and ratified the action of Brecher, and are bound, even though he, Brecher, was not authorized at the time by the plaintiffs to do all he did at the time the compromise agreement was made. Fourth. If you believe from the testimony that the defendant Treitschke agreed with Brecher to pay him, as his individual compensation for his services in procuring the signatures of Treitschke's creditors to the agreement, an amount equal to one-half of the claim which plaintiffs held against him, such agreement would be valid and binding between Treitschke and Brecher; and if, as a result of such agreement, you shall find that Treitschke paid to Brecher the amount stipulated for,—such payment cannot be charged against plaintiffs as a payment on their claim against Treitschke: provided, you believe from the testimony that such transaction was made in good faith, and not as a device to evade payment to the plaintiffs directly. Fifth. If, however, you find from the testimony that the purpose of such agreement between Treitschke and Brecher (if you find such agreement was made) was a device resorted to for the purpose of securing to plaintiffs payment in full of their claim, and that the plaintiffs received whatever money was paid under such agreement, and credited the same upon the claim against Treitschke, then you will be justified in finding that such payment was made by Treitschke to the plaintiffs in satisfaction of one-half of their claim against Treitschke, and in that case the plaintiffs would not be entitled to recover on the note in suit, and your verdict should be for the defendants."

The fourth instruction above quoted is criticised because of the following language, with which it closes: "Provided, you believe from the testimony that such transaction was made in good faith, and not as a device to evade the effect of a payment to the plaintiffs directly." In instruction 5, above quoted, the statement of the effect of finding that the agreement between Treitschke and Brecher was a device resorted to for the purpose of securing plaintiffs, etc., is also strenuously objected to by plaintiffs in error, for the reason, as alleged, that there was no proof to justify such language. The plaintiffs' contention in the district court was that the note sued on was taken by Brecher for services to be rendered by him for the benefit of Treitschke; that plaintiffs were unaware of this agreement; that this note was given directly to plaintiffs, and not to Brecher; that by this note, with the draft forwarded plaintiffs by Brecher at the date of the note, the full amount of plaintiffs' claim against Treitschke was realized; and that this note was taken by Brecher and forwarded to plaintiffs in satisfaction of Brecher's

guaranty of the debt of Treitschke to plaintiffs. Mr. Brecher himself testified that plaintiffs requested him to go to Omaha and watch their interest as against Treitschke after the attachment suits had been instituted against him for the collection of the same, and that he thereupon went to Omaha for the purpose indicated. It was while there as agent of the plaintiffs to look after this very claim that the agreement was made between Brecher and Treitschke as to securing a compromise between Treitschke and his creditors. According to Brecher's version of the matter he acted for the plaintiffs with reference to their claims as against Treitschke, settling for 50 per cent. of plaintiffs' claim; at the same time he released plaintiffs' right to the other 50 per cent., which he took himself in consideration of his services in procuring his principals and other creditors to approve of the general rebate of 50 per cent. In view of this unfortunate combination of circumstances, neither Brecher nor his principals, the plaintiffs in this suit, have just cause to complain that the court's instructions to the jury contained the language above complained of, for, upon the above circumstances and the other evidence in the case, the jury could not be justly criticised if they found as a fact that plaintiffs' claim was paid in full, and that the attempt to account for established facts upon a different theory was a mere device; and without doubt such fact was clearly within the scope of the issues to be tried. There were other instructions given at the request of the defendants of which complaint is made, but, as the ground of criticism is covered by the foregoing considerations, such instructions and objections will not be considered in detail. It will be necessary upon this branch of the case to say no more than that the law, as applicable to the issues made and evidence given, was correctly and very aptly stated to the jury in the instructions above quoted.

Plaintiffs, however, claim that the instruction which led the jury to discredit Mr. Brecher was erroneous and without foundation. It was as follows: "Seventh. You are instructed that if you believe any witness has willfully sworn falsely to a fact in respect of which he cannot be presumed liable to mistake, you may give no credit to any alleged fact depending upon his statement alone." In view of what has already been said, it can hardly be claimed that the court in this instruction had no reference to such facts as might fairly be deduced from the evidence; whether they were properly deductible was for the jury to say. It is barely possible that the criticism that the jury should have been told that the facts as to which the witness falsely testified must have been a material fact to justify the rejection of his evidence was a just criticism, if this was an original question. But it is not, for in *Dell v. Oppenheimer*, 9 Neb. 454, 4 N. W.

Rep. 51, the syllabus states the rule thus: "Where a party swears falsely to a fact in respect of which he cannot be presumed likely to mistake, courts are bound to apply the maxim, 'falsus in uno, falsus in omnibus,' and to give no credit to any fact depending upon his testimony alone." The instruction complained of very closely follows this language. It embraces the same principle, leaving the rejection of the evidence optional rather than imperatively requiring it, as in the case cited. The rule stated in *Dell v. Oppenheimer*, supra, was referred to with approval in *Young v. Pritchett*, 10 Neb., on page 357, 6 N. W. Rep. 416. In *Atkins v. Gladwish*, 27 Neb. 847, 44 N. W. Rep. 37, the qualifying word "material" was used, though the question considered did not arise upon the use of that word, but as to whether or not the words "unless corroborated" were indispensable. In *Walker v. Haggerty*, 30 Neb. 120, 46 N. W. Rep. 221, the word "material" had been used, and the contention there was whether there was any evidence which could be deemed material; not whether the word was indispensable. In the case at bar the evidence of Brecher was, without question, material. Indeed, without it plaintiffs' theory as to Brecher's having earned the note sued upon would have been entirely without support. Under these circumstances, we cannot say that the district court erred in giving the instruction omitting the word "material." This disposes of all the questions raised, and it results that the judgment of the district court is affirmed. The other commissioners concur.

DEWEY v. ALGIRE et al.

(Supreme Court of Nebraska. May 4, 1893.)
INSANITY—EVIDENCE—AVOIDANCE OF DEED—BOXER
FIDE PURCHASER.

1. The record of proceedings under chapter 40, Comp. St., whereby a person has been adjudged insane and a fit subject for treatment in the hospital for insane, is not admissible for the purpose of proving insanity, in an action brought to avoid a conveyance made by such person.

2. A judgment in a case tried without a jury will not be disturbed because of the admission of immaterial testimony, where the testimony properly admitted justifies the finding.

3. While mere imbecility or weakness of mind in a grantor will not, in the absence of fraud, avoid his deed, insanity will do so if of such a character as to induce the conveyance, although such insanity may not amount to a complete dethronement of reason and understanding upon all subjects.

4. The deed of an insane person may be avoided, as against a grantee without notice of the grantor's insanity, and against an innocent purchaser from such immediate grantee. In the latter case it is not necessary to restore the consideration paid by such purchaser to the immediate grantee.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Gage county; Appelget, Judge. Action by William F. Dewey, guardian of John Paulsen, an insane person against

Lyman W. Algire, John B. Mowry, and Lena Paulsen, to set aside a certain conveyance. Decree for plaintiff. Defendants Algire and Mowry appeal. Affirmed.

E. O. Kretsinger and T. F. Burke, for appellants. Hazlett, Bates & Le Hane, for appellee.

IRVINE, C. On the 12th day of November, 1889, one John Paulsen, who was then the owner of a farm lying in Gage and Pawnee counties, which had for some years been occupied as a homestead by Paulsen and wife, conveyed said farm to Lyman W. Algire, Paulsen's wife joining in the conveyance, and received in return certain lots in Blue Springs and in Wymore. On November 20, 1889, Algire conveyed the undivided one-half of the Paulsen farm to the defendant Mowry. In February, 1890, Paulsen was adjudged insane, and the plaintiff, Dewey, was appointed his guardian. Dewey, within a few days of his appointment, instituted this action against Algire, Mowry, and Lena Paulsen, the latter being the wife of John Paulsen, for the purpose of setting aside the conveyance to Algire, upon the ground that Paulsen was insane at the time of its execution. A decree was rendered in accordance with the prayer of the petition, finding all the material facts for the plaintiff, vacating the conveyances from Paulsen and wife to Algire, and from Algire to Mowry. It appeared in evidence that, immediately after the exchange was made, Paulsen and wife separated, and conveyances of the Blue Springs and Wymore property were made, whereby what was estimated as one-half in value thereof was conveyed to Lena Paulsen. The decree ordered a reconveyance of all of this property. The case was brought to this court upon appeal by Algire and Mowry. The questions involved in the case are discussed in the briefs under a number of heads. For the purposes of this opinion all these questions classify themselves within five topics.

1. Upon the trial, for the purpose of proving the insanity of Paulsen, the records of two proceedings were introduced in evidence, —the one in Pawnee county in 1886, and the other in Gage county in 1890. These proceedings were had under sections 17 to 23, c. 40, Comp. St., and in each case Paulsen was adjudged insane, and a fit subject for custody and treatment in the hospital for the insane. There is considerable discussion in the briefs of the effect of these records as creating presumptions of insanity by reason of the adjudications and commitments, and of sanity by reason of the discharge of Paulsen as recovered. But the appellants raised a broader question, by objecting to the introduction of the records in evidence, and, in the view we take of that question, all others relating to these records are eliminated from the case. An inspection

of the statutes under which these proceedings were had discloses that the sole object of such proceedings is to ascertain whether or not the person alleged to be insane is a fit subject for custody and treatment in the hospital. The proceedings may be *ex parte*. The commissioners are required to take testimony upon the subject, and any citizen of the county, or relative of the person charged, may appear and resist the application, but no notice to any one is required, and the commissioners may, if they see fit, dispense with the presence of the person charged during their proceedings. By section 54 of the same chapter the term "insane," as used in the act, is defined to include every species of insanity or mental derangement. At the common law an inquisition founded upon a commission *de lunatico inquirendo*, resulting in an adjudication of insanity, was held to be in all cases *prima facie* evidence, and sometimes conclusive, of the insanity of the person charged. This was upon the ground that such a proceeding was in the nature of one in rem, to determine the status of the party, and was therefore binding upon the whole world. This proceeding bore a close analogy to the proceedings under our statute, whereby guardians are appointed for persons insane. It differs very materially, however, from a proceeding looking towards the custody and treatment of a party in the hospital. In the latter proceeding the examination is more or less *ex parte*, and its object, under the broad definition of insanity before referred to, presents an issue entirely different from that presented in this case, which is the competency of the party to manage his own affairs and enter into a valid contract. The records of similar proceedings have been held inadmissible in such cases as we are now considering in *Leggate v. Clark*, 111 Mass. 308, and in *Knox v. Haug*, 48 Minn. 53, 50 N. W. Rep. 934, and we think the reasoning in those cases is sound. In the case of *Wheeler v. State*, 34 Ohio St. 394, it was held that, while such inquisitions were not even *prima facie* evidence of insanity, they were admissible as tending to prove the fact; but the authorities cited in the opinion in the latter case are all based upon inquisitions *de lunatico*, and the court seems to have mistaken the distinction between the subjects of inquiry in the two proceedings. We think that these records were improperly admitted in evidence. This leads us to a consideration of the question whether the evidence, aside from the insanity proceedings, was sufficient to justify the finding of the court, for, if it was, the decree should not be disturbed. It has been repeatedly held that error cannot be predicated upon the admission of immaterial testimony in a case tried to the court where the evidence otherwise justifies the finding.

2. Before examining the evidence, however, a question is presented as to the de-

gree of mental incapacity which must exist in order to avoid a conveyance. In the case of *Mulloy v. Ingalls*, 4 Neb. 115, this court held that, in the absence of fraud, mere imbecility or weakness of mind in a grantor, however great, will not avoid his deed, unless there be evidence to show a total want of reason or understanding. In several other cases this general doctrine has been restated, and it must be taken as the settled law of the state. We think, however, that counsel for appellants have somewhat mistaken the true import of the language used in these cases. It is very clear that the courts have never meant by such language that a deed will not be set aside unless the grantor, at the time of its execution, showed an absolute want of reason and understanding in every particular. It has been repeatedly held that the deed of one afflicted with monomania may be set aside where the execution of the deed was induced by the disease. The rule in fact means this: That one in possession of his normal faculties, and not afflicted with idiosyncrasy or actual insanity, may not, in the absence of fraud, avoid his deed, even though he be of inferior intellectual capacity; that the law will not undertake to discriminate between strong and weak minds, except to consider weakness of mind in connection with evidence of fraud; that the line is drawn at actual insanity inducing the conveyance,—insanity, as distinguished from mere weakness of mind, unaccompanied by mental disease overthrowing the reason.

3. Measured by this test, the evidence is ample to sustain the finding of the trial court. It appears that Paulsen came to Nebraska a number of years ago, bought the farm in controversy, and for several years conducted it in a profitable and apparently skillful manner. In 1886 he became the victim of a delusion, to the effect that he constantly carried about with him a man who rode upon his shoulders, and controlled all his actions. This was unmistakably an insane delusion which continued to possess him for years. He became sullen and morose, refusing to speak to his neighbors, and forbidding his wife to visit them. In 1889 he suddenly became a religious enthusiast, going many miles alone to church, and, in one instance at least, persisting in remaining in the church throughout the day after the service was concluded. At times he worked industriously; at others, without apparent reason, he refused to work for long intervals of time, spending such periods in the house reading his Bible, while his wife did the necessary work upon the farm, and neighbors marketed his stock for him. These occurrences are brought down by the evidence to and beyond the time of the execution of the deed. Several neighbors testified that in their opinion he was at the time of the execution of the deed incompetent to manage his affairs, and incapable of under-

standing the nature of such transactions. These witnesses, while not experts, stated the facts upon which their opinions were based. Such testimony is competent, and its weight was for the trial court to consider. A number of other facts appear in evidence tending to show a deranged mind. The transaction itself is shown by the preponderance of the testimony to be one manifestly to Paulsen's disadvantage. While an adjudication of insanity, in proceedings to appoint a guardian, has been held not admissible to prove insanity at a period long prior to the inquisition, still we think that the adjudication, whereby the plaintiff was appointed Paulsen's guardian only three months after the disputed conveyance, was sufficiently near in point of time to have some weight as evidence. We are satisfied that the trial judge was justified by the evidence in finding as he did.

4. It is claimed that no decree can be rendered, as against the defendant Mowry, for the reason that he was a bona fide purchaser from Algire without notice of Paulsen's insanity. The trial court found that he was not a bona fide purchaser, but whether he was or not the deed should be vacated as against him. It is not a question as to whether the deed of an insane person is void, or merely voidable. The cases declaring such a deed voidable are those wherein the question was one of affirmation or ratification. While some authorities hold that an executed contract made fairly, and upon adequate consideration, with an insane person, but without notice of his insanity, cannot be rescinded, and while other authorities hold that a conveyance from an insane person upon adequate consideration will not be avoided as against a grantee taking without notice of the insanity without restoring the consideration, we know of no case holding that mere bona fides will protect the grantee of an insane person against a bill to set aside the deed, where restitution is made. The decree in this case makes complete restitution to Algire. While this is equitable, we do not think it necessary, and as to Mowry, restitution of the purchase money paid by him to Algire, if any, must rest between those two. It is well said by Thomas, J., in *Gibson v. Soper*, 6 Gray, 279, that "to say that an insane man, before he can avoid a voidable deed, must first put the grantee in statu quo, would be to say in effect that in a large majority of cases his deed shall not be avoided at all. The more insane the grantor was when the bargain was made, the less likely will he be to retain the fruits of his bargain so as to make restitution. It would be absurd to annul the bargain for the mental incompetency of a party, and yet to require of him to retain and manage the proceeds of his sale so wisely and discreetly that they shall be forthcoming when, with restored intellect, he shall seek its an-

nulment." The same doctrine is held in other cases, notably that of *Hovey v. Hobson*, 53 Me. 457, and *Crawford v. Scovell*, 94 Pa. St. 48. In the Maine case it was held that the bona fide grantee of the grantee of an insane person must rely on the covenants of his deed for restitution, and that it is not necessary that he should be placed in statu quo by the plaintiff, in a suit to vacate the conveyance.

5. Some argument is based upon the fact that the farm was a homestead, and that Lena Paulsen joined in the conveyance. It was charged in the petition that she did so under duress from her husband. We think the evidence is not sufficient to show duress, but that question is not material. The homestead can only be conveyed by an instrument executed and acknowledged by both husband and wife. Comp. St. c. 38, § 4. The instrument in question was not validly executed by the husband, for want of mental capacity; the wife's joining in did not validate it. Moreover, she was a party to the action, is bound by the decree, and the decree requires her to reconvey all that she has received. The decree of the district court is right, and is affirmed. The other commissioners concur.

JANSEN et al. v. WILLIAMS.

(Supreme Court of Nebraska. May 3, 1893.)

SALE OF LAND—PURCHASE BY AGENT—COMMISSION—INSTRUCTIONS.

1. Instructions should be given clearly, concisely, and without contradictory statements of the rules by which the jury should be governed. If, however, the instructions are not in compliance with this requirement, the verdict will not be set aside, if, upon the evidence, no other verdict could be sustained.

2. An agent is required to disclose to his principal all the information he has touching the subject-matter of the agency, and his relation to his principal forbids his becoming a purchaser thereof for his own benefit, in any way, without the full knowledge by the principal of this fact, and the principal's acquiescence therein, with such knowledge. The burden of proving such knowledge and acquiescence is upon the agent.

3. A commission cannot be collected by the agent for his services as such, if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Tibbets, Judge.

Action by John C. Williams against Albert W. Jansen and W. L. Murphy. Judgment for plaintiff. Defendants bring error. Affirmed.

Jeffrey & Rich, for plaintiffs in error. Adams & Scott, for defendant in error.

RYAN, C. This action was brought by the defendant in error to recover the sum of \$100 retained as commission from the proceeds of the sale of real property, effected by the plaintiffs in error. The petition al-

leged the employment of plaintiffs in error to sell said real property for the sum of \$3,000, and that the plaintiff named in said petition meantime reserved for himself the right to sell said property if he met with an opportunity to do so before the same should be sold by plaintiffs in error; that, soon after such employment, the plaintiff below entered into negotiations with one E. T. Hartley for the sale of said property, and was about to sell said property to said Hartley for the sum of \$3,300; that, during such negotiations with said Hartley, plaintiffs in error, for the purpose of preventing the defendant in error from making said sale, and wrongfully compelling the defendant in error to pay plaintiffs in error a commission of \$100, induced said Hartley to abandon his negotiations with defendant in error, and agree to pay to them, the plaintiffs in error, \$3,000 for said property; and that thereupon plaintiffs in error represented to defendant in error that they had sold said property for \$3,000 to a good, responsible party, and induced the defendant in error to execute a deed to Albert W. Jansen, one of the plaintiffs in error, and defendant in error executed the same, believing that said grantee was another than the said plaintiff in error, and thereby deceived and defrauded the defendant in error to defendant in error's damage in the sum of \$100. The answer admits the placing of said property in the hands of plaintiffs in error for sale at \$3,000, but alleged that said E. T. Hartley was obtained by plaintiffs in error as an original purchaser, to whom they sold the property without any knowledge of any previous negotiations with defendant in error, and that the deed was taken to said Jansen only for the purpose of securing money advanced to said Hartley, and that the acts in connection with said transaction were in good faith. To this answer there was a reply in the nature of a general denial.

The testimony was conflicting as to some matters which are deemed as of minor importance, but, as to such as were essential to the determination of this case, the difference was but slight. It was fairly deducible from the testimony that Williams employed Jansen & Murphy to sell the real property in question; that he afterwards had negotiations with said Hartley for an exchange of said property for property owned by Mr. Hartley, of the fair value of \$3,300; that Hartley, pending these negotiations, went to Messrs. Jansen & Murphy, and, learning from them that the property could be purchased from them for \$3,000, he dropped the negotiations with Williams; that for some reason the title to the property was taken from Williams and wife to A. W. Jansen, one of the plaintiffs in error, whose identity with his agent of that name, Williams testifies, he was unaware of when said deed was executed; that Williams inquired of Murphy who was the purchaser, and was informed by Murphy that the purchaser did

not wish his name known in the matter, and therefore did not disclose it; that Jansen, in answer to the same inquiry of Williams, met it with the same refusal, at the same time saying that it made no difference, as the party was good. It was testified by Jansen and Murphy on the trial in the district court that the reason the title was taken in Jansen's name was that Hartley was not able, just then, to advance the money to make the cash payment, and therefore this money was advanced by plaintiffs in error to insure the present consummation of the trade, rather than to wait 10 or 12 days, until Hartley would have money which would then be due him. Mr. Murphy fixed the date on which Mr. Williams consented to accept \$3,000 for the property at September 7th, and testifies that on account of defects in the field notes, suggested by plaintiffs in error, the deeds were not executed and delivered until about three weeks after that date. It is not shown by the testimony when Mr. Hartley obtained his money, and paid it to plaintiffs in error. The fact that the settlement of the matter was held in abeyance until the expiration of a greater time than was necessary for Mr. Hartley to obtain his money, on his own estimate, to repay Jansen & Murphy, is possibly of no significance, and yet it might have been one circumstance contributing to the injury complained of. It would not be strange, or wholly illogical, if, from the circumstance that the title was not really taken in the name of Jansen until after the time Hartley's money was due, the jury should have inferred that delays were interposed by plaintiffs in error to prevent the consummation of the trade until Hartley put up his own money, with 8 per cent. per annum for the interim to repay Jansen his advancement.

Upon the admission or rejection of evidence, no serious question for our determination was presented. The scope of the cross-examination to be allowed is largely in the discretion of the trial judge, and we cannot see that such discretion was improperly exercised. As the only alleged error upon that score is sufficiently met by this general observation, it will not receive any further attention.

There were some instructions given at the request of the plaintiffs in error which presented the law more favorably to the plaintiffs in error than the facts warranted, but of these the plaintiffs in error cannot complain. These instructions based the rights of the plaintiffs in error to a commission upon but a partial statement of the facts upon which such right depended. For instance, the first paragraph of the instructions given at the request of the plaintiffs in error was as follows: "You are instructed that if you find from the evidence that defendants Jansen & Murphy negotiated the sale of the plaintiffs' property to Hartley, or to Jansen

for Hartley, upon the terms stipulated by Williams at the time he placed the property in their hands for sale, without any knowledge of the previous negotiations between plaintiff and Hartley, then your verdict should be for the defendant." This instruction leaves out of consideration the fact that Jansen was the agent of Williams, who, as such, was bound to obtain for his principal the best price obtainable. It further recognizes the unqualified right of an agent to purchase property of a principal, placed in his hands for sale. It gives the agent authority to deal with the property absolutely as he sees fit, provided he obtains the price fixed by the principal, and has no knowledge that the principal is in negotiation for a better price; and this to the extreme of buying the property himself, provided he buys for some one else,—a very slight guaranty of protection to the principal. Most likely, if plaintiffs in error had been successful in the district court, these considerations would have necessitated a reversal of the judgment. In this connection it might not be amiss to suggest that the trial judge has a duty to perform, as well in the refusal of pernicious instructions as in giving correct ones. The jury is supposed to obtain its sole ideas of the law applicable to the case from the presiding judge. Upon him, therefore, devolves the duty of clearly and concisely instructing, rather than hopelessly confusing. The statute requires the instructions to be in writing, that they may be prepared with due deliberation, and with the exactness necessary to assist jurymen unlearned in the law to apply principles perhaps for the first time brought to their attention. These instructions should therefore be clear and concise, and, above all things, should be exact, and free from contradictions. These remarks are made in this connection, for, with the instructions referred to above, there were given others entirely free from objection.

At the request of the defendant in error the court instructed the jury as follows: "An agent ought, as far as possible, to represent his principal; and, to the best of his ability, he should endeavor to successfully accomplish the object of his agency. It is also his duty to keep his principal fully and promptly informed of all the material facts or circumstances which come to his knowledge, and, since he is expected to represent his principal, he cannot have a personal interest adverse to the interest of his principal; and if he deals with the subject-matter of the agency the profits will, as a general rule, belong to the principal, and not to the agent. In all things he is required to act in entire good faith towards his principal. There are duties which the law imposes upon an agent, without any express stipulations on the subject; and one of these duties of an agent is to keep his principal informed of his acts, and to inform him within a reasonable time of sales made, and to give him a timely no-

tice of all facts and circumstances which may render it necessary for him to take measures for his security. An agent cannot act for his principal and for himself in the same transaction, by being both buyer and seller of property, and has no right to act as the agent for others for the purchase of property without the knowledge or consent of such owner, nor to take any advantage of the confidence which his position inspires to obtain the title in himself. If you find that the defendants were the agents of the plaintiff for the sale of the property mentioned in the petition, and that in making the sale they purposely kept from the plaintiff any of the material facts touching said sale, for the purpose of subverting their own interest, and intended to and did keep the plaintiff in the dark as to such facts until after the said sale was consummated, and deed executed by said plaintiff, then I instruct you that they are not entitled to a commission for selling the same."

In *Stettinische v. Lamb*, 18 Neb. 627, 26 N. W. Rep. 374, is this language: "The rule is well settled that a party will not be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account." This statement was sustained by several authorities cited, and of its correctness there can be no doubt. In the light of adjudged cases and of the text-books, therefore, let us see what duty the plaintiffs in error had to perform towards the defendant in error in respect of the real property which was the subject-matter of the agency between them. Upon this subject the following language is found in *Pom. Eq. Jur. § 959*: "In dealings without the intervention of his principal, if an agent for the purpose of selling property for the principal purchases it himself, or an agent for the purpose of buying property for the principal buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable. It will always be set aside at the option of the principal. The amount of consideration, the absence of undue advantage, or other similar features, are wholly immaterial. Nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts." In *Porter v. Woodruff*, 36 N. J. Eq., on page 179 et seq., the following language is found: "The general interests of justice, and the safety of those who are compelled to repose confidence in others, alike demand that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer, and places himself in a position towards his principal where his in-

terests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires, and his duty to his principal demands. He is no longer the agent, but an umpire. He ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide between his principal and himself what is just and fair. The reason of the rule is apparent. Owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer; and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interest as more important, and entitled to more protection, than his own. In such cases the courts do not stop to inquire whether the agent has obtained an advantage or not, or whether his conduct has been fraudulent or not. When the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself, and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning the merits of the transaction,—whether the agent has been able so far to curb his natural greed as to take no advantage,—but they at once pronounce the transaction void because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed, or an unjust advantage gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed, or unfair advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it, or prove it in such a manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against the agent acting in a dual character is made broad enough to cover all his transactions. The rights of the principal will not be changed, nor the capacities of the agent enlarged, by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price. No such distinction is recognized by the adjudications, nor can it be established without removing an important safeguard against fraud. *Benson v. Heathorn*, 1 *Younge & C.* 326; *Conkey v. Bond*, 34 *Barb.* 276, 36 *N. Y.* 427." In *Ruckman*

v. Bergholz, 37 N. J. Law, 440, is found the following language: "The judge, distinguishing this case from one where the price was left open to the negotiations of the agent, instructed the jury that, though the plaintiff was interested in the purchase when it was made, he might, nevertheless, recover his commissions as agent, notwithstanding the defendant was not aware of the existence of such interest. In this there was error, for it is a fundamental rule that an agent employed to sell cannot himself be a purchaser, unless he is known to his principal to be such. *Dunl. Paley, Ag. 33; Story, Ag. § 210*; and other cases cited. And this rule is not inapplicable, nor is it relaxed, when the employment is to sell at a fixed price, for it springs from the prohibitory policy of the law, adopted to prevent the abuse of confidence, and to remove temptation to duplicity. It requires a man to put off the character of agent when he assumes that of principal." *Mechem, Ag., in section 455*, states the rule as follows: "The agent will not be permitted to serve two masters without the intelligent consent of both. As is said by a learned judge, so careful is the law guarding against the abuse of fiduciary relations that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them, he need not show himself damnified. Whether he has been or not, is immaterial. Actual inquiry is not the principle the law proceeds upon in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit the agent to place himself in a situation in which he might be tempted by his own private interest to disregard that of his principal." Citing *People v. Township*, 11 Mich. 222. "This doctrine, to speak again in the beautiful language of another, has its foundation, not so much in the commission of actual fraud as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil,' and that caused the announcement of the infallible truth, 'A man cannot serve two masters.'" These quotations we shall properly close with the language of *Story, Ag. § 210*, quoted, with the approval of this court, in *Englehart v. Plow Co.*, 21 Neb. 48, 31 N. W. Rep. 391: "In this connection, also, it seems proper to state another rule in regard to the duties of agents, which is of general application, and that is that, in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious considerations that the principal bargains in the employ-

ment for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may; and even if impartiality could possibly be presumed on the part of the agent, where his own interests are concerned, that is not what the principal bargains for, and in many cases it is the very last thing which would advance his interest. If, then, a seller were permitted, as an agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other, and thus a temptation, perhaps in many cases too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity."

It is unnecessary to quote further illustrations of the correctness of the instructions given the jury at the request of the defendant in error. The same principles announced in these instructions pervade all the text works, and the decisions of the courts, which have to deal with the relations of principal and agent. In none of them is recognized the right of the suppression of important facts, of which the principal had a right to be informed, as a part of "the secrets of the real-estate business," as was claimed by plaintiff in error *Murphy* in his testimony. The evidence fully sustains the verdict which was rendered by the jury. Indeed, a verdict different would probably, of necessity, have been set aside, as has been shown by abundant citation of text writers and authorities. The instructions clearly gave the law to the jury, were applicable to the evidence, and the judgment of the district court must therefore be affirmed. The other commissioners concur.

BARR et al. v. WARD.

(Supreme Court of Nebraska. May 3, 1893.)

ACTION ON BOND—EVIDENCE—PLEADINGS.

1. Plaintiffs in error, as sureties, signed a bond to a manufacturing company that one W. would pay for all goods to be furnished him by the manufacturing company. One Ward brought suit on this bond against the sureties, alleging that on the date thereof the manufacturing company sold a bill of goods to W.; that he had not paid for the same; and that the manufacturing company had assigned the account to Ward. To sustain this allegation at the trial, he offered in evidence a note made by W. to the manufacturing company of the same date as the bond, with evidence that the note was given "for goods delivered, or to be delivered," by the manufacturing company to W. Held irrelevant, under the pleadings.

2. The petition against the sureties also contained a second cause of action, claiming damages for expenses Ward had been put to in prosecuting his claim against W. to judgment. *Held* not to state a cause of action against the sureties.

3. On the trial plaintiff was permitted to read in evidence to the jury protest of the note, showing protest charges, and a transcript of a judgment rendered on said note in favor of Ward, showing constable and justice of the peace costs. *Held* error.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Field, Judge.

Action on a bond by Obediah S. Ward against J. Frank Barr and another. Plaintiff had judgment, and defendants bring error. Reversed.

W. Henry Smith, for plaintiffs in error. Abbott, Selleck & Lane, for defendant in error.

RAGAN, C. Obediah S. Ward sued J. Frank Barr and F. L. Evarts and E. J. Witte in the district court of Lancaster county. The substance of his petition was as follows: That on the 7th day of February, 1889, the defendant Witte, as principal, and Barr and Evarts, as sureties, executed and delivered a bond to the Western Manufacturing & Novelty Company in the penal sum of \$1,000, conditioned that said Witte should pay for all goods bought by him of said novelty company. A copy of the bond is set out in the petition, the important clauses of which are as follows: "Whereas, the Western Manufacturing & Novelty Company * * * has entered into a contract with E. J. Witte to furnish and sell him, from time to time, goods, wares, and merchandise on credit: * * * Now, therefore, the said E. J. Witte, as principal, and J. Frank Barr and F. L. Evarts, as sureties, are held and firmly bound unto the said Western Manufacturing & Novelty Company in the penal sum of one thousand dollars; * * * that the said E. J. Witte will well and faithfully pay for said goods, wares, and merchandise so to be furnished and sold to him under said contract; and that he will do so within the time agreed upon between himself and said company." The petition also contained a copy of the contract mentioned in the bond, but it is not quoted, as it is not material here. The petition further alleged that, in pursuance of the contract, the novelty company did, on the 7th day of February, 1889, sell to E. J. Witte a bill of goods, amounting in value to the sum of \$188.50; that afterwards, to wit, on or about the — day of February, 1889, the Western Manufacturing & Novelty Company assigned the account for said goods to the plaintiff; that Witte had not paid said sum, or any part thereof; that the plaintiff has prosecuted a suit to judgment against Witte. Execution had been returned "No property found." For a second cause of action, the plaintiff alleged that his necessary costs and expenses incurred in the prosecution of said claim against the said Witte

amounted to the sum of \$65,—with the usual prayer for judgments against the defendants. The answer was, in effect, a general denial. There was a trial to the jury; verdict and judgment for the plaintiff; and the sureties, Barr and Evarts, on whom alone there was service, bring the case here for review.

In order for the plaintiff to recover on his first cause of action, it was necessary for him to prove by competent testimony that the Western Manufacturing & Novelty Company had, since the execution of said bond, sold to Witte a bill of goods; that the right of action of the Western Manufacturing & Novelty Company therefor had been assigned to the plaintiff; and that the goods were unpaid for. There is no proof in this record that the Western Manufacturing & Novelty Company sold a bill of goods to Witte after the execution of the bond, and assigned the account therefor to the plaintiff.

As to the second alleged cause of action in the petition, it does not state a cause of action against these plaintiffs in error; and no evidence whatever, of any character, was competent to be introduced under the said second alleged cause of action. On the trial the plaintiff offered in evidence a note bearing date February 7, 1889, for \$188.50, payable to the order of the Western Manufacturing & Novelty Company, and signed by E. J. Witte. This note bore an indorsement, without date, as follows: "The Western Manufacturing & Novelty Company. G. B. Cannon, Sec'y." To the introduction in evidence of this note, the defendants objected, on the ground of its being incompetent testimony. The court overruled the objection, and permitted the note to be read in evidence to the jury. This was error. If the note was offered for the purpose, as it seems to have been, of showing that Witte bought goods of the Western Manufacturing & Novelty Company after the date of the bond, and gave this note therefor, then it was incompetent, under the pleadings. It did not meet the allegation of the petition, as that does not declare on a note at all, but on an assigned account for goods sold and delivered. If it was claimed that Witte has bought the goods of the Western Manufacturing & Novelty Company after the execution of the bond, that he had given this note for those goods, and the note had been sold to the plaintiff, the petition should have so alleged, and, until the pleadings were amended, the note could not go in evidence. The counsel for plaintiff, so far as this record discloses, made no application to the court for leave to amend his petition. It was incompetent for another reason: Assuming it to be an account against Witte for goods sold and delivered to him by the Western Manufacturing & Novelty Company,—and there is some testimony which tends to show that it was given for goods,—there is no evidence in the record to show when the goods were sold to Witte, if at all, and there is no

evidence whatever that the indorsement on the back of this note was made by G. B. Cannon, the secretary of the company, to say nothing about the lack of proof as to Cannon's authority to sell the company's notes. There is still another error in admitting this note in evidence: The note was offered, together with the protest of the same, and they all went in together. I do not know under what theory the plaintiff could have offered in evidence this protest, except it was to sustain his allegation of damages in his second cause of action; and, as we have already seen, no evidence could be adduced under that cause of action. The contract of the sureties on Witte's bond was not to pay costs and expenses incurred by anybody in suing Witte for goods sold to him by the Western Manufacturing & Novelty Company, nor was their contract to pay protest fees on notes given by Witte to that company. Their contract was to pay for the goods that he bought, and, being sureties, they are entitled to have this contract construed with the greatest strictness, and it can be extended in no particular to make them liable beyond the very letter of their contract.

On the trial the plaintiff also put in evidence, over the objection of the defendants, a transcript of the proceedings before a justice of the peace in a suit brought by this plaintiff against Witte and a large number of others on the note above referred to. This was error. First, it was incompetent under the pleadings, as this suit is not a suit upon a judgment, and there is no foundation laid for the introduction of any such transcript. It was probably introduced in evidence to support the damages alleged by the plaintiff in his second cause of action.

The court below, notwithstanding the pleadings, tried this case upon the theory that the note above mentioned was given by Witte to the Western Manufacturing & Novelty Company after the execution of the bond sued on for goods purchased by Witte, and that the note stood for an account, and the indorsee of the note stood in the place of the assignee of the account. Aside from the fact that this theory was wholly incompetent under the allegations of the plaintiff's petition, there is absolutely no proof in this record as to when, if ever, the Western Manufacturing & Novelty Company sold any goods to Witte. There was some testimony which tended to show that the note was given for goods delivered, or to be delivered, by the novelty company to Witte. The plaintiff in his direct testimony testified that he had a talk with Barr, one of the defendant sureties, "and Mr. Barr admitted that it [the note] was given for goods delivered, or to be delivered." This testimony was not competent, as against the other surety, Evans, and counsel for defendants should have objected to it on that ground. It was probably competent to go to the jury for what-

ever it was worth as against Barr; and even this admission is denied by Barr, and the so-called "admission" and its denial constitute all the evidence on the subject as to the consideration for the note. The plaintiff was also asked: "Question. Did you ever, at any time, have a conversation with Witte regarding the payment of this note? Answer. Yes, sir. Q. State what was said, if anything, in regard to the signature on the note." This was objected to by defendants' counsel, on the ground that Witte was not a competent witness. The objection was overruled, and the witness answered: "A. Mr. Witte said he gave this note for the purpose of getting goods." This answer was not responsive to the question, and could have been stricken out, and probably would have been, if counsel for defendants had asked it. The court then asked this question of the plaintiff: "Q. That is, the note was for the purpose, [of getting goods?] A. Well, yes." This testimony was clearly incompetent, and its admission was highly prejudicial to these defendants; but, strange enough, there was no objection made by their counsel to the question of the court. As the case has to be tried again, it may be well to observe that the admissions or declarations of Witte, this principal, are not competent evidence against these sureties. For the foregoing reasons, the judgment of the district court is reversed, and this cause is remanded to the court below, with instructions to set aside the judgment rendered herein, and to grant the plaintiffs in error a new trial. The other commissioners concur.

DAWSON et al. v. WILLIAMS et al.

(Supreme Court of Nebraska. May 4, 1893.)

PRESUMPTIONS ON APPEAL — EXHIBITS — BILL OF EXCEPTIONS — ERRONEOUS INSTRUCTION — GIVING ON REQUEST — COMPLAINT.

1. Exhibits which the record shows were offered in evidence will not be presumed to have been held from the consideration of the jury, in support of a contention that the verdict was unsupported by the evidence.

2. If the bill of exceptions discloses that without doubt important evidence has been therefrom omitted, the settlement and authentication of the bill of exceptions will not control, though therein the recitations are to the contrary, and in such case the verdict will not be disturbed as contrary to the evidence.

3. A party asking the court to give an instruction to the jury cannot complain because this request is complied with, even though such instruction incorrectly states an issue to be tried.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Chapman, Judge.

Action by Anson Williams and others against Ira M. Dawson and another. Judgment for plaintiffs. Defendants bring error. Affirmed.

Abbott, Selleck & Lane, for plaintiffs in error. J. E. Philpott and Billingsley & Woodward, for defendants in error.

RYAN, C. On the 11th day of August, 1887, Anson Williams, the Valley National Bank of Red Oak, Iowa, and S. M. Melick, sheriff, etc., filed their petition against Ira M. Dawson and William Roggenkamp in the district court of Lancaster county for the recovery of \$341.60 and interest from March 29, 1886. A verdict was returned December 6, 1889, in favor of the above-named Anson Williams et al. against Ira M. Dawson et al. for \$425.69, upon which judgment was duly rendered, from which the said Dawson and Roggenkamp prosecute error proceedings. The petition above alluded to alleged that on December 16, 1884, Ira M. Dawson began in said district court a suit of replevin against Anson Williams et al. for the possession of certain personal property, giving therein a replevin undertaking in the penal sum of \$6,000, conditioned as required by law, the subject-matter to be returned being 190 head of two and three year old cattle, 57 head of hogs, 3 horses, and some hay. All necessary averments were made to entitle Williams et al. to a recovery, provided such averments were proved. The answer to the petition was made by Roggenkamp alone, who alleged that when he was solicited to sign said replevin bond he said he was willing to sign the same so far as it concerned the cattle, but not in reference to anything else to be taken on the writ; that it was agreed by Williams et al. with said defendant Roggenkamp that the said bond should not render the said Roggenkamp liable for the value or return of the horses or other property than the cattle in said bond described; that, pursuant to said agreement, said parties made a written stipulation that Roggenkamp's liability was to be limited to the cattle or their value; "that said stipulation was made and signed at the same time the said bond was signed, and was filed in and made a part of the records in said case;" that said stipulation has been lost or mislaid. The answer then closed in this language: "Defendant, further answering, says that upon the trial of the right of property in the said cattle the jury found that the right of possession and property was in the said Dawson, plaintiff in said replevin action, and final judgment was rendered thereon in favor of said Dawson therefor, and against plaintiff herein, defendant in said replevin action. Defendant further says that he never signed any replevin bond for the return of the hogs, horses, or hay in said petition described, or for the value thereof, or for any portion thereof. Defendant, further answering said petition, says he denies each and every allegation in said petition contained, not hereinbefore expressly admitted, and demands judgment

that he go hence without day and recover his costs." To this answer there was, in effect, a general denial by way of reply.

1. The first question discussed in the brief of the plaintiffs in error is in reference to the failure, as said plaintiffs claim, to introduce in evidence the original replevin bond upon which the action is brought, from which, and the absence of the bond from the bill of exceptions, plaintiffs deduce the conclusion that there was not sufficient evidence to sustain the verdict; therefore that this cause should be reversed. The bill of exceptions shows that plaintiffs offered a bond of replevin in evidence, to which defendants objected on various grounds, which objections were overruled, and an exception taken, and that the bond was marked "Exhibit C." Plaintiffs then moved to strike out the bond because not accompanied by the stipulation contained in the answer, which motion was withdrawn. That the bond was sufficiently in evidence is apparent.

2. Again, plaintiffs in error state the grounds of their next contention thus: "The evidence with reference to the judgment which it is alleged in the petition was rendered in said replevin suit is all found on page 8 of the bill of exceptions. We quote it in full: 'Question. What book have you now in your hands? Answer. District Court Journal M. Q. What page? A. The page this case is on is 131. Q. What case do you refer to? A. The case of Ira M. Dawson versus Anson Williams et al., No. 4,010.' Then follows the reporter's notes as follows: 'The plaintiff offers in evidence page 131, District Court Journal M, in the case of Ira M. Dawson versus Anson Williams et al., marked "Exhibit B." There is no further reference in the record to the contents of that page. Exhibit B is not in the bill of exceptions.' Explanatory of the above it is proper to remark that the identification of page 131 of Court Journal M was in the above trial by the clerk of the district court of Lancaster county. The contention of plaintiffs in error is that by the above record, considered with the fact that no page 131 is found in the bill of exceptions, it is shown that it was not presented for the consideration of the jury. It is, we believe, of common practice to offer in evidence a document or other written matter, and, having identified it, defer the reading of it till some later stage in the proceedings—possibly the argument to the jury—is reached. There is nothing objectionable in such a practice, and the offer of the page was sufficient to its consideration as evidence. We cannot assume that this page 131 was never in fact read or made known to the jury; hence this argument of plaintiffs in error must fail.

3. But there is another phase in which the contention of plaintiffs in error does become important, though not to their advantage. The bill of exceptions shows the absence of the replevin bond sued upon,

and of page 131 of District Court Journal M, notwithstanding these both were, as we have seen, introduced in evidence. Possibly it might be that as to the bond the parol evidence of its purport should be treated as a waiver of all objections as to the failure to incorporate said bond in the bill of exceptions, but there is no such consideration to be urged as to page 131 of the judgment docket. It is true that the bill of exceptions recites that all the evidence given is thereby preserved. There is indubitable evidence presented by the bill of exceptions, too, that these two necessary parts are missing therefrom. In such case it has been held that the certificate that the bill of exceptions contains all the evidence used on the trial will not be taken as conclusive on that point. *Railway Co. v. Hays*, 15 Neb. 224, 18 N. W. Rep. 51; *Oberfelder v. Kavanaugh*, 29 Neb. 427, 45 N. W. Rep. 471. Each of these missing exhibits was important, as plaintiffs in error most strenuously and justly insist. It therefore follows that the bill of exceptions cannot be further considered as showing whether or not the verdict was sustained by the evidence.

4. Instruction No. 6 is criticised by the plaintiffs in error as one given by the court upon its own motion. This instruction is open to serious criticism, for by it the jury were told in effect that the execution of the bond in suit was admitted, whereas it clearly appears from the above-quoted averments of the defendants' answer that no such admission was in strictness made. It may be that the instruction complained of was given by the court upon its own motion, but we must be guided by the record alone. This instruction is there found under the designation of "Instruction asked for by defendant Roggenkamp," and, having asked this instruction, the plaintiff in error cannot properly complain of it, even if it misstates the issues. No other error is pointed out or perceived in the instructions given, or in the refusal to give those asked. The judgment of the district court is affirmed. The other commissioners concur.

HORBACH v. MARSH et al.

(Supreme Court of Nebraska. May 9, 1893.)
CORPORATIONS — JUDICIAL SALE OF PROPERTY —
PURCHASE BY OFFICER—LIMITATION OF ACTIONS
—AMENDMENT—HARMLESS ERROR.

1. An officer of a corporation for pecuniary profit, who in good faith purchases at judicial sale the property of the corporation, will be protected in such purchase, provided he shows affirmatively that he has, as indicated, paid the full value of the property of which he so became the purchaser.

2. A stockholder of a corporation, who seeks as such to impress with an express trust the property of such corporation regularly sold at judicial sale to an officer of such corporation, should commence proceedings within a reasonable time after such sale, and must, when such

proceedings are unreasonably delayed, establish by a preponderance of the evidence the facts upon which such trust is based.

3. The lapse of four years after the discovery of the alleged frauds, or of such facts as were sufficient to demand such investigation by plaintiff as would have disclosed the alleged frauds, bars an action brought for relief upon the ground of such fraud.

4. After the submission of an equitable action for final determination, there was no prejudicial error in refusing an amendment of plaintiff's petition proposed to meet the alleged proofs, where, upon a full consideration of all the evidence upon appeal in this court, it is found that the relief prayed must in any event be denied.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Douglas county; Wakeley, Judge.

Action by John A. Horbach and others against William W. Marsh and others. Defendants had judgment, and plaintiff Horbach appeals. Affirmed.

J. H. Blair, for appellant. Geo. E. Pritchett, for appellees.

RYAN, C. The petition in this case was filed in the district court of Douglas county, on the 16th day of November, 1889, by the plaintiff therein, on behalf of himself and all other stockholders of the Omaha Horse Railway Company, of like interest with plaintiff. He alleged that the Omaha Horse Railway Company was created a corporation by an act of the territorial legislature of the then territory of Nebraska, approved February 18, 1867, and that as such corporation it ever since and still exists. That plaintiff is the owner of 20 shares of the first issue of 10,000 shares of the fully paid-up stock of said company, and became such owner on January 1, 1879. That on May 19, 1877, the Omaha Horse Railway Company was indebted to Peter E. and Joseph D. Iler in the sum of \$700, which was part of the indebtedness of \$20,000 of said company, secured by a mortgage and trust deed to Joseph H. Millard, as trustee, upon all the property of the company, of the value of upwards of \$100,000. That though the sum so secured was due, yet the said Joseph H. Millard, trustee, although requested, refused to bring suit for the foreclosure of said mortgage, because the property was more than ample security for the debt, and the company could have easily raised the money and paid said debt, and it was its duty so to do. That on May 19, 1877, the defendant Marsh was one of the directors and the president of said Omaha Horse Railway Company, and owned a large number of its shares of stock, and had the management of said company, and that it was in his power, as such officer, to raise the money to pay the debts of said company, which he failed to do, and permitted the said Ilers to bring said foreclosure suit, and thereafter procure himself to be made a party defendant in said action. That a decree of foreclosure was rendered in said suit on January 6, 1879, and that pending said suit said Marsh

bought up other shares of the stock of said company, so that when decree was rendered Marsh was owner of a majority of the stock of said company, and assigned to Frank Murphy and W. A. Smith, respectively, five shares of said stock, without consideration. That while said suit was pending an accounting was had, and it was found that the total indebtedness of the company secured by said mortgage was \$29,413.01, and that under a second mortgage there was due the further sum of \$3,743.59, making the total indebtedness \$33,156.60, and in said foreclosure proceedings the decree was that, unless the said sum found due was paid within ten days from its rendition, the mortgaged property should be sold to pay the debt. That on March 8, 1879, there was a sale, under said decree, of the property of said Omaha Horse Railway Company, at which defendant Marsh, then being a director, as well as president and superintendent of said company, bid off said property for \$24,500, and took to himself a sheriff's deed therefor. The petition stated in detail that by a resolution the place of meeting of the stockholders of said Omaha Horse Railway Company was fixed at an obscure place, said resolution having been adopted at a meeting of the stockholders of said company at which only W. W. Marsh, Frank Murphy, and W. A. Smith were present. That meetings were held at such obscure place, and without due notice to the stockholders of said company. That a deed to them of three-fifths of the property of the Omaha Horse Railway Company was made by Marsh, Guy C. Barton, Frank Murphy, and S. H. H. Clark. That to wrong, cheat, and defraud said company and its bona fide stockholders out of its and their property, the said Marsh, Barton, Murphy, and Clark made to the Omaha Horse Railway Company the following proposition: "To the Omaha Horse Railway Company: The undersigned hereby offer and propose to sell and convey to you the franchise of said company and all the lines of street railway now operated by us in the city of Omaha, Nebraska, together with all the horses, harness, street cars, barns, and other property connected therewith and owned and used by us in the operation of said street railway, and also to pay or procure the discharge of all the indebtedness now in judgment against you, for and in consideration of the issue to us of the full-paid stock of said company of the probable value of \$300,600, and the bonds of said company in the sum of \$233,000, payable in 20 years, with interest at the rate of 6 per cent. per annum, payable semiannually, secured by a first mortgage on said property and all property of every kind which may be hereafter acquired by said company. Dated at Omaha, February 12th, 1884. W. W. Marsh. Guy C. Barton. Frank Murphy. S. H. H. Clark." That at a meeting of the stockholders of said company a resolution was adopted accepting the above proposition. That at

said meeting Clark, Murphy, Barton, Marsh, and W. A. Smith were elected directors of said company. That at said time the said company was not indebted in any sum whatever, its earnings being sufficient to pay all indebtedness, which was correctly stated in the aforesaid decree of date January 6, 1879, and its expenses. That its earnings were largely in excess of what was necessary to pay both its indebtedness and running expenses. That said property, when said proposition was made and accepted, was of the value of over \$200,000 above all debts, and was free of all judgments and incumbrances, and that there was then a balance in the hands of Marsh and Murphy, as would appear upon an accounting duly had. That pursuant to said accepted offer, Marsh, Clark, Barton, and Murphy, by a deed dated May 13, 1883, pretended to convey to said Omaha Horse Railway Company all its own property, the consideration named in said deed being \$593,000, or \$93,000 more than twice what it was rated at when Marsh deeded three-fifths of it three months before to Murphy, Clark, and Barton. The petition further alleged that on July 11, 1884, the said Clark, Murphy, Barton, and Smith, who were then directors of said company, chosen on February 20, 1884, unlawfully, wrongfully, and without any consideration moving therefor, issued and distributed among themselves \$300,600 of stock, and \$233,000 of the bonds of said company, secured by mortgage upon the property of the company made also by themselves May 30, 1884. What was done with the remaining \$67,000 of said bonds the plaintiff alleged that he was unable to state; and demanded an accounting. The petition further, in substance, stated that, by a combination between the parties last named as directors, the property of the Omaha Horse Railway Company was taken possession of, and a consolidation of said company, and a transfer of all its property, and a merger of its franchise with that of another company then in existence, was in contemplation, and if not prevented would be consummated; that the several transfers from the said Marsh to the other parties named as directors was simply part of a scheme to defraud the other stockholders of the Omaha Horse Railway Company of their rights as such in said company. The manner in which this was attempted to be carried on is alleged at great length and considerable detail in the petition, but it would subserve no profitable use to set out these details more fully than has already been done.

The answer admitted the indebtedness to the Hers, the foreclosure, and the purchase thereunder by Marsh of the property of the Omaha Horse Railway Company, but denied that there was in said purchase or in any other transaction any intent to cheat or defraud any stockholder of said Omaha Horse Railway Company, and alleged that whatever was done was simply done by said

Marsh in his own right and for the protection of his own interest. It alleged that, at the time the action was brought to foreclose the mortgage executed to Millard as trustee, the company was hopelessly insolvent; that the property of the company was not worth more than one-half of its indebtedness; that besides the mortgage indebtedness there was a large floating indebtedness; and, in effect, denied the material averments of the petition. The answer also alleged that on the 2d day of April, 1889, the Omaha Street Railroad Company was formed by the consolidation of the Omaha Horse Railway Company and the Omaha Cable Tramway Company, and that ever since said 2d day of April, 1889, all the property, rights, and franchises of said two constituent companies have been owned and operated and in the possession of said Omaha Street Railway Company. The defendant also pleaded the statute of limitations in this connection.

Upon these pleadings the testimony was taken, and in July, 1890, the same was taken under advisement by the court, though no final decision was made until February 11, 1891. In December, 1890, the plaintiff applied for leave to amend his petition so as to conform, as he alleged, to the proofs adduced on the trial. The purpose of this amendment was to allege that Marsh encouraged the Hlers to bring the foreclosure suit, and after it was commenced, fraudulently contriving and intending to get control of the stock and property of said company, and to cheat plaintiff and others out of their stock, shares, and interest in said company, procured himself to be made a defendant, as hereinbefore stated. It further alleged, in addition to the first averments of the original petition, that upon an accounting, and before the sale under the decree obtained by the Hliers against the Omaha Horse Railway Company, it was found that said company was also indebted, under a judgment known as the "Doolittle judgment," in the sum of \$5,008.28, and under a judgment in favor of the State Bank in the sum of \$2,515.58, and that the total indebtedness of said company secured as above stated—that is, by first and second mortgages hereinbefore referred to, and under said judgments—all told, amounted to the sum of \$40,630.46, and that further than this said company was not indebted in any sum whatever. It also more fully alleged the different schemes set on foot by Marsh, in which he was alleged to have been assisted by Murphy, Smith, and his associates, to involve in appearance the title to the paper derived from Marsh by the Omaha Street Railway Company aforesaid, though in fact the same was alleged to have been held by Marsh and his associates for Marsh's sole benefit. The petition further stated that the plaintiff, Horbach, prior to said sale upon foreclosure, and as the date named therefor was drawing nigh, prepared himself with funds sufficient to bid said property off for the sum of \$40,-

000, and intended to bid on the same on the sale to that amount; that said Marsh was apprised of this fact, and came to plaintiff, and arranged with plaintiff not to bid at the sale, and that the defendant Marsh then stated to plaintiff that he, the said Marsh, desired and intended to bid the same off at the coming sale in his own name for the benefit of all the stockholders and all persons interested in the property, and that, if plaintiff would refrain from bidding, he, the said Marsh, would bid the same off, and hold the same in his own name for the benefit of all the stockholders and all parties interested therein. Plaintiff says that, in consideration of said promises, offer, and agreement, he promised and agreed not to bid on the same, and refrained from bidding thereon at the sale, and permitted the said defendant Marsh to bid said property off at said sale. The proposed amendment to the petition was further to the effect that but for the aforesaid promises, offer, and agreement of the said Marsh, the plaintiff would have bid on said property to the amount of the then indebtedness, interest, and costs due thereon, but that he relied upon the promises and agreement of the said defendant Marsh that he would bid in said property in trust for all the stockholders, and hold the same in his own name until such time when the company could earn and pay off its indebtedness, and that, relying on said promises and agreement, the plaintiff refrained from bidding and did not bid at said sale; and the said plaintiff said that the promises, offer, and agreement of the said defendant, made as aforesaid to plaintiff, were designedly made to him with the intent to wrong, cheat, and defraud the plaintiff and the other stockholders out of their stock, and out of their interest in and to said stock. The further proposed amendments were simply such as to charge that the promises of Marsh as to bidding in the property for the benefit of the stockholders of the Omaha Horse Railway Company, and his violation of said promises, were each solely for the purpose of cheating and defrauding the stockholders of the Omaha Horse Railway Company as to the property of said company, in respect of which each of said stockholders, as such, was interested. The court refused to permit amendments to the petition as proposed. The prayer of the said proposed amendments, as well as in the original petition, was that the defendants should be required to show how much stock over and above the original 1,000 shares had been issued by them; that they may be required to surrender the same for cancellation; that they be required to return to said company all sums of money they may have received, or that the company has paid out as dividends thereon; that in case they cannot or shall not surrender said stock, they be required to pay to the company the face values thereof, with all dividends the company has paid out there-

on; and that said defendants be required to surrender up for cancellation all the bonds of said company issued by them, and return to the company all sums of money at any time paid out as interest on said bonds; that in case they shall not surrender said bonds for cancellation, they be required to pay said company the full face value thereof, together with all interest the company has at any time paid out thereon. And the plaintiff further prayed that a full accounting might be had of all receipts and expenditures, debts and credits, of said company, from January 1, 1879, to the present time, and for the appointment of a receiver to take charge of all the books of the company and papers showing its business since January 1, 1879, and that said defendants be required to pay over, under order of the court, whether for said stock or bonds or both, or as balance of the earnings of the company over and above expenditures, and for general equitable relief. On the 11th day of February, 1891, a decree was entered in this cause, as follows: "This action having been heretofore tried to the court, and the plaintiff having before the conclusion of the trial filed his motion for leave to amend his petition to conform to the facts proved and tendered in said proposed petition, and the court having taken the case and the said motion under advisement, and being now fully advised in the premises, it is now ordered that said motion be, and it hereby is, overruled, to which the plaintiff excepts, and thereupon the court finds upon the issues joined for the defendants, to which the plaintiff excepts. It is therefore ordered and adjudged that this action be dismissed for want of equity, and that the defendants recover of the plaintiff their costs of their action to be taxed."

Under the petition as originally filed, the theory of the plaintiff evidently was that, by reason of the fiduciary relations sustained by W. W. Marsh to the Omaha Horse Railway Company, whatever purchase was made by him would of necessity inure to the benefit of that company and its stockholders. There is no averment of any irregularities or defects in the foreclosure proceedings at the suit of the Hiers against the Omaha Horse Railway Company, nor is there any allegations of any defect in the sheriff's sale or confirmation, such as in any way to impair the title of Marsh under his sheriff's deed. The question which is presented by these pleadings, then, is whether or not Marsh, as director and president of the Omaha Horse Railway Company, would be held as trustee for the benefit of the stockholders of that company in any purchase which he made. The amount of the decree under which the sale was made was, as alleged by the petition, something over \$33,000. The proposed amendment to the petition admits the existence of a judgment in favor of Doolittle, and one in favor of the State Bank, which swell the indebtedness of the Omaha Horse

Railway Company at the time of the foreclosure to upwards of \$40,000. The amount bid at the foreclosure sale by Marsh was \$24,500. No claim is made in the petition that he used funds other than his own in making this purchase, except inferentially it is asserted that the earnings were sufficient to pay the indebtedness of the company, and in a general way it is asserted that he had a balance in his hands over and above the indebtedness of the company. But of the fact that he advanced the \$24,500 in payment of the bid made by him there can be no question upon the testimony. Under these circumstances, the original theory of the plaintiff can only be made available upon the assumption that an officer of a corporation has no right whatever, in his individual capacity, to advance money for a corporation, or purchase its property at a judicial sale. In the case of *Gorder v. Canning Co.*, 54 N. W. Rep. 830, a somewhat similar question was considered by this court. In the opinion filed by Post, J., the following language occurs: "There is no doubt that the relation of directors of a corporation of which they are officers are of a fiduciary character, and their contracts and dealings with respect to the corporate property will be carefully scrutinized by the court. There are cases to be found in which it is asserted that such contracts are absolutely void, and not enforceable either in courts of law or in equity, but the decided weight of authority, as well as the most satisfactory reasoning, sustains the view that they are voidable only. It is frequently stated in the reports and text-books that contracts between corporations and their directors will be set aside by courts of equity at the election of the stockholders, but such statements are not strictly accurate. Not every purchase of corporate property by directors of a corporation will be adjudged void in an action by the stockholders, even by courts of equity. On the contrary, the relation of directors to the stockholders of a corporation is not essentially different from that ordinarily existing between trustee and cestui que trust. Courts of equity will set aside such contracts on the ground of fraud, and generally upon slight showing of fraud or bad faith by the trustee; but where it is clear that the transaction is in good faith, and the cestui que trust, being under no disability, has received and retains the consideration paid for the trust property by the trustee, it will be upheld when assailed, either in law or in equity." In the case at bar the money paid by Marsh was not paid by him to his cestui que trust, it is true, and yet it was paid for the cestui que trust as completely as though directly so to it or to the stockholders of the Omaha Horse Railway Company. By the most solemn method of proof it had been ascertained that said company was indebted to an amount of over \$33,000, and its property was ordered sold for the pay-

ment of that indebtedness. The proofs show that Marsh at the sale competed against all purchasers to the extent of running the property from \$16,000 up to \$24,500. He paid this amount upon his bid, and it was applied to the extinguishment of the indebtedness of the Omaha Horse Railway Company, without any objection and with the acquiescence of every stockholder of that company. Having in view simply his fiduciary relation, therefore, he is entitled to full protection in his purchase, under the language of the case just quoted from, unless something more than a mere fiduciary relation is shown to affect his rights. The proposed amendment to the petition, however, was based upon the theory of an expressed rather than an implied trust, possibly in addition thereto. The averments made by way of amendments in the proposed amended petition were to the effect that, previous to the sale under the *Hier* foreclosure, plaintiff had a conversation with Marsh, in which he expressed the intention of bidding at the proposed foreclosure sale, and was assured by Marsh that he himself would bid in the property of the Omaha Horse Railway Company for the benefit of the stockholders of that company. The plaintiff, in his amendments to the petition, alleged that he relied upon these assurances, and that by reason of such reliance he was induced to and did refrain from bidding upon the property at said foreclosure sale; that Marsh was thereby enabled to purchase said property, and did so purchase the same in his own name, though with plaintiff's expectation and understanding, superinduced by the assurances of Marsh to that effect, that the property would be held by Marsh for the benefit and protection of the stockholders generally. It was afterwards proposed by plaintiff, rather inconsistently with this theory, that plaintiff, as he testified, should purchase one-half of this same property of Marsh. There is abundant testimony that the property at the time of the purchase at the foreclosure sale was of little value, and that the price paid by Marsh was reasonable. It is shown that subsequently, either owing to the growth of the city of Omaha, or other circumstances, or perhaps all combined, the property rapidly appreciated in value and earning capacity. It was purchased by Marsh in 1879, and it is claimed by plaintiff was held by Marsh until it became much more valuable, when the trust under which it was held by Marsh was repudiated, and the property treated as the property of Marsh and his associates alone, without reference to the rights of the stockholders. The preponderance of the evidence shows that Marsh bid in this property without any promise, agreement, or understanding such as would constitute him a trustee, in respect thereof, for the benefit of the stockholders of said company; that he afterwards used, operated, and improved the same under great difficulties solely for his

own profit and benefit; that the sheriff's deed which he received upon its purchase at the foreclosure sale to himself individually was immediately recorded; that the deed evidencing the conveyance of the three-fifths interest in said property to his codefendants was also placed on record as soon as executed; that every act and use by him of the property was consistent with his individual ownership thereof; that immediately upon acquiring said property the accounts in relation to the receipts and expenditures of the Omaha Horse Railway Company were changed so as to indicate that there was no intention that they should be binding upon or for the benefit of the Omaha Horse Railway Company. It is true that in the litigation between the Omaha Horse Railway Company, plaintiff, against the Omaha Motor Railway Company and William M. Hewitt, defendants, statements were made under oath by Marsh which apparently should modify this general statement. In this evidence Mr. Marsh testified that he had been a stockholder in the Omaha Horse Railway Company for 15 years previous to the 1st of July, 1888, and had held stock therein right straight along, and that he had held the property for two or three years as belonging to the Omaha Horse Railway Company, and that finally it was conveyed to the company. Bearing in mind the apparent value attached to what was claimed by all the parties to this suit as the exclusive franchise to operate a horse railway in the streets of Omaha under the act of the territorial legislature of Nebraska, approved February 18, 1867, it is not difficult to account for the line of conduct pursued by Marsh, and his testimony in the case referred to. This exclusive franchise was in terms granted to the Omaha Horse Railway Company. The purchase of the property by Marsh did not of course vest him with that franchise. To avail himself of the benefits in that respect of the act referred to, Marsh reorganized the Omaha Horse Railway Company, after which he and his associates conveyed to said company the property necessary for its operation, for which they received as payment the stock and bonds of said company. Evidently this course was taken to control, on the one hand, the management of the property, and, on the other, to render available a special grant of franchises which were believed to be exclusive in their nature. Though the Omaha Horse Railway Company was reorganized, there seems to have been adopted no amendments in the way of a change in its name or otherwise, and it is therefore not strange that, in his dealings with a rival company calling in question the exclusiveness of the franchises claimed, Marsh should have testified as he did. Indeed, whatever were the property interests which had been held by Marsh and his associates, they were, by the deeds heretofore referred to in plaintiff's petition, conveyed to the Omaha Horse Rail-

way Company, and no act or deed of divestiture has since been shown to have had existence. While it was true that in the suit where this testimony was taken the Omaha Horse Railway Company's exclusive franchise was asserted for the purpose of preventing the use by a rival company of the streets of the city of Omaha for railway purposes, such issue does not found a substantive basis for plaintiff's contention in this case. The testimony of Marsh under consideration could only have had the tendency or effect to impeach the evidence and claims which he now advances in this case. Giving that testimony the full weight to which it is entitled, however, there was a preponderance in favor of the claims made by Marsh herein. The testimony fails to show the existence of an express trust, as against Marsh, or Marsh and his associates, in favor of plaintiff, or any of the stockholders, created by the alleged promises of Marsh to the plaintiff just before the foreclosure sale. If the evidence had been sufficient to sustain the amendments which were proposed to render the petition conformable to the testimony, it would have been prejudicial error to have refused permission to the plaintiff to make the amendments asked in the district court. Whatever amendments are necessary to enable a party to assert his rights or redress grievances should be permitted at any time, even, under our statute, after judgment. But in a case where there is not sufficient proof to sustain the amendment, even if permitted, and in which the general result must have been the same with as without the amendment, there can result no prejudice in refusing to permit the proposed allegation to be made by way of amendment. In the consideration of the equities urged and insisted upon by the plaintiff, it is impossible to ignore the fact that the alleged grievances had their origin in 1879, and that this suit was not commenced until November, 1889, a period of more than 10 years; nor can it be forgotten that while the plaintiff alleged that the time and place of holding directors' meetings was changed so as to be less generally known, yet that plaintiff himself testifies that he attended none of the meetings on account of the small amount of stock which he held. No other stockholder of the company has intervened, or in any other way set up or made objection to the contention in this case, and it cannot be assumed that any others exist or have cause of complaint.

2. In the district court appellees pleaded the statute of limitations in bar of this suit. The action was brought for relief on the ground of alleged fraud, and the statute applicable to such cases provides that an action for relief can only be commenced within four years after the cause of action shall have accrued, but that it shall not be deemed to have accrued until the discovery of the fraud. The petition in this case was filed

November 16, 1889; the sheriff's deed made to Marsh under the decree rendered in the foreclosure suit of the Ilers was dated March 15, 1879, and was filed for record March 17, 1879. As has already been noted, Marsh, from the time of said purchase, treated the property purchased as if he had been its absolute, unqualified owner. On the 9th day of February, 1884, for instance, Marsh and his wife, by deed, sold and conveyed to Silas H. H. Clark, Frank Murphy, and Guy A. Barton an undivided three-fifths of said property for the expressed consideration of \$150,000. This deed was filed for record July 11, 1884. On the 30th day of May, 1884, Marsh, Clark, and Barton, their wives and Frank Murphy joining therein, made conveyance of this same property to the Omaha Horse Railway Company for the expressed consideration of \$593,000, which deed was filed for record July 11, 1884,—the same day on which was recorded the deed last above described. The proposition of the last above-named grantors for the sale of the property conveyed to the Omaha Horse Railway Company was dated February 12, 1884, and was by resolution of the stockholders of said company accepted February 20, 1884. The deed pursuant thereto was executed on May 30th following. There is no charge made that the resolution accepting said proposition was not spread upon the records of the company, and only in very general terms is it alleged that these proceedings were kept concealed. The petition charged that, pending the foreclosure proceedings previous to January 6, 1879, Marsh purchased a majority of the stock of the Omaha Horse Railway Company, and that at the date of said foreclosure he was the holder of a majority of all the stock of said company; but nowhere is it alleged that this acquisition of stock was secretly made, nor that at the time its purchase was unknown to appellant. Under all these circumstances the bare statement of appellant that the knowledge that defendants repudiated the trust under which this property was held was not acquired until June, 1888, is not determinative of the date from which the statute of limitations began to run. Upon this point the language of Mr. Justice Clifford in *Godden v. Kimmell*, 99 U. S. 201, quoted with approval in *Parker v. Kuhn*, 21 Neb., on page 427, 32 N. W. Rep. 74, is applicable. He said: "Courts of equity, acting on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the cestui que trust. Relief in such cases may be sought, but the rule is that the cestui que trust should set forth in the bill specifically what were the impediments to an earlier prosecution of the claim; and how

he or she came to be so long ignorant of their alleged rights and the means used by the respondent to keep him or her in ignorance; and how he or she first came to a knowledge of their rights," citing *Badger v. Badger*, 2 Wall. 87; *White v. Parnter*, 1 Knapp, 227. This language is specially applicable to the averments of the petition upon which the cause was tried; that is, to a trust implied from the official relation of Marsh to the Omaha Horse Railway Company at the time of his purchase of its property. In respect to the additional averments embodied in the amended answer, by which an express trust relationship was charged, it is sufficient to repeat that the proofs failed to sustain them, and from this it follows that the operation of the statute of limitations was in no way suspended upon that theory of appellant. This action was therefore properly held barred by the statute; more than four years having elapsed from the time when appellant's cause of action, upon any theory applicable to the evidence, arose. The judgment of the district court is affirmed.

RAGAN, C., concurs.

IRVINE, C., concurs in the decision upon the ground that the action is barred by the statute of limitations.

McCONNELL v. McCONNELL.

(Supreme Court of Nebraska. May 16, 1893.)

DIVORCE—RESIDENCE—QUESTION OF FACT—CONDONATION—EVIDENCE—REVIEW ON APPEAL.

1. When the evidence upon which a decree has been entered is conflicting, the finding of the district court will not be disturbed upon appeal if there is sufficient evidence upon which such decree may be fairly based.

2. In a proceeding for a divorce the statutes of Nebraska recognize the right of each party to reside in a county different from that in which the other resides. Whether or not they so reside is a question of fact to be determined upon the evidence.

3. A wife may condone the cruelty of her husband, but the husband, to avail himself of such condonation, must establish the same by clear and satisfactory proofs.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Johnson county; Appelget, Judge.

Petition by Mary E. McConnell against John McConnell for divorce, alimony, and custody of child. Judgment for plaintiff. Defendant appeals. Affirmed.

Chamberlain Bros. & Rood, for appellant. S. P. Davidson, for appellee.

RYAN, C. A petition for divorce was filed in the district court of Johnson county March 14, 1891, wherein the plaintiff alleged she was then, and for the immediately preceding twenty years had been, a resident of said county; that she was married to the

defendant March 10, 1886, since which time she had treated and acted towards defendant as a chaste and dutiful wife, until, by the wrongs of said defendant, she was compelled to leave him. The petition further averred that for the three years just preceding the averments thereof the defendant, without provocation, had been guilty of extreme and repeated acts of cruelty towards plaintiff, by assaulting, shaking, and striking her, and seizing her by the throat, throwing her, and calling her a "damned liar," and that, by reason of the cruel treatment of the defendant, plaintiff was at the time of filing said petition in mortal dread and fear of the defendant, and had thereby been compelled to leave him. The petition further stated that there was born to plaintiff and defendant, as the fruit of their marriage, a son, who was at the time this suit was instituted of the age of 17 months, and that the defendant was the owner of certain real and personal property. There was a prayer for a divorce, the custody of the child, and alimony. An answer was filed in due time, in which the defendant admitted the marriage with plaintiff, and the birth of a son, at the time stated by the plaintiff. Each other averment of the petition was denied. The defendant, by his answer, alleged that during all the time mentioned in the petition the plaintiff had resided and cohabited with the defendant, and that any and all acts of alleged cruelty set forth in the petition had been freely condoned by the plaintiff, and that defendant at all times since had treated plaintiff with kindness, and had been a faithful and indulgent husband to her. The defendant, in his answer, prayed that the plaintiff's petition be dismissed, and for the care and custody of the child above referred to, and for general equitable relief. By an amendment of his answer the defendant alleged that the district court of Johnson county had no jurisdiction of the case, or the parties thereto, or either of them, for the reason that, at the time the action was commenced, neither plaintiff nor defendant resided in said county of Johnson. There was filed a reply in denial of each averment of the answer. On the 24th day of April, 1891, a trial of the issues was had, and a decree of divorce entered, as prayed in plaintiff's petition, with alimony and the custody of the child of the parties.

In so far as such questions of fact were in issue, there was evidence from which the district court could properly have found that the cruelty charged was proved. The evidence on plaintiff's behalf was detailed by witnesses orally examined in the presence of the court, and we are therefore without the means of considering the appearance of the witnesses, which may greatly have influenced the presiding judge in his consideration of their testimony. Under such circumstances, if the evidence is nearly in equipoise, the decree will not, upon appeal, be

disturbed, because against the weight of evidence, as it might be estimated in the appellate court. For our purpose, therefore, it must be assumed that the charges of cruelty made in plaintiff's petition were sufficiently proved to sustain these allegations of the defendant's misconduct towards plaintiff.

Upon the record, there remain only two questions,—one jurisdictional in its nature,—that is, whether or not, at and previous to the filing of plaintiff's petition, she was a resident of Johnson county; the other, whether or not defendant's cruel treatment of plaintiff has, since its occurrence, been condoned by her.

1. The evidence shows that the parties to this action resided together in Johnson county from the date of their marriage, in 1886, until January, 1891, when they removed to Lincoln county, in this state. There they cohabited together as husband and wife until March 11, 1891. The appellee urges that Mrs. McConnell agreed to accompany her husband, in his removal from Johnson county to Lincoln county, upon, and influenced by, his assurances that he would treat her kindly, and desist from all cruelty and unkindness towards her. It does not seem that these express assurances of future proper conduct ought to cut a great figure in determining whether or not plaintiff was justified in going with her husband to Lincoln county. The marriage relation itself implied just such line of conduct as it is claimed the defendant promised to follow towards his wife. She had a right to expect him to desist from cruelty towards her, and to assume that he would treat her with uniform kindness. It was no more than what he had solemnly promised when she became his wife, and a renewed promise thereafter made the obligation no more binding. But his cruel treatment still continued after the removal to Lincoln county, until, by a habeas corpus proceeding instituted by her own father, Mrs. McConnell and her son were brought back to Johnson county on March 11, 1891, where plaintiff has, as she alleges, ever since resided. It is impossible to avoid a very strong suspicion that this habeas corpus proceeding was a mere ruse to enable plaintiff to return to Johnson county, notwithstanding an appeal has been taken from the judgment of dismissal in the county court. There could be little doubt, however, upon the testimony, that since March 11, 1891, plaintiff has resided in Johnson county. The residence of the wife is, for some purposes, it is true, presumed to be that of her husband. In section 6, c. 25, of the Compiled Statutes, it is provided that a divorce "may be decreed by the district court of the county where the parties, or one of them, resides," thus expressly recognizing the possibility, in divorce cases, of either party residing in a county different from that in which the other resides. This language overcomes the mere presumption that the wife's residence must be that of her

husband. It was therefore possible for Mrs. McConnell to have become a resident of Johnson county, even though her husband at the time resided in Lincoln county. Whether she did become such resident was a question of fact for determination by the district court. Its finding was in her favor, and as there was evidence to sustain it we are bound to assume that, at the time this action was brought, Mrs. McConnell was residing in Johnson county, as alleged, and that, therefore, the district court had jurisdiction to render the decree prayed and granted.

2. The defendant, however, insists that by reason of the cohabitation of plaintiff and defendant in Lincoln county, superinduced by the promises of the defendant of a complete cessation of cruelties, and the substitution therefor of uniformly kind treatment towards his wife, there was a complete condonation of past cruel and unkind treatment. As has already been observed, this promise was simply to do what, from the marriage relation, is implied as the duty of the husband to his wife. The argument of appellant seems to be founded upon the assumption that the consideration, to uphold the promise of the husband as a contract, must have been a promise on the part of the wife,—in this case, to accompany him to Lincoln county, and there live with him as his wife. If we are right in assuming that the duty of the husband was to observe the very commendable course of conduct which he promised to follow towards his wife, an agreement merely to perform that duty would not, in law, constitute a sufficient consideration to sustain a contract solely dependent thereon. It would too much resemble the promise of the maker of an overdue note to pay the amount thereof as constituting a sufficient consideration for an additional extension of time of payment. In the case under consideration, however, there was proved no express promise of condonation of former cruelty. Whatever condonation there may have been must be implied solely from the cohabitation of Mrs. McConnell with her husband. It is true that under some decisions condonation of cruel treatment may be inferred from the conduct of the wife, but this inference is controlled or modified by the situation of the parties, and the circumstances of each particular case. It is held in all cases, however, that the evidence to establish a condonation must be clear and convincing. In the case at bar the evidence shows that the wife was in ill health, and under medical treatment; that she was not at all strong, physically; and that, owing to nervous prostration, it was with great difficulty that she attended to her household duties. It was under such circumstances that she was abused, in coarse language, roughly shaken, and even choked and struck, by her husband. The welfare of her son, a mere infant, may have strongly impressed the necessity of forbearance on this mother's part, and, of one in her nervous

feeble condition, it is too much to require the vigorous energy which the abandonment of her husband necessarily would imply. The rule which would in all cases infer the forgiveness of physical violence from the mere fact that the wife chose rather to bear the ills she had, than fly to those she knew not of, too much resembles that obsolete relic of barbarism which recognized the right of the husband, by corporal punishment, gently to correct his wife. We find the existence of no such facts as would justify a finding or inference of the appellee's condonation of the appellant's misconduct. The judgment of the district court is affirmed. The other commissioners concur.

CRYSTAL ICE CO. v. SHERLOCK.

(Supreme Court of Nebraska. May 9, 1893.)
MASTER AND SERVANT—NEGLIGENCE OF FOREMAN.

Where a foreman having charge of laborers directs one of them to perform certain work in such manner, and under such circumstances, as to subject the said laborer to great danger of injury, the company for whom the said foreman is acting cannot shield itself from liability for damage, under such circumstances, caused directly to such laborer by the negligent order of such foreman, upon the ground that the only negligence imputable to the foreman consisted in the performance of an act of mere manual labor in setting in motion the agency which caused the injury, and that thereby the foreman, as to such act, was reduced to the grade of a co-servant of the injured party.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Irvine, Judge.

Suit by Joseph Sherlock against the Crystal Ice Company. Judgment for plaintiff. Defendant brings error. Affirmed.

C. A. Baldwin, for plaintiff in error. Moriarty & Berka, for defendant in error.

RYAN, C. 1. The defendant in error brought suit in the district court of Douglas county against the Crystal Ice Company for an injury received while in the employ of the said company. The petition alleged that the defendant in error was engaged with some 10 or 12 other persons in handling and depositing in said company's ice house blocks of ice, which were elevated some distance by means of an inclined chute; then, by means of a descending chute, said blocks were landed in the ice house. That while so engaged one of the blocks of ice stuck fast in the latter chute, whereupon the foreman in charge of the work directed the defendant in error to disengage said block, and that while the defendant was engaged in complying with said order the said foreman, without warning the said defendant in error, and while defendant in error's back was towards said superintendent, carelessly and negligently set free, and sent down said chute, another piece of ice, of the weight of about 140 pounds, which struck defendant in error, and severely in-

jured him, without fault on his part. The recovery prayed was for pain, loss of time, medical attendance, etc., the alleged proximate result of said injury. The plaintiff in error took no exception as to the instructions either given or refused. The questions presented by the brief of the plaintiff in error will be considered in order as presented upon the brief filed on that behalf.

It is insisted that the petition below failed to state a cause of action, for that, as plaintiff in error insists, there was no averment therein charging, or attempting to charge, the ice company with any carelessness or negligence in any respect whatever, either in respect to the employment of a competent foreman, or in the construction of the chute, or in respect to any of the appliances in use about the carrying on of the work of the ice company. Nor was there, as plaintiff in error claims, any averment that the employment, the nature of the business, or the place where the accident occurred, was in any degree hazardous or dangerous. Fairly construed, the petition charged the company with negligence and carelessness by reason of the above-charged carelessness and negligence of its foreman, which, as the defendant in error alleged, was the proximate cause of the injury which he received.

2. The next and final contention of the plaintiff in error is that the company, while it was concededly responsible for the acts or default of its agent, in his capacity as manager or vice principal, was not otherwise liable. In other words, as applied to the facts of this case, the plaintiff in error argues that, as the injury was caused by setting free the piece of ice which caused the damage sued for, plaintiff in error should not be held liable, though the act was done by its foreman, for such act was not peculiarly within the scope of the foreman's duties, but was rather one, the performance of which properly fell within the class of labor properly to be performed by the laborers under the direction of said foreman. The difficulty with this argument is that it loses sight of the fact that the defendant in error was placed in a dangerous place, and required to do an act which of necessity forbade his avoidance of injury, should the foreman set in motion a piece of ice from a point above, where the foreman's orders required him to go. Suppose, now, that this piece of ice had been detached by a fellow servant of the defendant in error, under the orders of the foreman, after the foreman had so located the defendant in error that he must inevitably suffer if the order was executed. Could it with any propriety be claimed that the company was relieved of liability simply because the agency which caused the injury was set in motion by a fellow servant? In such case, as in the one at bar, the negligence and carelessness pertained, not to the mere manual act of releasing the ice which caused the injury, but was rather imputable to the order

which placed defendant in error in such situation, under such circumstances that injury to him was unavoidable from the foreman's setting in motion the ice which caused the damage. The judgment of the district court is affirmed.

RAGAN, C., concurs. IRVINE, C., having presided on the trial of this case in the district court, took no part in the consideration or determination of this case.

NILAND et al. v. KALISH et al.

(Supreme Court of Nebraska. May 9, 1893.)

WITNESS—COMPETENCY—HUSBAND AND WIFE.

Under the provisions of section 331 of the Code of Civil Procedure, a wife, over her husband's objection, cannot be required to testify as to facts which it is claimed by the adverse party would show that a transfer of property from her husband to herself was fraudulent. Neither can the husband, under like circumstances, be compelled to testify as against his wife.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Hopewell, Judge.

Action by Peter Niland and others against Solomon Kalish and another to cancel a deed. Defendants had judgment, and plaintiffs bring error. Affirmed.

Switzler & McIntosh, for plaintiffs in error. C. A. Baldwin, for defendants in error.

RYAN, C. This action was brought in the district court of Douglas county to set aside the title of Adalia Kalish to certain real property, and subject the same to the payment of the debts of her husband, Solomon Kalish, evidenced by judgments in favor of the plaintiffs severally, upon each of which judgments execution had issued and been returned nulla bona. The petition alleged, in effect, that the property sought to be subjected had been acquired by Solomon Kalish, but that the title was taken in the name of his wife, to enable him to hinder, cheat, and defraud his said creditors, who were remediless, except by subjecting said property to the payment of said judgments respectively. The answers of both Solomon Kalish and his wife denied the matters above averred, and alleged that Mrs. Kalish acquired said property through the use of her separate inheritance, earnings, and gifts to herself. A trial was had upon these issues, and judgment rendered in favor of the defendants. In the progress of this trial, in the language of the bill of exceptions, "the plaintiffs called upon Mrs. Kalish, the wife of the defendant, to take the witness stand, and testify for the plaintiffs; whereupon the defendant Solomon Kalish objects to the witness and codefendant, Adalia Kalish, being examined, and giving testimony in this case, for the reason that she, being the

wife of the defendant Solomon Kalish, is not a competent witness to testify in this case under the law. Objection sustained, and plaintiffs except. Plaintiffs' counsel said he called the witness last referred to for the purpose, and offered to prove by her, that the property which is held in her name was purchased by her, as set forth in plaintiffs' petition, with funds belonging to the defendant Solomon Kalish, said funds having been accumulated and used by her through his direction in the purchase of said property, and the placing of the same in her name, in fraud of the creditors of the defendant Solomon Kalish." Argumentatively, counsel for plaintiffs also in that connection gave reasons why the proposed evidence should be allowed,—as, that it would rather be in favor of than against her husband's interest in respect of the said property; that the knowledge of these facts was confined to witness and her husband, etc., but there was no further statement of facts proposed to be proved by Mrs. Kalish. Objections to the proposed evidence were sustained, and plaintiffs excepted. In like manner, *mutatis mutandis*, there was an offer to make proof of the same matter by Solomon Kalish's evidence, resulting in the same ruling, and exception upon objection of the same nature. There was no question propounded to either of the witnesses, and the testimony proposed to be elicited can only be conjectured from plaintiffs' own offer of proof already quoted from the bill of exceptions. Having in view the liberal charges of fraud made in the plaintiffs' petition against Solomon Kalish, followed by the above specific offer of proof of a fraudulent transfer of property, it is difficult to conceive how, as plaintiffs contend, this proposed evidence would be in favor of Solomon Kalish. It might, it is true, tend to show as a remote result that Solomon Kalish was the beneficiary for whom his wife held the title of the property in dispute, and in that narrow, technical view it might be insisted that the proof of such interest in the property might be of matter in his favor. Such a construction, however, savors too much of casuistry, and cannot be accepted as the sense in which the offer was made and insisted upon, for this whole proceeding was on the theory that Solomon had no property whatever, and plaintiffs could hardly be suspected of the inconsistent attempt to establish in Solomon's favor a basis for credits. Plaintiffs further contend that it was impossible to determine whether or not the evidence would be for or against the party objecting until after it was actually given. It sufficiently answers this to remark that the scope of the evidence proposed was limited by plaintiffs' own statement of what it would be. If the offer of proof does not subserve that purpose it is entirely useless, for it could perform no other function. The sole question then presented is whether or

not the district court erred in excluding the evidence offered for the purposes stated by counsel. While no statute has been found in the exact language of our own, there are those which contain substantially the same inhibition. Section 331 of the Code of Civil Procedure is in the following language: "The husband can in no case be a witness against the wife or the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." In *Wolford v. Farnham*, 44 Minn. 159, 48 N. W. Rep. 295, there was considered a statute having a similar provision to that just quoted, and it was there held that the district court properly excluded the evidence of the husband upon the wife's objection thereto. In *Blanchard v. Moors*, 85 Mich. 380, 48 N. W. Rep. 542, the supreme court of Michigan held under a similar statute that the proposed evidence of the husband as to the alleged fraudulent transfer of property by him to his wife was inadmissible over the objection of his wife. No adjudged case has been cited at variance with the conclusions of the courts above reached, and we believe the language of the statute is susceptible of no other construction. The rulings of the district court were right, and its judgment is therefore affirmed. The other commissioners concur.

FITZGERALD v. MEYER.

(Supreme Court of Nebraska. May 9, 1893.)
REVIEW ON APPEAL—EVIDENCE—INSTRUCTIONS—
ISSUE NOT WITHIN PLEADINGS.

1. Where the burden of proof is upon the plaintiff to establish the bona fides of a chattel mortgage whereunder he claims, a verdict in favor of defendant will not be set aside on the ground that the verdict is not sustained by the evidence, unless the evidence offered by plaintiff is of a clear and convincing character.

2. A judgment will not be disturbed because of an instruction submitting to the jury an issue not within the pleadings, where the only effect of such an instruction must have been in favor of the party complaining.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Ferguson, Judge.

Action by John Fitzgerald against Axel Meyer. Judgment for defendant. Plaintiff brings error. Affirmed.

Breckenridge, Breckenridge & Crofoot, for plaintiff in error. Connell & Ives, for defendant in error.

IRVINE, C. This is an action of replevin for a pair of mules by the plaintiff in error against the defendant in error. The case has once before been in this court, and is reported in 25 Neb. 77, 41 N. W. Rep. 123, where a general statement of the case appears. A new trial in the district court resulted in a verdict in favor of the defendant.

One of the assignments of error is the refusal of the court to give certain instructions asked by the plaintiff, but the substance of these instructions was given by the court of its own motion, and plaintiff in error in his brief does not urge this assignment. Under the assignments that the verdict was not sustained by the evidence, that it was contrary to law, and contrary to the instructions, plaintiff in error urges the insufficiency of the evidence. No complaint is made of the general effect of the instructions given, and they certainly state the law as favorably to the plaintiff in error as could be asked. The plaintiff, in his petition, claims the property under a chattel mortgage. This mortgage was given in January, 1885, and in May following the mortgagor executed to the plaintiff a bill of sale covering this and other property. It seems to have been urged by the defendant below that the transfer by the bill of sale abrogated the mortgage by way of merger, and the jury was fully instructed upon the law raised upon this issue. No change of possession followed either transfer, and the burden of proof was upon the plaintiff to establish bona fides. The only evidence offered for this purpose was that of plaintiff's agent, who testified that the mortgagor was indebted to plaintiff at the time the mortgage was made, and that the mortgage was given to secure such indebtedness. The amount of the indebtedness is not disclosed, nor is its source, nor were any of the circumstances attending the execution of the mortgage elicited, or sought to be elicited. Whether this testimony was sufficient to overcome the presumption of fraud in a chattel mortgage, not accompanied by change of possession, was for the jury to determine, and we cannot say that upon such meager evidence it was bound to determine the question in favor of the plaintiff. Moreover, there was absolutely no evidence of the circumstances attending the execution of the bill of sale, and there is evidence that when the controversy first arose between plaintiff and Furay, who bought the mules from the mortgagor, and sold them to defendant, Furay and plaintiff's agent consulted Mr. Connell, and the agent, in support of plaintiff's claim, produced and claimed under the bill of sale, and did not produce or mention the mortgage until after Mr. Connell had advised Furay that the bill of sale was insufficient. This evidence warranted the jury in finding that the mortgage had, by the intention of the parties, merged in the bill of sale. Upon either of these points the jury may have based its verdict, and was warranted by the evidence in so doing.

The court instructed the jury, in effect, that if it found that after the bill of sale was made the vendor retained possession of the property, the sale would be presumed to be fraudulent as against subsequent purchasers in good faith, but that this presumption might be rebutted by evidence showing that

the sale was made in good faith, and without any intent to defraud such purchasers. The giving of this instruction is assigned as error, upon the ground that plaintiff was not claiming under the bill of sale, but under the mortgage alone. Plaintiff contends that an element not in issue was thus injected into the case. Even if this be so, the error was without prejudice to the plaintiff. Had the court withheld this issue altogether from the jury, the plaintiff's case would have rested entirely upon the mortgage. Under the instructions as given there was still left an opportunity to find for the plaintiff in case the jury found that the mortgage had merged in the sale. It is only where the giving of an instruction foreign to the issues may mislead the jury to the prejudice of the unsuccessful party that he may complain. Affirmed. The other commissioners concur.

SPURGIN v. THOMPSON.

(Supreme Court of Nebraska. May 9, 1893.)

ELECTION CONTESTS—MARKED BALLOTS—ANSWER—AMENDMENT.

1. In an election contest, the incumbent having dismissed before judgment, a paragraph of his answer alleging the improper refusal to count certain ballots cannot, by an original amendment in the district court, over the contestant's objection, set up the same matters as to which he had entered a dismissal in the county court.

2. The indorsement of the name "Eagleham," he not being one of the election judges, upon a ballot, was within the inhibition of the statute forbidding the marking of his ballot by an elector, and vitiates said ballot.

3. While the statute requires that the cross which signifies the preference of the elector shall, in ink, be placed in a space designated for that purpose, a ballot upon which such preference is indicated by a cross made with a lead pencil, outside the space designated, but opposite the name of the choice of the elector, should be counted according to such manifest intention.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Keya Paha county; Kinkaid, Judge.

Proceeding by Joseph M. Spurgin against Henry B. Thompson to contest an election for the office of sheriff. Determination in favor of Spurgin. Thompson appeals. Affirmed.

R. M. Logan and Reese & Gilkeson, for appellant. L. K. Alder, for appellee.

RYAN, C. According to the original canvass of Keya Paha county, there were cast 337 votes for Hugh Booth, and 338 votes for H. B. Thompson, for sheriff of said county, and there was accordingly issued to said Thompson a certificate of election. Within the proper time, Joseph M. Spurgin, an elector of said county, as provided in such cases, filed in the county court of said county a complaint accompanied by a bond, with the view of contesting said election of sheriff. The complaint alleged irregularities as to

some precincts, of which no notice will be taken, because, whatever may have been the merits of the contest, there was no evidence to show such merits. The complaint alleged that in Simpson precinct there were four ballots regularly cast, which showed clearly the choice of the voter in each case for sheriff, but that said ballots, which were cast for Hugh Booth, were by the judges of election omitted from their canvass and return. The complaint alleged that in Garfield precinct the judges of election omitted from their return of the ballots and votes two ballots which had been cast for said Hugh Booth for sheriff, upon one of which ballots the voter had placed a cross indicating his choice,—not upon the margin, however, but just opposite, and very near, the name of Hugh Booth. The other ballot was crossed in the same way as that last mentioned, except that the first-described ballot was marked with ink, the other, with a lead pencil. The complaint further set forth that in McGuire precinct one ballot was counted for Thompson, upon the back of which the voter had marked the name of "Eagleham," and that said ballot should not have been counted for the incumbent, Thompson. The incumbent, by an amended answer, denied the averments alleged as reasons for receiving and for rejecting the ballots aforesaid, in so far as they related to the office of sheriff. There were various irregularities affirmatively alleged in said answer, but, as there was no evidence in relation to them, they will receive no attention. As there was a complication as to the seventh paragraph, it is copied in extenso. It was as follows: "(7) The incumbent, for further and other defense to contestant's complaint, alleges that at said election in Norden precinct, in said county, on the 3d day of November, 1891, the judges of election therein, while canvassing the votes and ballots of said Norden precinct, and the ballots cast therein, erred in this: That there were three ballots in the ballot box, cast at said election in said precinct, which were regular, legal, and proper ballots, and which the said judges of election rejected, and wholly omitted and rejected from their return and count of the ballots so cast at said election in said precinct, each of which said three votes were cast for the incumbent, Henry B. Thompson, for sheriff of Keya Paha county; said ballots being regular and legal and official ballots, upon two of which the voters had marked the cross in lead pencil, and the third one the voter had scratched out all the names of all the candidates except the names of the candidates for whom he intended to vote. The incumbent alleges that said three ballots, and each of them, were legal ballots, and that the same were sufficiently plain for the intention of the voter to be gathered therefrom, so far as the vote for the office of sheriff was concerned, and that the said three ballots should have been canvassed, counted,

and returned as legal votes, and counted for the said Henry B. Thompson for sheriff of said county as aforesaid. The incumbent further alleges that in said Norden precinct, at said election, there were cast for said incumbent five other votes, which the judges of election refused and neglected to canvass and count for said incumbent for the office of sheriff, but did wrongfully count, canvass, and return said five ballots as having been cast for the said Hugh Booth. Incumbent alleges that said five ballots were legal and proper and official ballots, and should have been canvassed, counted, and returned for said incumbent; and incumbent asks that the court count the eight ballots herein referred to as having been cast in said Norden precinct for said incumbent, and, for the purpose of said count, incumbent asks that the ballots cast in said Norden precinct be brought in, and inspected by the court." There was a reply in denial. During the trial in the county court the incumbent, with leave of court, dismissed paragraph 7 of his answer, above quoted, whereupon contestant, as to the same precinct, filed the following, (omitting formal parts:) "The contestant asks leave to amend his complaint herein to comply with the evidence, in this: That the evidence showed that in Norden precinct, in said county, at said election held therein on November 3, 1891, there was an error in the canvass, count, and return from said precinct made by the judges in said precinct, in this: The whole number of votes cast, as shown by the return of the judges, for Hugh Booth, for sheriff of said county, was 41, when in fact there were cast for him, in said precinct, 42 legal and official ballots; and this is shown fully by a recount of the ballots returned from said precinct, made by the court in this case, and as shown by the records in this case; and incumbent has dismissed paragraph seven of his amended answer herein, as to the vote of said precinct, after the returns from said precinct have been examined by the court at incumbent's request, as shown by the record in this case; and contestant asks that 42 votes and ballots be counted from said precinct as votes for said Hugh Booth for sheriff of said county of Keya Paha, Neb., instead of 41, as shown by the official canvass of said precinct." Upon a trial had in the county court, it was adjudged that Hugh Booth had received 341 votes, and that H. B. Thompson had received 337 votes, for sheriff, and Booth was accordingly declared elected. From this an appeal was taken to the district court of said county, where, upon trial had, it was adjudged that each candidate had 340 votes, and it was ordered that the right to hold the office in question should be determined by lot. This was done, and Hugh Booth was duly designated in that way as the candidate entitled to the office. An appeal brings the case into this court.

In the district court the contention as to

the Norden precinct was considered in determining the rights of the parties to the contest. The result in that precinct was first called in question in the county court by the incumbent in paragraph 7 of his answer. This paragraph was dismissed by the incumbent during the trial in the county court. The contestant thereupon amended his complaint so as to allege that, as against Booth's rights, there had been a mistake in canvassing the votes in said precinct, whereby Booth had been deprived of one vote. Then the appeal was taken to the district court. Incumbent had, therefore, no averments in the pleadings of anything improper, as against his candidacy, having transpired in said precinct. On appeal from the county court to the district court the issues to be tried should be confined to those tried in the county court, except that new matter arising in the interim may be pleaded in the district court. *School Dist. v. McIntire*, 14 Neb. 46, 14 N. W. Rep. 656; *Baler v. Humpall*, 16 Neb. 127, 20 N. W. Rep. 108; *Railroad Co. v. Oglivy*, 18 Neb. 638, 26 N. W. Rep. 464; *Lamb v. Thompson*, 31 Neb. 448, 48 N. W. Rep. 58; *Bishop v. Stevens*, 31 Neb. 786, 48 N. W. Rep. 827. There was no basis for the incumbent to affirmatively claim in favor of himself upon averments of the contestant's complaint as amended, for those averments were only of matters hostile to the incumbent's contention, confined to the act of canvassing. At any rate, even this amendment was dismissed by the contestant before the trial in the district court, and there could properly be considered no matters with reference to the vote in Norden precinct, even though the district court had permitted a new amendment to be filed therein, alleging the same matter pleaded in the seventh paragraph of the answer, and voluntarily stricken out by the incumbent before the conclusion of the trial in the county court. The alleged irregularities as to Norden precinct are therefore not properly before this court for determination.

In Simpson precinct the official count gave Booth 10, and Thompson 22, votes, respectively. The ballots brought to this court by the incumbent, as part of the evidence to be considered in this appeal, show that there were cast 21 votes for Thompson, and 11 for Booth. There were several witnesses in the district court who gave evidence that the ballots, when counted, showed that there were 10 for Booth, and 22 for Thompson. The ballots themselves were the best evidence upon this point, for the oral testimony amounted simply to an attempt to reinforce the statement of the certificate of the result arrived at by the canvassers. Undoubtedly, this result both canvassers and the said witnesses at the time believed correct, yet to permit this canvass, no matter how proved, to control our inquiry, based, as it must be, upon an actual count of the ballots, would be to declare the result reached upon the first

canvass conclusive, even in a contest calling such result in question. Neither the return of the canvassers, nor oral evidence of it, relieves this court of the onerous duty of counting the ballots properly submitted. Upon a careful canvass of the ballots of Simpson precinct, we find there should be taken from the footings made by the canvassers one vote for Thompson, and there should be added one to the vote of Booth.

In Garfield precinct there was one ballot on which, opposite the name of Booth, was a cross made with a lead pencil. For this reason alone this was rejected. This ballot should have been counted in favor of Booth. *State v. Russell*, (Neb.) 51 N. W. Rep. 465. In this same precinct the canvassers threw out one vote for Booth because the cross required was placed directly opposite and near the name of Booth, and not in the marginal space designated for it in the ballot. Under section 150, c. 26, Comp. St., it is "provided that, when the ballot is sufficiently plain to gather therefrom a part of the intention of the voter, it shall be the duty of the judges of election to count such part." As to the preference of the voter who cast this ballot there could be no doubt, and the mistake made in rejecting it will be corrected by counting still another vote for Booth, which, with one already noticed in Garfield precinct, increases the vote of Booth by two in that precinct.

In McGuire precinct there was cast a ballot upon which was indorsed the word "Eagleham,"—possibly, as suggested on the trial below, the name of an elector. This was cast and counted in favor of Thompson. It is provided in section 154, c. 26, Comp. St., that "no elector shall place any mark upon his ballot, by which it may afterwards be identified as the one voted by him." Clearly, the indorsement of the word "Eagleham" was within the prohibition of this clause of the statute, and the ballot in question should therefore be rejected. This lessens the vote in favor of the incumbent by one vote. This disposes of the contentions of the respective parties, properly presented by the pleadings.

As the vote was canvassed originally, there were cast, for Booth, 337, and for Thompson, 333, votes. As shown in detail, these totals should be varied in the following manner: To the total of 337 for Booth, there should be added 1 vote from Simpson precinct, and 2 from Garfield precinct, making Booth's entire number of votes 340. From Thompson's total of 333 there should be taken 1 vote counted for him in McGuire precinct, which leaves Thompson's entire number of votes 337. This entitles Booth to the office in question.

The claim was made with earnestness, on this contest, that the ballots should not be counted, because they had not been kept safely, as required by statute. The evidence shows that they were kept in a vault adjoining the office of the county clerk, in which

were kept the records of deeds, mortgages, etc. There might possibly have been found an opportunity to remove a part of these ballots during the temporary absence of the clerk and his deputy from the office in the daytime, but they could have been removed at no other time, for at night the vault was secured by a combination lock. Even in the daytime it is shown that the clerk and his deputy kept special watch that nothing should be removed from the safe, and that whenever any one went into said vault it was under the surveillance of one of these officers. It is true that sometimes it happened that both the county clerk and the deputy were absent from the office, when it would be necessary to bring in wood, or for some like purpose, and the evidence shows that at some two or three times parties, during such absence, entered the vault, unnoticed by any one; but we do not think there is any evidence that any vote was tampered with, or removed from the vault in question. One ballot was referred to in the district court as missing, but there is nothing to raise the presumption that it was taken from the vault. It might have been lost before it was placed in the envelope, or might have been mislaid in the judicial proceedings afterwards. Under such circumstances it would be unsafe to presume that the ballots were not safely kept, as required by law, thereby practically prohibiting a review by contest or upon appeal, in any court, of the returns made by the canvassers. It follows, therefore, that the judgment of the district court, adjudging that Hugh Booth was the duly-elected sheriff of Keya Paha county for two years from the 7th day of January, 1892, is affirmed. The other commissioners concur.

STATE ex rel. CASPER et al. v. MOORE,
Auditor.

(Supreme Court of Nebraska. May 9, 1893.)

STATUTES—ENACTMENT—ERROR OF ENROLLING
CLERK—EFFECT OF.

1. Where a general appropriation bill, carrying an item of \$15,000 for a specific purpose, was duly passed by both houses of the legislature, but by a clerical error of an enrolling clerk the \$15,000 was afterwards changed to \$25,000, and the bill was in this condition presented to and signed by the presiding officers of the two houses, and approved by the governor, *held*, that the bill appropriated \$15,000 for the purpose specified therein.

2. Where a bill has been attested by the signature of the presiding officers of both branches of the legislature, and signed by the governor, it will not be declared invalid because of irregularities in the proceedings of the legislature, where no express provision of the constitution has been violated.

3. When the journals of the two houses of the legislature and the acts of the governor clearly manifest the intention of the lawmaking branches of the government, the courts will not permit the will of the people so manifested to be thwarted by the error or dishonesty of an enrolling clerk.

(Syllabus by the Court.)

Commissioners' decision.

Submission without action, to the supreme court in its original jurisdiction, of a controversy between the state on the relation of C. B. Casper and others, and Eugene Moore, state auditor, to determine the validity of an appropriation bill.

BY THE COMMISSION. This case was submitted under section 567 of the Code of Civil Procedure, upon an agreed statement of facts substantially as follows: "That in the general appropriation bill known as 'House Roll No. 207 of the 23d session of the legislature of the state of Nebraska,' after the said bill had been sent to the senate, and was there amended and returned to the house of representatives, the house of representatives then further amended the bill by including an item therein of \$25,000 for the purpose of paying the expenses of impeachment proceedings; that said bill then went to the senate for concurrence in the house amendments, and was referred to a conference committee of the members of both houses, and by said conference committee was amended by reducing the amount of said appropriation from \$25,000 to \$15,000, as shown by its report, which report of said committee of conference was adopted by both houses after various conferences had thereon; that in enrolling said bill the enrolling clerk, by a clerical error, included in said enrolled bill said item to cover the expenses of said impeachment proceedings at the sum of \$25,000 instead of \$15,000, as reported by said conference committee, and adopted by both houses, which bill, as enrolled, was signed by the presiding officers of both houses, with an emergency clause attached thereto, and was thereupon approved and signed by the governor on April 10, 1893." It will be observed from the facts set forth in the foregoing stipulation that the general appropriation bill as passed by both houses of the legislature carried an appropriation for impeachment proceedings of \$15,000, but that when the bill reached the committee on engrossed and enrolled bills, by a clerical error the \$15,000 was changed to \$25,000, and in this condition it was signed by the presiding officers of the two houses and by the governor. The question, then, before us is this: Does this bill appropriate \$25,000 for impeachment proceedings, or does it appropriate \$15,000 for such proceedings, or does it fail to appropriate anything? Were the question a new one in this state, we would say that a bill duly deposited in the office of the secretary of state, bearing the signatures of the presiding officers of the respective houses of the legislature and of the governor, imports absolute verity, and that the courts could not look beyond the signatures of these officers to ascertain what either house has done as to any items in said bill. There are numerous authorities

holding this view, among others, the supreme court of the United States. See *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495, where it is said on page 672, 143 U. S., and page 497, 12 Sup. Ct. Rep.: "The signing by the speaker of the house of representatives and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses, through their presiding officers, to the president, that a bill, thus attested, has received in due form the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him; and when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable. As the president has no authority to approve a bill not passed by congress, an enrolled act in the custody of the secretary of state, and having the official attestation of the speaker of the house of representatives, of the president of the senate, and of the president of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act so authenticated is in conformity with the constitution." The supreme court of Nebraska, however, has taken a different view of this subject, as will be seen from an examination of the following: *State v. McLelland*, 18 Neb. 236, 25 N. W. Rep. 77, where it is said: "The certificate of the presiding officer of a branch of the legislature that a bill has duly passed the house over which he presides is merely prima facie evidence of that fact, and evidence may be received to ascertain whether or not the bill actually passed. The journals of the respective houses are records of the proceedings therein, and if it should appear from them that a bill had not actually passed the presumption in favor of the certificate would be overthrown, and the act declared invalid." See, also, *State v. Robinson*, 20 Neb. 96, 29 N. W. Rep. 246. It is now settled that this court will look into the records and journals of the two houses of the legislature to ascertain if they have complied with the constitutional provisions of the state with reference to the enactments of a law. When this is done it becomes evident that the senate did not at any time, nor did the house of representa-

tives upon the final consideration of the bill, agree to an appropriation of \$25,000, so that the act cannot be construed as an appropriation of this sum for want of concurrence of all the lawmaking branches. *State v. Liedtke*, 9 Neb. 462, 4 N. W. Rep. 68. It is equally clear that both houses did concur in the appropriation of \$15,000. This appropriation must also fail, unless approved by the governor, or by the bill's becoming a law in one of the ways provided by the constitution without his approval. The governor, by signing the bill as enrolled, expressed his approval of an appropriation of \$25,000. We think that, this sum being one greater than that provided by the legislature, his approval thereof included an approval of the lesser sum. In *State v. Mollendand*, supra, it was held that a bill creating the office of register of deeds for counties having not less than \$15,000 inhabitants did not become a law because the enrolled bill as signed by the governor expressed the number of inhabitants as 1,500 instead of 15,000. The error here was in a matter of description, one essential to the merits of the bill, and the enrolled bill as signed was different in character from that passed by the legislature. In this case the error related to no matter of description, and could not have influenced the governor to approve the bill, when a correct enrollment would lead him to veto it. By giving the law this interpretation, we enforce the clearly expressed will of the people as manifested by their legislative officers. Any other conclusion would permit such clearly expressed will to be thwarted by the carelessness or dishonesty of a clerk in the enrolling rooms. It was to avoid this danger that this court adopted the doctrine that the enrolled act is only prima facie evidence of the enactment of a statute.

It was contended in argument that the item in question should not have been incorporated as an item in the general appropriation bill, and that the title of the bill was not broad enough to comprehend it fairly within its terms. The title of the bill read as follows: "A bill for an act making an appropriation for the current expenses of the state government for the year ending March 31st, 1893, and to pay miscellaneous items of indebtedness owing by the state of Nebraska." This title was comprehensive enough to include any current expenses incident to the due administration of the affairs of the state. The trial upon impeachment charges preferred by the legislature against state officers and ex-officers before the supreme court is most certainly a part of such expenses. In the title of no appropriation bill would it be practicable to set forth in detail the items provided for, and a general statement, such as above occurs, is sufficient for the purposes contemplated. It may further be observed in this connection that on account of the impracticability

of so doing, it is not required that each item of expenditure proposed should be the subject-matter of a separate bill. It was also insisted that the house of representatives, having passed the original appropriation bill, and sent it to the senate for concurrence, without which it was returned to the house, the house was powerless to amend such portion of the bill as it had previously passed; its right of amendment being confined to such amendments as the senate had ingrafted into the bill as to which its concurrence had been asked. There was cited a very respectable array of authorities on this proposition, and, as fixing a rule for the government of these bodies, we are not prepared to say that this contention was without merit. We do not understand, however, that as to the mere routine of parliamentary business courts are required to interfere with legislative procedure where no substantive requirement of the constitution has been violated. The signature of the officers of the respective branches of the legislature attesting the due passage of the bill in question precludes an inquiry in that direction. It follows, therefore, that house roll No. 207 of the twenty-third session of the legislature of the state of Nebraska, as the same is now on file in the office of the secretary of state, appropriated \$15,000 for impeachment expenses.

CITY OF GRAND ISLAND v. OBER-SCHULTE.

(Supreme Court of Nebraska. May 13, 1893.)

DEFECTIVE STREETS—DUTY OF CITY TO REPAIR.

1. Instructions set out in the opinion held not calculated to mislead the jury, and that the verdict is sustained by the evidence.

2. The verdict conforms to the proof.

(Syllabus by the Court.)

Error to district court, Hall county; Harrison, Judge.

Action by Hannah Oberschulte against the city of Grand Island. Judgment for plaintiff. Defendant brings error. Affirmed.

O. A. Abbott, for plaintiff in error. Thompson Bros., for defendant in error.

MAXWELL, C. J. This is an action brought by the defendant in error against the plaintiff in error for damages caused by injuries received by her from a fall or sudden jar received while crossing one of the streets in the said city on the night of the 11th day of February, 1890. This street had been graded during the fall of 1889, and in grading the same an embankment was left on the west side thereof, over or through which a person would be compelled to cross in passing from the east to west along the sidewalk on the north side of Sixth street, which excavation was perpendicular, and, as shown by the evidence, was at least from one and a half to two feet deep; that there

were no guards, lights, or other protection to a traveler passing along and over the said excavation; that the rain and melting snow had deepened this excavation, so that at the time of the receiving of the said injuries the bank was at least two feet deep; and that the city had carelessly, knowingly, and negligently permitted the said street to remain in such dangerous condition; that on the night in question the defendant in error, with her husband and a lady friend, were passing along Sixth street, and, on arriving at the said excavation, the defendant in error, without knowing the bad condition of the street, stepped suddenly down in the said excavation, the defendant in error receiving serious internal injuries, caused by such sudden fall or jar. The night was extremely dark, and there was nothing to warn the said defendant in error of the dangerous condition of the street, she and each of her said companions being unacquainted with the street. The testimony also shows that prior to receiving the injury Hannah Oberschulte was a stout, able-bodied woman, able to do all her own work and work for other people; but from the time of receiving the said injury she was unable to work, the injury being of a permanent nature, and was caused without any fault or negligence on her part. The cause was tried to a jury. Verdict and judgment in favor of the said defendant in error for the sum of \$1,000.

Two grounds are assigned for a reversal of the case: First. That the court erred in giving instruction No. 7, which is as follows: "You are further instructed that if you find from the evidence that the defendant did not exercise reasonable care and supervision over that portion of the street where the injury in question was alleged to have occurred, to keep it in good and safe condition, and by that means allowed it to become defective and unsafe; and if you further find from the evidence that the plaintiff, in attempting to walk along that portion of the street, by reason of such defect was injured, and has sustained damage thereby, as charged in the petition, and that she was at the time exercising reasonable care and caution in walking on said street,—then the defendant is liable. It is the duty of the defendant city to keep and maintain its sidewalks in good repair for the safe use and the convenient use of the traveling public walking and passing thereon; and if the city authorities, knowing that said street is defective and unsafe, or, after having sufficient time in exercising reasonable diligence or ordinary care to discover and repair the defect complained of, suffers it to remain in an unsafe condition, and if the plaintiff, while lawfully and in the exercise of ordinary care, passed over the said street in such unsafe condition, and was injured by reason of the defective condition of the said street, then the city is liable for her damages sustained at the time of such accident." The

objection in the plaintiff in error's brief is "that the city is under no obligations to make its sidewalks convenient." The first definition of "convenient" given by Webster is: "Fit or adapted to an end; suitable; becoming; appropriate." "Fit" or "suitable" is probably the proper meaning as applied to a sidewalk. This does not necessarily apply to any particular material out of which it is to be constructed, but it must be placed in such condition that people in the exercise of ordinary care will not in the night season fall into an excavation or place left in a dangerous condition. It is evident that the instruction in question did not mislead the jury, and the verdict conforms to the proof. The judgment is therefore affirmed. The other judges concur.

GILLESPIE et al. v. COOPER et al.
(Supreme Court of Nebraska. April 26, 1893.)

CREDITORS' BILL—FRAUDULENT CONVEYANCES—
LIMITATION OF ACTIONS.

1. Under section 12 of the Civil Code an action for relief on the ground of fraud can only be commenced within four years after a discovery of the facts constituting the fraud.

2. The cause of action mentioned in said section is the fraudulent act complained of, and the cause of action accrues when discovered, and it is discovered when the party seeking relief is in possession of sufficient facts to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to a discovery of the fraud; and the statute begins to run against a creditor from the discovery of the fraudulent act on the part of his debtor, whether the creditor's claim has been reduced to judgment or not, as he is not limited to a creditor's bill in order to obtain relief on the ground of fraud, but may attach the property fraudulently conveyed. Irvine, C., dissents.

3. A party defrauded must be diligent in making inquiry. Means of knowledge are equivalent to knowledge. A clue to the facts, which, if followed up diligently, would lead to a discovery, is, in law, equivalent to discovery. Accordingly, where a party who was known by her creditors to have recently failed in business, and to be insolvent, conveyed all her real estate by deed recorded October 28, 1884, in the county where she resided, and she, in conversation with her creditors at that time, said that the object of the conveyance was to beat her foreign creditors; that she had been advised to put her property out of her hands; that she intended to put her property in other hands until she could settle matters; that she had made arrangements by which she could pay all her home creditors; that there were some debts she did not feel bound to pay; that the object of the deed was to secure a debt to the grantee, and the surplus to be paid her,—it was held that these facts were a discovery by the creditors, on the date of recording of said deed, that the same was fraudulent, and the statute of limitations commenced to run from that date.

4. It seems that the fraud, within the meaning of said section 12, is discovered when the fraudulent deed is recorded in the county where the debtor lives.

5. On the 28th day of October, 1884, C., being largely indebted to various parties, conveyed all her property—four city lots—to one R., with a secret agreement between them that R. should sell the lots, and retain the amount of the debt owing him by C., and return the surplus property, or proceeds thereof, to C., or such person as she might designate. *Held*, that

this was a fraud on the other creditors of C., but, as this fraudulent conveyance was discovered by them on the date of its record, their suit to set it aside, commenced more than four years thereafter, was barred. But where it also appeared that while R. held the title to the said four lots he agreed with C. that if she would find a purchaser for, or sell, them, he would pay her as commission all that remained of the lots, or their proceeds, after the payment to him of her debt; two of the lots were sold, R.'s debt paid, and at C.'s request the remaining two lots were conveyed to her husband, without consideration,—*held*, that the two lots thus conveyed were C.'s property, acquired from R. by purchase, and were conveyed to C.'s husband for the purpose of defrauding her creditors. *Held*, further, that this was not a continuation or consummation of the fraud of October 28, 1884, but a new and independent one, and as the suit of C.'s creditors to set aside the conveyance of October 28, 1884, also assailed this conveyance of the two lots purchased by C. from R., and conveyed to her husband, and was commenced within four years of the recording of such conveyance, it was not barred as to the lots purchased by C. of R.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Lancaster county; Chapman, Judge.

Creditors' bill by Luella Gillespie and others against Philip H. Cooper and another. From a decree entered, defendants appeal. Modified and affirmed.

Lamb, Ricketts & Wilson, for appellants. Harwood, Ames & Kelly, Stevens, Love, Cochran & Teeters, and W. S. Summers, for appellees.

RAGAN, C. In 1883 the appellant Sarah Cooper was the owner of lots Nos. 4, 5, 6, 7, 8, and 9, in block No. 124, in the city of Lincoln, and, together with her husband, the appellant Philip H. Cooper, occupied, of said lots, as a homestead, Nos. 8 and 9. Mrs. Cooper was engaged in the mercantile business, and about October 1, 1884, failed, owing appellees debts contracted on the faith and credit of her property and business. On January 8, 1883, Mrs. Cooper conveyed by quitclaim deed said lots Nos. 8 and 9 to the State National Bank of Lincoln to secure the payment of a debt she owed it. On January 7, 1884, she was still indebted in the sum of \$4,500 to said bank, as an evidence of which said debt she executed and delivered to it her note, due in 60 days, on which, prior to October of said year, there were indorsed \$1,300. At this date all these lots were incumbered by a mortgage of \$3,500 held by one Bowles. On October 27, 1884, Mrs. Cooper and her husband, by a warranty deed, and for the expressed consideration of \$5,200, conveyed to John R. Richards, then president of said bank, four of said lots, namely, Nos. 4, 5, 6, and 7. This deed contained this clause: "The party of the second part, as a part of the purchase money of said premises, agrees to pay, and have applied on a certain mortgage executed by the parties of the first part to one Kate Bowles, the sum of \$2,000, and which said mortgage also covers lots 8

and 9 in said block, and is to secure \$3,500, and is recorded in book V of Mortgages, in Lancaster county, Nebraska. The balance of said mortgage, being \$1,500 and interest, the parties of the first part are to pay, and if not paid, and is enforced by foreclosure, said lots Nos. 8 and 9 are to be first sold, and the proceeds to be applied to the payment of said balance of \$1,500 and interest." On the day of the execution of this deed to Richards the State National Bank executed and delivered to Mrs. Cooper a quitclaim deed for the said lots Nos. 8 and 9, previously conveyed by her to the bank as security. The deeds from Mrs. Cooper and husband to Richards, and from the bank to Mrs. Cooper, were both recorded October 28, 1884. About this last date, Mrs. Cooper and husband conveyed said lots Nos. 8 and 9 to one Hyde, and he at once conveyed them to appellant Philip H. Cooper, who thereupon gave his wife a written receipt or paper reciting that he accepted said conveyance from Hyde in full payment of \$1,300 before then loaned by Mr. Cooper to his wife, and agreeing to hold said lots as the homestead of the family. It appears that this \$1,300 was the money indorsed on the \$4,500 note. Some time after the date of the deed from Mrs. Cooper and husband to Richards, he was succeeded as president of the bank by one Brown, and at that time Mr. Richards conveyed said lots 4, 5, 6, and 7 to him, (Brown.) About April 1, 1886, Mr. Brown sold and conveyed two of said lots, namely, lots Nos. 4 and 5, to one Patrick, for \$4,500; and, on April 14th of the same year, Brown conveyed to appellant Philip H. Cooper the other two lots, namely, lots Nos. 6 and 7, the consideration expressed in the deed being \$1.

The appellees brought this suit, a creditor's bill, to the district court of Lancaster county, alleging their judgments against Mrs. Cooper; that the debts on which they were based were contracted while she was owner of the record title of said lots Nos. 4, 5, 6, 7, 8, and 9, and on the faith and credit of the same; her insolvency; that said lots were of the value of \$9,000,—the homestead of herself and husband; that they had conveyed them to Hyde, and caused him to convey them to Philip H. Cooper, without consideration, and for the express purpose of defrauding the creditors of Mrs. Cooper. As to said lots 4, 5, 6, and 7, appellees, in their amended petition, alleged that on October 27, 1884, the appellant Mrs. Cooper was indebted to the State National Bank of Lincoln in the sum of \$3,200, and, to secure the payment of the same she and her husband conveyed all said lots to said Richards, president of said bank, and that it then was, and at all times prior and subsequent thereto continued to be, well understood and agreed by and between the said Coopers and the said Richards, and the bank of which he was president, that Richards received said deed, and the title to said lots, in trust, only, and by

way of mortgage to secure an indebtedness of \$3,200 from the said Sarah Cooper to the said bank, and that upon the payment of said indebtedness said lots should be reconveyed to the said Sarah Cooper, or to such person as she might direct, or that in case said lots should be sold the bank should be first paid out of the proceeds of the sale, and the residue, if any, should be paid over to the said Sarah Cooper, or to such person as she might direct. Appellees further alleged that some time after that one Brown succeeded Richards as president of said bank, and that thereupon Richards conveyed said lots to Brown on the same terms under which they were conveyed to him by the Coopers, and that in pursuance of the trust and agreement between the said Coopers and the said Richards and Brown and the bank, in April, 1886, Brown sold, of said lots, Nos. 4 and 5, to one Patrick, for a sum of money sufficient to pay the indebtedness of Mrs. Cooper to the bank, and did, with the proceeds of said sale, pay off and discharge Mrs. Cooper's indebtedness to the bank, and thereupon, on the 14th of April, 1886, at the request of Mrs. Cooper, and with the intention to hinder, delay, and defraud her creditors, and without consideration, conveyed said lots Nos. 6 and 7 to the appellant Philip H. Cooper. The appellees further alleged that they had no knowledge of the facts set forth in their amended petition as to the fraudulent intent and purpose of the conveyance of the lots by the Coopers until long after said conveyance. The prayer was that all of the conveyances, so far as the same affected said lots 6 and 7, be set aside, canceled, and annulled. The answer of the appellants alleged that, as to lots 8 and 9, they were conveyed to the appellant Philip H. Cooper in consideration of the \$1,300 which he had loaned his wife, and which he had paid on the note held by the State National Bank. As to lots 4, 5, 6, and 7, the answer alleged that the deed made by the Coopers of said lots to Richards on the 27th of October, 1884, was an absolute sale and conveyance of the property, made in good faith. The appellants also pleaded the statute of limitations, viz. that the cause of action of the appellees accrued more than four years prior to the bringing of this suit.

The judgment of the court, found in the record, makes no disposition whatever of said lots Nos. 4, 5, 8, or 9. The court found and decreed, however, that the conveyance made by the Coopers on the 27th of October, 1884, to Richards, of lots 4, 5, 6, and 7, was made to secure the payment of \$3,200 then owing by Mrs. Cooper to the State National Bank, and in trust for Mrs. Cooper, with an agreement on the part of Richards that after the debt was paid the remaining property, or the proceeds of the sale of the property, if it should be sold, should be returned to Mrs. Cooper, or to such persons as he might designate, and that

both the conveyance of October 27, 1884, of the Coopers to Richards, and the conveyance of April 14, 1886, of Brown to appellant Philip H. Cooper, were made for the purpose of hindering, delaying, and defrauding the creditors of Mrs. Cooper; and the court decreed that the said conveyance of April 14, 1886, by Brown to Cooper, be set aside, and the property subjected to the payment of the debts of appellees. The court further found that the appellees were ignorant of all said fraudulent transactions and agreement and intent until within four years prior to the bringing of this action. The appellants filed the usual bond in the court below, and bring the case here on appeal.

The finding of the court that the conveyance made by the Coopers to Richards on the 27th of October, 1884, and the subsequent conveyance of Brown to Cooper in April, 1886, were fraudulent, and made for the purpose of hindering and delaying the appellees in the collection of their debts, is supported by the evidence. But we are of the opinion that the finding of the court that the appellees were ignorant of both these fraudulent transactions until within four years next prior to the bringing of their suit is not supported by the evidence in the record. This suit was brought more than four years after October 28, 1884. Now, when did appellees discover the fraud perpetrated October 27, 1884, within the meaning of section 12 of the Civil Code, as construed by the courts? The parties all lived in the city of Lincoln, in Lancaster county, Neb. The lots fraudulently conveyed were situated in said county and city. The fraudulent deed was recorded in said county and city October 28, 1884. Mrs. Cooper had failed in business, and was known to be insolvent. The fraudulent grantors remained in possession of the property conveyed to Richards. The appellees testify: Mrs. Gillespie: "Question. You are one of the plaintiffs in this case? Answer. Yes, sir. Q. Are you acquainted with the defendants, Cooper and his wife? A. Yes, sir. Q. How long have you known them. A. I should say about fourteen years. Q. Did you know or hear about the conveyance of Coopers to J. R. Richards? A. Yes, sir; I did. Q. Of the property in question, in October, 1884? A. Yes, sir. Q. At that time Mrs. Cooper then was, or had been, in the grocery business? A. Yes. Q. It was about the time of the failure of that business, was it not? A. Yes, sir. Q. At or about that time, or immediately afterwards, did you have any conversation with Mrs. Cooper in reference to the transaction? A. Yes, sir. Q. State when and where that conversation was. A. It was at Mrs. Cooper's house. Q. On what date? A. I could not say the date. Q. With relation to the transaction, on what date? A. It was the day that those deeds were to be made. I met her son, and, I think, the attorney,—I was not acquainted

with the gentleman,—as I went up. Q. Was that this gentleman, Mr. —? A. I could not identify him now, but she told me that Mr. — had advised her to deed the property out of her hands. Q. Where did that conversation occur? A. At Mrs. Cooper's house. Q. Did you have any further conversation with her at that time, and at that place? A. Yes, sir; she asked me if I had taken any action in the matter, as soon as I went in, and I told her no; that I called to see her, to see what she had to say about it, and she said they intended putting the property into Mr. Richards' hands until they could settle the matter, and straighten themselves. She said, of course, she intended to pay me, and she said she intended to fix it so the creditors of Willie could not get hold of it; and she said, when that property was sold, Mr. Richards had entered into an agreement with her that she would have all over and above her indebtedness to Mr. Richards, and that she would have ample means to pay all her debts of honor, as she termed them, when that was fixed up. Q. Willie was her son? A. Yes, sir. Q. Had he been conducting her business in the grocery? A. Yes, sir; he had been conducting the grocery business. Q. That was the business that failed about that time? A. Yes, sir. Q. That business was conducted in her name,—it was her business? A. Yes, sir; that was my understanding." J. H. McClay: "Question. Where do you reside? Answer. Lincoln. Q. Are you acquainted with the defendants? A. Yes, sir. Q. You are one of the plaintiffs in this action? A. Yes, sir. Q. You may state whether you had any conversation with the defendants, or either of them. A. I have had conversation with them at different times about this matter. I have had conversation with Mrs. Cooper in reference to this matter in controversy. Q. State when and where they were, and what they were. A. Very soon after her failure, and the transfer of this property in these deeds offered heretofore. Q. What was said? A. It was after the quitclaim, and prior to the 1884, deed. It was between that time. It was just after the failure of the grocery business that I had the conversation. Q. Fix the date. A. I could not do that. It was just after the failure of the grocery business. My conversation with Mrs. Cooper was about some money that she owed me, that I had paid as security on a note, and she said she had made arrangements by which she could pay all her debts to the people here in Lincoln; that there was some debts that she did not feel bound to pay; she had plenty of property to pay them with. I asked her where the property was. She refused to tell me where it was. She said she had made such arrangements as would protect her interests, and she thought it would protect the rest of us." W. W. Holmes: "Question. You are one of the plaintiffs? Answer. Yes, sir. Q.

You live in Lincoln? A. Yes, sir. Q. You are acquainted with the defendants? A. Yes, sir. Q. You have heard the testimony in this case, so far? A. Yes, sir. Q. Did you at any time, about the time of the transfer or conveyance of these lots to Richards, have any conversation with the defendants, or any of them, in reference to it? A. I had, with Mrs. Cooper. Q. When? A. It was on Monday following the conveyance. Q. What day of the week were the conveyances? Do you know? A. She said she had been up all night Sunday night making them. Q. It was the day following that you had that conversation with her. A. Yes, sir. Q. Where was that conversation? A. At her house. Q. What was it? A. She said she had turned the property over to Richards to beat her foreign creditors, and all the home creditors were to be paid. Q. Was there any further conversation? A. Yes, sir; I had a long conversation with her. Q. State the substance of it, as near as you can. A. I don't know as she said anything more about that. She said she was most sick; she had been up all night. Q. Did she say what the object of the transfer to Richards was,—what office that was intended to perform? A. It was to secure the bank. The bank was to be paid first. Q. What was to become of the residue? A. That was to go to her." J. H. McClay, recalled: "Question. Did you have any such conversation as that with Mrs. Cooper? Answer. Yes, sir; I had that kind of a conversation with her, and she told me that the lands were hers after the bank had been paid off,—the State National Bank was paid,—the balance belonged to her."

Were these facts a discovery by appellees of the fraud of October 27, 1884, within the meaning of section 12 of the Civil Code, and the construction placed thereon by the courts? That section is as follows: "An action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." The settled rule is that the party defrauded must be diligent in making inquiry; that means of knowledge are equivalent to knowledge; that a clue to the facts, which, if followed up diligently, would lead to a discovery, is, in law, equivalent to a discovery,—equivalent to knowledge. *Norris v. Haggin*, 28 Fed. Rep. 275, and cases there cited; *O'Dell v. Burnham*, 61 Wis. 562, 21 N. W. Rep. 635; *Kuhlman v. Baker*, 50 Tex. 630. In *Parker v. Kuhn*, 21 Neb. 413, 32 N. W. Rep. 74, this court said: "An action for relief on the ground of fraud may be commenced at any time within four years after the discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." *Hellman v. Davis*, 24 Neb. 793, 40 N. W. Rep. 309, was a creditor's bill, alleging that in 1873 the defendant was a

member of an insolvent copartnership, and on said date caused certain lands to be purchased with his money, and title taken in his wife's name, for the purpose of defrauding his creditors; that the plaintiff had no knowledge of the fraud until within four years prior to the bringing of the suit. It appears from the evidence quoted in the opinion that the fraudulent deed was recorded in 1873; that the plaintiff knew that the defendant and his wife were living on the land, and that the defendant was insolvent; and the only other fact of the fraud that plaintiff had learned since its perpetration was that within four years before the suit was brought his attorney had told him his claim against the defendant could be made. Justice Cobb, speaking for this court, with those facts before him, held that the action was barred by the statute of limitation, citing and affirming *Parker v. Kuhn*, 21 Neb. 413, 32 N. W. Rep. 74. In *Wright v. Davis*, 28 Neb. 479, 44 N. W. Rep. 490, a creditor's bill, it was alleged that the defendant became indebted to the plaintiff in the year 1868; that the plaintiff's claim was reduced to judgment, became dormant, and was revived in 1885; that the defendant, about the date of the incurring of the indebtedness, contemplated utter insolvency, and, with a view to defraud his creditors, purchased certain real estate with his own money, and caused the title to the property to be taken in the name of his wife; that subsequently, in 1879 and 1880, she conveyed the real estate to certain other persons, and they afterwards reconveyed the same to her; that such conveyances by her and to her were made for the purpose of covering up and hiding the title; and that during all these times the defendant was the sole owner of the real estate. The plaintiff also alleged that, aside from what was shown by the records of Douglas county, the fraud was discovered and made known to the plaintiff within a year prior to the bringing of the suit, and not before, and that the cause of action accrued upon the discovery of the fraud. The plaintiff, on the trial, testified: "Question. You knew this land had been bought and stood in the name of Mrs. Davis. Answer. I presume I did. I don't think I ever looked at the records, but I was satisfied that was the case." It also appears that he testified on the trial that he had seen the defendant frequently after the recovery of his judgment; had conversed with him about the payment of it; had received assurance that it would be paid, and that he was to be taken care of. Chief Justice Reese, speaking for this court, with these facts before him, said: "There is no question but that the plaintiff's right to apply the property to the payment of his claim was barred by the statute of limitations, if the statute began to run upon the filing for record of the deed by which the real estate was finally conveyed to Mrs. Davis, for

by section 12 of the Civil Code the statutory limit is four years after the discovery of the fraud." He then cites *Hellman v. Davis*, supra, and *Parker v. Kuhn*, supra, and continues: "By these cases it is pretty well settled in this state that, while a person against whom a fraud has been perpetrated has four years from the discovery of the fraud in which to commence his suit, yet the fraud will be deemed to have been discovered when such facts are known, either actually or constructively, as would amount to knowledge, or which would naturally suggest such inquiries as, if followed up, would lead to such knowledge. * * * It clearly appears that the conveyances were made and placed on record at a time when the defendant was known to be insolvent; that defendant resided upon the land, and made improvements thereon; * * * that it was claimed by some of the [defendant's] family, —and was charged by the record with knowledge of the condition of the title, as it then appeared. * * * It appears from all the evidence that the plaintiff was fully aware of the financial condition of the defendant, and that the conveyance to his wife could not be otherwise than fraudulent; or, if this cannot be said to have been fully established, that, by the most superficial examination suggested by facts within his knowledge, he might have had full and complete knowledge of the condition of the title. * * * This was sufficient to cause the statute to run." In *Laird v. Kilbourne*, 70 Iowa, 83, 30 N. W. Rep. 9, the supreme court of Iowa say: "An action to set aside a fraudulent conveyance of real estate is barred in five years after the fraud is discovered, and it is conclusively presumed to be discovered when the fraudulent conveyance is filed for record." See, also, *Humphreys v. Mattoon*, 43 Iowa, 556. In *Rogers v. Brown*, 61 Mo. 187, the supreme court of Missouri say: "They [the appellees] are chargeable by law with notice of the recorded conveyance. * * * The statute must be held to have commenced to run against them on the 26th day of October, 1857,—the day on which the deed was recorded." In *Cockrell's Ex'r v. Cockrell*, 15 S. W. Rep. 1119, a creditor's bill, the court of appeals of Kentucky say: "The statute of limitations was pleaded, and the reply attempted to avoid it by saying that the appellant * * * did not know that the deed was made and recorded. This is no excuse for the delay; and, besides, the land was conveyed, and the deed recorded, in the county where the debtor lived, and where the suit was instituted, and all the party had to do was to examine the county records, and there the deed could have been found." The foregoing facts, looked at in the light of the authorities just quoted, were sufficient to put appellees on an inquiry, which, if pursued, would have led to the discovery of the fraud in the conveyance by the Coopers to Richards; and appellees

must be held to have discovered that fraud October 28, 1884. The statute then began to run in favor of Mrs. Cooper's grantees, and against her and her creditors.

Appellees, however, claim that their cause of action did not accrue until they recovered their judgments against Mrs. Cooper. What was the appellees' cause of action? Evidently, the fraudulent conveyance between the appellants. When did it accrue? When discovered. And it was discovered when appellees were in possession of sufficient facts to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would have led to discovery that the conveyance to Richards was fraudulent. What facts were in possession of appellees October 28, 1884? The fraudulent conveyance from the Coopers to Richards was of record. The appellees and appellants all resided in the same county and city. Appellees knew that Mrs. Cooper had failed in business, and was insolvent. The appellees knew that the Coopers continued in possession of the property conveyed to Richards. Appellees had been told by Mrs. Cooper that she had conveyed her property to Richards to defeat her creditors, or some of them. These facts were sufficient for appellees to have maintained an attachment suit against this property October 28, 1884, whether their claims against her were due or not, and their right to relief against this fraudulent conveyance was an accrued right, when they could, by any form of action, set the courts in motion to relieve them from this fraud. Were the appellees limited to a creditor's bill in order to obtain relief from this fraudulent conveyance? We think not. Appellees could have attached the property on the ground that it was fraudulently conveyed to Richards for the purpose of delaying Mrs. Cooper's creditors. Subdivision 8, § 198, Civil Code; Keene v. Sallenbach, 15 Neb. 200, 18 N. W. Rep. 75; Brown v. Brown, (Ky.) 11 S. W. Rep. 4; Rogers v. Brown, 61 Mo. 187. For this court to hold that appellees' cause of action did not accrue—the fraud discovered—until appellees were in a position to file a creditor's bill would be to judicially amend this statute, and leave it to the discretion of creditors to fix the time of the accrual of their cause of action by hastening or delaying the recovery of judgment. A case might arise where, by reason of the debtor being a nonresident, a personal judgment could not be obtained. In such case, would appellees have no cause of action for relief on the ground of fraud until the debtor became a resident, and a personal judgment was rendered against him? It is an old maxim that for every wrong the law affords a remedy, but if one effectual remedy is afforded by the law the maxim is complied with.

The final contention of the appellees is that if the October, 1884, conveyance was

fraudulent, and discovered by them in such time as to make the statute of limitations a bar, yet the conveyance by Brown of lots Nos. 6 and 7 in April, 1886, to Mrs. Cooper's husband, gave appellees a new cause of action. In this view we concur. From the evidence of Mr. Brown in the record, it appears that during the time Richards held the title to these lots he agreed with Mrs. Cooper that if she would sell them, or find a purchaser for them, he would allow her, as commissions, whatever surplus remained after satisfaction of her debt to the bank. The record does not expressly show that a purchaser was procured by Mrs. Cooper for the property, but sufficient of the lots were sold to pay her debt to the bank, and Mr. Brown, in fulfillment of Richards' agreement, conveyed these lots to Mrs. Cooper's husband, at her request. Here, then, Mrs. Cooper became the owner of the property, which, if conveyed directly to her, appellees would have been able to levy upon. She had it conveyed to her husband for the very purpose of preventing this levy. This was a fraud,—not a continuation of the old fraud of October, 1884, not a consummation of that fraud, but a new and independent one; and appellees' cause of action for relief therefrom did not accrue until the filing for record of the deed from Brown to Mr. Cooper. See Piper v. Hoard, 107 N. Y. 73, 13 N. E. Rep. 626. The claim of appellants that Mr. Cooper paid anything for this property is not supported by the evidence.

Complaint is made by appellants because the decree is silent as to said lots 8 and 9, and no account taken of taxes and interest on the Bowles mortgage, paid by Mr. Cooper, on lots 6 and 7. As to lots 8 and 9, we think the statute of limitations precludes appellees from questioning Cooper's title to the same. The decree of the district court will be so modified here as to dismiss the petitions and cross petitions of appellees as to said lots 8 and 9. As to interest and taxes paid on lots 6 and 7 by Mr. Cooper, he accepted the title to these lots without consideration, and for the purpose of defrauding the creditors of his wife, and is therefore in no position to ask a court of equity to relieve him from burdens he voluntarily and fraudulently assumed. A decree will be entered in this court dismissing the petitions and cross petitions of appellees as to lots 8 and 9, block 124, in the city of Lincoln, and as thus modified the decree of the district court is in all things affirmed. Judgment accordingly.

RYAN, C., concurs in the affirmance of the decree of the district court.

IRVINE, C. I concur in the conclusion reached, but not in the construction given the statute of limitations. I think the statute means that in such cases the cause of action shall not be deemed to accrue until

the discovery of the fraud, but not necessarily that it does accrue upon such discovery. The cause of action in this case was the right of the creditors to proceed against the fraudulent grantee, and was not complete until judgments were recovered. I therefore think that the statute began to run upon the recovery of judgments, when the creditors were for the first time in position to institute the action.

GRAFTON et al. v. MOORMAN et ux.
(Supreme Court of Iowa. May 24, 1893.)

EVIDENCE—WAIVER OF OBJECTIONS.

Evidence admitted without objection in the lower court cannot be rejected on a trial de novo in the appellate court.

Appeal from district court, Jefferson county; E. L. Burton, Judge.

Plaintiffs, heirs at law and legatees under the last will and testament of Thomas Moorman, deceased, alleged that said deceased died seised in fee simple of certain real estate described, in which the widow's dower interest has been set off to her; that said last will and testament contains the following provision: "Item Second. I will that the balance of my land be sold to the highest bidder, for ready money. And I will that my granddaughter Albertie Gainer be paid one hundred and fifty dollars out of the proceeds of the same; and the balance of the proceeds of the sale of said land, after all just debts are paid, to be divided equally among my seven children, viz.: Ann E. Grafton, Eliza E. Junkin's heirs, C. W. Moorman, Amanda J. Warwick, W. R. Moorman, Martha M. Searls, Sarah Alice Campbell; deducting, however, two receipts, —one against C. W. Moorman, and one against W. T. Moorman,—which are to be charged against them, respectively, as a part or all of their respective shares, as the case may be." They alleged that the defendant W. T. Moorman has no interest in said real estate, for the reason that his receipt, referred to in said will, is for a larger sum than the one-seventh part of said real estate. That said receipt is for \$950 advanced by Thomas Moorman, deceased, to his son, W. T. Moorman. The receipt is set out as follows: "Jefferson Co., Iowa, July 1, 1869. Received of Thomas Moorman the sum of \$9:50 dollars, to be taken into consideration and settled at his death, so as to make an equal distribution of his effects between his legal heirs, (without interest.) [Signed] W. T. Moorman." Plaintiffs ask an order for the sale of said real estate, and for a distribution of the proceeds, and that, in the distribution, said receipt be taken into account for the sum of \$950. Defendants, W. T. Moorman and wife, answered, denying that W. T. Moorman ever received \$950 from his father, Thomas Moorman, deceased, and denying that said re-

ceipt is for that sum. They alleged that it is for \$9.50, wherefore they claim that W. T. Moorman is entitled to a full one-seventh part of the proceeds of the sale of said real estate, less \$9.50. Appellants moved that the case be set down for trial to a jury. This motion was overruled, and at the next term the case was tried to the court, as in equity, and an order and decree entered for the plaintiffs, as prayed, from which the defendants appeal.

Raney & Simmons, for appellants. Jones & Fullen, for appellees.

GIVEN, J. 1. The case was tried as in equity, and is before us upon abstracts and a full transcript. Appellants, in their opening argument, ask that, if it is held that they were not entitled to a jury trial, we consider the case de novo. Appellees replied, in argument, that, appellants having appealed upon this assignment of error, they waived the right to trial de novo. Appellants, in their argument in reply, withdraw their assignment of error, and ask that the case be tried upon its merits. The case having been tried below as in equity, and fully argued upon its merits before us, we conclude that, under the record, we should try it de novo, without, however, determining whether the assignment of error waived the right to such a trial.

2. The single issue presented is whether said receipt of W. T. Moorman is for \$9.50, or \$950. Appellants contend that the receipt is clear and unequivocal in its language, and that its exact language is "\$9:50 dollars." They contend that, by the reference made in the will to this receipt, it is made a part of the will, and governed by the same rules as to evidence; that, under the rule, parol evidence is inadmissible to change the language of a will, and that the court erred in admitting parol evidence introduced for the purpose of showing that the receipt is for \$950. Plaintiffs introduced evidence showing certain acts and declarations of Thomas Moorman, deceased, tending to show that this receipt was for more than \$9.50, to all of which the defendants objected; some of their objections being upon the grounds that the evidence is incompetent, irrelevant, and immaterial, and others upon the additional ground that it was immaterial, incompetent, and irrelevant, under section 3639 of the Code. It appears by appellees' additional abstract that all these objections were sustained, to which plaintiffs except, and though, under the practice, the answers were taken, they were not considered by the court. The rulings on this evidence being favorable to appellants, their complaint cannot be considered as relating thereto. Plaintiffs introduced evidence showing the declarations of the defendant W. T. Moorman with respect to the amount named in said receipt, to which

no objection appears to have been made. The case being before us for trial *de novo*, we will consider all objections made by appellants to evidence offered by appellees, and, if we find the objections well taken, will exclude the evidence from consideration; but, if the evidence has been admitted without objection on the trial below, appellants will not be heard to object on this appeal. Conceding that the law is as claimed by appellants,—a question we do not determine,—it is clear from the record that the evidence as to defendant W. T. Moorman's declarations must be considered on this appeal, because admitted without objection. *Lee v. Percival*, (Iowa,) 52 N. W. Rep. 543. As already stated, appellants' contention is that, the receipt being a part of the will, parol evidence is not admissible to change its language, and that its language is, clearly, "\$9.50 dollars." We have the original receipt before us, and our inspection of it does not lead us to the conclusion that it is "clear and unequivocal in its language." It was evidently written in blank, as to the amount, and the dollar mark and figures, 950, inserted in a different hand. The only ground for claiming, from the face of the receipt, that it is for \$9.50 is the fact that two dots are found between the figures 9 and 5, which are claimed to be decimal points. It is probable that they were so intended, but the fact that nothing appears between the figures and the word "dollars" renders it questionable whether they were intended to indicate \$9.50 as the amount of the receipt. Whether the language of the receipt is so obscure as to the amount as to admit parol evidence, we do not need to determine, as, for reasons already stated, the evidence of the declarations of the defendant W. T. Moorman must be considered on this appeal.

3. It only remains for us to determine whether, under the evidence admitted without objection, the receipt in question should be held to be for \$950, or for \$9.50. It is unnecessary that we here discuss this evidence in detail. It is sufficient to say that from the receipt itself, the circumstances under which, and the purpose for which, it was given, and the evidence as to the declarations of the defendant W. T. Moorman, we think it fully and fairly appears that the sum named in said receipt is \$950. Such was the conclusion of the district court, and, concurring in that conclusion, it follows that the judgment of that court must be affirmed.

SCHICHTL v. SCHICHTL.

(Supreme Court of Iowa. May 17, 1893.)

DIVORCE—CRUELTY—CUSTODY OF CHILDREN.

1. In an action for divorce, plaintiff testified that her husband constantly struck and kicked her, and a witness who was present before and after plaintiff's confinement corroborated

statements made by plaintiff as to inexcusable neglect during her sickness. *Held*, that defendant was entitled to a divorce.

2. It appearing that plaintiff had always been thoughtful of the children's comfort and education, and that she was industrious and prudent in management, while the testimony failed to show that defendant had the ability or disposition to suitably provide for them, it was proper to award their custody to plaintiff.

Appeal from district court, Kossuth county; George H. Carr, Judge.

Action for divorce. Decree for plaintiff. The defendant appealed.

Oliggit & Rule, for appellant. George E. Clarke, for appellee.

GRANGER, J. This suit was commenced in January, 1880. The parties were married in April, 1877, and had five children, the oldest of which, at the commencement of this suit, was 11, and the youngest 2, years of age. About three years before the commencement of the action the plaintiff left the home of the defendant, taking with her the youngest child, the other children remaining with the defendant. Some averments of the petition, on which plaintiff seeks the divorce are as follows: "Par. 4. That defendant has shamefully misused plaintiff by striking, kicking, and maltreating, which treatment has very greatly injured plaintiff's health, and nearly cost her life, which has been endangered on two different occasions in the spring and summer of 1886." A further paragraph of the petition is as follows: "Par. 6. Defendant is shamefully abusing and misusing the children, by not properly feeding or clothing them, and by obscene language and conduct in their presence; and plaintiff is able and anxious to take care of properly and educate the children." The prayer of the petition, besides a decree of divorce, asked for a temporary injunction restraining defendant from attempting to prevent plaintiff's taking the children, or molesting her in the care and control of them. The writ was allowed, upon a bond being filed, and the children delivered into the custody of the plaintiff. A motion to dissolve the injunction was afterwards overruled. The answer puts in issue the averments of the petition as to the misconduct of the defendant, on which the prayer for relief is based, and presents a cross action for divorce on the grounds of desertion and inhuman treatment. The district court found the facts with the plaintiff, and a decree for divorce was entered, granting to her the custody of the children, with certain restrictions as to her and privileges to the plaintiff, and gave to the plaintiff alimony for the support of the children at \$10 per month.

It is unfortunate that this plaintiff and defendant should have become husband and wife. They are illy suited to the companionship of each other, and much of their domestic life of nearly 10 years has been the reverse of what it should have been, and probably what was anticipated at its inception.

This result is not the fault exclusively of either, but of both. The plaintiff has been peevish, quarrelsome, and needlessly meddling in her husband's business and other affairs, and in a way to discourage, rather than encourage, prosperity or domestic happiness. The details of her course in this respect constitute the grounds of his complaint and claim for divorce in the cross bill, and they have, beyond question, been a strong provocation to many of the acts of which she complains, but they do not amount to a justification. The testimony in support of the cross petition, while, as we have said, it shows a strong provocation, comes far short of justifying, in his behalf, a legal separation. Our conclusion from the testimony accords with that of the district court,—that the plaintiff should be decreed a divorce. This conclusion is based on his acts of personal violence towards her. The fact of personal violence is not in dispute. The character, extent, and effect of the violence are matters to be determined from conflicting testimony. It is not important that we should review the whole course of his treatment of the plaintiff in this respect. We cannot give a few facts more concisely than by quoting a part of the plaintiff's evidence as follows: "Left him because that day he threatened to finish us all, entirely, and I was afraid of my life, and he was abusing me so shamefully, and had abused me before and after my children were born. Before the child was born, he struck and kicked me; struck me about head and shoulders, kicked and cuffed me until I did try to get out of his way; and the way my health was, I was not able to walk as I ought to be able to. This was the 5th of May, and he kicked and cuffed me to a step or two of barn, and back to a step or two of house, that evening; and he told his brother, who stood on corner of house, to watch that I did not get off the place. Kicked me in side, for which I suffered more or less ever since. Hit me so many different places that I can't tell, but certain places that I could state, because other people have seen the marks. Question. Whereabout did he kick you? On your limb? Answer. Think he struck me,—that is, whether with his foot or part with his fist, could not swear, because he followed me right from the back, because I could not see where all the blows came from, because it was in the evening; and he kicked me so that I was bruised badly from head down around my limb and ankle, besides bruises that I had on my body and head. I think there were some of those marks left after my confinement. This was time my limb got blackened and he blacked my face. It was morning that I left that he struck me back of and around my ear, right back of and below ear, so blood dropped down and dried on before neighbors seen it. He made threats that if children told any one what they seen he would serve them worse than me, and I sent my youngest

child to Jains' to ask for one or two men to come, so I could get off the place alive. Mr. Jains and his son came, and said other men didn't want anything to do with it. I tried to walk, and got to Rod. Jains' potato patch, where his two daughters were digging potatoes; but I dropped before I got there, and second time I dropped they came and helped me to their house." A Mrs. Haswell, who was present before and at the confinement of plaintiff, says she went there about a week before the confinement, and that the plaintiff could hardly help herself; that "she was bruised badly on her face and limbs; on side of face. These bruises appeared of recent date." She corroborates the plaintiff in her statements of acts of neglect during her sickness by confinement that are without any excuse or palliating circumstances. Other witnesses saw the plaintiff with her face bruised and blackened; and, upon the whole, the testimony satisfies us that her treatment at the hands of defendant was inhuman and such as to endanger life, and for which she is entitled to the decree separating her from her marital relationship to him. The story of her complaints is a long and sad one, for which she is not wholly faultless, but for which, as we have said, he is without legal justification. Much, from the record, might be added in support of our conclusion, but it is unnecessary. These acts by the defendant are a justification on her part in separating from him, which act is the ground of his claim for divorce on the ground of desertion. To the children the plaintiff was always kind, and she was always thoughtful for their comfort and education. They can be intrusted to her care without an apprehension of neglect or abuse, and with every reasonable assurance that an effort will be made for their suitable support. She is industrious and prudent in management. While the defendant may not be wanting in affection for his children, the testimony fails to show that he has the same ability or disposition to meet the situation and provide for their comfort and educational opportunities that the plaintiff has. To our minds, the decree of the district court in each particular meets the demand of the case, and its judgment is affirmed.

Mr. Justice KINNE took no part in this case.

SNELL v. DUBUQUE & S. C. RY. CO. et al.
(Supreme Court of Iowa. May 23, 1893.)

TAX SALE—VALIDITY—FAILURE TO CARRY FORWARD DELINQUENT TAX—NOTICE OF EXPIRATION OF REDEMPTION—ATTACK ON DEED—PLEADING—FILING—FORM OF ACTION—COSTS.

1. A sale of land for taxes of 1878, made after the tax list of 1879 was in the hands of the treasurer, is invalid where the delinquent tax of the former year was not brought forward and entered on the tax list of the latter

year before such sale, as required by Code, § 845.

2. Where the notice of expiration of the time for redemption of land from tax sale is not served on the person in possession, a tax deed issued in pursuance of the sale is void.

3. Where, in an action by the owner to quiet the title to land sold for taxes, the pleadings, filed within five years from the date of the tax deed, allege generally that such deed is void, and no motion is made for a more specific statement, they are sufficient.

4. Where a pleading was filed, and so marked by the clerk, and attached to the pleadings, but the filing was not entered on the appearance docket, it is not error for the court, four years after such filing, when the pleading is first attacked because not filed, to order the filing to be entered on the appearance docket as of the date it was delivered to the clerk.

5. It is proper for the court to treat such action as an action to redeem, and require plaintiff to reimburse the holder of the tax title.

6. Where no motion is made in the trial court to retax costs, the question of the taxation of costs will not be considered on appeal.

Appeal from district court, Webster county; S. M. Weaver, Judge.

This is a suit in equity, and it involves the title to the tract of land in Webster county. There was a trial on the merits, and a decree for the plaintiff. The defendant W. G. Watters appeals.

R. M. Wright, for appellant. Frank Farrell, for appellee.

ROTHROCK, J. 1. The action was commenced in June, 1885. The plaintiff claimed the land under the act of congress approved September 28, 1850, relating to swamp lands. The defendant railroad company claimed title to the same land under the act of congress approved May 15, 1856, granting certain lands to the state of Iowa to aid in the construction of a railroad from Dubuque to a point on the Missouri river near Sioux City, and other roads. The cause was tried on the issue thus made, and there was a decree for the plaintiff. An appeal was taken to this court, and the decree was affirmed. See 78 Iowa, 88, 42 N. W. Rep. 588. F. T. Walker, one of the defendants, made an independent claim of title under a tax deed for the land, which deed was executed on the 24th day of September, 1883, in pursuance of a sale of the land for taxes made on the 15th day of January, 1880, for the delinquent taxes of the year 1878. A hearing was had on this issue in November, 1891, which resulted in a decree to the effect that the tax title was invalid. It is from this decree that the present appeal is taken. Walker, who was claimant under the tax title, had conveyed the land to W. G. Watters, and the trial was had between the plaintiff and Watters. The tax deed is claimed to be invalid upon two grounds. The first ground is that, when the tax sale was made, the tax list for 1879 was in the hands of the county treasurer, and the delinquent tax of 1878 was not brought forward and entered on the tax list of 1879 before the treasurer proceeded to make the sale. This is required to be done by section

845 of the Code. The tax sale was therefore invalid. *Gardner v. Early*, 69 Iowa, 42, 28 N. W. Rep. 427; *Barke v. Early*, 72 Iowa, 273, 33 N. W. Rep. 677. The second ground upon which the invalidity of the tax title is claimed is that the notice of expiration of redemption required by statute was not given to the person in whose name the land was taxed, nor to the person in possession. The evidence shows beyond all question that the notice was not served on the person in whose name the land was taxed. This alone is sufficient to invalidate the deed. Counsel for appellant seeks to avoid the effect of these omissions by claiming that the deed was not attacked on these grounds by any pleading in the case within five years after the tax deed was made. It is true that no attack was made within that time upon the deed upon the specific ground that the delinquent taxes were not carried forward. But the deed was attacked by general averments that it was void, and there was no motion for more specific statement. The pleadings all through, within the five years, abound in averments and allegations as to the invalidity of the tax deed. One of these pleadings was filed April 30, 1887, and so marked by the clerk of the court, and was attached to the files in the case, but no memorandum of the filing was entered on the appearance docket. The pleading remained on the files without being questioned until 1891, when it was attacked by Watters as not being a pleading in the case. The court disregarded this attack, and ordered that it be entered on the appearance docket as filed at the time it was delivered to the clerk and marked "Filed." There was no error in this ruling.

2. It is claimed that the action should have been in the form of an action to redeem from the tax sale, and not an action to quiet title. The court treated it as an action to redeem, and required the plaintiff to reimburse the defendant for the taxes he had paid. In view of all the pleadings in the case, we think this was proper. No question is made that the amount awarded by the court was not sufficient.

3. Complaint is made because the court taxed the cost of the motion to the appellant. It is a sufficient answer to this objection that no motion was made in the court below for retaxation of the costs. Code, § 3168; *Cox v. Railway Co.*, 77 Iowa, 20, 41 N. W. Rep. 475; *Allen v. Seaward*, (Iowa,) 52 N. W. Rep. 557. The decree of the district court is affirmed.

CITY OF STUART v. CUNNINGHAM.
(Supreme Court of Iowa. May 17, 1893.)

PEDDLER—WHAT CONSTITUTES.

Under a city ordinance which provides that any person who shall sell, or offer for sale, barter, or exchange, any goods or other articles of value, in any street or alley or other public place, or in wagons or other vehicles, or at

private or public houses, shall be deemed a peddler, a person who delivers goods previously sold by another is not a peddler.

Appeal from district court, Guthrie county; J. H. Applegate, Judge.

Defendant was accused and convicted of the offense of peddling without a license. From the judgment requiring him to pay a fine of \$20 and costs, he appeals.

McHenry & Johnson, for appellant. Sayles & Hinkson, for appellee.

ROBINSON, C. J. The conviction of defendant was had under an ordinance of plaintiff which contains provisions as follows: "Be it ordained by the council of the city of Stuart: Section 1. That any person who shall sell, or offer for sale, any goods, wares, merchandise, or other articles of value, for sale, barter, or exchange, at any place in, upon, along, or through the streets, alleys, or other public places, or in wagons or other vehicles, or at private or public houses, shall be deemed a peddler. Sec. 2. It shall not be lawful for any peddler to exercise his calling within this town or city without a license." Other sections provide for the granting of licenses, and for the punishment of a violation of the ordinance. This prosecution was instituted in the court of the mayor of the city of Stuart. The defendant was found guilty, and adjudged to pay a fine, by that court, and appealed to the district court of Guthrie county, in which he was again convicted. An agreed statement of facts shows the following: On or about the 1st day of July, 1891, E. E. Taylor went to Stuart, and canvassed the town, from house to house, taking orders for merchandise thereafter to be delivered. The orders were verbal, but memoranda thereof were kept by Taylor. He acted in the transaction as agent of W. A. Edwards, who was the proprietor of a store in Des Moines. On the 4th day of August, 1891, the merchandise ordered was shipped to Stuart, consigned to defendant, who went there, opened the packages in which the merchandise was shipped, and, with some of it in his possession, but without a peddler's license, started to deliver to the purchasers, as the agent of Edwards. While so engaged he was arrested for a violation of the ordinance specified. The merchandise consisted of spoons, albums, rugs, etc. No money was paid when the orders were given, and neither Taylor nor Edwards had a peddler's license. The question to be determined is whether, under the facts stated, defendant was a peddler exercising his calling, within the meaning of the ordinance, and the statute of Iowa, under which it was adopted.

Incorporated cities and towns have power " * * * to regulate and license * * * peddlers." Code, § 463. In *Town of Spencer v. Whiting*, 68 Iowa, 678, 28 N. W. Rep. 13, it was said that the taking of orders for goods to be manufactured was not peddling. In

City of Davenport v. Rice, 75 Iowa, 74, 39 N. W. Rep. 191, it was held that soliciting orders for future delivery of goods was not peddling, where the goods to be delivered were kept in stock in the city in which the delivery was to be made. But the character of the transaction did not depend upon the place where the goods sold were kept. It is not within the power of a city or town to discriminate in favor of its resident, and against its nonresident, merchants. *Town of Pacific Junction v. Dyer*, 64 Iowa, 38, 19 N. W. Rep. 862. Whether a person is a peddler depends upon his method of doing business. In *Com. v. Ober*, 12 Cush. 495, it was said: "The leading, primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale, and sells them, in a fixed place of business." A peddler may carry on his business by traveling from town to town, or by going from place to place in a single town. It was said in *City of Chicago v. Barte*, 100 Ill. 61, that the term "peddler," used in its general and unrestricted sense, "fully embraces persons engaged in going through the city, from house to house, and selling milk in small quantities to different persons." We are of the opinion that the defendant was not a peddler, within the meaning of the ordinance in question, or the authorities cited. The ordinance forbids a person from selling, or offering for sale, barter, or exchange, goods and other property specified, without a license. The defendant did not, however, sell, nor offer for sale, nor propose to offer for sale, property of any description. The sale had been made previously by another, and his purpose was to deliver the property which had been so sold. Whether he was to collect the money to be paid by the purchasers is not shown, but, conceding that he was to do so, that fact is not material in this case, for the reason that it would not change the character of the transaction so far as defendant participated in it. He proposed to visit citizens of the town of Stuart for the purpose of delivering articles they had ordered, and to that extent his visits may be presumed to have been invited by them. He did not carry about from house to house, nor from place to place, merchandise for sale, seeking purchasers, fixing prices and terms, endeavoring thus to make contracts of sale, but his purpose was merely to perform those previously made. See *Com. v. Ober*, *supra*. The authorities are not agreed as to what constitutes a peddler, some holding that a person who travels from place to place, or house to house, selling goods for future delivery, by sample, is one; but the case of *City of Davenport v. Rice*, *supra*, in effect, holds that he is not. Our attention has not been called to any authority which holds that a person who delivers goods pre-

viously sold by another is a "peddler," within the ordinary use of that term. The ordinance under which defendant was convicted prohibits unlicensed persons from selling, or offering for sale, or barter or exchange, goods or other articles of value, on its streets, or at public and private houses. The defendant did nothing which was prohibited by the ordinance, and should have been acquitted. The judgment of the district court is reversed.

ELLITHORPE v. REIDESSELL et al.

(Supreme Court of Iowa. May 19, 1893.)

REVERSAL—FAILURE TO AWARD NOMINAL DAMAGES.

A cause will not be reversed for failure to award nominal damages.

Appeal from district court, Ida county; George W. Paine, Judge.

This is an action at law to recover damages for an alleged trespass upon a farm, by entering thereon, and cutting and carrying away part of the crops. There was a trial by jury, and a verdict and judgment for the defendants. Plaintiff appeals.

C. S. Macomber and Homer S. Bradshaw, for appellant. Warren & Buchanan and J. O. Walter, for appellees.

ROTHROCK, J. The land upon which it is alleged the trespass was committed originally belonged to the Iowa Railroad Land Company, and was sold by said company, by contract, to W. R. Abell, who assigned his contract to one Cox, who assigned it to M. R. Ellithorpe, and he assigned the contract to the plaintiff. M. R. Ellithorpe was in possession of the land while he held the contract of purchase, and he continued in possession after he assigned the same to the plaintiff. There was no change in the manner in which the land was managed. M. R. Ellithorpe was indebted to the defendant Reidesell upon a judgment. On the 6th day of June, 1885, an execution was issued on the judgment, and the crops growing on the land were sold in satisfaction of the judgment on the 3d day of July of the same year. This action is against the execution creditor, and the constable who made the levy and conducted the sale. The defendant Leinmiller purchased the crops at the sale. It was determined on a former appeal of this case that the crops were not subject to levy and sale as personal property, because they were yet growing, and immature. Ellithorpe v. Reidesell, 71 Iowa, 315, 32 N. W. Rep. 238. When the case was remanded the only question involved was the amount of damage done to the crops by the defendants. The evidence shows that the purchaser of the crops cut the oats, and plowed the corn. It is claimed by appellant that the oats were cut when they were unripe, and for that reason they were greatly damaged,

and that the corn was improperly cultivated. There is a square conflict in the evidence upon these questions, and we cannot interfere with the verdict on the ground that it is not sustained by the evidence. No part of the crops was appropriated or taken by the defendants, except a few sheaves of oats, worth from 10 to 15 cents. We do not reverse a cause for a failure to award nominal damages. Portman v. Klemish, 54 Iowa, 198, 6 N. W. Rep. 265; Rowley v. Jewett, 56 Iowa, 402, 9 N. W. Rep. 353; Insurance Co. v. Findley, 59 Iowa, 591, 13 N. W. Rep. 738; Machine Co. v. Haven, 65 Iowa, 359, 21 N. W. Rep. 677. There is no other question presented for our consideration. The judgment of the district court is affirmed.

WILLITTS v. CHICAGO, B. & K. C. RY. CO.

(Supreme Court of Iowa. May 18, 1893.)

SURFACE WATER—ACTION FOR OVERFLOW—LIABILITY OF RAILROAD COMPANY—EVIDENCE—INSTRUCTIONS—DAMAGES.

1. In an action against a railroad company for damages caused by an overflow, where it appeared that an embankment constructed as a roadbed through plaintiff's land by defendant's predecessor in title prevented the surface water from passing off, and that plaintiff's land would have been relieved from the overflow if a ditch which was constructed along the embankment for the purpose of carrying off the water had been kept open, a verdict for plaintiff was justified.

2. The petition set up a cause of action for an improper construction of the embankment, but the issue raised by the answer and reply, and on which the case was tried, was defendant's failure to keep open the ditch. Held, that the cause of action was not a single one accruing at the time of the construction of the embankment, but that plaintiff could recover for all damages sustained during the last preceding five years.

3. The fact that defendant acquired the railroad after the embankment was constructed, and that it was not served with express notice of the nuisance, and demand for its abatement, was no defense to the action, since it appeared that defendant's officers were fully informed of the injury, and they had no right to presume that this damage had been considered and paid for in the original procurement of the right of way.

4. It was proper to instruct the jury that in allowing damages the jury should consider the difference in the value of the land before and after each flooding which occurred as a result of the embankment during the last five years, but that, if plaintiff planted crops on the land when it was evidently useless to do so because it was certain to be flooded, he could not recover the value of such crops, though in that case the rental value and permanent injury to the land might be considered.

5. The admission of testimony by plaintiff that he planted crops because defendant's officers told him that they would drain the land was proper, when accompanied by an instruction that the evidence could be considered only as bearing on the question why plaintiff continued to try to cultivate the land.

6. It was proper to allow a civil engineer to state that a couple of culverts through the embankment would materially help in draining the land.

7. The testimony of witnesses that they were engaged in clearing out the ditch when they heard of the commencement of the suit, and that they did not finish work, but were ordered to stop after working part of two days, could not prejudice defendant, since the work referred to was practically contemporaneous with the bringing of the suit.

Appeal from district court, Van Buren county; W. I. Babb, Judge.

The plaintiff states as his cause of action that he is the owner of the land described; that the defendant so constructed its line of railway across said lands as to throw up an embankment which prevents the surface water and other water coming on his lands from flowing off in their natural course, and causes the same to collect upon, flow back over, and remain upon his lands, to his damage \$2,500. Defendant answered, denying generally, and averring that the road was constructed in the year 1871 by the Burlington & Southwestern Railway Company; that the construction was permanent, and in a skillful manner; that the cause of action is barred, the cause of action, if any, having accrued in 1871; that this defendant became the owner of the road in February, 1882, and has ever since operated it. The case was tried upon these issues, and on appeal was reversed; this court holding that evidence of facts in avoidance of the plea of the statute of limitations was not admissible without being pleaded in reply. 80 Iowa, 531, 45 N. W. Rep. 916. After the case was remanded, the plaintiff filed a reply, admitting that the railroad was constructed by the Burlington & Southwestern Company in 1871, and that the defendant became the owner in 1882. Plaintiff alleged that after the construction the Burlington & Southwestern Company attempted to make a way for the water on plaintiff's land obstructed by the embankment to escape therefrom by cutting a ditch along the north side of the embankment within the right of way, but that the ditch has never been sufficient, for the reason that it was permitted to fill up and become obstructed, and was not kept open, or large enough, although the companies attempted, from time to time, to do so; that defendant's section foreman on that part of the road repeatedly promised to open said drainage, and put in culverts sufficient to drain said land; that he did some work in cleaning said ditch nearly every year, but has not kept it sufficiently open or large enough to carry off the water, although plaintiff had repeatedly requested him to do so. Defendant's demurrer to this reply being overruled, the case was tried upon these issues, and a verdict and judgment for the plaintiff. Defendant appeals.

Sloan & Work, H. H. Trimble, and Palmer Trimble, for appellant. Wherry & Walker, for appellee.

GIVEN, J. 1. The following facts are shown by the evidence introduced, and are

not contradicted nor disputed in the testimony: The plaintiff was the owner of the land described in 1871 and ever since. In that year the Burlington & Southwestern Railway Company, having acquired a right of way over said land, constructed a solid embankment thereon as a roadbed from a point on the east line of said land southwesterly across it to Indian creek, a short distance west of the west line of the land. A bridge was constructed across Indian creek of sufficient capacity to carry off all water flowing in that stream. In consequence of the conformation of said land and the building of said embankment the surface water falling upon the land and coming thereon from the hills north and west of it was prevented from flowing from the land as it naturally would but for the embankment. Because of the embankment, the surface water stood upon said land until carried off by settling into the earth and by evaporation. About the year 1877 the Burlington & Southwestern Railway Company cut a ditch along the north side of the embankment within the right of way for the purpose of carrying said surface water southwesterly into Indian creek. By reason of this ditch becoming obstructed with sediment and debris from time to time, it failed to carry off the surface water from plaintiff's land. The ditch was several times wholly or partially cleared by each of these companies while operating the road, but was not kept so as to drain the surface water from plaintiff's land. This railroad was operated by the Burlington & Southwestern Railway Company and its receiver until February, 1882, since which time it has been owned and operated by the defendant company.

2. Appellant cites the rule of the common law, namely, "that surface water is a common enemy, which every landowner may repel at pleasure and refuse to receive on his land," and contends that this is the rule in Iowa as between individual landowners, and alike applicable to individuals and railroad companies. Several cases are cited wherein this rule has been so applied, notably *Railroad Co. v. Stevens*, 73 Ind. 278; *O'Connor v. Railroad Co.*, 52 Wis. 526, 9 N. W. Rep. 287. The rule of the civil law is that the lower land owes to the higher land the service or servitude of being bound to receive all of the water which naturally (without the hand of man) flows down upon it. The following extract from the case of *Sullens v. Railway Co.*, 74 Iowa, 659, 38 N. W. Rep. 545, will show that neither of these rules has been adopted in Iowa by statute, as in some of the states, nor followed without qualification by this court. It is there said, in speaking of the case of *Abbott v. Railway Co.*, 83 Mo. 271, as follows: "That case adheres to the common-law rule, and seems to depend in part upon the fact that by the statutes of Missouri the common law is made the rule of action and decision in that state.

In this state there is no requirement of that kind, and we are free to determine the questions involved according to such rules of law as shall seem to us to be applicable. The difficulty which must sometimes arise from attempts to apply the strict rule of the common law to all cases is illustrated by the fact that the supreme court of Missouri was constrained to abandon it in two cases, which were overruled in the one cited above. Each case must, of necessity, depend largely upon its facts. Even in those states where the common law prevails the courts hold that the landowner must improve his property in a reasonable manner. *Hosher v. Railway Co.*, 60 Mo. 329; *Abbott v. Railway Co.*, supra; *Pettigrew v. Evansville*, 25 Wis. 229. But persons exercising this right to improve and ameliorate the condition of their own land must exercise it in a careful and prudent way. Each proprietor, in such case, is left to protect his own lands against the common enemy of all, so as to occasion no unnecessary inconvenience or damage to plaintiff. *McCormick v. Railway Co.*, 57 Mo. 433. See, also, *Benson v. Railway Co.*, 78 Mo. 504. This court said in *Livingston v. McDonald*, 21 Iowa, 172, that the rules of the civil law, so far as they deny to the upper owner the right to collect the water in a body, or precipitate it in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter, we deem to be just and equitable; and to this extent it is supported by the weight of authority in the common-law courts. It also said: "We recognize the general rule that each may do with his own as he pleases, but we also recognize the qualification that each should so use his own as not to injure his neighbor." *Id.* 173. The same principle as applied to the obstruction of a flow of surface water from the dominant to the servient estate was recognized in *Drake v. Railway Co.*, 63 Iowa, 302, 19 N. W. Rep. 215. The rule thus far adhered to by this court seems to be just, and we do not think there is sufficient cause to abandon it. The reasons for requiring that improvements on land be so made as to do no unnecessary injury to other lands apply with especial force to the construction of railways." It will be seen from this case and *Livingston v. McDonald*, 21 Iowa, 161, that neither of the rules above stated have been adopted in their entirety in this state, but that, in common with the courts of many of the states, "we are free to determine the questions involved according to such rules of law as shall seem to us to be applicable." It is clearly the rule in this state that persons exercising the right to improve the condition of their own land must exercise it in a careful and prudent manner, so as to occasion no unnecessary inconvenience or damage to the servient owner; or, in other words, while each may do with his own as he pleases, he must do so in a manner not to unnecessa-

rily injure his neighbor. There being evidence tending to show that the defendant and its predecessor could have relieved the plaintiff's lands from the surface water by keeping open the ditch that was cut for that purpose, there was no error in overruling the defendant's motion for a verdict, nor in the giving and refusing instructions as to the rule in respect to surface water. The case being so exactly within the rule announced in *Sullens' Case*, it is hardly necessary that we refer to other authorities. See, as relating to the subject, the following cases: *Drake v. Railway Co.*, 63 Iowa, 303, 19 N. W. Rep. 215; *Id.*, 70 Iowa, 59, 29 N. W. Rep. 804; *Moore v. Railway Co.*, 75 Iowa, 263, 39 N. W. Rep. 390; *Noe v. Railway Co.*, 76 Iowa, 360, 41 N. W. Rep. 42; *Wharton v. Stevens*, (Iowa,) 50 N. W. Rep. 562; *Hunt v. Railway Co.*, (Iowa,) 52 N. W. Rep. 668.

3. It is claimed on behalf of defendant that, as the obstruction—the embankment—was a permanent structure, the cause of action is single, and for all damages present and prospective; that, being single, the cause of action accrued at the time of the first injury, to wit, in 1872, more than five years before the commencement of this action; and that, therefore, the action is barred. While it may be said that the cause of action as stated in the petition is for an improper construction of the embankment, yet, in view of the answer and reply, that is not the issue upon which the case was tried, but rather for a failure to maintain the ditch in proper condition to carry off the surface water. The cause of the injury thus alleged was not permanent, but only that which could be reasonably and readily removed, and with the removal of which the injury would cease. In each of the cases cited the cause of the injury was permanent, and consequently damages might at once be fully recovered. Appellant contends in argument that the ditch along the embankment was not intended to drain the defendant's land, but was a mere right of way ditch, and that it was made to carry the water from, instead of to, Indian creek. We do not so understand the evidence. True, the plaintiff, in speaking of the condition of the ditch, and that it did not carry off the water, gave as a reason, "it has to run up hill," basing his answer, no doubt, upon the obstructed condition of the ditch. Henry Rastoffer, who worked upon that section, says: "The ditch commences about 19 or 20 rails east of the west line of the plaintiff's land, and empties into Wolf branch, running alongside of the track, inside of the right of way fence." There is no evidence in conflict with this, nor with the conclusion that the ditch was designed to carry off the surface water from plaintiff's land as well as from the south side of defendant's right of way. The cause of action not being single, nor the damages prospective, the plaintiff's right to recover damages sustained

within the five years next preceding the bringing of this action was not barred.

4. Appellant further contends that, coming into the ownership of the railroad as it did, it is not liable to the plaintiff until "express notice of the nuisance and demand for its abatement was served upon it." There can be no doubt but that the defendant's officers were fully informed of the fact of the injury complained of. It is evident that they knew not only the conditions, but the cause thereof. It is said that in the absence of notice the defendant might presume that this damage had been taken into consideration and paid for in the original procurement of the right of way. The defendant had no right to so presume. Such damages are not an element in assessing right of way damages. See *Drake v. Railway Co.*, supra.

5. Appellant complains of the measure of damages submitted to the jury. The court instructed the jury that they could only allow for damages sustained within the five years next prior to the bringing of this suit, and then as follows: "In arriving at this, you will find the different times that it was flooded with water during said five years, caused by said embankment, if any. Then take the value of the land each time before the flooding and after such flooding, considering the condition of the land as to crops as well as other elements in arriving at this difference of value, and the difference in value, if any, would be the damage on account of any particular act of flooding, and the aggregate of said sums, if any, will be the amount of your verdict. But if you find from the evidence that it was fully evident to the plaintiff at any time that it was useless to plant any crop upon any part of the land in question because it was certain to be flooded and destroyed, and that plaintiff, notwithstanding such fact, planted a crop upon the same, and it was destroyed by water which was caused to stand upon same by said embankment, then the value of the crop planted upon the same under such circumstances is not an element which you should consider in estimating his damages, but you might consider the rental value and permanent injury to the land, if any, under such circumstances in estimating his damages." This instruction is clearly within the rule in *Drake v. Railway Co.*, supra. *Sullens v. Railway Co.*, supra; and *Peden v. Railway Co.*, 78 Iowa, 134, 42 N. W. Rep. 625.

6. Appellant complains of certain rulings of the court in admitting testimony over his objection. Plaintiff was asked if bridge 62 was sufficient to carry off the water coming down Wolf branch, to which he answered, "It would be if it wasn't for the water running from Indian creek." Wolf branch is the channel into which the ditch along the embankment emptied, and through which it flowed into Indian creek. While there was

no complaint as to the capacity of bridge 62, there was no error in admitting the evidence, as it related directly to the drainage of plaintiff's land. It is said that the witness was not shown to have the requisite skill to form an opinion as to the sufficiency of the bridge. It appears he answered from actual observation. Plaintiff was permitted to testify that his reason for planting crops was that Hosford and Smith, officers connected with the management of the road before appellant acquired it, had promised to drain his land. The court instructed that this evidence was received only for the purpose of bearing upon the question as to why the plaintiff continued to try to cultivate the land, and that it should not be considered for any other purpose. Evidence as to the cultivation of crops prior to the five years, and the effect that the water had thereon, was introduced as tending to show the effect of the water on the land during the five years. With this instruction there was certainly no error in admitting the evidence. Mr. Burton, a civil engineer, was permitted to answer, over appellant's objection, that a couple of culverts through the embankment would help materially in draining the land. This evidence was proper, as showing one of the means by which appellant could have avoided the injury complained of. A witness was permitted to testify that the embankment was raised two or three inches in 1886. There was no pretense that this change in the embankment affected the flow of water, and, while the evidence was immaterial, it was certainly without prejudice to appellant. Several witnesses were permitted to testify that they were engaged in cleaning out the ditch at the time they heard of the commencement of this suit; that they did not finish work, but were ordered to quit, and that they had worked part of two days. It is probable that this work was being done on the day the suit was brought and the day following. It was certainly so near that time as that no prejudice can result from admitting that evidence. Our examination of the case leads us to the conclusion that the judgment of the district court should be affirmed.

HARKER v. BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of Iowa. May 22, 1893.)

MASTER AND SERVANT—RISKS OF EMPLOYMENT—MEASURE OF DAMAGES.

1. Plaintiff, a conductor on defendant's freight train, was ordered by the train master to hurry and loosen some brakes, and ran to overtake the cars, which were moving at six miles per hour. He climbed up the side of a car, and was struck by an awning of an hotel owned by defendant. The only way in which the brakes could be loosened was as attempted by plaintiff, and in his haste he did not see the awning. *Held*, that though plaintiff knew

of its existence, and that it was dangerous, his negligence was a question for the jury.

2. When injured, plaintiff was 30 years old, his expectancy of life was 34 years, and he was earning \$65 per month. He was confined to his bed for one week, and could not work for three months, nor perform labor of any sort, except chores, for nine months. There was also evidence that plaintiff was permanently disabled from following his business as conductor of a freight train. *Held*, that a verdict awarding him \$7,660 was not excessive.

Appeal from district court, Dickinson county; George H. Carr, Judge.

Action to recover for injuries alleged to have been sustained by plaintiff in consequence of negligence on the part of defendant. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

J. W. Cory and S. K. Tracy, for appellant. Parker, Funk & Carlton, for appellee.

ROBINSON, C. J. In February, 1890, plaintiff was in the employment of defendant, as conductor of a freight train. His ordinary run was from Estherville to a siding near Hotel Orleans, at Spirit Lake, where ice was being loaded, and back to Estherville. At that time there was a railway platform south of the hotel, over a part of which was an awning about 50 feet in length, constructed to protect passengers who should be there for trains. On a day of the month named, plaintiff left Estherville with his train, which was made up of empty cars, under orders to set out a part of them on a side track at the Hotel Orleans, and to take the remainder about 80 rods further west, to a point where ice was being loaded. When he arrived near the hotel, he found loaded cars standing on the main track, between the switches. He slackened the speed of his train, intending to set out some of the cars, as he had been ordered to do, and to couple onto the cars on the main line. The engine had been backed from Estherville, was at the west end of the train it was drawing, and had reached the loaded cars. Plaintiff was on a car near the engine, but before it reached the platform he descended, and met one Forrest, who was the train master of defendant, and his superior in authority. Forrest said to him: "Damn it; they are waiting for cars down here. Where have you been? Couple that engine onto these cars. Back them right up to the main line. Take everything up to the side." In obedience to that direction, plaintiff coupled the engine, which was moving slowly, to the loaded cars, and stepped out to one side. Forrest took charge of the train, and gave the signal for backing. Plaintiff then started eastward to go onto the foremost car of his train, when Forrest said to him, "The brakes are set on those cars," referring to those to which the engine had just been coupled. That was, in effect, an order to loosen the brakes, and plaintiff at once started westward, running to overtake the loaded cars; climbed up the side of the one

next to the engine, to loosen the brakes; and, just as he had reached the top, was struck in the back by a corner of the awning, and received the injuries of which he complains. The plaintiff charges defendant with negligence, in maintaining the awning in the position in which it was at the time of the accident; in running the train towards it at too rapid a rate of speed while he was upon it; and in ordering him to go upon it, to loosen the brakes, while it was being so run. The defendant denies negligence on its part, and avers that plaintiff was injured by reason of his own negligence.

1. The car which plaintiff was climbing when injured was one of defendant's ordinary box cars. There is nothing to show that he was ascending it in any way other than the usual manner, and the evidence is ample to sustain the charge of negligence on the part of defendant in maintaining the awning in the condition in which it was when the accident occurred. That it was so negligent is not denied with any apparent confidence. But defendant contends that plaintiff had assumed the usual risks of its service, and the perils which he incurred from structures which were visible and well known to him, and that, by remaining in its service after obtaining the knowledge he possessed of the awning, he waived all right to recover for injuries which he might sustain by reason of its existence. The plaintiff had known of the awning three or four years when he was hurt. He had been employed on the railway of the defendant, from Estherville to Spirit Lake, 10 or 12 months before the accident, and had unloaded freight under the awning many times. It was familiar to him, and he and his coemployees had frequently spoken of it as dangerous. The accident occurred in the daytime, when the danger he incurred in doing what he attempted while the train was passing the awning could have been seen readily. The general rule is, as claimed by appellant, that a person who accepts employment with knowledge of its risks does so at his peril, and has no claim on his employer for indemnity on account of such risks, and that if the employe remains in the service of his employer without objection, and without promise of a change, after obtaining knowledge of special hazards not known to him when the service was entered, he will be deemed to have waived a right to compensation for injuries which he may sustain by reason of such hazards. *Wells v. Railway Co.*, 56 Iowa, 524, 9 N. W. Rep. 364, and cases therein cited; *Overby v. Railway Co.*, (W. Va.) 16 S. E. Rep. 813. But there are exceptions to the general rule, and acts which would be negligent under some circumstances may be the result of reasonable diligence and due care under others. An employe may sometimes do without negligence when ordered by a superior what would be negligent if done voluntarily. *Rayburn v. Railway Co.*, 74 Iowa, 640, 35 N. W. Rep. 606,

and 38 N. W. Rep. 520; *Frandsen v. Railway Co.*, 36 Iowa, 375; *Greenleaf v. Railroad Co.*, 29 Iowa, 47. There are cases where a subordinate may disobey the order of a superior when to obey would be negligent; as, where the order cannot be obeyed with reasonable regard for the safety of human life. *Hawley v. Railway Co.*, 71 Iowa, 726, 29 N. W. Rep. 787; *Wescott v. Railroad Co.*, (Mass.) 27 N. E. Rep. 10; *Patt. Ry. Acc. Law*, §§ 334, 335. But an employe is not required to use the highest degree of care and diligence which is possible. Absolute perfection in that respect is not required. *Greenleaf v. Railway Co.*, 33 Iowa, 57. "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The duties are dictated and measured by the exigencies of the occasion." *Railroad Co. v. Jones*, 95 U. S. 439. In 1 *Shear. & R. Neg.* § 213, it is said: "The mere technical fact of the servant's knowledge of a defect is not sufficient to exonerate the master, if, for any reason, the servant forgets it, and is not in fault in forgetting it, at the precise time he suffers thereby. In analogy to the principles already stated under the head of 'Contributory Negligence,' the servant's rights are not prejudiced by his forgetfulness or failure to observe a defect, under the influence of sudden alarm, or of an urgent demand for speed, or if his duties are such as necessarily to absorb his whole attention, leaving him no reasonable opportunity to look for defects." See, also, *Id.* § 89; *Plank v. Railroad Co.*, 60 N. Y. 607; *Snow v. Railroad Co.*, 8 Allen, 447. In *Hosic v. Railway Co.*, 75 Iowa, 684, 37 N. W. Rep. 963, it appeared that a brakeman had occasion to pass over a car which was so loaded that the passage could not be made without danger to himself, and that he must have known that fact before he went upon the car. He attempted to pass over it, but fell from it to the ground, and received injuries for which he sought to recover. This court said that whether he was negligent in what he did depended upon all the circumstances of the case; that the efficiency of the railway service, and the due protection of life and property, require prompt obedience to orders, and prompt discharge of duties, on the part of employes, especially in regard to the management of moving trains; and that it would not do to make the subordinate judge of the propriety of obeying an order. See, also, *Frandsen v. Railway Co.*, 36 Iowa, 375. In this case the remark of Forrest to plaintiff when the latter reached Hotel Orleans showed irritation, by reason of supposed delay on his part, and a necessity for haste. The directions he then received were contrary to those given him at Estherville, and which he had communicated to his brakemen. When he was told that the brakes on the loaded cars were set, and, in effect, to loosen them, he

was about 100 feet east of the awning, and on the same side of the track, the cars were moving westward at an increasing rate of speed, which was then from 4 to 6 miles an hour. He ran to overtake the car, which he ascended, and, as he was going up, turned his face towards the east, to see that the brakemen did not cut the trains as they had been ordered to do at Estherville. The only way in which the brakes could be loosened was for some one to climb the car as he was doing, and at the time he was not looking at the awning, and did not think of it. It was natural that he should have been somewhat confused by the language and conduct of Forrest and the haste demanded, and that his mind should have been fully occupied with the effort required to execute the directions given him. Whether, under these circumstances, he was negligent in not remembering and avoiding the awning was clearly a question of fact for the determination of the jury. The cases upon which appellant relies are not in conflict with the conclusions we reach. In *McKee v. Railway Co.*, (Iowa,) 50 N. W. Rep. 209, it appears that the employe injured exposed himself voluntarily, and, without any occasion to incur unusual risk, placed himself in a position in which he came in contact with a wing fence, of which he had knowledge, and which he would have avoided had he used ordinary care. The facts involved in *Platt v. Railway Co.*, (Iowa,) 51 N. W. Rep. 254, were that the person injured knew before the accident occurred that the roof of the depot building projected over the track; that he was engaged in pushing a car along the track; that the car was higher and wider than ordinary freight cars, and that he knew that such was the case; that there was no emergency which required him to expose himself to danger, but that, without looking for, or taking any precautions to avoid, danger, he ascended the car, and was caught between it and the roof of the building, and injured. In *Bengston v. Railway Co.*, (Minn.) 50 N. W. Rep. 531, it was held that the employe had assumed the risks from the acts of negligence which caused his death. In *Overby v. Railway Co.*, *supra*, it was held that the injuries for which a recovery was sought were received in consequence of an effort made by the person injured in direct violation of a rule of the company, with which he had agreed to comply. There was no sudden alarm, no urgent demand for speed, and his duties were not of such a character as necessarily to absorb his attention. The facts involved in *Helfrich v. Railway Co.*, (Utah,) 26 Pac. Rep. 295, showed that the employe was killed in consequence of gross carelessness on his part. The case of *Fisk v. Railroad Co.*, (Mass.) 33 N. E. Rep. 510, is also cited. The plaintiff in that case appears to have been injured while engaged in performing the ordinary duties of his employment. He was chargeable with knowledge of the risk which he incurred, and does not appear to have been acting under

circumstances which excused his failure to remember it.

2. The amount of the verdict and judgment is \$7,660. Appellant contends that it is excessive. When injured, the plaintiff was 30 years of age, his expectancy of life was 34 years, and he was earning \$65 per month, as conductor. He testifies that, in consequence of his injuries, he was confined to his bed one week, was unable to perform labor of any kind for three months, and was unable to perform manual labor, excepting a few chores, for nine months; that he suffered severe pain for about three days, and after that time did not suffer much, unless he was moving; that, since the expiration of nine months from the date of the injury, he has done some light work on a farm, and has hunted ducks for the market, but has been unable to do lifting or heavy work; that the conductor of a freight train is required to do various kinds of lifting, and to set brakes; that he has been unable to do that kind of work; and that the twisting movements required to set brakes causes him great pain, and for a time disables him to do work of any sort. A physician examined the plaintiff at the time of the trial, which was about one year and ten months after the injury was received, and testified that he did not find any mark or indication of injury, and ascertained nothing in regard to it, excepting what plaintiff told him; also that a physician should be able to ascertain by such an examination whether the injuries exist as claimed. But he also stated, in effect, that, if the condition of plaintiff was correctly shown by his testimony, his injuries were probably permanent. The plaintiff and the physicians were the only witnesses who testified in the case, and the jury were authorized to find from the testimony given that plaintiff was permanently disabled to discharge the duties of conductor of a freight train, or any but light manual labor. If the jury so found, we cannot say, in view of all the facts stated, that the amount allowed is excessive. *Collins v. City of Council Bluffs*, 35 Iowa, 433; *Rice v. City of Des Moines*, 40 Iowa, 646; *Allender v. Railway Co.*, 43 Iowa, 281; *Funston v. Railway Co.*, 61 Iowa, 463, 16 N. W. Rep. 518; *Knapp v. Railway Co.*, 71 Iowa, 43, 32 N. W. Rep. 18; *Reed v. Railway Co.*, 74 Iowa, 195, 37 N. W. Rep. 149; *Henry v. Railway Co.*, 75 Iowa, 89, 39 N. W. Rep. 193; *Knott v. Railroad Co.*, (Iowa,) 51 N. W. Rep. 58. No reason for disturbing the judgment of the district court has been shown. It is therefore affirmed.

GOODFELLOW v. RIGGS et al.

(Supreme Court of Iowa. May 25, 1893.)

TRESPASS—DEDICATION OF HIGHWAY—EVIDENCE.

1. In trespass against road supervisors for plowing up plaintiff's land for 33 feet from his north line as a highway, defendants relied upon a dedication by conduct. On cross-examination, plaintiff testified that in setting out a

grove of trees about his house he did not set any close to the line on the north side, but left a space of 19 feet. *Held*, that it was error not to permit plaintiff to testify on redirect examination that he left this space, not for a highway, but as a way to reach his barn in the rear of the house, since there can be no dedication without an intention to grant land.

2. On cross-examination, it appeared that certain rumors of the existence of a road along the north line had come to plaintiff's notice, and defendants relied, in part, upon this knowledge of plaintiff, and his acts in pursuance of it. *Held*, that it was error not to permit plaintiff to testify that when he heard the rumors he employed counsel to investigate as to the existence of a road, and that counsel informed him that there was none.

Appeal from district court, Tama county; G. M. Gilchrist, Judge.

Action for trespass. Judgment for defendants, and the plaintiff appealed.

Struble & Stiger, for appellant. Mullan & Pickett, for appellees.

GRANGER, J. 1. The plaintiff is the owner of the N. E. $\frac{1}{4}$ of section 1, township 86, in Tama county. The defendants are road supervisors. The plaintiff's land along the north line is unfenced. In the spring of 1888, he sowed and planted his land with grain along the north line. When the crops were growing the defendants plowed and destroyed the same for the width of 33 feet from the line, under a claim that there was a public highway along the north line of plaintiff's land of 66 feet in width. The action being for damage for the destruction of the crop, the defendants justify their acts by the facts that they were necessary in the proper improvement and preservation of the highway. The existence of the highway is denied by the plaintiff. If there is a highway on the line in question it has been established by prescription or dedication. The case was tried to a jury, that found for the defendants, and hence in favor of the existence of the highway. The question of dedication is a very important one in the case. The establishment of a highway by dedication may be shown "by writing, by declaration, or by conduct." *State v. Birmingham*, 74 Iowa, 407, 38 N. W. Rep. 121. In this case the only evidence of dedication is the conduct of the plaintiff. The court properly instructed that the burden of establishing a road by dedication was on the defendants. The plaintiff was a witness on his own behalf, and on cross-examination he stated that in setting out a grove of trees about his house, situated in the northeast corner of the quarter section, he did not set the trees close to the line on the north side, but left a space of about 19 feet. This was a part of the conduct of the plaintiff on which reliance was placed to show a dedication. On a redirect examination, plaintiff was asked this question: "Now, for what purpose did you put that grove there, and leave a space at the north side of the grove?" An objection to the question was sustained.

The witness should have been permitted to answer the question. A dedication involved an intention on the part of the plaintiff to grant or give the land for a highway. Without the intention there was no dedication. The evidence as to leaving the space when setting the trees was to show such an intent. As we understand, the purpose of the question was to enable the plaintiff to testify that the space was not left for a public highway, but as a way to reach his barn and sheds in the rear of his house. But however that may be, the public was, in effect, claiming his land by an implied dedication for a highway because of his conduct, and it was his right to give full and explicit explanation of his purposes in doing the acts relied upon to show the dedication. When the liability of a party depends upon the intent with which an act is done, and not upon the act itself, independent of the intention, he may testify as to what his intent in fact was in doing the act. Intent is an element of fraud in fact, and where it is sought to establish a liability for fraud the party may testify as to his intent in doing the act alleged to be fraudulent. *Selz v. Belden*, 48 Iowa, 451. Any other rule would be arbitrary and unreasonable. The contention by appellees is that the intention was an ultimate conclusion to be found by the jury. Not more so than in a case of fraud. Intention bears the same relation to a dedicatory act, of the kind under consideration, as it does to the act of fraud. It is an indispensable factor, in either case, and, where liability is sought because of it, the rule of evidence is not different. Of the cases cited by appellees none are in point.

2. On cross-examination it also appeared that certain rumors as to a road being along the north line of his land came to his notice. Defendants relied, in part at least, upon such information to plaintiff, to show his knowledge of a road being claimed there, and to bind him because of such knowledge and his acts in pursuance of it. Counsel for plaintiff then offered to prove, by the plaintiff, that when he heard the rumors he employed counsel to investigate as to the fact of there being a road located on the line, and that he was informed by counsel that there was none. Such evidence was refused. This testimony was also admissible. What he said and did when and after he was informed that the public claimed a highway was highly important as showing his intentions as to granting a road, and it was as much his right to show his conduct with regard to the highway, at times when it might not be presumed to have been for the purposes of the suit, as it was that of the defendants. The claim that such testimony is hearsay, and statements of a party in his own behalf, is without force in such a case. Defendants seek to establish against him a dedication because of his acts. All of his acts relative to the subject of the inquiry, and the

motives and inducements thereto, are competent and material at the instance of either party. Let us suppose that when he first knew of a claim that a road existed he at once posted notice along the line of the road denying the right of the public to its use; would it be doubted that, in such a case, he could show his act as against a claim of dedication? Now, suppose that when he heard the rumors of the road being there, he at once made investigation as to the facts of one being established, and upon information that there was none he took no steps to interfere with the travel along the line, without intending to grant any right to the public. It seems to us there is no doubt of the competency of evidence to show such facts, and that offered is to the same effect. Because of errors in the admission of evidence the case must be reversed. We discover no other question that it is important for us to consider. Reversed.

KINNE, J., took no part in this case.

SMALLEY v. FULLERTON et al., (FAHNEY et al., Interveners.)

(Supreme Court of Iowa. May 22, 1893.)

ACTION ON SHERIFF'S BOND—WRONGFUL LEVY—SUFFICIENCY OF EVIDENCE—HARMLESS ERROR.

1. On a trial to the court, where there was a conflict in the evidence, a judgment for plaintiff should not be disturbed.

2. Where evidence is improperly excluded, and afterwards admitted, the error in excluding it is harmless.

Appeal from district court, Des Moines county; J. M. Casey, Judge.

Plaintiff brings this action upon the official bond of the defendant Fullerton as sheriff. He asks to recover of him as principal, and of the defendants J. N. Martin and J. W. Gilbert as his sureties, damages alleged to have been sustained by reason of the wrongful taking and keeping of a certain stock of millinery goods. Plaintiff claims said goods by virtue of a chattel mortgage executed to him by Miss Annie E. Bennett and George W. Bennett on the 1st day of January, 1889, to secure their two promissory notes for \$400 each. He alleges that the defendant sheriff wrongfully took said property under an attachment sued out by interveners against the property of Annie E. Bennett. The defendants answered, admitting the execution of the bond, the taking and detention of the property, and denying every other allegation. Interveners allege that the plaintiff failed to file said mortgage for record until December 12, 1889; "nor did he at any time notify interveners that he held a mortgage on said stock of goods, but falsely, and for the fraudulent purpose of benefiting himself, represented to them that he had been paid in full for said goods, and that said Annie E. Bennett was a person to whom goods

could be sold with safety, and that she was worthy to be trusted." They further alleged "that plaintiff withheld his mortgage from record for the purpose of falsely and fraudulently benefiting himself and aiding the said Annie E. Bennett in securing credit in her said business, and thereby increasing the value of her stock, so that he could thereafter file his said mortgage and claim said goods as well as the goods bought and added thereto." They alleged that between the execution and recording of said mortgage they sold goods on credit to Annie E. Bennett to about the sum of \$700, and that, had they known of the existence of said mortgage, they would not have extended credit to the said Annie E. Bennett. They ask that their lien under their attachment be held prior to said mortgage. Plaintiff answered said petition of intervention, denying every allegation thereof. The cause was submitted to the court, and judgment rendered in favor of the plaintiff for the full amount of the mortgage. Defendants and interveners appeal.

W. W. Dodge, A. H. Stutsman, and Thos. Hedge, for appellants. P. Henry Smyth and Power & Huston, for appellee.

GIVEN, J. 1. The following statement of facts and issues will be sufficient for a correct understanding of the questions presented on this appeal: In February, 1888, plaintiff sold a stock of millinery goods, valued at about \$3,000, to Miss A. E. Bennett, receiving certain real estate in part payment, valued at \$1,000, and 23 or 24 promissory notes in equal amounts, one falling due each month, for the balance, which mortgage was never recorded. The goods were delivered to Miss Bennett, and removed to a store, where she kept them for sale. On January 1, 1889, these notes were surrendered, and plaintiff received in part payment another piece of real estate, and for the balance the two notes of A. E. and George M. Bennett for \$400 each, secured by a mortgage on the goods then kept in Miss Bennett's store, "including all goods of every kind and description now kept or hereafter to be kept or added to said stock of goods at said place." This mortgage was not filed for record until December 12, 1889. Between January 1 and December 12, 1889, interveners sold goods on credit to Miss A. E. Bennett to the amount of about \$1,600, which goods were added to said stock. It is for this indebtedness that the interveners sued out the attachment under which the mortgages were seized after the mortgage was filed for record. The foregoing facts are unquestioned. The only facts in dispute are why the plaintiff withheld his mortgages from the record, and whether interveners had notice of said mortgages, or either of them, at the time they extended the credit.

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2. Appellants' first complaint is as to certain specific rulings in the taking of testimony, and generally that they were improperly restricted in their cross-examination of the plaintiff. We are inclined to think, upon reading, that a greater liberality might have been allowed in the cross-examination, and that two or three of plaintiff's objections made upon his cross-examination might have been properly overruled. We find, however, that upon recall the evidence was fully elicited upon all the points to which objections had been sustained. Our examination of all the evidence leads us to the conclusion that there was no prejudice in these rulings because of the matters having been subsequently fully inquired about.

3. Appellants' remaining contention is that the court erred in finding for the plaintiff. They insist that under the undisputed facts it was a fraud upon the interveners for the plaintiff to withhold his mortgage from record, even though it was through oversight. This being a law action tried to the court, the findings of the court have the same force as a verdict of a jury. If, as plaintiff claims, interveners had notice of the existence of his mortgage before they gave credit to Miss Bennett, the mortgage is as valid against them as if it had been then filed for record. There is a direct conflict in the evidence as to whether interveners had such notice, but there is certainly evidence upon which the court could have so found, and such a finding would fully support the judgment. As the case is before us for review upon errors assigned, and not for a trial de novo, and as there is evidence to sustain the conclusion reached by the district court, its judgment must be affirmed.

MENDENHALL v. PRICE.

(Supreme Court of Iowa. May 17, 1893.)

ADVERSE POSSESSION—EVIDENCE.

Plaintiff made a contract to convey land to his son, which was not recorded. Defendant and his grantors, claiming title under a deed from the son, held exclusive possession of the land for the statutory period. Plaintiff at various times attempted to gain possession, but his acts were trespasses; and he brought an action to recover the land, which was dismissed without prejudice. *Held*, that plaintiff had lost his title to the land.

Appeal from district court, Mahaska county; David Ryan, Judge.

This action involves the title to a certain tract of land. The plaintiff claims to be the owner by reason of an agreement in writing entered into between himself and E. Mendenhall on the 2d day of April, 1864, and a deed of general warranty executed by said E. Mendenhall on the 15th day of February, 1884. The defendant claims title under a conveyance made by E. Mendenhall to one William D. Neeley on the 4th day of

October, 1864, and several intermediate conveyances down to the defendant. The cause was tried in equity, and there was a decree for the defendant. Plaintiff appeals.

Liston McMillen, for appellant. John F. Lacey, for appellee.

ROTHROCK, J. The written agreement, which is the basis of the action, is as follows: "This agreement, made the second day of April, 1864, between M. V. Mendenhall and his father, E. Mendenhall, both of the state of Iowa, and Mahaska county, witnesseth that, in accordance with an agreement made the second day of April, 1864, M. V. Mendenhall agrees to take his mother, his brother, his sister, and take care of them, to provide them with a living as best he can; to take each of the children till they are of age, or have other homes; also to pay the debt now on the farm; then this contract to expire. To be fulfilled, and the said Mendenhall, in consideration of the fulfillment of this contract, gives his son, M. V. Mendenhall, his farm, consisting of one hundred and sixty acres, in the state of Iowa, and Mahaska county, giving him possession this 2nd day of April, 1864, to be and to have possession from this date; to have the help of the boys as they become old enough to work; also to have the stock now on the farm; also the farming implements now on the farm. When this contract is fulfilled, then the above-mentioned M. V. Mendenhall is to have a deed in full of the above-mentioned farm. In witness whereof we have hereunto set our hands the day and year above written. M. V. Mendenhall. E. Mendenhall. Witnesses: Dennis V. Archer. J. F. White." This contract has never been recorded. The conveyance of the land under which defendant claims was made by E. Mendenhall to Neeley, and filed for record on the 4th day of October, 1864. It appears from the record that in July or August, 1864, E. Mendenhall and his wife separated, and ceased to live together, and were divorced. His wife moved off the land in the spring of the year 1865, and one Engles, the grantee of Neeley, took possession of the premises. The evidence is absolutely conclusive that from that time the defendant and those under whom he claims have held absolute and exclusive possession of the land. It is true that plaintiff has at various times attempted to take possession, but his acts have been mere trespasses upon the possession. He brought an action to recover the land in the year 1884, which was dismissed without prejudice. He alleged in the petition in that action that those under whom defendant claims had deprived plaintiff of the use of the land from January 3, 1872. The fact is, the deprivation of the use was actual, notorious, visible, and continuous, with all the elements necessary to constitute adverse possession. We need not

review the evidence. It is enough to say that the claim of the plaintiff is shown beyond all question to be barred by the statute of limitations.

The decree of the district court is affirmed.

McNAMARA v. CORPORATION OF NEW MELLERAY.

(Supreme Court of Iowa. May 24, 1893.)

CONVERSION BY BAILEE—ACTION BY EXECUTOR—EVIDENCE—HARMLESS ERROR.

1. In an action by an executor for the conversion by defendant corporation of bonds alleged to have been deposited with it by his testator for safe-keeping, it is error to exclude questions asked of plaintiff as to whether his testator owned any such bonds at and prior to the time at which they are claimed to have been placed in defendant's custody.

2. A receipt for such bonds, signed by one M. individually, is admissible when evidence had been introduced that M. acted for the defendant in all its dealings, and uniformly signed his individual name to receipts for money and property received by the corporation.

3. The exclusion of competent evidence offered by plaintiff cannot be claimed to have been without prejudice because he failed to make a case, when, if such evidence had been admitted, with possibly other evidence depending thereon, plaintiff might have stated a case entitling him to go to the jury.

Appeal from district court, Dubuque county; John J. Ney, Judge.

Action against the defendant for the recovery of \$9,000, being the proceeds of United States bonds which plaintiff claims the defendant received from decedent, John McNamara, and converted to its own use. Verdict and judgment for defendant. Plaintiff appeals.

William Graham and J. H. Shields, for appellant. W. J. Knight and W. E. Utt, for appellee.

KINNE, J. 1. Plaintiff claims that in October, 1873, one John McNamara, (now deceased,) being the owner of United States bonds of the par value of \$5,000, deposited same with defendant for safe-keeping; that defendant is a corporation; that it unlawfully converted said bonds to its own use; that John McNamara died March 11, 1881, and plaintiff is the administrator of his estate; that defendant has refused to return said bonds. Defendant denied each allegation of the petition; also pleaded the statute of limitations; and averred that decedent, though he lived for more than six years after the alleged deposit, never made any claim on defendant for said bonds.

2. Several questions were asked plaintiff touching his knowledge as to whether or not the deceased in 1870, 1871, 1872, and prior to October 1, 1873, was the owner of any United States bonds. Each of them was objected to as incompetent, irrelevant, and immaterial, and the objections sustained. This was error. The action was for the conversion of certain United States

bonds. It was essential that plaintiff should establish that the bonds converted by defendant, if any, belonged to decedent. The questions called for testimony to establish the fact that the decedent was the owner of these bonds at and prior to the time it is claimed they were by him placed in defendant's custody. The evidence, then, was competent, relevant, and material to the issue presented, and should have been admitted. Because it might turn out in the further progress of the case that such evidence would not avail the plaintiff because of his failure to establish some other essential fact, was a presumption that the court had no right to indulge in to the extent of excluding proper evidence, which was offered in regular order. Counsel cannot establish all the facts in a case at the same time. Of necessity, he must introduce the evidence step by step, item by item, and, when competent evidence is rejected, the party ruled against may rely upon such error. *Hollenbeck v. Stanberry*, 38 Iowa, 328.

3. Plaintiff offered in evidence the following paper: "New Melleray, Oct. 1st, 1873. Received from John McNamara five thousand dollars in United States bonds for safe-keeping. John B. Murphy." This was ruled out as incompetent, irrelevant, and immaterial, and plaintiff excepted. It is urged that this writing purports to bind Murphy individually, and hence it was inadmissible. It occurs to us that, while on the face of the receipt it appeared to be the obligation of Murphy alone, yet, in view of the fact that the evidence then introduced showed that Murphy had acted as the agent for the corporation in its dealings with the outside world, and had uniformly signed his individual name to receipts given for money and property received for the corporation by him as agent, the receipt should have been admitted. Of itself, it is true it might not show any obligation on the part of the corporation, but it was proper to be received in connection with other evidence which might connect it with the defendant as an act done for it, and in its behalf. The receipt showed, prima facie, at least, that Murphy had received the bonds of decedent. When it was introduced plaintiff had the right to show the position Murphy held in the corporation, and his relation to it, and other facts which might tend to show that these bonds actually went into the possession of the defendant. It was one step in making plaintiff's case. Counsel for appellee cite cases which decide questions which may go to the merits of this case. We are not now passing on the merits of this case, but on the errors of the trial court, which prevented plaintiff from showing whether he had a case or not. Counsel also argue that parol evidence would not be admissible to show that Murphy intended by this receipt to bind the corporation. That is a question, so far as this record shows, not raised below.

4. Plaintiff was asked as a witness what Father Aberic or Father Bernard said to him in regard to the bonds in 1881, when he demanded their return. This was objected to, because it was not yet shown that they were authorized to bind the corporation, and the objection was sustained. We think, in view of the evidence then in, the ruling was proper.

5. One Johnson was asked several questions as to whether, when he was assessor, he made inquiry of Murphy, as agent of the defendant, as to the amount of money, credits, or other property which defendant held belonging to the deceased, and, if so, what reply Murphy made. An objection was made to these questions on the grounds before stated. If Murphy was the agent of the defendant, and authorized to speak for it as to its financial matters, it would seem that the testimony was competent; and, if competent, we cannot say that it was not relevant and material. It is urged that the testimony was not competent because Murphy's authority to bind the corporation had not been shown. We think the evidence tends strongly to show that Murphy was the agent for the defendant in the management of all its business and financial affairs. Whether the declarations proposed to be proved related to a matter within the scope of his agency is not so clear. It seems to us that the condition of the record was such as that the witness should have been permitted to answer. As we have said, a case can only be established item by item.

6. But it is urged that the exclusion of all this evidence was without prejudice, as plaintiff did not establish the essential facts which would have justified the court in submitting the case to the jury. It may be conceded that on the record there was no case to submit to a jury; that all the facts necessary for the plaintiff to recover are not proven; and, ordinarily, that would end in our affirmance of the judgment below. We do not know whether plaintiff would have succeeded in making such a case as the court should have submitted to the jury if he would have been permitted to have introduced the evidence which was properly excluded. We cannot tell to what extent, if at all, the ruling out of this material evidence prevented him from establishing the facts essential to his recovery. It frequently happens that when material and competent testimony is ruled out it prevents the party from introducing other proper evidence. We are not unmindful of the rule that great latitude is allowed the trial court as to the order of introducing testimony, and this should be so, to the end that business may be facilitated; but in this case there was no suggestion from the court that counsel for plaintiff should introduce his testimony in any certain order, or that the offered testimony would be proper at some other stage of the case, or when some other

fact had been established. We think, when competent and material testimony is thus ruled out, it will not do to say it is without prejudice, because plaintiff failed to make a case, for it is impossible for any one to say, if the testimony improperly excluded had been admitted, and possibly other evidence depending upon it, whether plaintiff would have made a case entitling him to go to a jury or not. The rule is that, when errors appear, prejudice is presumed to result therefrom; and it cannot be disregarded, unless from the record it appears that the error has worked no prejudice to the objecting party. We cannot say that such is the case. *George v. Railway Co.*, 53 Iowa, 504, 5 N. W. Rep. 615; *Strobel v. Moser*, 70 Iowa, 126, 29 N. W. Rep. 821; *Hall v. Railroad Co.*, (Iowa,) 51 N. W. Rep. 150; *Hibbard v. Zenor*, 75 Iowa, 477, 39 N. W. Rep. 714; *Elliott*, App. Proc. §§ 594, 610. We think the case should be tried again, when the plaintiff may have an opportunity to present his evidence which is competent, relevant, and material. Reversed.

HARRIS v. BOARD OF SUP'RS OF MAHASKA COUNTY.

(Supreme Court of Iowa. May 18, 1893.)

HIGHWAYS—VACATION AND ESTABLISHMENT—SUFFICIENCY OF PETITION—CERTIORARI TO SUPERVISORS—MATTERS REVIEWABLE.

1. A petition "for a change in the road as follows: Beginning at a point * * *; thence east 16.41 chains, intersecting with old road; and that the old road beginning at the point first above mentioned * * * be vacated and abandoned, or that the old road be vacated only, and no change made, or new road established; and that a commissioner be appointed to view the proposed change of road,"—is sufficient, under Code, § 922, declaring the form for a petition to establish, vacate, or alter a highway.

2. There is no objection to asking in the same petition for the vacation of one highway and the establishment of another, when the latter is to be used in place of the former.

3. In a certiorari proceeding to set aside the action of the board of county supervisors in vacating a portion of one highway and establishing another, the question whether the action was expedient cannot be considered.

4. The fact that the order of the supervisors required petitioners therefor to open and put the new highway in as good condition as the old one did not render it illegal.

Appeal from district court, Mahaska county; D. Ryan, Judge.

Certiorari proceeding to set aside the action of defendant in vacating a portion of one highway and in establishing another. The district court granted the relief demanded. Defendant appeals.

W. G. Jones and John F. & Wm. R. Lacey, for appellant. Bolton & McCoy, for appellee.

ROBINSON, C. J. In April, 1889, a petition was filed in the office of the auditor of Mahaska county, a copy of which is as

follows: "Petition for Change of Road. To the Auditor of Mahaska County, Iowa: The undersigned, citizens of said county, respectfully petition for a change in the road as follows: Beginning at a point 9.20 chains south and 30 links east of the stone at the southwest corner of the northwest quarter of northwest quarter, section 10, township 75 north, range 16 west; thence north 8.90 chains; thence east 16.41 chains, intersecting with old road; and that the old road beginning at the point first above mentioned, and running north, 61 degrees and 30 minutes east, 18.67 chains, be vacated and abandoned, or that the said old road be vacated only, and no change made or new road established; and that a commissioner be appointed to view the proposed change of road, pursuant to the statute in such case made and provided. Filed in auditor's office, April 15, 1891. A. B. and J. F. Prine." The petition was accompanied by a bond, which was approved by the auditor, and filed in his office, and a commissioner was appointed to examine and report upon the changes asked. He examined the premises, and recommended that the changes be made as asked. Notice of the recommendation of the commissioner, and of the time within which objections and claims for damages should be filed, was thereupon duly served and published as required by law. On the day before that fixed in the notice for filing objections, a remonstrance, signed by plaintiff and many others, was filed. On the final hearing, after receiving the testimony of witnesses, the defendant board, on the 19th day of November, 1889, made the following order: "Road case 617, A. B. & J. F. Prine, petitioners, having been taken under advisement by the board, and after a careful examination of all the evidence and all the papers in said case, the board grant the prayer of the petitioners to vacate old highway and establish the new highway, as prayed for; conditioned that the petitioners open up and put new highway in as good condition for travel as the old highway, when needed, and pay all costs within sixty days from date hereof." On the 30th day of November the remonstrants filed with the auditor a petition for rehearing. The board refused to hear it, on the ground that there was no authority for doing so. On the 31st day of July, 1891, in vacation, judgment was entered by the district court annulling the proceedings establishing the highway, on the ground that the board had no jurisdiction to establish it. The next term of court was held in October, and was adjourned on the 2d day of November. At the December term the court made an entry in the judgment record, which recited the judgment entered in vacation; that it had not been signed; and that it failed to state the actual adjudication; and, for the purpose of conforming the judgment to the actual determination of the court, ordering

and adjudging that the board had no jurisdiction to establish or vacate the road described in the petition, and annulling its proceedings in establishing and vacating it. The defendant appealed in November, 1891, from the judgment as first entered, and in December, 1891, it appealed from it as amended.

1. The appellee contends that the petition upon which the board of supervisors acted was insufficient to give it jurisdiction to act, for reasons which are, in substance, as follows: That the petition was defective in not asking for the establishment of a highway; that it was deficient in not asking for the vacation of a highway; and, if these objections are not well founded, that the petition was defective in asking for both the establishment and vacation of a highway. It is also insisted that the petition was indefinite and uncertain. "The board of supervisors has the general supervision over the highways in the county, with power to establish and change them" in the manner provided by law. Code, § 920. "Any person desiring the establishment, vacation, or alteration of a highway shall file, in the auditor's office of the proper county, a petition in substance as follows: 'To the Board of Supervisors of — County: The undersigned asks that a highway, commencing at —, and running thence —, and terminating at —, be established, vacated, or altered,' (as the case may be.)" Id. § 922. It is not necessary that the form given in the statute be strictly followed. The petition is sufficient if it follows the statutory form in substance, "expressing with reasonable certainty the action desired." A petition which asks "the appointment of a commissioner to open a road" has been held to be sufficient, as in substantial compliance with the statute. *McCollister v. Shuey*, 24 Iowa, 363. The doctrine of that case was approved in *State v. Pitman*, 38 Iowa, 252, and *Stevens v. Board*, 41 Iowa, 343. See, also, *Woolsey v. Board*, 32 Iowa, 132. The case of *Curtis v. Pocahontas Co.*, 72 Iowa, 152, 33 N. W. Rep. 616, relied upon by appellee, is not in conflict with the conclusion we reach. That case involved the right of the plaintiff to recover damages alleged to have been caused by the establishment of a highway. The petition for the highway asked that "the highway * * * be opened for travel, as required by law." In the circuit court the defendant pleaded that the road in question was located in 1871. The court held that the petition for the highway did not ask that a highway be established; therefore, that the board lacked jurisdiction to establish one. It is evident that the language of the petition under consideration is not the best which could have been chosen to express the wishes of the petitioners. But, construing all parts of the petition together, it appears with reasonable certainty that the petitioners asked that a new highway be established, and that a portion of an old

one be vacated, both of which were described; or that the portion of the old one be vacated without the establishment of a new one. There is nothing in the record to suggest that the relief demanded was not understood by any one, and no objection to the petition was made, so far as the record shows, until the petition for rehearing was filed. We are satisfied that the petition was understood by all persons in interest as asking for the vacation of a part of an existing highway and the establishment of a new one to supply the place and purpose of the part vacated, or, if that was not done, that the vacation be ordered without the establishment of a new highway. The fact that alternative relief was asked did not affect the right of the auditor and board of supervisors to act.

2. It is said that the vacation of one highway and the establishment of another cannot be asked in the same petition. We know of no valid objection to such a practice in cases like this, where the highway to be established is to be used in lieu of the one to be vacated. It is not provided for in terms by the statute, nor is it forbidden. It is not only a common practice, however, but may be necessary in many cases to enable the board of supervisors to act intelligently in vacating and establishing highways. It is manifest that cases may be numerous arising from the improvement of the country, changes in its population, and other causes, where a highway which answered all public demands when located should be changed, but where, in order to make the change, a new highway must be provided to take the place of the old one, or the part thereof vacated; and that can be done best in a single proceeding. So far as we are able to judge, this case may furnish an example of that kind. The change made by the board vacated a portion of a highway which extended diagonally across a corner of a government subdivision of land for a distance of about 80 rods, and established in lieu thereof a highway on boundary lines of that subdivision. Whether the change was wisely made is a question not before us for determination. The board had jurisdiction of the parties in interest, and power to make the change which it ordered. The expediency of its action cannot be questioned in this proceeding. *Tiedt v. Carstensen*, 61 Iowa, 334, 16 N. W. Rep. 214. The fact that the order in question was made on condition that the petitioners should open and put the new highway in as good condition for travel as the old one did not render the order illegal. *State v. Kinney*, 39 Iowa, 226.

3. The first six grounds of the petition for a rehearing are in the nature of objections to the petition for the relief which the board granted, and are insufficient, for the reasons stated. Moreover, had they been valid, they should have been filed before the final hearing. The seventh and eighth grounds of the

petition for rehearing are not sustained by the record, and are not pressed in argument. Whether the board gave a valid reason for refusing a rehearing we need not inquire, since its action in that respect was not prejudicial.

4. The power of the district court to amend its judgment record after a full term of court had been held is questioned, but, in view of the conclusions announced, need not be determined. For the reasons shown, the judgment of the district court is reversed.

HUTTON v. SMITH.

(Supreme Court of Iowa. May 18, 1893.)

DEED—DELIVERY.

Plaintiff executed a deed to her daughter, and, after having it recorded, placed it in a box in her room, where it remained for some months, till the daughter's husband took it, without plaintiff's knowledge or consent. The deed was never in the daughter's possession, nor did she claim any interest in the land, and after her husband obtained possession of it they rented the land from plaintiff, and paid rent therefor. The deed was to be signed by plaintiff's husband, which, she had been advised, was necessary to pass title, but this was not done. *Held*, that the deed was not delivered.

Appeal from district court, Calhoun county; G. W. Paine, Judge.

Action to quiet title. Decree for plaintiff. Defendant appeals.

O. J. Jolley, for appellant. C. A. Irwin, for appellee.

KINNE, J. 1. This action was brought by plaintiff to quiet title to 80 acres of land in Calhoun county. The petition averred that plaintiff was the absolute owner of the land, and that defendant asserted a claim under a deed from William Palmatier and Minnie F. Palmatier, executed in October, 1890; that said William had no interest therein except as the husband of Minnie F. Palmatier, and that the latter had no right therein except as created by a warranty deed from plaintiff to her, of date October 23, 1889, and that said deed was never delivered; that Minnie F. Palmatier is the daughter of plaintiff; that no consideration was paid for the deed. It also claimed that the land was plaintiff's homestead, and had never been conveyed by any joint instrument; that, at the time of the conveyance of the land to defendant by William Palmatier and Minnie F. Palmatier, he had actual notice of all the facts pleaded. Defendant filed a general denial, and a cross petition claiming title in himself, and asking to have it quieted.

2. The controlling and only question we need consider in this case is whether the deed from plaintiff to Minnie F. Palmatier was ever delivered to the grantee therein. The facts, as disclosed by the record, so far as material to this inquiry, are that on October 23, 1889, plaintiff, who then held

the legal title to the land in controversy, executed a deed for it to Minnie F. Palmatier, her daughter. Plaintiff caused the deed to be recorded, and, after it had been recorded, received it back from the recorder, and placed it in a tin box in her room in the house where she was then living. It remained there until the next summer, when the husband of her daughter, without plaintiff's knowledge or consent, took it from the box, and kept it, so far as appears, afterwards. Some time after he had taken it, plaintiff learned of the fact, and demanded it of him. He promised to return it, but never did so. When he took the deed his wife (plaintiff's daughter) and plaintiff were living in the same house, though plaintiff appears to have had a separate room for her own use, in which the box was kept. After obtaining the deed, Palmatier and his wife executed a mortgage to the defendant upon the land, and later on deeded the land to defendant for a consideration of about \$440. It is under this deed that defendant claims title. The testimony satisfies us fully that the deed from plaintiff to her daughter never was delivered. Authorities need not be cited in support of the doctrine that a delivery of a deed is essential to a transfer of title to real estate. It has often been held that a deed found in the possession of the grantee would be presumed to have been delivered and accepted. *Wolverton v. Collins*, 34 Iowa, 238; *Craven v. Winter*, 38 Iowa, 471; *Blair v. Howell*, 68 Iowa, 619, 28 N. W. Rep. 199. Delivery may also be presumed from the fact that a deed has been executed, acknowledged, and filed for record by the grantor. *Robinson v. Gould*, 26 Iowa, 89; *Craven v. Winter*, 38 Iowa, 471; *Foley v. Howard*, 8 Iowa, 56. But, even when the filing of a deed for record raises a presumption of delivery, such presumption may be overcome by proof that the acts relied upon were not intended to constitute a delivery. The question of delivery of a deed is always one of intention of the parties. The act of delivery is not complete unless there be an acceptance on the part of the grantee. Hence it follows that, if the deed comes into the possession of the grantee without any intention on the part of the grantor that it shall become operative, a delivery does not take place. *Steel v. Miller*, 40 Iowa, 406; *Stevens v. Castel*, 29 N. W. Rep. 823, 63 Mich. 111. It is not our rule to enter into a detailed discussion of the evidence in equity cases. From a careful reading of this record the following facts are found to be fully established: That there was no agreement or arrangement whatever between plaintiff and her daughter Minnie that the deed should be delivered to the latter unless plaintiff's husband should sign it. The daughter never made any claim to any interest in the land. The deed was never in the possession of the daughter. The grantor never voluntarily parted with possession

of the deed. Plaintiff was advised that she could not convey the land unless her husband should join with her, which he did not do. Another fact which tends very strongly to support plaintiff's claim that she did not intend to deliver the deed unless it was signed by her husband, and that in fact the daughter never understood that it had been delivered, is that the daughter and her husband, after the latter had surreptitiously obtained possession of the deed, rented the land in controversy of plaintiff, and paid her rent therefor. If they, or either of them, had any reason to believe that the deed had been legally delivered to them, they would have asserted their rights as owners of the property, and not have sustained the relation of tenants to plaintiff. *Miller v. Murrefield*, 79 Iowa, 64, 44 N. W. Rep. 540. Again, as we have said, the deed was to be signed by the husband of the plaintiff. It is clear that no delivery was ever contemplated until he became a party to the instrument. *Overman v. Kerr*, 17 Iowa, 490; *Parker v. Parker*, 1 Gray, 409. We need not pursue this subject further. This deed came into the possession of the daughter's husband by stealth. There was no act on plaintiff's part showing, or even tending to show, any intention on her part to deliver the deed until the husband had also executed it, which he never did. No title passed to the daughter by reason of the surreptitious possession of her husband. A case will hardly be found where any presumption of delivery which may arise from the recording of a deed is so completely and satisfactorily overcome as in the case at bar.

3. Appellant claims that he was an innocent purchaser for value, without notice, and hence should be protected. We do not find such to be the fact. He also claims that plaintiff executed the deed to defraud the creditors of herself and her husband, and therefore should not be permitted to recover. This question is not in issue. Appellant rested on a denial of plaintiff's claim, and cannot now be heard to say that plaintiff should be prevented from recovering by reason of matters which he has not pleaded.

The judgment and decree of the district court are affirmed.

MOSER v. BOONE COUNTY.

(Supreme Court of Iowa. May 18, 1893.)

CORONER—SUMMONING PHYSICIAN AT INQUEST—COMPENSATION.

McClain's Code, § 503, provides that the coroner may, when he deems it requisite, summon at an inquest one or more physicians, "who, instead of witness fees, shall receive such reasonable compensation as may be allowed by the county board of supervisors." *Held*, that the compensation so allowed by the board is conclusive, in the absence of fraud, and that a physician is not entitled to maintain an action to determine whether his services are not in fact reasonably worth more than the amount allowed.

Appeal from district court, Boone county; S. M. Weaver, Judge.

Ramsey & Baker and O. M. Brocket, for appellant. J. R. Whitaker, for appellee.

GIVEN, J. 1. The learned judge presiding at the trial below certifies the following questions, upon which the opinion of this court is desired, and upon this certificate the plaintiff has appealed: "The questions upon which the opinion of the supreme court is desired are: (1) Where a physician makes a post mortem examination of a body, under the order and direction of the coroner, is the action of the board of supervisors, fixing his compensation for such services, final and conclusive upon him? (2) Where a physician has performed valuable services as an expert at the summons of the coroner, as provided in section 503 of McClain's Code, and the board of supervisors has allowed what it considers a reasonable compensation therefor, can the physician maintain an action against the county to recover a greater compensation on showing that his services are in fact reasonably and fairly worth more than the allowance so made?"

Under section 412 of the Revision of 1860, and section 368 of the Code of 1873, the reasonable compensation for such services was fixed by the coroner. By chapter 64, Acts 20th Gen. Assem., said section 368 was amended to read as follows: "In the above inquisition by a coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, who, instead of witness fees, shall receive such reasonable compensation as may be allowed by the county board of supervisors." McClain's Code, § 503. In *Cushman v. Washington Co.*, 45 Iowa, 256, it was held, under section 368 of the Code of 1873, as follows: "The coroner, or the justice acting in his absence, is the officer or tribunal exclusively charged with the duty of fixing the compensation in question. For refusal to act on the claim made, he may be compelled to do so by mandamus. For allowing an insufficient compensation, as no appeal is allowed, it is not clear what, if any, remedy is provided. The petition in this case shows that the justice refused to allow the claim for \$50, but did allow \$5 for witness fees and mileage for attending the investigation. This allowance is in excess of ordinary witness fees, and having been made, and the same being in the nature of an adjudication still in force, the plaintiff cannot maintain an original action against the county for his compensation." In *Sanford v. Lee Co.*, 49 Iowa, 148, the coroner had certified the amount charged as reasonable, and recommended the same to be allowed. The board of supervisors allowed only a portion of the amount. This court held that under said section 368 of

the Code of 1873 the recommendation of the coroner amounted to an allowance or approval of the amount charged; that it became a liquidated demand, and plaintiff was not bound to present it to the board before bringing an action; and that the defendant was bound, in the absence of fraud, to pay the amount allowed by the coroner. These cases clearly hold that under said section 868 the coroner, or justice acting as such, could alone determine what was a reasonable compensation, and that such determination was, in the absence of fraud, conclusive. The act of the 20th Gen. Assem. vests that same power in the county board of supervisors, and for the same reasons their action must be held to be conclusive, in the absence of fraud.

The force of these decisions is conceded by appellant's counsel, but it is argued that the board may, through ignorance of the reasonable value of the services, or arbitrarily, refuse to allow a reasonable amount, and, no appeal being allowed, appellant is entitled to his action in court to determine what is a reasonable amount. We may not presume that the board will act arbitrarily, or without due inquiry. In this, as in many other instances, the law does not fix the amount of compensation, because what would be reasonable in one case may not be in others. When it cannot be foreknown what will be a reasonable compensation, the law vests some person, board, or tribunal with power to determine that matter. Our statute contains many such provisions, of which we mention paragraph 14 of section 303 of the Code, authorizing the supervisors to fix the compensation of all services of county and township officers not otherwise provided for by law, and section 3814, authorizing the court to fix the compensation of witnesses called as experts. It would hardly be contended that a witness called as an expert might maintain an action to recover more than the court allowed him, and yet he was not permitted to have a jury to determine the amount, and the court may have ignorantly or arbitrarily allowed an insufficient compensation. Such a claim as this is unlike a claim for damages, as in *Fleming v. Hull*, 73 Iowa, 598, 35 N. W. Rep. 673. It is like any other item of costs incident to legal proceedings, and when the amount is fixed by statute, or by the person, board, or tribunal authorized to fix it, it is conclusive. The questions certified must be answered in the affirmative, and the judgment of the district court affirmed.

LIKES v. POLK.

(Supreme Court of Iowa. May 19, 1893.)

SALE OF MORTGAGED PREMISES—ANTICIPATION OF PAYMENTS BY VENDOR.

1. A reservation in a mortgage, to the mortgagor, of the right to pay off, on the day

for making any payment of interest, a portion of the principal, "so that the principal shall not be reduced to a less sum than five hundred dollars," is not inconsistent with a further provision that such payment "may include the whole of the principal," as it was merely intended that an unpaid balance of less than \$500 should not be left; and there is no necessity to resort to the rule of construction that written words prevail over those printed, the words "five hundred" being written into a printed blank.

2. Defendant conveyed land to plaintiff, subject to a mortgage, agreeing to pay the mortgage "as soon as it can be according to its terms." In the mortgage was a reservation to the mortgagor of the right to pay off the mortgage on any day named for making a payment of interest. *Held*, that it was the duty of defendant to avail himself of the earliest opportunity to pay off the mortgage at which the mortgagor could have paid it.

3. The mortgage was assigned by the mortgagee in trust. On the refusal of defendant to pay it off on a day on which interest was payable, plaintiff paid it to the mortgagee, and the assignee, upon being notified of such payment, received other securities from the mortgagee. *Held*, that the court properly found that there was such payment by plaintiff as would entitle him to sue defendant for breach of the contract.

Appeal from district court, Polk county; C. P. Holmes, Judge.

Action on contract for the payment of a mortgage debt. Joseph B. Davis was the owner of the property, being certain lots in the city of Des Moines, and gave a mortgage thereon to the New England Loan & Trust Company, due February 1, 1894. The lots were conveyed to the defendant, and by him to the plaintiff, with the incumbrance thereon; the defendant agreeing to discharge the mortgage. With certain omissions,—not important, in view of the questions presented in argument,—appellee states the facts as follows: "(1) The contract between the plaintiff and defendant for the purchase and sale of the said property was in writing, and contained, among other things, the following clause with reference to the payment of the mortgage of Joseph B. Davis and wife to the New England Loan & Trust Company, hereinafter mentioned: 'The party of the second part [defendant in this suit] is to furnish an abstract of title to lots seventeen, (17,) eighteen, (18,) nineteen, (19,) and twenty, (20,) showing that he is the owner in fee simple thereof, and that the same is without lien or incumbrance except the judgment against the said party of the second part and one F. M. Hubbell, for \$1,107.13. in favor of Martin Tuttle, and a mortgage thereon executed by Joseph B. Davis and wife to the New England Loan & Trust Company. Said party of the second part is, however, to convey said lots by warranty deed to said party of the first part, warranting the title against all incumbrances whatsoever, and is to discharge the said premises from the lien of the said judgment and the said mortgage. Said judgment is to be paid when the appeal now pending in the supreme court is finally determined, and the mortgage is to be paid as soon as it can be, according

to its terms.' (2) 'The party of the first part reserves the right to pay *five hundred* dollars, or any multiple thereof, or \$1,750, at the date named for making any interest payment: provided, thirty days' notice in writing be given the said second party of the intention to make such payment: and provided, further, that the principal shall not be reduced to a sum less than *five hundred* dollars. But the payment made under this provision may include the whole of the principal. *and, when \$2,000 shall have been paid, said lot seventeen (17) shall be released from the lien of this mortgage; and, upon the payment of \$1,750, lot eighteen (18) shall be released; and upon the payment of \$1,000, lot nineteen (19) shall be released. The payment for release of one lot shall not apply towards the release of any other.*' (3) The above mortgage was executed on a printed blank, and the words written therein at the time it was executed are italicised in the above quotation. This mortgage was assigned to the Farmers' Loan & Trust Company of New York prior to August 29, 1890. After the contract of August 29, 1890, was made and entered into by and between the plaintiff and the defendant, the plaintiff, desiring to borrow money upon the security of said property so sold to him by the said Polk, and on which said Davis mortgage rested, found it necessary to remove the mortgage of the said Davis and wife therefrom, and to this end he procured the New England Loan & Trust Company, the mortgagee in said Davis mortgage, to consent, so far as it might do, that the same might be paid off before its maturity, and notified the defendant of such agreement, and asked the defendant to pay the same. This the defendant, Polk, declined to do, because it was in violation of his contract and understanding made and entered into by him, as shown by the contract of August 29, 1890. The plaintiff, having paid off the mortgage to the New England Loan & Trust Company, asks judgment against the defendant for the amount so paid." The district court, upon the main issue, gave judgment for the defendant, and the plaintiff appealed.

Cummins & Wright, for appellant. J. S. Polk, with J. D. Whisenand, for appellee.

GRANGER, J. 1. The principal contention is upon the construction of the clause, "and the mortgage is to be paid as soon as it can be, according to its terms." The different claims for construction are these: Appellant says the mortgage could be paid the 1st day of February, 1891, it being one of the days fixed by the terms of the mortgage for the payment of interest. Appellee says: "This contract does not, as is claimed by plaintiff, bind the defendant, Polk, to pay off the mortgage on the 1st day of February, 1891, or as soon as the mortgagor, Davis, could pay it off by its terms; but it binds the defendant, Polk, to pay it off as soon as he (Polk) could

do, according to the terms of the mortgage." We think the concluding clause of appellee's statement of his obligation is entirely correct; that is, that he should pay whenever "he could do so, according to the terms of the mortgage." He thinks, however, that he would not have the right to pay as soon as Davis would have the right to, and here seems to be the difficulty of construction. If we look to the different obligations of defendant and Davis, as created by the different instruments, a correct conclusion ought to be reached as to this question. Davis' obligation and privilege for payment were fixed by the terms of the mortgage. Defendant's obligation was fixed by his agreement with Likes, and he contracted to discharge Davis' obligation according to its terms. The mortgage, by its terms, knew only Davis as an obligor, and its terms for payment, whether obligatory or permissive, are with reference to him. Defendant's agreement was to discharge a pre-existing obligation, to which he was not a party. We do not look to his agreement, then, to know the terms of payment, but to the mortgage; that is, he agreed to pay according to the terms made by Davis when he gave the mortgage. Now, having in mind—and upon this the parties agree—that defendant was not a party to the mortgage contract, and was without obligation to the mortgagee, it will be seen that his duty was not to pay upon demand, but to pay without demand, as soon as he could, by the terms of the mortgage. His obligation was, to say the least, to try to pay as Davis would have a right to pay, for plaintiff and defendant, surely, had in mind, when contracting, the terms of the mortgage, and the language is far from indicating that they then had in view its maturity for the time of payment. If but one time was then in contemplation, and that the maturity of the mortgage, the words, "as soon as it can be, according to its terms," would not have been apt or natural language to express the purpose. But, with the clause of the mortgage permitting an earlier payment, at the election of Davis, such language is entirely appropriate. The language indicates that the parties had in mind a time when it could be paid, as distinct from a time when it should or must be paid. It seems to us that defendant, by his agreement, was to take the place of Davis, and pay as, by the mortgage, he would be permitted to. If from the contract had been omitted the clause in question, which has reference only to time of payment, the legal effect would be precisely as appellee now claims it to be, for the mere agreement to pay the mortgage, which is expressed in another clause, would require its payment at maturity. We must assume that the specific clause as to time was inserted for some purpose. It is by no means clear that he had not the legal right to pay as Davis could, but that we need not decide. It is clear that he was to discharge the mort-

gage February 1, 1891, if he could do so,—that is, if payment would be accepted from him, as it must have been from Davis; and before he can avoid liability for a failure he must be able to show that he could not do so. On the contrary it is made to appear that he could, but would not. To our minds, there is clearly a breach of his undertaking, and the district court should have ordered judgment for the plaintiff.

2. It is urged that this suit was commenced before the mortgage was paid by plaintiff, and hence that there can be no recovery, conceding that the defendant had the right to pay the mortgage February 1, 1891. The facts important in this connection were found by the district court, and are as follows: "That on the 3d day of April, 1889, the New England Loan & Trust Company assigned to the Farmers' Loan & Trust Company, of New York city, as trustee, the said bond and mortgage. The terms of the trust under which the Farmers' Loan & Trust Company received and held such bond and mortgage, so far as they relate to the present controversy, are shown in the copy of the paper hereto attached, marked 'Exhibit C.' And about the same date the New England Loan & Trust Company assigned to B. F. Kauffman and G. W. Marquardt, trustees, the said note and mortgage, a copy of which is shown in Exhibit B. The terms of the trust under which the latter note and mortgage were received and held are, so far as they relate to this controversy, shown in the copy hereto attached, marked 'Exhibit D.' That prior to the 1st day of February, 1891, the defendant, Likes, had an interview with the officers of the New England Loan & Trust Company, and said officers then and there, so far as they had the right or power, waived that provision in the mortgage requiring thirty days' notice to be given of an intention to pay the same, or some part thereof, and notified the said Likes of its willingness to accept payment of both of said mortgages upon said 1st day of February, 1891, without notice. That prior to said 1st day of February, 1891, the said Likes notified the said Polk of the waiver of said notice by the New England Loan & Trust Company, and willingness to accept payment, and demanded of him (the said Polk) that he pay the said mortgages on the said 1st day of February, 1891. That the said Polk failed and refused to pay the said mortgages on said day, and refused to pay the same at any other time before the maturity thereof, according to their respective terms. And thereupon, on the 26th day of March, 1891, and before the bringing of this suit, the said Likes paid to the said New England Loan & Trust Company the sum of \$2,635.84, in full payment and satisfaction of said mortgages, and the said New England Loan & Trust Company then and there accepted said sum in full payment and satisfaction thereof. That on the 27th day of March, 1891, the

New England Loan & Trust Company notified its New York office that the bond and mortgage shown in Exhibit A had been paid, and on the 9th day of April, 1891, the Farmers' Loan & Trust Company, having received other securities as a substitute for said bond and mortgage, delivered the same to the New England Loan & Trust Company, together with a satisfaction piece." As we understand, the district court found that the mortgage was paid before the suit was instituted, and on the same day; the suit having been commenced March 26, 1891. The finding is warranted from the facts. The Farmers' Loan & Trust Company held the mortgage as security, and in trust. The fact that the money was received by the New England Loan & Trust Company as a payment, and that upon a mere notice of such fact the treasurer accepted other security, and surrendered the mortgage, would indicate that the payment was in pursuance of some previous understanding. The trustee, after notice that the New England Loan & Trust Company was receiving money in payment of its securities, makes no question of its right to do so, but gives the acts its approval by accepting other securities. This is certainly evidence upon which the district court could have found the fact of payment.

3. By a reference to the first statement of facts, and in the quotation from the mortgage, will be seen this provision: "And, provided, further, that the principal shall not be reduced to a sum less than five hundred dollars; but the payment made under this provision may include the whole of the principal." It is contended that the provisions are contradictory, and, as we understand, that but one of them is of force. It is said that the mortgage was made on a printed blank with certain parts filled in by writing, and that the words "five hundred" are of that class, and that under the rule the writing must prevail. That is true where written and printed matter in an instrument are inconsistent. Code, § 3651. But we must harmonize the language, if we can, consistently, and let all parts stand. We think the following construction is clearly within the scope of the language used, and is consistent: The mortgagor, besides the interest, may make payments of \$500, or any multiple thereof, and such payments may be of the whole debt, or any part thereof, so that of the principal there shall not be left a sum less than \$500; that is, the parties have contracted against leaving an unpaid balance of less than \$500. Such a provision is a reasonable one, and by such a construction we preserve both clauses of the mortgage.

The district court, in its judgment, provided that it should be without prejudice to another action, and from that provision the defendant appealed. Our conclusions render it unnecessary to consider the question. The judgment on plaintiff's appeal is reversed.

STATE v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Iowa. May 23, 1893.)

RAILROAD COMPANIES—SWITCHING SERVICES—ORDER OF RAILROAD COMMISSIONERS.

An order of the railroad commissioners that defendant railroad company transfer cars delivered to it by another company, from its station to another point, as a switching service and at switching rates, will not be enforced where such point is beyond the yard limits, and the service rendered is on the main line, and is done under orders, as in case of trains, and not under the direction of the yard master.

Appeal from district court, Dubuque county; John J. Ney, Judge.

This action was commenced with the railroad commissioners as plaintiffs, and the state subsequently substituted. It is an action to enforce an order of the railroad commissioners to the defendant company for the switching of cars from the station at Dubuque, Iowa, to Eagle Point, a place within the city of Dubuque. The necessary facts are as follows: Fendler & Schwaegler is a firm doing a business of burning lime at Eagle Point. The firm contracted with the Niagara Fuel-Oil Company, of Lima, Ohio, for fuel oil for use in its business; the oil to be furnished at the rate of 75 cents per barrel delivered at Eagle Point. The oil was shipped in tanks, and was, for a time, taken over the lines of the defendant company from Chicago to its destination at Eagle Point. Because of an advance in rates on the defendant's line, the transportation was so changed that from Chicago the oil came over the line of the Chicago, St. Paul & Kansas City Railway to Dubuque, at the rate formerly charged by the defendant company. This latter line has no road running to Eagle Point, nor has any company except the defendant. The defendant company refused, for a time, to transfer the cars with the oil over its line to Eagle Point. This led to a complaint by the oil company, through its president, E. J. Little, to the railroad commissioners, which is as follows: "The complainant states that the Niagara Fuel-Oil Company is a corporation doing business at Lima, Ohio, shipping fuel oil for manufacturing purposes. That, prior to August 24th, last, they have been shipping west of Chicago over the line of the Chicago, Milwaukee & St. Paul Railway. That in January, 1889, they contracted with Fendler & Schwaegler, of Dubuque, Iowa, to deliver fuel oil for 1889 at their lime kilns near the city of Dubuque, at a certain figure, based on a 14-cent through freight rate, or \$53.80 per car, the rate then existing on respondent's line. That on or about August 12th respondent road advanced its rates to \$86.47 per car, an increase of nearly \$33, which rates were so exorbitant as to deprive them of any profit on shipments; in fact, if paid, would subject them, under their contract, to serious loss. That the Chi-

cago, St. Paul & Kansas City Railway, a line running parallel to respondent's road, declined to advance rates, and complainant has since been shipping over said road to Dubuque. That, on the arrival of shipments at place of destination, respondent road refused, and still refuses, to switch said cars to the lime kilns of Messrs. Fendler & Schwaegler, when asked to do so both by the Chicago, St. Paul & Kansas City Railway and complainant, accompanied with a tender of switching charges; the switches of respondent being the only ones running to said kilns. That Messrs. Fendler & Schwaegler have been seriously hindered and damaged by failure to receive the shipments of oil, of which they use large quantities, and have been compelled to extinguish the fires in their works at two different times, and suspend operations three days at one time, and four at another. That complainant is held for the damage already sustained, caused by respondent road's refusal to switch cars as aforesaid, and will be greatly damaged in the future unless relief is obtained." The complaint is "for refusal to switch cars tendered at Dubuque, Iowa, October 14, 1889, with switching charges." Upon investigation the commissioners ordered the defendant company to "take shipments above, and any other that may be tendered them by connecting lines, and switch them as required by law." The company then established a station at Eagle Point, and announced its readiness to transfer the oil cars, but, as we understand, upon a basis of charges in conformity with the rates fixed by the commissioners in this state for the regular transportation of freight, under which, for five miles or less, the rate per car would be, as the commissioners state, "\$13 to \$15, the distance from Dubuque station to Eagle Point being three and one-tenth miles." The commissioners, in their order, fixed the rate at two dollars for three miles, but fixed no rate for an excess. Thereafter, in the same case, they made an order fixing the rates for switching at Dubuque as follows: "For any distance not exceeding one mile, \$1.00; for any distance in excess of one mile, and not more than two miles, \$1.50; for any distance in excess of two miles, and not more than three miles, \$2; for any distance in excess of three miles, and not exceeding four miles, \$2.50." Upon a neglect or refusal of the company to obey the order, this action was instituted in the district court of Dubuque county for its enforcement, and that court, upon the submission of the cause, dismissed the petition, and the plaintiff appealed. Other minor facts may be noticed in considering the case.

John Y. Stone, Atty. Gen., and D. B. Lyon, for the State. John W. Cary and W. J. Knight, for appellee.

GRANGER, J. From the record we find three ways of operating or moving cars on railways,—by “regular trains,” by “extra” or “special” trains, and by switching. Trains, whether regular or special, are generally upon the main line, and under orders from a train dispatcher. Switching is done by a crew with an engine, and is under the direction of a yard master, and within the yard limits. If the engine goes outside of the yard limits, it is under special orders, the same as a special train. Within the yard it is operated under general orders to the yard master to keep out of the way of regular trains on the main line. Eagle Point is a little more than a mile north of the yard limits of Dubuque station. The order of the commissioners requires the defendant company to transfer, not only the cars with oil, but all others tendered to it, as a switching service. Eagle Point was not, at the commencement of the proceeding before the commissioners, a regular station on defendant's line, but there was a side track there, and for years cars had been switched from the main line onto this track with fuel and other supplies for Fendler and Fendler & Schwaegler, and perhaps for others. Prior to the time when the oil company transferred its cars to be hauled over the Chicago, St. Paul & Kansas City Railway from Chicago to Dubuque, defendant company had transferred cars for other companies from Dubuque to Eagle Point at a rate of from two to three dollars per car, and it may be regarded as having been a place of local railway traffic on the defendant's line of road, though not a regular station. From the opinion of the commissioners, which is in evidence, it appears that they regarded Eagle Point as within the city and yard limits, for they say: “In the case in controversy the board is of the unanimous opinion that the service required of the respondent road is local in its character, confined to the city limits and yard and sidings of the respondent company.” As to its being within the city limits, our conclusion is the same, but upon the question of the yard limits the commissioners must have been favored with evidence not before us, for under this record it is beyond question more than a mile outside of the yard limits, and accessible only over the company's main track. It is further an undisputed fact that the switching crew and engine never passed from the yards to Eagle Point except under train orders, and as doing special train service. It is, of course, our duty to try these cases, wherein we are to determine whether the orders of the commissioners are “just and equitable,” under the facts as disclosed by the record, and it is to be regretted that the state of the law is such that they may reach their conclusions on a state of facts entirely different from those upon which ours are reached. In this case we find, as we must, that the switching service ordered is, in part, over the main track of the company's line to a side

track at least a mile outside the yard limits. We have the undoubted assurance that the commissioners, under the facts as we find them, would not have made the order for a switching service in this case. This assurance is based on a previous investigation and conclusion of the commissioners in the case of Wylie against this same company. The case is reported in the commissioners' report for 1890 at page 901. The cases are remarkably similar as to controlling facts. In that case, as in this, it seems that a service had been rendered by the switching engine and crew outside of yard limits on a main line to a “side-track station,” called “Oakton,” within the city limits of Davenport, and three miles from the Davenport station. The facts of that case, as stated by the commissioners, are as follows: “On June 9, 1890, Mr. Wylie complains that the Chicago, Milwaukee & St. Paul Railway Company charges him 30 cents per ton for switching soft coal from his yard, which is $\frac{3}{4}$ miles north of its Davenport station, to the Oakton switch. The Oakton switch is within the limits of the city of Davenport as extended, and about three miles from the Davenport station, making the distance about two and one-quarter miles. The complainant states that the Chicago, Rock Island & Pacific Railway Company switches cars to the glucose works in Davenport, about the same distance, for one dollar per car. The principal use of the Oakton side-track station is stated to be for setting out cars of supplies for the orphans' home, situated near the side track. Mr. Wylie asks the board whether the road is allowed to retain their present tariff to this station.” The commissioners, properly we think, regarded that case as involving a determination of what was properly a switching service, so as to know if they could fix the charges as applicable to such a service, or if they must regard it as a train service, so as to bring it under the regular schedule of tariffs for such a service. The commissioners then defined “switching” in the following language: “The general definition of a switch is that movement of cars within yard limits where an engine and cars may run without orders from the dispatcher, or, in other words, that occupancy of tracks that belongs to yard engines, and where all approaching trains are expected to run with special care, knowing that their rights of track are second to switching trains.” In reply to Mr. Wylie the commissioners stated that they “had finally settled down to this view: That a switch is that delivery within or without yard limits that is ordinarily made with a switch or special engine and crew, and does not partake of the character of the ordinary train made up for service over a line of road. While this work may be done by regular train, it is understood as the work usually done by the switching crew.” The following, from the commissioners, further indicates the similarity of the two cases as to facts: “At the hearing Mr. Wylie stated that up to July,

1888, the company treated this service as a switch, and charged two dollars per car. That the cars were taken out by the switch engine that pushed the freight trains up the grade, and that the empty cars were brought back from this station when it returned, after the loaded cars had been put on the Oakton siding. From June 4, 1889, to June 11, 1890, 105 cars were taken to Oakton. That at 30 cents per ton he is unable to compete for business, and must abandon it." It then appeared in that case, as undisputed, that when the switch engine went to Oakton it went under special orders. The conclusion was that the service was "not a switching service, but a haul from one station to another station," and, to meet the emergency, the commissioners adjusted the tariff rates to make them 20, instead of 30, cents per ton for coal between those stations. We are not aware of a single fact in this case, and not in that, favorable to the conclusion that the service from Dubuque to Eagle Point was a switching service. We do not understand that the commissioners have intended to interfere with, or change the facts as to, what shall constitute the different classes of service in regard to operating trains, for it must be understood that such prerogative, if it exists, should be exercised with the utmost caution, in view of the public and private interests involved, and the consequences liable to flow from such an interference. Nor do they confound the different services because of the crew or engine by which it is rendered, but characterize each, as should be the case, by the manner and place of the service,—as, where a regular train crew does switching duty, as is often the case, it is switching service; and the commissioners, speaking of switching, say: "While this work may be done by the regular trains, it is understood as the work usually done by the switching crew." The other conclusion necessarily follows that, where the switching crew does the work usually done by a train crew under orders from a dispatcher, it is a "train," and not a "switching," service. This precise rule was applied in the Wylie Case. So far as the point under consideration is involved, we think the conclusions in the Wylie Case are unassailable from a legal, and, we may add, equitable, standpoint. It gave a remedy for what, in the judgment of the commissioners, was a wrong without any unwarrantable interference with train regulation and management, in particulars as to which interference might involve prejudice as to some without a compensating advantage to any one. The importance of leaving railway management, in its details, to the wisdom and discretion of those who, from education and experience, can best control it in the interest of all concerned, is manifest.

Misapprehension should be avoided because of what is said in this opinion in connection with the definition given by the commissioners as to what constitutes switching. It is,

perhaps, not best here to place any arbitrary limitation upon the term. The commissioners do not, nor do we, think that such a service is bounded always by yard limits, for there may be outside trackage on which such a service, under proper regulations, would be rendered; but we hold, as we think the commissioners have, that a service upon a main line, outside of yard limits and under orders, as in cases of regular or special trains, is not a switching service. If the order of the commissioners is to be enforced by a decree in this case, the enforcement involves a change in the management of the company as to classification and operation of its trains. Its line for switching service must be extended to Eagle Point, and a part of the main-line track, outside the yard limits, must be subjected to switching service under direction of the yard master. We are convinced that no such result was ever contemplated by the order, and, further, that, with the facts as they appear before us, such an order would never have been made. It is not an order that, under the law, we can sustain. The district court, upon the same record, reached the conclusion that the petition should be dismissed, and its judgment is affirmed.

SHAW et al. v. JACOBS.

(Supreme Court of Iowa. May 23, 1893.)

NEGOTIABLE INSTRUMENTS — FRAUD IN PROCUREMENT — TRANSFER TO BANK — CUSTOM AND USAGE — PROOF OF SIGNATURE.

1. Where a check is payable to a named person as bearer, and the payee indorses it in blank, and delivers it to a bank, and receives credit for it, in an action by the indorsee against the maker, evidence that, by a custom among bankers, where a check is drawn on a bank and presented to another bank, it is passed to the credit of the customer, but that the credit so given is treated as a receipt for the check, and not as a payment, is inadmissible, as the indorsement and check evidence the agreement between the payee and indorsee, and the transfer of the check is governed by the law merchant.

2. In an action on a check, evidence as to the genuineness of the indorsee's signature is inadmissible, under Code, § 2730, where it is not denied under oath.

3. Evidence, in an action on a check, that it was given in payment for hogs; that the seller warranted them to be sound; that, about the time the sale was made, there were some dead hogs in the yard where those sold were kept; and that most of the hogs sold died within three weeks from the time they were delivered,—without any evidence as to the nature of the disease of which the hogs died, or that the seller knew that they were diseased, is insufficient to show fraud.

Appeal from district court, Jones county; J. H. Preston, Judge.

Action to recover the amount of a check drawn by defendant. After the evidence on the part of defendant had been submitted, the court directed a verdict for the plaintiffs, and rendered judgment for the amount of the verdict, which was returned as ordered. The defendant appeals.

Sheean & McCarn and M. W. Herrick, for appellant. Remley & Ercanbrack, for appellees.

ROBINSON, C. J. The check upon which this action is founded is as follows: "\$362.68. Monticello, Iowa, Oct. 17, 1890. G. W. & G. L. Lovell, Bankers: Pay Osborn Bros., or bearer, three hundred sixty-two 68/100 dollars. John Jacobs." The petition alleges that the payees of the check, in the usual course of business, transferred it to plaintiffs by writing thereon "Osborn Bros.," that it was forwarded through a bank in Dubuque to a bank in Monticello, which presented it to G. W. & G. L. Lovell for payment, but that payment was refused for the reason that defendant had ordered that payment be not made; and that the check was then duly protested. The answer alleges that the check was given to pay the purchase price of 125 young hogs which were sold by Osborn Bros. to defendant; that, to induce him to purchase the hogs, Osborn Bros. fraudulently and falsely stated that said hogs were perfectly sound and free from all disease, and warranted them to be so, well knowing at the time that they were not sound and free from disease; that defendant relied upon such statements and warranty in making the purchase, and believed such statements to be true; that the hogs were not as represented and warranted, but at that time were infected with a fatal disease, which caused the death of 118 of the hogs purchased, and rendered the remaining ones worthless, by reason of which there was a total failure of consideration for the check. Damages to other hogs of the defendant, and for services rendered and medicines used in attempting to cure the hogs, to the amount of \$315, are also alleged. The answer denies that plaintiffs are now the owners of the check, and avers that this action is brought for the benefit of Osborn Bros., who are the sole parties in interest, for the purpose of avoiding the defense pleaded.

1. On the trial, plaintiffs introduced in evidence the check, the indorsement thereon, and the certificate of protest, and rested. The defendant then offered testimony which showed that the check was given for hogs, as alleged in the answer. That while he was negotiating for them he told one of the Osborns that he would not have diseased hogs on his place for \$1,000, and that Osborn said: "They are just as sound as any hogs could be. We have had them for some time, and they eat well and do well." That he also said: "I warrant every pig to be as sound as any pig you ever had on your place." That the price was then agreed upon, and the hogs purchased were selected from a large number in the yard where they were kept. That the purchase was made Wednesday, and the hogs were received by him the next Saturday. That they began to die, and many of them were dead on the next Wednesday, and that,

of the 125 hogs purchased of the Osborns, 118 died within three weeks from the time they were received. That 23 of his hogs not obtained from the Osborns also died, and that he incurred expense and performed labor in caring for the diseased hogs. The evidence on that branch of the case would have authorized the jury to find that there was a total failure of consideration for the check. No witnesses testified for the plaintiffs in regard to their ownership of it, but defendant stated that he had a conversation with Mr. Schoonover in which the latter was asked why he did not return the check to the Osborns, and answered: "I did try to return it, but they wouldn't take it back;" and "I don't know whether they are worth anything, but we are secured by their father." In regard to obtaining the check, Mr. Schoonover said: "Osborn came in after banking hours, threw down the check and asked, 'How is that?'" Schoonover looked at it, and said, "All right," and gave credit for it. When payment of the check was refused by the persons on whom it was drawn, the cashier of the Monticello bank, to which it had been sent for collection, informed Schoonover by telephone of the fact. In response the latter said: "Well, what have I got to do about it?" The Osborns transacted their banking business with plaintiffs, but refused to take up the check until an attempt should be made to collect it by suit. The defendant admits, in effect, that, if plaintiffs are innocent purchasers of the check for value, they are entitled to recover its amount, but he insists that in law they are presumed to have taken it for collection only, with the right to return it when payment was refused. For the purpose of showing that such a presumption is authorized, he offered to prove by two experienced bankers of Jones county that, by general custom of bankers in that county and elsewhere, a check drawn on one bank, when presented to another by one of its customers, was passed to his credit, but that the credit so given was treated as a receipt for the check, and not as a payment. The offered evidence was rejected. The appellant insists that it should have been received, and cites numerous authorities to show that in the absence of a special agreement, when a bank receives from a depositor a check upon another bank for collection, if, without fault on the part of the bank receiving it, the collection is not made, that bank has the right to return the check, and cancel the credit for it which was given to the depositor. The custom which defendant sought to prove would not have affected the right of plaintiffs to stand upon their agreement with Osborn Bros. That was shown by the check and the indorsement thereon set out in the petition. The check is in form a negotiable instrument. The transfer of such checks is governed in most respects by the rules applicable to negotiable promissory notes. Tied.

Com. Paper, § 440; 2 Pars. Notes & B. 57 et seq. Notwithstanding the fact that the check in suit is payable to bearer, it was transferred by an indorsement in blank. By so indorsing it the payees assumed the same liability they would have been under by such an indorsement had the check been made payable to order. Tied. Com. Paper, § 237a, 270; Bigelow v. Colton, 13 Gray, 309; Smith v. Rawson, 61 Ga. 208; Johnson v. Mitchell, 50 Tex. 212; 1 Morse, Banks, § 391; Story, Prom. Notes, § 132. The effect of the blank indorsement of a negotiable instrument, including delivery, is to transfer the title to such instrument to the indorsee, and the presumption, in the absence of a showing to the contrary, is that it was for a valuable consideration. Tied. Com. Paper, § 250. The effect of the indorsement in question was to transfer to the plaintiffs the title to the check, not merely to enable them to collect it, but for all purposes. That such was the intent of the parties is shown to some extent by the fact that credit was given to Osborn Bros. for the check. In the absence of evidence that the giving of credit was only for the purpose of keeping a record of the check,—a matter of bookkeeping,—we must presume that it was intended as a payment. The custom of banks upon which defendant relies could not have controlled the agreement of the parties as shown by the indorsement, and evidence to prove it was therefore properly rejected. The claim that plaintiffs are not the owners of the check is not supported by the evidence.

2. A witness for defendant testified that the indorsement on the check was, in his opinion, in the handwriting of one of the plaintiffs. On cross-examination the witness stated that he was not much acquainted with the handwriting of Osborn Bros., and would not attempt to identify it, and that he would not say the indorsement was not in the handwriting of one of the Osborns. There was no attempt to show that the indorsement was made without due authority, and the evidence on that point would have been entitled to but little weight, had it been competent and material. It was immaterial, however, for the reason that the party whose signature the indorsement purported to be did not deny it in writing under oath. For that reason it was the duty of the court to treat it as genuine and admitted. Code, § 2730; Robinson v. Lair, 31 Iowa, 10.

3. It is said the jury might have found from the evidence that the check was procured from defendant by fraud on the part of Osborn Bros., and that the burden was on plaintiffs to show that they procured it for a valuable consideration, without notice of the fraud. But the record does not contain evidence which would have authorized the jury to find that the fraud alleged had been proven. The evidence falls to show with what disease the hogs died. It does not show that they were infected when sold.

It is shown that, about the time the sale was made, there were some dead hogs in the yard where those sold were kept, and that some of them died soon after they were removed from it. But it is not certain whether the dead hogs in the yard specified died before or after the purchase was made, and, if it be conceded that the hogs in controversy were diseased when sold, it is not shown that Osborn Bros. knew that fact at the time of the sale. We conclude that the evidence was not sufficient to authorize a verdict for defendant, and that the action of the court in directing a verdict for plaintiff was right. The judgment is affirmed.

CONGER v. CRABTREE.

(Supreme Court of Iowa. May 25, 1893.)

ACTION ON NOTE—MATERIAL ALTERATION—NEG-
LIGENCE OF MAKER—BURDEN OF PROOF.

In an action on a note by a purchaser before maturity, defendant pleaded an unauthorized alteration in the note. Plaintiff filed a general denial to the answer, and on the trial placed the note in evidence, and rested. Defendant showed that the payee had made unauthorized alterations by filling in interest blanks left by defendant. *Held*, that the burden of proving that defendant was guilty of such negligence in leaving the blanks in the note as would estop him from denying liability was upon plaintiff, and that plaintiff did not assume the burden.

Appeal from district court, Polk county; C. P. Holmes, Judge.

Action to recover an amount alleged to be due on a promissory note. After the evidence for defendant had been introduced the court sustained a motion of plaintiff to direct a verdict in his favor, a verdict was returned as directed for the amount of the note, and judgment was rendered thereon in favor of plaintiff. The defendant appeals.

Phillips & Phillips, for appellant.

ROBINSON, C. J. The note in suit as it appeared on the trial is in words and figures as follows: "100.00. Des Moines, Iowa, Sept. 3, 1889. Six months after date, for value received, I promise to pay to S. E. McCreary, M. D., or order, one hundred (100) dollars, at Des Moines, Iowa, with interest at ten per cent. per annum, payable annually, and interest in arrears shall draw ten per cent. interest till paid; and in case of nonpayment of interest when due the whole sum of principal and interest to become due and collectible, at the holder's option. And, in any action that may be brought for any sum under the provisions of this note by the holder hereof, he shall be entitled to recover of the maker hereof a reasonable sum as attorney's fee, to be taxed by the court. Geo. W. Crabtree." It bore indorsements as follows: "Pay to W. W. Whitmore or order, without recourse. S. E. McCreary, M. D." "Pay to C. M. Conger, or order, without recourse. J. W. Whitmore."

The plaintiff introduced the note in evidence, and rested. The defendant then introduced evidence which must be regarded, for the purposes of this appeal, as showing that when the note was made and delivered it did not provide for the payment of interest, but contained two blanks, one of which was in the clause in regard to the payment of interest on the principal, and the other in the clause which refers to the payment of interest on interest in arrears; that it was agreed between defendant and the payee of the note that it should not bear interest, and that the blanks for the rate of interest were filled without the knowledge or consent of the maker, after the note was delivered.

It has been held in some cases that the holder of a note has an implied power to fill blanks which were not filled when it was delivered. But whether a power to fill such blanks as those in controversy may exist by implication, in any event, we need not determine. In this case, it is shown, clearly, that it was withheld. The filling of the blanks was unauthorized, and was designed to affect the liability of the maker of the note, by increasing the amount for which he was liable. The alteration was therefore material, and a forgery, and rendered the note void, as between the maker and the party who made the alteration. Code, § 3917; *Bank v. Hall*, (Iowa,) 50 N. W. Rep. 3944; *Smith v. Eals*, 81 Iowa, 235, 46 N. W. Rep. 1110; *Adair v. England*, 58 Iowa, 314, 12 N. W. Rep. 277; *Tied. Com. Paper*, §§ 391, 394; *McGrath v. Clark*, 56 N. Y. 34; *Bank v. Burns*, 129 Mass. 596. Such an alteration may be shown as against an innocent purchaser for value, before maturity. *Charlton v. Reed*, 61 Iowa, 106, 16 N. W. Rep. 64; *Bank v. Clark*, 51 Iowa, 265, 1 N. W. Rep. 491. It is possible that the maker of an altered note may be estopped to deny liability on account of it because of negligence on his part in delivering it with unfilled blanks, but we do not think it can be said, as a matter of law, that proof that the alteration was made by filling blanks left by the maker, even though they were provided for inserting therein the rate of interest, is alone proof of negligence which will estop him to deny liability. When he shows such an alteration in the note as will make it void as between him and the party who altered it, the burden is upon the party asking a recovery thereon to establish the liability of the maker notwithstanding the alteration. *Smith v. Eals*, supra; *Robinson v. Reed*, 46 Iowa, 220; *Scofield v. Ford*, 56 Iowa, 370, 9 N. W. Rep. 309. In *Rainbolt v. Eddy*, 34 Iowa, 441, it was held that the innocent holder for value, before maturity, of a note which had been altered by inserting without authority the words, "ten per ct. inst.," in a blank left in the note by the maker, could recover. The statement of facts in that case is brief, but we are justified in presuming that the defendant assumed the burden of

proving that the plaintiff acquired the note with knowledge of its alteration, and what this court said in regard to the burden of proof must be considered as applicable to that case, as it was presented by the pleadings. The petition in this case set out the note, alleged that it was owned by plaintiff, and that it was unpaid, and demanded judgment for its amount. The answer did not deny the making of the note, as originally drawn, but pleaded as a defense the alteration, and that it was unauthorized. To the answer, plaintiff filed a general denial. The pleadings did not aver that defendant was negligent in making and delivering the note with the blanks unfilled, nor that plaintiff had notice of the alleged alteration when he purchased it. The evidence showed that the note had been altered without authority, as alleged, and that defense was fully sustained. If negligence on the part of defendant in making and delivering the note would have estopped him to deny liability thereon, the burden of proving the negligence was on plaintiff, under the rule we have stated, and no attempt was made to assume that burden. But, by going to trial on the issues presented by the answer, plaintiff waives objections to its sufficiency. Code, §§ 2650, 2664; *Linden v. Green*, 81 Iowa, 306, 46 N. W. Rep. 1108. It follows from what we have said that the district court erred in directing a verdict for the plaintiff.

Its judgment is therefore reversed.

FORD v. EASLEY et al.

(Supreme Court of Iowa. May 26, 1893.)

AGENT TO SELL LAND—COMPENSATION—RECORD ON APPEAL.

1. Where an agent to sell land is not authorized to execute a conveyance, but merely to obtain a purchaser, he is entitled to compensation upon finding a person ready and willing to make the purchase, although, owing to the owner's selling the land, the sale is not consummated.

2. Objectable remarks of counsel cannot be preserved for review on appeal in affidavits, a bill of exceptions being necessary.

Appeal from district court, Woodbury county; Scott M. Ladd, Judge.

Action to recover an amount alleged to be due plaintiff as compensation for effecting a sale of real estate which was owned by defendants. There was a trial by jury, and a verdict and judgment for plaintiff. Defendants appeal.

Kean & Sherman, for appellants. T. F. Bevington, for appellee.

ROBINSON, C. J. In April, 1890, the defendants owned a part of two lots in Sioux City, having a front of 21 3-7 feet, on which there was a mortgage to secure an indebtedness of \$4,800. One-half of that amount was due on the 17th day of the next month. They authorized plaintiff to sell the prop-

erty for \$400 per front foot, the purchaser to assume \$2,400 of the mortgage debt, and pay \$3,000 in cash, and the remainder in one and two years. Plaintiff was to receive, for his services in effecting the sale, whatever he should obtain in excess of \$400 per front foot. He claims that on the 19th day of May, 1890, he effected a sale, on the terms of payment he was authorized to make, for the price of \$425 per front foot, and seeks to recover as commission on the sale the sum of \$535.71. The defendants claim that the plaintiff was authorized to sell the property for the purpose of providing funds with which to meet the part of the mortgage debt which matured on the 17th day of May; that his power to make a sale terminated on that day, and, when it was at an end, the defendant R. Holt Easley purchased the property for his wife, to whom a deed conveying it was delivered on the 24th day of May; that, before plaintiff made a sale of the property, he was informed that it had been sold. In reply the plaintiff states that after the 17th day of May, and before the property was sold to Mrs. Easley, the defendants were informed that plaintiff was about to make a sale, and directed him to complete it if possible, and that, after being so directed, he made the sale as alleged. The jury found that plaintiff is entitled to the compensation claimed, and judgment was rendered for that amount.

1. The appellant claims, by means of various assignments of error and the argument based thereon, that the authority given to plaintiff, as shown by the pleadings and evidence, was to effect a sale of the premises in controversy, but that the evidence showed that the most he did was to find a person who was ready and willing to make the purchase on the terms given; and that the court, in its charge, authorized the jury to find for plaintiff if the arrangement made was that he was to receive a commission if he found a purchaser, and if the evidence showed that he found one. It is true, the pleadings allege that plaintiff was authorized to sell the property on the terms given, and that he was to receive as commission whatever sum he might obtain in addition to \$400 per front foot, and that he was entitled to the amount claimed as commission for selling the property; but it is clear that no power was given him to execute a conveyance of it, and that what the parties contemplated by the arrangement made between them was that plaintiff should obtain a purchaser for the property for the price and on the terms given him, and that the conveyance should be made by the defendants. It was said in *Blodgett v. Railway Co.*, 63 Iowa, 609, 19 N. W. Rep. 790, that "there is no doubt that an agent or broker who is employed to sell property at a designated price, and on stated terms, is entitled to his commission when he has

found a customer who is able and willing to take the property at that price and on those terms, whether the sale is consummated or not." In this case, when plaintiff found a person who agreed to take the property on the terms given, and was able and ready to carry out the agreement, he had done all he was authorized to do to effect a sale, and was entitled to the agreed compensation for his services. The evidence shows that plaintiff did procure a purchaser who agreed to pay \$425 per front foot for the lot on the terms fixed by defendant. That he was ready and willing to complete the purchase is shown, and not questioned. There is some conflict in the evidence in regard to an extension of the time within which plaintiff had the right to effect a sale, but the jury were authorized to find that the time had been extended, and that what plaintiff did was within the scope of his employment.

2. Appellants complain of the refusal of the court to grant a new trial on account of alleged misconduct on the part of an attorney for plaintiff in making the closing argument to the jury. The remarks to which objection is made are shown only by the affidavit of one of the defendants. We have held that matters of that kind cannot be made a part of the record by an affidavit, but that they should be preserved in a bill of exceptions. *Rayburn v. Railway Co.*, 74 Iowa, 641, 35 N. W. Rep. 606, 38 N. W. Rep. 520. Therefore we cannot decide the objections made. What we have said disposes of the controlling questions in the case. The judgment of the district court is affirmed.

HITCHCOCK v. CHICAGO, ST. P. & K. C. RY. CO.

(Supreme Court of Iowa. May 18, 1903.)

OBSTRUCTION OF STREET BY RAILROAD EMBANKMENT—INJURY TO ADJACENT HOUSES BY VIBRATION—PLEADING.

1. Plaintiff alleged that he was the owner of a lot on Ninth street, in a named city, and that defendant railroad company built an embankment for its track along S. street, and across Ninth and Tenth streets near his said lot; that an embankment was made, "where the railroad is located on said streets," at an unnecessary height, so that the necessary approach thereto raised Ninth street, in front of said lot, two feet, and that the embankment and approaches thereto constituted an obstruction to Ninth, Tenth, and S. streets, where they are used in going to and from his lot, and rendered it subject to overflow, and difficult of access. *Held*, that the petition stated a cause of action for damages.

2. The fact that it is not alleged that the acts of defendant are not merely negligent, and that the obstruction is wrongful, and without right, unless damages are paid plaintiff, does not render the petition bad on demurrer.

3. In an action by an abutting owner for the obstruction of a street by a railroad company the fact that he claims damages for the obstruction of other streets, on which his lot does not abut, does not render his petition vulnerable to a demurrer.

4. A count of a petition based on a claim that defendant railroad company violated a city ordinance by running its trains at an excessive rate of speed, and shook his dwelling house, and the lot on which it is situated, is bad on demurrer because of failure to aver that the lot abuts on the street on which the railroad runs, although it is alleged in another count, seeking damages for obstructing a street, that the track is in S. street, near lot 2, block 51.

Appeal from district court, Polk county; W. F. Conrad, Judge.

This is an action to recover damages for the negligent construction of a railroad track along a street in the city of Des Moines. There was a demurrer to the petition, which was sustained. Plaintiff appeals.

H. S. Wilcox, for appellant. Cummins & Wright, for appellee.

ROTHROCK, J. 1. It appears from the averments of the first count of the petition that the plaintiff was the owner of lot 2, in block 51, on Ninth street, in the city of Des Moines, and that the defendant "built an embankment for its track along Scott, and across Ninth and Tenth streets, near lot two," owned by plaintiff; that in constructing the railroad an embankment was made where the railroad "is located on said streets, and crosses the same at an unnecessary height, so that the necessary approach thereto raised Ninth street in front of said lot two feet, and the embankment, together with the necessary approaches thereto, became, and ever since have been, an obstruction to the use of Scott street, and Ninth and Tenth streets, where they are ordinarily used in going from and to lot two, block fifty-one, and that they have thus rendered said lot subject to overflow from surplus water, made it difficult of access, and undesirable for residence or business purposes." In our opinion there is in this count of the petition a distinct averment that the defendant raised Ninth street two feet in front of plaintiff's property, and we infer that Ninth street crosses Scott street at right angles. The railroad is constructed along Scott street, and the embankment of two feet in front of plaintiff's property is part of the approach to the railroad track. How far plaintiff's lot is from the intersection of the streets does not appear. If the defendant, in making an approach to the railroad, erected an embankment in front of plaintiff's property, to his damage, he has a right of action, because the approach is part of the railroad. *Gates v. Railway Co.*, (Iowa,) 48 N. W. Rep. 1040. It is true that plaintiff claimed damages for obstructing other streets upon which his lot did not abut. But a petition is not vulnerable to a demurrer because it claims more than the plaintiff is entitled to; and it may be that there should have been additional averments to the effect that the acts of the defendant were not merely negligent.

but that the obstruction in front of plaintiff's lot was wrongful, and without right, unless damages were paid. But we think the averments in that respect were sufficient on demurrer.

2. Another count of the petition was based on a claim that the defendant violated an ordinance of the city in running its trains along Scott street at such an excessive rate of speed that "the ground about the dwelling house on said lot two has been shaken, and by its being shaken, and the disturbance in the air caused by said rapid running of trains, engines, and cars, the foundation, walls, ceilings, and other portions of said house have been much cracked and shattered, thus damaging said house in its value one thousand dollars." The demurrer, so far as it attacked this count of the petition, was properly sustained. There is no averment that the plaintiff's lot abuts on Scott street. It appears from the other count that the railroad track in Scott street is "near lot two, block fifty-one." What that may mean, no one can tell. It is evident that there must be at least one lot between lot 2 and Scott street. The averments of the petition should be sufficiently explicit to enable the court to determine, so far as can be, from the face of the pleading, whether the plaintiff has any just cause of complaint. For the error in sustaining the demurrer to the first count of the petition, the judgment of the district court is reversed.

RUPPIN v. LEE.

(Supreme Court of Iowa. May 26, 1893.)

MONEY HAD AND RECEIVED — EQUITABLE COUNTERCLAIM — EVIDENCE.

Where, in an action for money had and received, defendant sets up an equitable counterclaim, and the evidence preponderates in favor of his contention, a decree granting him affirmative relief will not be disturbed.

Appeal from district court, Johnson county; S. H. Fairall, Judge.

Action for money had and received. An equitable counterclaim, and a decree from which the plaintiff appealed.

Runck & Wade and Hedges & Rumble, for appellant. Milton Remly, for appellee.

GRANGER, J. In October, 1887, the plaintiff placed in the hands of defendant the sum of \$3,000, and again, in December, 1887, the sum of \$1,000. The money was sent to one Carey R. Smith at Santa Ana, Cal., and by him invested in real estate, with the title in the name of the plaintiff. The plaintiff's claim is that she placed the money in the hands of the defendant, to be loaned for her, and she brings her action as for money so had and received. The defendant's claim is that he received the money under an agreement that it should be sent to Smith, in California, for investment in real estate, intrusting the investment there to the judgment of Smith:

that plaintiff was to furnish the money for the investment, and the parties were to share the profits thereof equally; that the money was, in pursuance of such agreement, invested by Smith in certain lots in California, with the title thereof in plaintiff; that the transaction has never been completed by a sale of the lots, and that plaintiff now refuses to recognize the transaction in the purchase of the lots as in any manner hers, but denies the same, and brings her action to recover the money furnished the defendant. Defendant files his cross petition in equity, reciting the facts, and averring that he has advanced the sum of \$56.41 on account of sidewalks, exchange, taxes, and recording, in connection with said investments, which plaintiff refuses to pay. Defendant asks a decree in effect requiring plaintiff to perform according to the conditions of the agreement. A reply puts in issue the averments of the cross petition. The district court found for the defendant as to the \$3,000 item, and gave decree for performance, and found for the plaintiff as to the \$1,000 item, entering a conditional decree in her favor. It is from the decree granting affirmative relief to the defendant that the appeal is taken.

The decree must be affirmed. The testimony is conflicting, but it preponderates largely in favor of defendant. As to the agreement, upon which the money was received, it was verbal, the witnesses in support of defendant's contention being as three to one, with no discrediting circumstances in favor of the plaintiff. The circumstances of the investment, at a time when motives or purposes to falsify or disguise the true condition were entirely wanting, are also highly corroborative of the defendant's claim as to the facts. The then anticipated profits of the investment, seemingly a certainty, were beyond any possible results from a loan of the money, which was the inducing cause of the money being sent to the west for investment. When we divest the record, as we must, of a large amount of immaterial, and in every sense useless, matter, the prominent and controlling facts are not difficult of solution. The questions in the case are of fact, and the testimony upon which they are found is not of importance beyond this case. It is a fact that for years the plaintiff and her husband relied upon the defendant for counsel and aid in the conduct of their affairs, relying with implicit confidence upon his integrity and judgment. The plaintiff also knew Mr. Smith; saw his letters as to the situation and the prospect for profitable investment in California; and both she and the defendant, no doubt, believed the opportunity a good one for large returns in a few months. Because of the long-continued confidence of the plaintiff in the defendant, and her placing so fully her business and affairs under his control or direction,—which, up to this transaction, seemed to be satisfactory,—there has been a want of such business methods and

precautions as to, in some respects, throw doubts upon some parts of the transaction. It is not unusual for such results to flow from such relationships. We are further impressed with a belief that, but for the interference of other parties, there would have been no such contention as to the facts as to give rise to this case. The judgment of the district court is affirmed.

JACKSON et al. v. ROWLEY.

(Supreme Court of Iowa. May 16, 1893.)

DELIVERY OF DEED IN ESCROW—CONVEYANCE BY GRANTEE BEFORE PERFORMANCE OF CONDITIONS—RIGHT OF GRANTOR TO RESCIND.

Plaintiff owned an equity in certain lots, to some of which P. acquired title, subject to a mortgage. P. agreed to convey same and other land to defendant, to make certain improvements, and to pay off incumbrances, in consideration for which defendant agreed to convey a tract of land to P. A deed to such tract was delivered in escrow, delivery to be made to P. on his performance of the contract. Thereupon, P. conveyed to plaintiff the land described in the deed from defendant, in consideration for which plaintiff directed the release of the lots to which P. had title from the aforementioned mortgage. Subsequently, P. being unable to pay off the incumbrances on the land conveyed by him, and not having completed the improvements as agreed, the contract was rescinded, and the deed held in escrow was returned to defendant, the latter having no knowledge of the conveyance to plaintiff. *Held*, that title did not vest in P. until his performance of the contract, and, not having performed, he had no title that he could convey, as against defendant, who had a right to rescind.

Appeal from district court, Woodbury county; Scott M. Ladd, Judge.

Action in equity to compel defendant to execute and deliver a deed for certain lands to plaintiffs, and to enjoin defendant from disposing of or incumbering said lands. Decree for defendant, and plaintiffs appeal.

Davis, Gantt & Briggs, for appellants.
Joy, Hudson, Call & Joy, for appellee.

KINNE, J. 1. The following facts are either admitted in the pleadings, or satisfactorily established on the trial: That plaintiffs, Byam & Jackson, are real-estate agents in Sioux City, Iowa, and owned an equity in certain lots in Highland Park addition to that city. This property was mortgaged to one Leighton Wynn, as trustee, for \$200 per lot. Prior to August, 1889, W. H. and De Ette H. Porter, his wife, had traded for a large number of the lots referred to, taking them from Byam & Jackson subject to the incumbrance of \$200 per lot. The Porters at this time owned two other houses and lots. Appellee, Rowley, was the owner of about 1,000 acres of land in Yankton county, S. D., and on August 2, 1889, he made a trade with the Porters, by the terms of which he was to transfer his land to them, subject to a mortgage of \$3,000, and was to receive therefor, from the Porters, the two

houses and lots heretofore mentioned, and also three lots in block 28, Highland Park addition to Sioux City, being some of the lots covered by the Wynn mortgage, above mentioned. The Porters were also to erect a house, and make certain other improvements, on these three lots, and to pay all liens and incumbrances against the house and lots. Rowley, by the terms of the contract, was to execute, and place in the hands of one Clough, the warranty deed of himself and wife for the land, and also to deliver to De Ette H. Porter a mortgage for \$2,000. When the Porters complied with the contract on their part, Rowley was to cause Clough to deliver the deed to them. In pursuance of the contract the Porters executed to Rowley conveyances of the two houses and lots, also of the three lots, and erected a house upon the last-described lots, but failed to pay off the liens and incumbrances on the property, which amounted to about \$3,000. The several lienholders commenced suits against Rowley and the Porters, and, it appearing that the Porters could not comply with their contract, the same was, by Rowley and the Porters, rescinded, so far as was practicable, on March 8, 1890. On the same day the Porters and Rowley, to effect a settlement of all matters appertaining to the proposed exchange of properties, agreed in writing that Rowley should pay off certain mechanics' liens on the three Highland Park lots, pay a note held by Clough, of \$30, and also pay Porter \$179. The land contract was canceled, and the deed held in escrow by Clough was to be delivered to Rowley, as was also the abstract for the land described in the deed. Rowley was also to retain lot 8, in block 27, and lots 15, 16, and 24, in block 28, in Highland Park, with all the improvements thereon. In September, 1889, Porter, it appears, had conveyed to Byam & Jackson the Dakota land heretofore mentioned, in consideration of which they had directed Leighton Wynn, trustee, to release a large number of the lots from the Wynn mortgage, and he did release enough lots (at \$200 each) to amount to \$11,000, the sum they had agreed to pay for the Dakota land. At this time, neither Wynn, trustee, nor Byam & Jackson, had knowledge of the real transaction between Porter and Rowley, but both of them seem to have acted upon Porter's statement that he had bought the land of Rowley, and had a deed for it. They saw an abstract of the land, which showed title in Rowley, and they had Porter's statement that he had a deed from Rowley, but did not investigate the matter until some months later. When they did investigate the title to the Dakota land, they discovered that Clough held Rowley's deed to Porter, that the Porters had failed to comply with their contract, and that the deed had all the time been held by Clough as an escrow. On March 8, 1890, when Porter and Rowley rescinded the con-

tract, Rowley had no knowledge that Porter had conveyed the Dakota lands, or that plaintiffs, or either of them, had, or claimed to have, any interest in them.

2. Appellants claim that the Porters fully complied with their contract with Rowley, and hence the deed to the Dakota lands, held by Clough in escrow, became the property of the Porters. If the conditions of the contract on the part of the Porters had been complied with, the title would, no doubt, have passed to them. But the evidence clearly shows that the Porters had not completed the house and other improvements, as agreed upon, and Rowley was compelled to, and did, pay off a large sum in satisfaction of liens and incumbrances on the property, which the Porters had agreed to pay, hence they were not entitled to the deed.

3. Plaintiffs' real contention is that the delivery of the deed to Clough in escrow vested the title in fee simple in the Porters, as counsel say, "subject only to a defeasance by a failure on their part to carry out the contract between them and Rowley, which was the condition of the special delivery." The claim finds little, if any, support in the authorities. We understand the general rule to be well settled that when a deed is delivered to a third person, to be by him held until the performance of certain conditions by the grantee, the title does not vest in the latter until the conditions are performed. *Dev'l. Deeds*, § 323. The following are a few of the later decisions in support of the rule above laid down: *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. Rep. 127; *Hayden v. Meeks*, (Ark.) 14 S. W. Rep. 864; *Steamboat Co. v. Moragne*, 91 Ala. 610, 8 South. Rep. 867; *Daggett v. Daggett*, 143 Mass. 516, 10 N. E. Rep. 311; *Quick v. Milligan*, 108 Ind. 419, 9 N. E. Rep. 392; *Taft v. Taft*, 59 Mich. 185, 26 N. W. Rep. 426; *Patrick v. McCormick*, 10 Neb. 1, 4 N. W. Rep. 312; *Knopf v. Hansen*, 37 Minn. 215, 33 N. W. Rep. 781. See, also, 6 Amer. & Eng. Enc. Law, p. 867. This court has also recognized this general rule. *Haven v. Kramer*, 41 Iowa, 387; *Logsdon v. Newton*, 54 Iowa, 448, 6 N. W. Rep. 715.

Counsel insist that, if the conditions of the contract had been performed, then from that time the deed ceased to be held as an escrow, and the custodian became the agent of the grantee. That question, and others argued, we need not determine. The conditions were never performed on the part of Porter. He never became entitled to the deed, and hence had no interest in the land, which he could convey to Byam & Jackson. Porter having failed to comply with his contract, it was defendant's right to rescind the same, and enter into the contract of March 8, 1890. Having done so in good faith, and without knowledge of Byam & Jackson's claims, he is in no wise amenable to them. Plaintiffs were grossly negligent

in not ascertaining the real facts touching Porter's interest in the land before canceling the mortgage they held against him.

Affirmed.

SLONE v. BERLIN.

(Supreme Court of Iowa. May 17, 1893.)

PRACTICE ON APPEAL — TRANSCRIPT OF STENOGRAPHER'S NOTES — SCHOOLS — CONTRACT WITH TEACHER.

1. Where, at the close of the trial of an action at law, the shorthand notes were filed, and the translation thereof was filed prior to the time the clerk made his abstract, it is not ground for striking all of the evidence from the abstract that the translation was not filed within six months from the rendition of judgment, and that it had not been filed on the date of the service of appellee's additional abstract; appellee never having called for a transcript of the notes, and the filing of his additional abstract being the first notice to appellant that a translation of the notes would be required. *Lowe v. Lowe*, 40 Iowa, 220, and *Harrison v. Snair*, 41 N. W. Rep. 315, 76 Iowa, 558, distinguished. *Hammond v. Wolf*, 42 N. W. Rep. 778, 78 Iowa, 228, followed.

2. An appeal will not be dismissed for failure to pay or secure the clerk his fees for a transcript of the testimony, although the record shows that the fees were not paid until after the date when the translation of the stenographer's notes was filed, there being no claim that the fees have not in fact been paid.

3. Defendant, as a sub school director, entered into a written contract with plaintiff, employing her as a teacher. She having no certificate, the contract was not approved by the president of the board, and she was notified to stop teaching. *Held*, that defendant was not individually liable for her services.

4. Although it would have been permissible for plaintiff to show that defendant orally agreed to pay her himself for teaching, evidence that he agreed to pay what the written contract required the district to pay was properly excluded.

Appeal from district court, Jones county; James D. Giffen, Judge.

Action against plaintiff to recover for wages as a school teacher. Verdict and judgment for defendant. Plaintiff appeals.

Welch & Welch, for appellant. J. W. Dorse and Sheean & McCarn, for appellee.

KINNE, J. 1. Appellee moves to strike from the abstract all of the evidence because no translation of the shorthand notes was filed with the clerk of Jones county within six months from the date of the rendition of the judgment in the case, nor had it been filed or made of record on April 1, 1892, the date of service of appellee's additional abstract. Judgment was entered September 28, 1891, and the shorthand notes of the evidence taken in the trial were filed at its close, and on the same day. The abstract was served on appellee January 12, 1892, and filed February 19, 1892. Appellant's argument was served February 25, 1892, and filed February 26, 1892. By agreement, appellee was given till April 1, 1892, to file an additional abstract. It was in fact served and filed March 31, 1892. The translation

of the reporter's notes was filed with the clerk of the district court April 5, 1892. April 16, 1892, appellant served a denial, which was filed in this court, with a transcript, on April 21, 1892. Appellee, in support of his contention that the translation of the notes must be filed within six months from the date of the rendition of the judgment, refers to *Lowe v. Lowe*, 40 Iowa, 220, and *Harrison v. Snair*, 76 Iowa, 558, 41 N. W. Rep. 315. It appears in the case at bar that a duly-certified skeleton bill of exceptions was filed with the clerk of the district court of Jones county within the time given to file a bill of exceptions. The notes of the shorthand reporter, which were then on file, were properly made part of said bill. In the *Lowe Case* neither the notes nor a translation of them was ever filed in the lower court, or made of record therein. In *Harrison v. Snair* no translation of the notes was ever in the clerk's office. We held in *Hampton v. Moorhead*, 62 Iowa, 95, 17 N. W. Rep. 202, that it was competent to make a skeleton bill of exceptions, and incorporate the original notes by mere reference, and that when such a bill was made and filed the original notes were by it made a part of the record, and the record was thus made complete, so far as the evidence embraced therein was concerned. It is there held that the transcript of the notes is only necessary for the purpose of making the record—the notes—intelligible to others than the reporter. It is true that was an equitable action. In *Hammond v. Wolf*, 78 Iowa, 228, 42 N. W. Rep. 778, it is said that in civil cases, not triable de novo, there is no time fixed by statute within which the translation of the shorthand reporter's notes must be filed. That they should be filed before the clerk is required to prepare a transcript of the record for this court. *Warbasse v. Card*, 74 Iowa, 309, 37 N. W. Rep. 383. In the *Hammond Case* it is further said: "Since there is no provision of law fixing, in terms or by necessary implication, the time within which the translation of the shorthand reporter's notes shall be certified and filed in civil actions at law, we conclude that it is sufficient in any case if done within such time as to permit the submission of the case in this court in the manner and within the time fixed by statutory and other rules applicable to such cases." Now it appears in the case at bar that the translation of the notes was in fact filed April 5, 1892, and prior to the time the clerk made his transcript. Appellee complains that they were not filed before he prepared his additional abstract. But he had never, so far as this record shows, called for a transcript of the notes. His filing of an additional abstract was the first notice to appellant that a translation of the notes would ever be required. She had, up to that time, reason to believe that the appellee might be satisfied with the evidence as set out in the abstract. Just as

soon as it became apparent that it would be necessary to have the notes transcribed, a translation of them was filed. In the light of what is said in the Hammond Case, appellant, in this regard, did all that was required of her. The motion is overruled.

2. Appellee moves to dismiss the appeal because the clerk of the district court of Jones county had not been paid or secured his fees for a transcript of the testimony. The record shows that the fees for a transcript were not paid until after April 5, 1892, the time when the translation of the notes was filed. There is no claim that such fees have not in fact been paid. It was said in *Fairburn v. Goldsmith*, 56 Iowa, 347, 9 N. W. Rep. 300: "It seems to us a distinction is recognized by the statute between an appeal and a perfected appeal. * * * There is no provision fixing a time when it must be perfected by paying or securing the fees of the clerk for a transcript." This case was followed recently by *Bruner v. Wade*, (Iowa,) 52 N. W. Rep. 558. Inasmuch as no transcript was necessary in case appellant's abstract should prove acceptable to appellee, and when it appeared that it was not satisfactory the clerk's fees were paid, and transcript secured, the object of the law has been attained. The motion is overruled.

3. It appears that the plaintiff claims that on December 6, 1890, she entered into a written contract or agreement with the defendant by which she was engaged to teach a certain school, at \$35 per month, for the period of four months; that she taught a little over two months, when defendant compelled her to quit teaching. She seeks to recover \$140, being her wages, and for loss of time. In a second count the same services are claimed for as having been performed by virtue of a verbal contract with defendant. It appears that defendant, as a subdirector, had been empowered to employ a teacher in a subdistrict wherein there was no subdirector then; that he entered into the usual contract with plaintiff; that, she not having a certificate, her contract was never approved by the president of the board; that he caused her to be notified to stop teaching, as she could not be paid for her services. Plaintiff claims that she made a verbal contract with defendant after she executed the written contract, whereby he employed and agreed to pay her. She cannot recover on the written contract. It shows that it was made by defendant on behalf of the school district, and there is nothing to show that, by it, it was intended to bind him individually. No doubt it would have been competent for plaintiff to show that after the execution of the written contract she entered into a verbal agreement with defendant to teach the school, and that he was to pay her therefor.

Much testimony was offered which, it is claimed, was erroneously ruled out. An examination of the abstract and transcript

satisfies us that the proposed evidence did not go to the extent of establishing a verbal contract to teach the school, and to be paid therefor by the defendant, but it was sought to show that defendant agreed to pay what the written contract required the district to pay. The testimony was properly excluded. The effect of the offered evidence would be to show that defendant agreed to see that plaintiff got her pay for teaching under the written contract. The court properly directed a verdict for the defendant. **Affirmed.**

HERSHEY v. BOTNA VAL. STATE BANK.

(Supreme Court of Iowa. May 17, 1893.)

WRITS—SERVICE ON ABSENT DEFENDANT—ESTOPPEL—HOMESTEAD.

1. Where a person disappears from home, without any expression of an intention not to return, process left with his wife, nine days after his disappearance, at his usual place of abode, is a sufficient service to give the court jurisdiction.

2. Where, in an action against such absentee, a homestead is set off to his wife, plaintiff is not estopped to deny that the absentee is a nonresident, as against parties who have sued him as such.

Botna Val. State Bank v. Silver City Bank, (Iowa,) 54 N. W. Rep. 472, followed.

Appeal from district court, Mills county; N. W. Macey, Judge.

Action to establish a priority of liens. Judgment for defendant, and the plaintiff appealed.

Smith McPherson, L. T. Genung, and W. S. Lewis, for appellant. E. B. Woodruff and P. P. Kelley, for appellee.

GRANGER, J. The record in this case presents precisely the same question for determination, and upon the same facts, as in *Botna Val. State Bank v. Silver City Bank*, decided at the last term, and is reported in 54 N. W. Rep., at page 472. Following the conclusion in that case, the judgment in this is affirmed.

DISTRICT TP. OF EUREKA v. FARMERS' BANK OF FONTANELLE et al., (SULLIVAN et al., Interveners.)

(Supreme Court of Iowa. May 17, 1893.)

ACTION BY TOWNSHIP—FOLLOWING TRUST FUNDS—INCONSISTENT REMEDIES—DECREE.

1. A treasurer of a township deposited its money in a bank, which subsequently made an assignment for the benefit of its creditors. The township brought suit against the bank and assignee to have a trust in the assigned property declared in its favor for the amount of the debt, and subsequently attached property which the assignor had conveyed prior to the assignment, and also property which it thought had not passed by the assignment. *Held*, that the attachment was not inconsistent with the attempt to follow the property as a trust fund.

2. The fact that some of the property which passed to the assignee was unintentionally seized under the writ of attachment does not constitute an election between inconsistent remedies.

3. Where money has been deposited by a treasurer of a township in a bank which subsequently makes an assignment for the benefit of its creditors, it is not necessary, in order to follow the money as a trust fund, to trace the deposit into specific property; but it has no greater interest than an ordinary creditor in land purchased before any money was deposited by its treasurer, and to which its deposits in no way contributed.

4. A decree that before paying anything on plaintiff's claim the court must determine the amounts, if any, to be paid in similar cases, and that, if the property in the hands of the assignee shall not prove sufficient to pay all claims for trust funds of equal equities with that of plaintiff, then pro rata payments shall be made, is unauthorized when no party to the action asked such relief, and since the relief of plaintiff should not be postponed to a determination of the rights of persons who were not parties, and were less diligent than he.

Appeal from district court, Adair county; J. H. Applegate, Judge.

The plaintiff seeks to recover on account of money deposited in the Farmers' Bank of Fontanelle, and to have the amount of its recovery established as a preferred claim against property in the hands of the assignee of the owner of that bank. The interveners, who are general creditors of the bank, resist the demands of the plaintiff. The district court rendered a decree in favor of plaintiff, but provided that payment should not be made until the rights of other creditors should be adjudicated. From that portion of the decree in favor of plaintiff the interveners appeal, and from so much of the decree as is adverse to it the plaintiff appeals, its appeal having been last taken.

Church & Gaines, for appellants. Haddock & Culver and A. L. Hager, for appellee. Grass & Storey, for assignee.

ROBINSON, C. J. For several years the defendants W. Taylor and A. E. Jackson, as partners, owned and carried on a banking business under the name of the Farmers' Bank of Fontanelle. From the 15th day of September, 1884, until the 10th day of December, 1890, Abner Rood, as treasurer of the plaintiff, deposited in the bank money which belonged to plaintiff. The deposits were made in his name, but the owners of the bank knew that the money so deposited belonged to the plaintiff. In November, 1890, Jackson sold his interest in the bank to Taylor. On the 10th day of the next month Taylor made an assignment for the benefit of his creditors to the defendant James H. Hulburt. The liabilities of the bank are about \$80,000, while the assets will not yield one-half of that amount. The balance due plaintiff at the time of the assignment was \$2,303.23, no part of which has been paid. Before the assignment was made, Taylor conveyed certain real estate and other property to James H. Hulburt, to H. Gross, and to others who had become sureties for him, to secure them against loss by reason of such suretyship. This action was commenced on the 18th day of December, 1890, after the deed of assign-

ment was recorded, and after the inventory of the property conveyed to the assignee had been filed. The petition of plaintiff stated, in substance, the facts showing the depositing of the money, that it belonged to the plaintiff, and was taken by the bank with knowledge of that fact. It also stated that defendants had disposed of their property with intent to defraud their creditors. It asked that Hulburt, as assignee, be required to pay to plaintiff the sum which should be found to be due it, and that such sum be adjudged a preferred claim against the property in the hands of the assignee. An attachment against the property was also asked. A writ was issued and levied upon various lots and tracts of land, and Hulburt and Gross were garnished. In an amendment to its petition, filed after the writ of attachment had been served, the plaintiff alleges that a large number of persons have commenced suit against Taylor and his assignee, and that other persons will commence suit against them for the recovery of trust funds, and that the funds in the hands of the assignee will not be sufficient to pay all claims of that character in full. The prayer of the petition is therefore renewed, and judgment against Taylor and Jackson is demanded for any balance remaining unpaid after the funds in the hands of the assignee are exhausted. An order for the sale of the attached property is asked, and general equitable relief is demanded.

1. It is contended by appellants that the plaintiff cannot seek a judgment against the bank and its owners for the amount of the deposit, and at the same time demand that it be treated as a trust fund, and established as a preferred claim against the property in the hands of the assignee; that it is estopped by the attachment proceedings to assert that the property attached is in the hands of the assignee, subject to be taken to satisfy a trust, for the reason that the attachment proceedings are inconsistent with a claim of that kind. The cases of *Bank v. Dows*, 68 Iowa, 460, 27 N. W. Rep. 459, and *Crawford v. Nolan*, 70 Iowa, 98, 30 N. W. Rep. 32, are relied upon by appellants as supporting their theory of the law. The facts in the case first cited were substantially as follows: The plaintiff had possession of certain corn, by an agent, to secure advances of money which it had made, and for which it was entitled to a lien. While holding such possession it sued out an attachment against the owners of the corn on account of the debt for which the lien was given, directed the sheriff to levy upon the corn, and received from him the money realized from the sale of a portion of it. This court held that the lien of the plaintiff in that case depended upon its possession of the corn, and that when the sheriff seized it under its direction the lien was waived by the act of the plaintiff. In *Crawford v. Nolan* the plaintiff held a chattel mortgage on a stock of merchandise. The mortgagor had previously sold and delivered the property

which was mortgaged to Lederer, Strauss & Co., but after the execution of the mortgage they caused the property to be attached as the property of the mortgagor. It was held that they could not thereafter defeat the mortgage by claiming to be the owners of the property attached, for the reason that their act in attaching it was inconsistent with their claim of ownership. The decision in both cases was that a person cannot claim property under two inconsistent rights at the same time. In this case the plaintiff was not in possession, and did not claim to be the owner, of any of the property in controversy. The claim that the bank and its owners were indebted to plaintiff was not inconsistent with its right to have the indebtedness established as a preferred claim against the property in the hands of the assignee. Plaintiff did not insist upon a right to any specific portion of that property, but claimed that the deposit was a trust fund which had been wrongfully used to increase the property of the debtor, which had passed into the possession of his assignee, and that by reason of those facts the plaintiff had an equitable claim against such property. No attempt to take it from the assignee by the process of attachment was made. It seems to have been the theory of plaintiff that the assignee acquired no property of Taylor by virtue of the assignment, excepting that which was set out in the inventory. When the writ of attachment was placed in the hands of the sheriff for service he was directed not to levy it on any property which had passed into the hands of the assignee, nor upon any which was described in the inventory. He was instructed to serve garnishment process upon Hulburt, and at the same time to tell him that it was not intended to hold him for any property which he had received under the assignment. Thus it appears that plaintiff did not attempt to seize by attachment any of the property against which he sought to have the indebtedness of Taylor established as a preferred claim. The attachment proceedings were intended to be auxiliary to the attempt to establish a trust as against the assignee, and were resorted to for the purpose of reaching property which the plaintiff believed had been conveyed to defraud the creditors of Taylor, and which he also believed the assignee did not claim. That property which passed to the assignee may have been levied upon under the circumstances stated will not defeat the right of plaintiff to have so much of the property in the hands of the assignee as may be needed, and as is liable for the purpose, treated as held in trust for the payment of its claims. No lien was created by levying the writ, and the elements necessary to constitute an estoppel are lacking.

2. The decree of the district court provided for the payment of the amount due the plaintiff out of any funds which should come into the hands of the assignee. The

appellants complain of that portion of the decree on the ground that a considerable amount of property was transferred to the assignee by the deed of assignment, to which the deposits of the money of plaintiff did not in any manner contribute. In Independent Dist. v. King, 80 Iowa, 498, 45 N. W. Rep. 908,—a case in many respects like this,—the identical money deposited was not shown to have been delivered to the assignee, and it was said that, if a trust for the amounts deposited were established, "it must be on the ground that the deposits must be held to have increased the estate of the insolvents, and that the balance due is represented by an increase now in the hands of the assignee." It was further held that, the money having been traced into the estate of the insolvents impressed with the character of a trust fund, the burden was upon the assignee to show that it contributed nothing to the estate which he acquired by virtue of the assignment. In this case it is shown by the interveners that Taylor owned property before any of the money of plaintiff was deposited in the bank, and to which the money so deposited contributed nothing in any manner, which is described as follows: "An undivided one-half of the west one-half of the east one-third of lot one, of block twenty-seven; an undivided one-sixth of lot sixteen in block five; an undivided one-third of lot seven in block sixteen; an undivided one-half of lots seven and eight in block thirteen; an undivided half of lots three and four in block fifteen, 'excepting forty feet off of them,' sold to a Mr. Ewing,—all in the township of Fontanelle. Also an undivided one-sixth of the southeast quarter of the southwest quarter of section fifteen; the southeast quarter of the northwest quarter, and the south half of the southwest quarter, of the northwest quarter of section twenty,—all in township seventy-five north, of range thirty-two west." It is insisted, however, that the trust fund has been traced into the estate of the insolvent which is in the hands of the assignee. We do not think it is necessary to trace the deposit into any specific property in the hands of the assignee in order to establish a trust, but it should be shown, presumptively at least, that the estate in his hands has been augmented by the trust fund. The equities of plaintiff as against property to which its money contributed nothing, directly or indirectly, are no greater than those of the general creditor. If the money deposited had been used to purchase any of the real estate described, to improve it, to remove incumbrances therefrom, or to permit other funds to be used for such purposes, plaintiff would have a claim against the property to the extent of the money it deposited which was so used; but nothing of that kind was done. We conclude that as to the tracts of real estate specified the rights

of plaintiff are not superior to those of the general creditors, and that the decree of the district court was erroneous, so far as it established the amount due plaintiff as a preferred claim against such property.

3. The decree of the district court recites that, "it appearing from the calendar of this court that there are now pending several other cases of like character to this one, and that neither of said cases has been determined, and that it is now uncertain as to whether the assets of said estate will be sufficient to pay in full all of said claims, if so established, as prayed for in said causes;" and provides that, before paying anything on the claim of plaintiff, the court shall determine the amounts, if any, which shall be paid in each of the cases pending for relief like that asked in this case, for the purpose of fixing and determining the amounts and priorities of the claims. It further provides that, if the property in the hands of the assignee shall not prove to be sufficient to pay all claims for trust funds which shall be established as of equal equities with the claim of plaintiff, then pro rata payments shall be made. From that portion of the decree the plaintiff appeals. We are of the opinion that it was erroneous. No party to this action asked relief of that kind, and the order in question would not affect the rights of persons who are not such parties. There is no foundation for it in the pleadings, and it is not justified by the evidence. The plaintiff has commenced its action, and made a showing, which entitles it to immediate relief. The granting of that relief should not be postponed to a determination of the rights of persons who are not parties to this action, who have been less diligent than plaintiff, and who may not have any just claim against the property in the hands of the assignee. Reference is made in an amendment to the petition of plaintiff to suits which have been commenced, and to others which are likely to be commenced, for the recovery of trust funds, and it is stated that the property in the hands of the assignee may not be sufficient to pay in full all claims on account of such funds; but the statements were so made for the purpose of laying the foundation for a judgment against Taylor and Jackson for any balance which might be due the plaintiff after the funds in the hands of the assignee should be exhausted, and for an order for the sale of the attached property. They did not recognize the right of any one to funds in the hands of the assignee equal to that of plaintiff. It is only necessary to say, in regard to such right, that, if it exists, that fact has not been shown in this case. So much of the decree of the district court as is presented for review by the appeal of plaintiff is reversed, and so much as is presented by the appeal of the interveners is modified and affirmed.

PHILBRICK et ux. v. TOWN OF UNIVERSITY PLACE et al.

(Supreme Court of Iowa. May 20, 1893.)

HIGHWAYS—REMOVAL OF OBSTRUCTIONS—INSTRUCTIONS.

In an action against a town for damages for the destruction of a certain hedge, which defendants allege was in a public street, an instruction directing a verdict for plaintiffs if the hedge was within the street, and was not a material obstruction to the free use of the street by the public for the purpose of travel, is erroneous, since the town had a right to require its removal if the hedge was in the street. *Quinton v. Burton*, 16 N. W. Rep. 569, 61 Iowa, 471, distinguished. *Emerson v. Babcock*, 23 N. W. Rep. 656, 66 Iowa, 257, followed.

Appeal from district court, Polk county; C. P. Holmes, Judge.

The town of University Place is an incorporated town, and the other defendants are the mayor and councilmen thereof. Plaintiffs are owners of what is designated as "Lot 26" in said town, it being thus designated on an official plat of the S. W. $\frac{1}{4}$ of section 23, township 79, range 24. The action is to recover damages for the destruction, by defendants, of a certain hedge fence which plaintiffs allege was upon their premises, but which defendants claim was in one of the public highways of said town, known as "North Street." The jury returned a verdict for the plaintiffs, and from a judgment thereon the defendants appeal.

A. A. Haskins and Brennan & Bailly, for appellants. Phillips & Day and W. B. Crosby, for appellees.

GRANGER, J. What is claimed as North street is south of plaintiffs' premises, and they abut thereon. The hedge fence was in what is claimed to be North street. The defendant town ordered a sidewalk built along the street adjacent to plaintiffs' premises, and to be placed one foot from the lot line. The hedge fence was of willow, which plaintiffs were notified to remove, failing in which it was removed by defendants. The only complaint argued by appellant is as to instruction No. 6 given by the court, as follows: "(6) If you shall find by a preponderance of the evidence in this case that the land on which the hedge in controversy stood was within one of the streets or highways of said defendant town, and that said hedge was not a material obstruction to the free and unobstructed use and enjoyment of said street or highway by the public for the purposes of travel thereon by teams and foot passengers, and that said hedge was by authority of the defendant town cut down, without consent of the plaintiffs, then owning said land, you should return your verdict for the plaintiffs for their damages, the amount of which should be determined as directed in the last preceding instruction." The complaint as to the instruction is that it directs a verdict for the plaintiffs if the hedge fence was within

the street of the town, provided, it was not a substantial obstruction to the free and unobstructed use and enjoyment of said street or highway by the public. It is insisted that the instruction is erroneous because of the language of the proviso. The argument by appellees deals largely with facts pertaining to the acquisition of the land by plaintiffs, its situation before and since such acquisition, the planting of the hedge, and the fact as to the street in question being a legal one. It seems to us these questions are not important in the determination of the correctness of the instruction. The court did not determine the legality of the street, but left it as a question of fact for the jury. There is evidence as to the survey and establishment of the street or highway. The instruction is a direction to the jury what it shall do if it finds that the hedge was in one of the streets or highways of the town, and there is no complaint of the steps taken in the progress of the investigation to know the fact as to the place being a street or highway; hence we are to consider the question of the correctness of the language complained of, with the legality of the street conceded. It is, then, a question if, in an incorporated town, the owner of a lot abutting on a street may maintain a hedge fence in the street in such a manner that it does not materially obstruct its use for travel by teams or footmen. Appellees, in support of such a right, urge, as a fact, that the highway, if it exists, is but an easement basing the claim upon particular facts that we need not consider. The only highway claimed is a legal street in the defendant town; one that it had a right to control under the authority of the law. The court gave no instructions whatever as to any other street, nor did it say to the jury how it should determine the fact as to the street. Being instructed as to a street or highway "of said defendant town," we assume that it was a street or highway the fee title of which was in the town. The case is not controlled by *Quinton v. Burton*, 61 Iowa, 471, 16 N. W. Rep. 569. That was a case involving the right of a road supervisor to so construct a bridge, in his discretion, as to injure or destroy a hedge, not in the highway, but on the line between the highway and the road. This case involves no such a question. Nor does it involve any of the principles or reasoning by which shade trees on a public highway are protected. The hedge, in this case, was merely a fence for the private use of the plaintiffs. It was, as to their right to maintain it in the street, like any other fence built to inclose private property. Its maintenance there was not a matter of legal or equitable right. The town council, in the exercise of its granted powers over streets and their improvement and preservation for the public use, had the right to order the fence removed, or see to the removal itself. This is in line with our holding in *Emerson v. Babcock*, 66 Iowa, 257, 23 N. W. Rep. 656. If

the rule contended for by appellee is to obtain in this case, we do not see why an iron or board fence may not with impunity be placed in a street if not a substantial hindrance to the public travel, and there be maintained against the authority of the city government. Shade trees in a street have been protected upon considerations of a public good where not a nuisance. See *Everett v. City of Council Bluffs*, 46 Iowa, 68. The jury should have been told, if the hedge was in a public street, that the town council had a right to require its removal.

The judgment is reversed.

KALINE v. STOVER.

(Supreme Court of Iowa. May 18, 1893.)

ASSAULT AND BATTERY—MATERIALITY OF EVIDENCE—INSTRUCTIONS.

1. In an action for damages for an assault evidence is immaterial that plaintiff appeared in justice's court, on a criminal prosecution against defendant, with a large bandage on his head, with intent to deceive as to the extent of his injuries.

2. An instruction that the burden of proof is on plaintiff to show by a preponderance that defendant assaulted plaintiff "substantially as claimed in his petition" is erroneous, since it is sufficient if he showed a good cause of action on any of the grounds stated therein.

3. An instruction that it was plaintiff's theory that defendant, without cause, first struck plaintiff with a hatchet, and afterwards with his fist with brass knuckles on, and pounded plaintiff when he was down; that it was defendant's theory that plaintiff came at him as if to strike him, and that defendant struck him in self-defense; and that the jury must determine from all the facts which theory is correct,—is erroneous, as tending to require proof of all matter alleged to entitle plaintiff to a recovery.

Appeal from district court, Johnson county; S. H. Fairall, Judge.

Action to recover damages alleged to have been caused by an assault and battery committed by defendant. There was a trial by jury, and a verdict and judgment for defendant. The plaintiff appeals.

Slater & Conklin and M. J. Wade, for appellant.

ROBINSON, C. J. The petition alleges that on the 20th day of July, 1889, the defendant, without provocation, willfully and feloniously assaulted the plaintiff, beating, bruising, and maltreating him by striking him on the head, body, and limbs with his fists, and weapons unknown to him, and that defendant knocked out plaintiff's teeth and cut off one of his fingers. The defendant denies that he made an unprovoked assault upon plaintiff, and avers that any assault made or injury inflicted by him upon plaintiff was done in self-defense, and in resisting attacks made upon him by the plaintiff and plaintiff's wife, children, and dogs, the persons at the time of their attack being armed with clubs, broomsticks, and other weapons.

1. Evidence given for the plaintiff tended to show that at the time stated in the peti-

tion the defendant struck him with a hatchet and with brass knuckles, causing severe injuries. It appears that the affair led to the criminal prosecution of defendant in justice's court. The defendant was permitted to show in this case, notwithstanding the objections of plaintiff, in substance, that the latter appeared in justice's court with a large bandage around his head; that he claimed it was worn in consequence of injuries inflicted by defendant, and that it could not be removed; that it was finally taken off, notwithstanding his resistance, but that few, if any, marks of an injury to the head could be found. There is nothing in the record to show that this evidence was material. Its purpose does not appear to have been to show the extent of plaintiff's injuries at the time the examination was made. The wearing of the bandage by plaintiff, and his resistance to attempts to remove it, would not tend to show the nature or extent of his injuries, and we are inclined to think that the theory of plaintiff that the evidence was introduced for the purpose of showing that he had attempted to deceive in justice's court in regard to the extent of his injuries is well founded. Whether he did or not was clearly immaterial to any issue in this case.

2. The court charged the jury as follows: "(4) The burden of proof is on plaintiff to satisfy you by a preponderance of the evidence that on or about July 20, 1889, the defendant assaulted and struck plaintiff substantially as claimed in his petition, and that he was thereby injured, the extent of such injury, and the amount of his damage; and if he has done so your verdict should be for the plaintiff, unless such alleged assault and striking was done in self-defense, as hereinafter explained." The sixteenth paragraph of the charge instructed the jury that if the plaintiff had failed "to establish the allegations in his petition as is stated in paragraph No. four, above, he is required to do," their verdict should be for the defendant. We are of the opinion that these portions of the charge were erroneous, in requiring the plaintiff, in order to recover, to prove that he was assaulted and struck "substantially as claimed in his petition." He was thus required to prove substantially that defendant struck him on the head, on the body, and on the limbs with his fists, and also with weapons unknown to him. The plaintiff was not required to prove all the averments of his petition to entitle him to recover. It was sufficient if he showed a good cause of action on any of the grounds stated in his petition. *Malchen v. Clay*, 62 Iowa, 455, 17 N. W. Rep. 658. It is clear, if defendant made an unprovoked and unjustifiable assault upon him, that he is entitled to recover, whether the assault was made with fists alone, or with weapons unknown to plaintiff only, or with fists and weapons, and whether he was struck on the head, body, and limbs, or on either. See

Harley v. Brick Co., (Iowa,) 48 N. W. Rep. 1000.

3. The jury were told in the thirteenth paragraph of the charge that "there are two theories in this case. The one claimed by plaintiff, that defendant, without any cause or provocation, first struck him with a hatchet, and followed this up with striking him with his fist with brass knuckles on his hands, and with pounding plaintiff when he was down; and the other theory, that of defendant, that plaintiff commenced the difficulty by coming at defendant in a hostile way, as if to strike him; that he, defendant, struck him, plaintiff, in self-defense." In the fourteenth paragraph the jury were told that they must determine from all the facts and circumstances which of the two theories is correct, and return their verdict accordingly. These portions of the charge were erroneous as tending to require proof of all the matter alleged to constitute the theory of plaintiff to entitle him to recover. He might have been entitled to recover on proof of but a part of them, for reasons already stated in this opinion.

4. Appellant contends that the court failed to instruct the jury correctly and fully in regard to the right of self-defense. Since we are without the benefit of an argument for appellee, and the evidence on a second trial may not be like that before us now, we refrain from expressing any opinion in regard to the question thus presented. For the same reason we think it best not to determine other questions discussed by appellant. The judgment of the district court is reversed.

JANDT et al. v. BRONK et al.

(Supreme Court of Iowa. May 27, 1893.)

REVIEW ON APPEAL.—OBJECTIONS NOT RAISED BELOW.

In an action on a note, where the defense is an estoppel, and the jury are instructed, without objection, that the burden was on defendant to establish it by a preponderance of evidence, the verdict for defendant will not be disturbed on a theory raised for the first time on appeal, that the estoppel must be made out by conclusive proof, and, the evidence being conflicting, the court, on appeal, will examine it to see if, with or without conflict, it creates an estoppel.

Appeal from district court, Woodbury county; Scott M. Ladd, Judge.

Action on a promissory note, jointly made by the defendants to the plaintiff firm. The defendant Ferguson alone answers, pleading, among other defenses, an estoppel. The jury found for the defendant Ferguson on his plea of estoppel, and from a judgment on the verdict the plaintiff appealed.

J. S. Lothrop and R. M. Dott, for appellant. T. E. Bevington and Wright, Hubbard & Yoemans, for appellee.

GRANGER, J. The argument of the case is limited to a single assignment,—that of

the sufficiency of the evidence to support the verdict. We cannot better indicate the spirit of appellant's contention than by a quotation from its argument, as follows: "There is a conflict in the evidence, it is true, but leaving out of consideration the fact of such conflict, giving to appellee Ferguson the full weight of all that is shown for him in the evidence, and leave such as directly conflicts therewith out of consideration,—that is, where the testimony of appellant and appellee directly clash, as in dispute,—consider only that favorable to appellee, and the evidence, so considered, measured by the law governing estoppel, cannot be made to support the verdict of the jury. We insist, as in our former brief, that the estoppel claimed must be made out by proof conclusive in its character, and the fact that there was a conflict in the evidence at the trial below will not prevent this court from an examination of the evidence to see if the evidence, with or without conflict, creates an estoppel against appellants." That the verdict has such support in the evidence that, by the rule of mere preponderance, we should not disturb it, there is positively no doubt. Nor do we understand appellant to contend otherwise. The argument is a candid admission of the conflict, and the quoted portion, as well as its general tenor, is a contention for a different rule as applicable to estoppel. The contention, in view of the record, is easily settled. The court, in its instructions, said to the jury: "You are instructed that the burden is upon the defendant Ferguson to establish his defense by a preponderance of the evidence." Again, the court said: "By a preponderance of evidence is meant the greater weight of evidence; that which, on the whole, produces the stronger impression on the mind, and is the more convincing as to its truth, when weighed against the evidence in opposition thereto." The correctness of these instructions is not brought in question on this appeal, and hence they are the rules that must govern the case, in so far as they apply. The rule contended for differs from that given by the court as widely as the subject of their application—the degree of proof essential to establish a given fact—will admit of. That given is the ordinary rule of preponderance; that contended for is the highest degree of proof known to the law,—such as places a fact beyond dispute. To sustain the rule contended for is to indirectly override the rule given by the court. It is not to be gathered from the record that, at the trial below, the proposition now contended for was in the minds of any. The plaintiff asked instructions, but nothing of the kind now contended for. The verdict was found upon the rule of the instructions given, and we cannot set it aside upon the rule now urged, which would be the effect of holding that the verdict has not support in the evidence,

under the claim of appellant. It is said that the representations, to amount to an estoppel, must have been willfully made,—“that there must have been a fraudulent intent” in making them. We are not to be understood as concurring in the view stated, as it is sought to be applied; but appellant meets, in this connection, with the same difficulty as before. The argument is, under the assignment of error, that the verdict is without support in the testimony. The facts of the estoppel are pleaded, and the proofs are as broad as the averments. The instructions authorize a verdict for defendant upon proof of the facts pleaded, and the effect of the complaint is to challenge the rule of law as given, and it cannot be done upon a complaint as to sufficiency of the evidence to support the verdict. It is also urged that there can be no estoppel unless the party relied upon the representations made. That is an element of the estoppel as pleaded. The court so instructed, and the evidence is so in support of it that the verdict is warranted. Considerable is said in argument upon the elements of estoppels, but we need only say, as we have in effect, that the averments upon which the estoppel in the case rests have the requisite support to sustain the verdict, and the judgment is affirmed.

ANDERSON et al. v. ORIENT FIRE INS. CO. et al.

(Supreme Court of Iowa. May 26, 1893.)

COUNTY BONDS—LIMITATION—ACTION TO CANCEL—VENUE—PARTIES—JURISDICTION—REMOVAL OF CAUSES.

1. Action was brought by a number of taxpayers against the treasurer, auditor, and supervisors of a county to restrain payment of certain bonds, said to have been unlawfully issued. After judgment against the treasurer, who was the only one served, a continuance was had for several terms. Leave having been granted to make certain other persons defendants, plaintiffs then amended their petition so as to allege that such persons were owners of the bonds, and asking that the bonds be brought into court and canceled. *Held*, that the proceeding under the amendment was not a new action, but merely a further prosecution of the original, and hence was not without parties defendant actually resident in the county, within Code, §§ 2586, 2589, relating to venue, although the defendants last mentioned may none of them have resided in that county.

2. The county was not an indispensable party.

3. Where no suit was then pending on the bonds, and the county officers were about to levy taxes for their payment, plaintiffs had no adequate remedy at law. *Grand Chute v. Winegar*, 15 Wall. 373, distinguished.

4. There was no separable controversy with relation to the county officials and bondholders, such as would authorize removal to the federal court on the ground of nonresidence of one of the bondholders. *Anderson v. Bowers*, 40 Fed. Rep. 708, followed.

5. Bonds issued by a county in excess of the 5 per cent. of taxable property allowed by Const. art. 11, § 3, for indebtedness created in any manner or for any purpose by a county, are void.

Appeal from district court, Lyon county; G. W. Wakefield, Judge.

Action to enjoin the payment, and for the cancellation, of certain county bonds. Decree for plaintiffs, and the defendants appealed.

Charles J. Cole and Henderson, Hurd, Daniels & Kiesel, for appellants. H. G. McMillan and Kauffman & Guernsey, for appellees.

GRANGER, J. The plaintiffs, five in number, being citizens and taxpayers of Lyons county, Iowa, "each for himself and for the benefit and use of all the tax payers," of said county, brought suit in May, 1887, against George W. Bowers, as treasurer, T. C. Thompson, as auditor, and others, as members of the board of supervisors, of said county, representing that: "All the residents and taxpayers of said Lyon county, being more than a thousand persons, have a common and general interest in this suit, and are suffering damages by acts herein complained of, and sought to be enjoined, and said parties are so many and numerous that it is impracticable to bring them all before this court. Wherefore, these plaintiffs bring this action for all the residents and taxpayers of said Lyon county, and in the interest of the public and good government." And further that: "Under the laws of Iowa the said county of Lyon has no power or authority to contract any other or greater indebtedness than five per centum of the assessed valuation of all the property, real and personal, as the same appears upon the state and county tax lists for the year previous to that in which said indebtedness is created." And that: "The county of Lyon has created an indebtedness far in excess of the said five per centum, and far in excess of the legal indebtedness which it could in any manner incur, which said indebtedness is evidenced by negotiable bonds." And that: "When each and every one and all of said bonds were issued, and when the indebtedness upon which they were issued was created, the said county of Lyon was indebted to an amount far in excess of the constitutional limit of five per centum of the assessed value of all real and personal property therein." It was further averred that, unless restrained, the board of supervisors would levy a tax for the payment of said bonds, and that the treasurer would pay them; and a temporary injunction was asked, restraining such officers from so doing, with a prayer that upon final hearing it be made perpetual. Upon notice to the county auditor and the members of the board of supervisors, and upon their failure to appear, a temporary writ was ordered on the 8th day of September, 1887. No service of the original notice was made, except upon George W. Bowers, as treasurer. At the October term, 1887, of the court, the cause came on for hearing, and upon the default

of Bowers a decree in accord with the prayer of the petition was entered as to him and his successors in office. The cause was then continued, apparently, from term to term, to June 10, 1889, when the plaintiff presented a motion to make certain parties defendants, and upon leave granted the plaintiffs filed an amendment to the petition, reciting that the bonds described in the original petition were owned by certain parties named, 13 in number, being those named in the motion. It is averred in the amendment to the petition that the bonds owned by the parties are void for the reasons stated in the original petition. After other averments, not necessary to be recited here, is a prayer that "the defendants be ordered to bring their bonds into court, and that the same be canceled and declared void," and for other relief. The service of the notice under the petition, as amended, was, as to most of the parties,—they being non-residents,—by publication. George W. Provost is a resident of this state, at Dubuque, and was served personally. The Orient Fire Insurance Company and George B. Provost appeared, joined in the issues afterwards tried, and are appellants in this court. The county auditor and members of the board of supervisors, after the amendment to the petition was filed, were brought in as parties, and joined in the issues. On the 5th day of March, 1890, a decree was entered against all parties then served except the Dubuque National Bank, the Orient Fire Insurance Company, and George B. Provost. In October, 1890, the cause came on for trial upon the issues joined between the plaintiffs and the appellants. In March, 1891, the district court entered its decree, granting to plaintiffs relief as prayed. Other important facts can be better stated in connection with the different propositions to be considered.

1. In October, 1889, the defendant Provost filed objections to the amendment of the petition, and moved that the place of trial be changed to Dubuque county,—that of his residence,—which the court refused. With certain exceptions, actions must be brought in the county wherein some of the defendants actually reside. Code, § 2586. If suit be brought in a wrong county it is the right of the defendant, on application to the court, to have the venue changed to the proper county. Id. § 2589. The theory upon which Provost was made defendant in a suit in Lyon county is that other defendants were residents of the county, bringing the case within the provisions of section 2586, cited. It is in this connection that the particular facts as to the judgment entered in October, 1887, are important. At the entry of that judgment but one party defendant, the treasurer, had been served with the original notice. The auditor of the county and the members of the board of supervisors had been served with notice of the application for the temporary writ before the judge in

vacation, but made no appearance. The cause had then been continued from October, 1887, to June 10, 1889; and it is said by appellants that at the entry of the judgment, in October, 1887, against the treasurer, the suit, as to him, was concluded,—was at an end,—and as no other defendants in the county had been served with the original notice when the amendment was filed, in June, 1889, it was, in effect, a new action, without parties to justify a suit against Provost in Lyon county. We think, to a proper determination of this question, we should look to the purposes of the suit at its commencement, and the course of procedure to the time of filing the amendment to the petition. That the purpose of the suit, originally, was to free the taxpayers from a liability to pay the bonds, is not to be doubted; and that more than a judgment against the treasurer was then contemplated is clear, because the auditor and members of the board were named as parties in the record, though for some reason they were not brought into the case. As to the entry of the judgment in 1887, it is manifest that it was not regarded as final, because of the continuance of the cause, which we must assume was for the purpose of further proceedings therein; and we think the right of the plaintiffs to bring in the members of the board of supervisors for further judgment in the case could not well be questioned, which was in fact done. A fact to have in view at every stage of the inquiry is the claim that the bonds were void, the determination of which fact lay at the foundation of any judgment to be entered. The judgment against the treasurer—he not being a real party in interest, but simply enjoined in his official capacity—was dependent upon such a state of adjudications as to the parties in interest (the bond owners) as would conclusively establish their validity or invalidity. It is hardly to be claimed that the decree against the treasurer would prevail against an adjudication in which the the bond owners, as against the county, had established their validity. As showing the incidental relationship of that judgment to one in which the bond owners were parties, let us suppose them to be present under the amended petition, and that the final judgment would declare the bonds valid, and dismiss the petition as without merit. What would be the effect upon the judgment, as against the treasurer? It would certainly avoid it, for the reason that it would be the final judgment in the same proceeding between the parties in interest, and determinative of the entire issues in the case. To our minds the proceeding under the amended petition, with the new parties, is but a continued or further prosecution of the original suit. It is said that the amendment is distinct from the original petition. We do not think so. As we have said, the invalidity of the bonds is the gist of the prosecution. It is as conclusively so of the

amendment as of the original petition. The whole scope of the amendment is to bring in new parties to be bound by the final judgment. It is not a case of two actions joined, but of one cause of action, in which there is a joinder of parties in interest. The authorities as to a misjoinder of causes of action are not in point. To the amendment there is a prayer that the bonds be declared void and canceled, and it is urged that it constitutes a separate action from the original, to which the county should be a party. The same facts must be established to secure the judgment sought under the original petition, namely, a restraint of collection, as to justify a cancellation; that is, that the bonds were invalid. The prayer for cancellation is induced by the presence of the parties in interest, and is for the same purpose that the restraint of payment was sought. It follows that if citizens, as taxpayers, can conclude the parties in interest by perpetually enjoining the collection of the bonds because not valid, they may have a judgment for cancellation, which is, in effect, the same. It is said that in the original notice served on Provost there is "no intimation of any action such as that of the original petition." No more does it refer to the amendment. The original petition was there, as amended, and the original, with the amendment, constituted the petition, and the notice is that "there is now a petition filed by said plaintiff," etc. It may further be said that at the same term, with Provost, the auditor and members of the board of supervisors were made parties, and a decree entered against them. It is true that service may have been made upon them after service on Provost, but the order of service could make no difference.

2. It is urged that the county is an indispensable party to the action. The right of a taxpayer to maintain such an action is well established. *Hospers v. Wyatt*, 63 Iowa, 264, 19 N. W. Rep. 204; *Cornell College v. Iowa Co.*, 32 Iowa, 520; *Collins v. Davis*, 57 Iowa, 256, 10 N. W. Rep. 643; *Snyder v. Foster*, 77 Iowa, 640, 42 N. W. Rep. 506; *Goetzman v. Whitaker*, 81 Iowa, 527, 46 N. W. Rep. 1058. It is to be borne in mind that there is no attempt to in any way divest the county of a right, or impose upon it an obligation. In *Moore v. Held*, 73 Iowa, 538, 35 N. W. Rep. 623, the town was held to be a necessary party, because it could not be divested of property by a proceeding to which it was not a party. It cites *Turner v. Cruzen*, 70 Iowa, 202, 30 N. W. Rep. 483, in which case the county was held to be a necessary party for the same reasons. This case is clearly in line with the cases in which taxpayers have been permitted to maintain suits for their protection against illegal burdens by taxation. The judgment sought involves no such interests or consequences as to make the county an indispensable party.

3. It is said that, even with the county a

party, this case must be reversed, under fundamental principles of equity jurisprudence; that no action lies, in equity, to rescind or cancel, where there is an adequate remedy by a defense to a suit on the instrument. Among other cases cited to support the claim is that of *Grand Chute v. Winegar*, 15 Wall. 373. It is a good case by which to illustrate the distinction of this case from those cited. The facts in that case are: "The town of Grand Chute, in Wisconsin, filed its bill on the equity side of the court below against one Winegar; three other persons, Goodwin, Hewett, and Conkey, being also made defendants. It set forth that Winegar had brought suit on the law side of the same court against the town to recover from it the amount of certain bonds—nine in number, and for the sum of \$8,500 in all—purporting to have been issued by the said town; that the bonds were issued without authority, in violation of law, and in fraud of the town, by the other defendants, Goodwin, Hewett, and Conkey; that for reasons set forth in the bill the bonds had no legal force or validity; that the transfer of them to Winegar was colorable merely; that he paid no valuable consideration on the pretended purchase; that he had given his note for them, he was a bankrupt, and altogether 'irresponsible, in a financial point of view;' that he knew all the facts in relation to the issue; and that he never had any right or title to the said pretended bonds, or to any of them. It was further alleged that Winegar was a citizen of the state of New York, and that the other defendants were citizens of Wisconsin. The bill prayed that an injunction might be issued, restraining Winegar and his confederates from the further prosecution of the suit on the bonds, and that the bonds themselves might be adjudged to be fraudulent and void, and be decreed to be canceled. To this bill the defendant demurred. The demurrer was sustained in the court below, and the complainant now appeals to this court." If this suit, like that, was to enjoin a suit at law for judgment on the bonds, the authority would apply with force, for then we would have a case in which the authorities of the county would, presumably, at least, be resisting payment in the interest of the taxpayers, and their rights would be protected in a defense to the suit sought to be enjoined. But how different is this case! Here there is no suit pending on the bonds, and the proper officers of the county are about to levy taxes for the payment of the bonds, or the interest, and apply the money thereto, and the taxpayer has no remedy at law. Without this suit the bond owners have but to present their bonds when mature, and they will be paid, and there is no action on the instruments in which defense can be made, either present or prospective. And, further, in the opinion, in that case, referring to the bill in equity, it is said: "No particular circumstances are

stated showing the necessity for the court interfering, either for preventing suits or other vexation, or for preventing an injustice irreparable at law." In this case the showing in these particulars is abundant. Appellant cites, in the same connection, *Smith v. Short*, 11 Iowa, 523, which was also an attempt to enjoin an action at law.

4. The Orient Fire Insurance Company appeared, and filed its application for a removal of the cause to the federal court, which was granted, and appellees there moved to remand the cause, which motion was sustained, and the opinion of the court (Shiras, J.) upon the motion is reported in 40 Fed. Rep. 708, and the reasoning seems to us so conclusive of the question that we merely adopt the conclusions of that court.

5. The constitutional provision on which plaintiffs seek exemption from liability on bonds in question is article 11, § 3: "No county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness." Lyon county was organized in 1872. Five per centum of the assessed valuation of taxable property in the county from that time to 1884 was somewhat fluctuating; the lesser amount being for 1872, \$24,954.99, and the greater for 1884, \$71,876.35. At various times from 1873 to May, 1885, the county issued bonds, under different legislative acts, for the purpose of funding and refunding its indebtedness upon judgments and outstanding warrants. There was no time between these dates that the bonds of the county, outstanding, did not exceed the constitutional limit of indebtedness. On the 1st day of May, 1885, the county issued a series of 120 bonds, of \$1,000 each, and they were placed in the hands of one Richards, as refunding agent for the county, who negotiated the same, and applied the proceeds to the payment of other outstanding bonds, except a small amount used for commissions and expenses. It is this series of 120 bonds that is the subject of this suit. Just the amount of the indebtedness of the county on the 1st day of May, 1885, when the \$120,000 of bonds were issued, does not definitely appear, nor is it material as to the precise amount. It is a fact that it was quite largely in excess of the \$120,000 of bonds that were issued, and it is also a fact that the constitutional limitation at that time was \$71,876.35. Another important fact to be stated, in view of the argument, is this: That of the previous issue of bonds, paid off with the proceeds of the \$120,000 of bonds in question, were some issued in discharge of judgments existing against the county, and probably bonds issued upon warrants or other evi-

deences of debt within the constitutional limitation; so that it may be said, for the purposes of our present consideration, that the bonds in question represent indebtedness both within and without the constitutional limit. A ground of earnest contention by appellants against the judgment of the district court is that, notwithstanding the validity of a part of the indebtedness for which the bonds issued, yet the decree embraces, and declares void, the entire series. The case of *Aetna Ins. Co. v. Lyon Co.*, 44 Fed. Rep. 329, tried in the United States circuit court for the northern district of this state, was a law action upon interest coupons of this same series of bonds, and the opinion of the court is a subject of comment and difference between counsel. In that opinion it is said: "As the case now stands I hold that the facts show that the series of bonds issued by the county and negotiated by B. L. Richards, as agent for the county, represent in part bonds previously issued, and which were enforceable against the county, and in part bonds which were invalid and nonenforceable, but that in the present case, at law, and in the absence of interested parties, it is impossible to determine what part or proportion of the coupons sued on belong to bonds that represent the valid indebtedness refunded therein. While the plaintiff has shown a right of recovery against the county for some amount, it has failed to show a legal right to recover on all the coupons sued on, or any particular number thereof, and hence there is no basis for rendering a judgment at law in the present cause." Counsel do not seem to differ as to the correctness of the rule stated, as applicable to that kind of a proceeding, but their difference is as to the applicability of the same rule to this proceeding, being in equity. Accepting the correctness of the rule as applied, some additional authorities may aid in its application to this case. However, to a full understanding of the opinion in that case, it may be well, in addition to the above quotation,—which is that of appellants,—to add the following, as a part of the same paragraph: "It seems to me that the only means of solving the difficulties of the situation is for the plaintiff and the other nonresident bondholders to unite in a proper proceeding against the county and such other bondholders as may refuse to act as complainants; and in such a suit it can be finally determined for what amount the county can be held liable, and the rights of the respective bondholders in and to this sum can be decreed." Since that case was determined, the case of *Doon Tp. v. Cummins*, 12 Sup. Ct. Rep. 220, has been decided in the supreme court of the United States, and it will be hereafter referred to. The relationship of that case to this, as to the subject-matter, is such that, if the two courts are in harmony as to the legal rules for application, the final solution of a problem of

great importance to parties in interest will be materially aided.

Some facts and well-settled rules of law lie at the threshold of this inquiry. It is to be remembered that it is the taxpayer, and not the county, that brings the suit, and also that defendants to the suit are the officers of the county, who are its legal representatives and business agents, and upon whose care and conduct the taxpayer has a right to rely for protection against illegal taxation. These bonds were wrongfully placed upon the market by these officers against whom they now seek relief. It is a rule of law that purchasers of such bonds are bound to take notice of the constitutional limitation of municipal indebtedness, and of such facts as constitute a basis for their issuance, with certain defined exceptions, as to the facts recited in the bonds. In *Buchanan v. Litchfield*, 102 U. S. 278, it is said: "The purchaser of the bonds was certainly bound to take notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city." The rule is quoted and approved in *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315. In *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654, the rule is stated as follows: "Nothing is better settled than this rule: that the purchaser of bonds such as these [being county bonds in excess of a constitutional limitation in Colorado] is held to know the constitutional provisions and the statutory restrictions bearing on the question of the authority to issue them." The same rule, in substance, is announced by this court in *First Nat. Bank v. District Tp. of Doon*, reported in 53 N. W. Rep. 301; and see authorities there cited. With such a rule of law to govern, we have the fact that the purchasers of the bonds, through Richards, took them with knowledge that they were illegally issued. *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820, was a suit in equity to establish a lien for the purchase price of such bonds—because of the adjudged illegality of the bonds—on certain waterworks of the city, to the construction of which the money had been applied. Mr. Justice Miller, in the opinion, used these words: "The holders of the bonds, and agents of the city, are *participes criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a public policy so strongly declared." The "declared" public policy refers to the constitutional provision limiting the indebtedness of the city, and, while that is a case from Illinois, the constitutional language is the same as ours,—that a county "shall not be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in

the aggregate exceeding five per centum on the value of its taxable property." The following, from the opinion, indicates the scope of this prohibitive language: "It shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner; neither by bonds nor notes, nor by expressed or implied promises. Nor shall it be done for any purpose. There stands the existing indebtedness to a given amount, in relation to the sources of payment, as an impassable obstacle to the creation of any further debt, in any manner or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the expressed promise, and is as binding in a court of chancery as a court of law." The italicised language is the same in the opinion. The case being in equity, and dealing with the equitable rights of such holders of bonds, because of the advantages of the corporation from the use of the money paid for the bonds, we may profitably give the case further notice. It denied to the plaintiff a recovery in any form, and directed the lower court to dismiss the bill. In the most unmistakable terms, it holds that no debt was created because of the purchase of the bonds, either expressed or implied; that if the plaintiff had a right against the city it was for some specific property, as the particular money expended, or the property representing it, "as property which they have purchased." The court below granted the lien on the waterworks, and the opinion speaks of it as "having decreed an indebtedness where none can exist." It is further said: "The money received on the bonds having been expended, with other funds raised by taxation, in erecting the waterworks of the city, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition, as to raise against the city an implied assumpsit for money had and received." That case is a very significant and conclusive one upon the equitable claim that the county should be held to respond to the extent of its having received, appropriated, and profited by the money paid for the bonds, and we doubt if such a holding would have obtained except for the controlling principle that the bond purchasers, in parting with their money, were parties to a legal fraud upon the taxpayers. *Doon Tp. v. Cummins*, 142 U. S. 360, 12 Sup. Ct. Rep. 220, is a law action to recover upon interest coupons, and the case involves the application of this same constitutional provision, and the facts are closely allied to the point we are considering. The district township had issued refunding bonds in excess of the legal limit. The bonds were sold to Cummins, and the proceeds thereof were placed in the treasury of the district township, and \$6,000 thereof were applied to the payment of outstanding bonds and coupons, the remaining

part of the proceeds of the bonds being applied to other purposes. The circuit court gave judgment for \$6,462.40, being the amount of the coupons sued on, with interest. The case was free from any confusion as to conflicting interests of different bondholders, and the circuit court evidently applied the rule of allowing a recovery where the money for the bonds had been applied to the payment of debts within the constitutional limit. The case, on appeal, was reversed, with instructions to enter judgment for the township. The opinion in that case contains some reasoning as to the application of the proceeds of the sale of the bonds, and the consequence to result from a failure of the officers to do their duty in that respect, which we do not find it necessary to approve or disapprove, because in this case the situation is such that there is no pretence of knowing, or being able from the record to know, that any part of the proceeds of the bonds in question—that is, those affected by the judgment in this case—were applied, or intended to be applied, to any legal indebtedness of the county; and the burden of such a showing, even if available,—which we do not decide,—would be with the holder of such bonds. Under the facts as they appear in this case the bonds are to be treated as void. We are not to be understood as in any manner changing the rule as to the right of a municipal corporation, where its indebtedness is up to or exceeds the constitutional limit, to make improvements or otherwise expend its moneys in a way that the legal effect of its action is not to create an indebtedness in excess of the constitutional limit, as is indicated in *Dively v. City of Cedar Falls*, 27 Iowa, 227, nor to change the rule as to contracts within the rule as to current revenues, as held in *Grant v. City of Davenport*, 36 Iowa, 396. Appellants cite many authorities upon familiar rules as to "laches" and "clean hands" for those asking equity, but they are entirely inapplicable, and have never, to our knowledge, been applied to a similar state of facts. Our conclusion is that the decree of the district court is fully warranted under the law, and it is affirmed.

KNAPP v. KNAPP.

(Supreme Court of Michigan. May 31, 1893.)

DISTRIBUTION OF DECEDENT'S ESTATE—RIGHTS OF WIDOW—WAIVER AND RELINQUISHMENT.

1. On a claim by a widow for an allowance, and a distributive share of her husband's estate, it appeared that, while residing with her husband in Wisconsin, in consideration of his securing a certain sum to her, she waived all claim which she might have as his widow "by or under the laws of Wisconsin." Held that, as it did not appear from the record whether the law of that state gives to the widow the same allowance and distributive share in the husband's estate as does the law of Michigan, it must be assumed that the common law, which gives neither, prevails there, and hence it could not be claimed that she had

waived her rights to such share and allowance under the law of Michigan.

2. A relinquishment by a wife of all her rights in her husband's property in case she survive him, made for a valuable consideration, previous to their separation by agreement, is avoided by their subsequent reconciliation and cohabitation for a few weeks.

3. The husband's executor cannot recover from the widow the amount received by her under the agreement with his testator, where it does not appear that the latter ever made any claim for its return.

Appeal from circuit court, Genesee county; in chancery; William Newton, Judge.

Injunction by William M. Knapp, executor of John Knapp, deceased, against Emily Knapp, to restrain her from claiming any portion of decedent's estate as his widow. From a decree for defendant, complainant appeals. Affirmed.

Durand & Carton, for appellant. Gold & Johnson, for appellee.

HOOKER, C. J. The facts in this cause, briefly stated, are as follows: John Knapp and his wife, Emily, resided in Wisconsin, and on February 29, 1885, executed the following contract upon an agreement to separate: "Whereas, my husband, John Knapp, of Princeton, Wisconsin, has this day secured me the payment of \$2,800 by his note and mortgage upon his farm, which sum so secured I hereby acknowledge my fair and just part of the property which we have and hold: Now, therefore, in consideration of the said sum so secured, I do hereby release to him, the said John Knapp, all claim, title, and interest in the property owned and possessed by the said John Knapp, and I hereby waive all claim which I may have as the widow of said John Knapp (if I shall survive him) by or under the laws of the state of Wisconsin; and in case of a legal separation between the said John Knapp and myself, the sum so secured by him I hereby accept in lieu of alimony, support, and all other expenses, except I am to have just and liberal support until the 10th day of June next; and, further, I am to have one-half of the beds and bedding in the house, and such few dishes as I may choose to take. Witness my hand and seal this 9th day of Feb-

ruary, 1885. Emily ^{her} X Knapp. In presence ^{mark}

of John Sullivan, George D. Waring." The mortgage was delivered to Emily, and the parties separated. Proceedings for divorce were commenced September 28, 1885, by the husband, and proofs were taken, but the cause was discontinued in April, 1886. Subsequently the parties met in Michigan, and "lived and kept house by themselves together in Davison for a few weeks," when they again separated. The husband afterwards made a will, leaving his property, consisting of between one and two thousand dollars' worth of personal property, to some nephews and nieces, to the exclusion of his wife, stating in the will, as a reason for making no pro-

vision for her, that she had already received the larger portion of his estate. William Knapp, the complainant, was one of the legatees, and was appointed executor of the will. The widow having asserted her claim to an allowance and a distributive share of her husband's estate, the executor filed his bill in the circuit court, in chancery, praying that she be enjoined from claiming any portion of said estate, and upon dismissal of his bill he appealed to this court.

It may be doubted whether the contract precludes her from receiving a share of her husband's property, as it in terms confines her waiver to such claims as she might have, "as the widow of John Knapp under the laws of the state of Wisconsin." It does not purport to waive all claims. Whether the law of Wisconsin gives to the widow the same statutory allowance and distributive portion of her husband's personal estate as does the law of Michigan we have no means of determining from this record, and must therefore assume that the common-law rule prevails there, which gives neither. It cannot, therefore, be said that she waived them. The testimony shows that the parties became reconciled, and lived together for a time, after coming to Michigan. Under many authorities this avoided the contract, and she became entitled to her former rights. Story, Eq. Jur. §§ 1427, 1428; Shelthar v. Gregory, 2 Wend. 422; Kehr v. Smith, 20 Wall. 31; Carson v. Murray, 3 Paige, 501. We therefore conclude that the defendant was entitled to her full rights in her deceased husband's property, under the law of Michigan. Counsel for the claimant seem to have proceeded upon the theory that the amount received by her upon separation was an equitable claim against her on behalf of the estate, but we find no authority for such a proposition. The decedent did not see fit to require its return, and though he made mention of his wife in his will, and expressed the opinion that she had sufficient, the will did not indicate that he made any claim against her upon account of it. If we treat it as a voluntary gift, (which is the most that can be claimed,) the representatives of the deceased cannot complain of it. Without saying that equity cannot entertain such a case as this, we feel that there is little excuse for bringing it here. Our law (How. St. § 5964) gives to probate courts the authority to make decrees, assigning estates to those by law entitled to the same. This would seem to confer the power to adjudicate between contesting claimants, as was done in the case of Jenks v. Trowbridge's Estate, 48 Mich. 94, 11 N. W. Rep. 822. In the present case the complainant's bill asks a decree denying to the defendant a hearing in the forum expressly provided by law for such cases. The decree of the court below dismissing claimant's bill will be affirmed, with costs of both courts against the complainant. The other justices concurred.

GARDNER v. WALSH.

(Supreme Court of Michigan. May 31, 1893.)

CONTRACT IN AID OF RAILROAD—WHEN PAYABLE—INTERPRETATION.

A contract recited that to aid "the construction of the Battle Creek & Bay City Railroad, and in consideration of the benefits to be derived therefrom," defendant promised to pay, to the order of a trustee, a specified sum "when the road is constructed, and the cars are running thereon, from Midland to West Bay City, Michigan." *Held*, that the money was payable when that portion of the road between Midland and West Bay City was completed, and cars were running thereon, and the completion of the entire line was not a condition precedent to defendant's liability.

Error to circuit court, Bay county; George P. Cobb, Judge.

Action by Henry A. Gardner against Thomas Walsh on a written contract executed to George H. Young, trustee, and assigned to plaintiff. There was a judgment for plaintiff, and defendant brings error. Affirmed.

O. E. Pierce, for appellant. Hatch & Cooley, for appellee.

MONTGOMERY, J. The plaintiff sued and recovered as indorsee and assignee of the following contract: "\$25. West Bay City, Mich., Aug. 15th, 1888. For the purpose of promoting and aiding the construction of the Battle Creek and Bay City Railroad, and in consideration of the benefits to be derived therefrom, I do hereby promise and agree to pay to the order of George H. Young, trustee, the sum of twenty-five dollars, payable when the road is constructed, and the cars are running thereon, from Midland to West Bay City, Michigan. Thomas Walsh." It appears that that portion of the road from Midland to West Bay City was constructed before the institution of this suit; that for the period of three months trains were run over that portion of the road by the Battle Creek & Bay City Railroad, commencing on the 27th day of December, 1888; that thereafter no trains were run upon said road until it came into the hands of the Michigan Central Railroad, under a lease; and that the latter company commenced running its road under such lease the 17th of June, 1890, and has since continuously operated the same. It further appears that no work has been done upon the other portions of the road between Midland and Battle Creek, except a survey.

It is contended by the defendant that the consideration has failed, that the consideration was not the construction of a road from Midland to West Bay City, but was the benefits to be derived by the construction of the Battle Creek & Bay City Railroad, which means its construction for the entire length. It is further contended that the time for the payment of the note, as expressed, being "when the road is constructed, and the cars are running thereon, from Midland to West Bay City, Michigan," should be con-

strued to mean, not the time when that portion of the road from Midland to West Bay City was constructed, and the cars running between said points, but when the entire road was constructed, and cars running between the points named. We think it clear that the true construction of the agreement makes it payable when that portion of the road between Midland and West Bay City is completed, and the cars are running thereon. In this case, as in *Stowell v. Stowell*, 45 Mich. 364, 8 N. W. Rep. 70, a construction which would defer the right to call for payment until the whole line had been actually built by the company would defeat the intent of the parties, and disappoint the manifest object which was meant to be carried out. Adopting this construction, the contract is precisely like that considered in *Railroad Co. v. Johnson*, 55 Mich. 456, 21 N. W. Rep. 888; and, on the authority of that case, it must be held that the construction of the entire road was not a condition precedent to recovery. In that case it was claimed that, inasmuch as the consideration for the promise was the construction of the whole line of road named in its articles, and as the plaintiff failed to show performance in that respect, it could not recover. The court said of this contention: "The agreement is to pay on or before six months from the time the first cars run over the road from Ann Arbor to Toledo. This shows that payment should not be deferred until the whole line was completed." As the sole defense in this case was a total failure of consideration, and as we have seen the construction of the entire road is not a condition precedent to recovery, it becomes unnecessary to consider what the rights of the defendant might be under a different state of the pleadings, or in an action against the company for a breach of contract. Judgment will be affirmed, with costs. The other justices concurred.

WAYNE COUNTY SAV. BANK v. AIREY et al.

(Supreme Court of Michigan. May 31, 1893.)

INTERPLEADER—TITLE TO BANK DEPOSITS—CONSTRUCTION OF ORDER—ESTOPPEL.

1. A bank declined to pay money on deposit to the depositor's daughter, and drew a paper, which the depositor signed, to the following effect: "Allow A., my wife, to sign yr. books, and allow her draw any and all money standing in my name as depositor." The depositor and his wife died before the money was withdrawn. *Held* that, as the writing on its face was only an authority to the wife to receive money for the depositor, but may have been intended as an assignment to the wife, the bank, upon demand being made upon it by the representatives of the depositor and his wife, should be permitted to bring a bill of interpleader to have the question determined.

2. The fact that the bank drew the paper, and paid money thereon for the burial expenses of the wife, does not estop it to deny the suffi-

ciency of the order, as it did not undertake, as a professional adviser, to guaranty the efficiency of the paper.

Appeal from circuit court, Wayne county, in chancery; Henry N. Brevoort, Judge.

Bill by the Wayne County Savings Bank, praying that John Airey and others be caused to interplead and have determined their right to certain money deposited with complainant. From a decree dismissing the bill, complainant appeals. Reversed.

Moore & Goff, for appellant. James H. Pound and William J. Gray, for appellees.

HOOKER, C. J. The complainant, doing a banking business in Detroit, had on deposit a sum of money to the credit of Michael Airey. On the 20th day of January his daughter, Mary E. Airey, went to the bank to get some of this money, and represented that her father was sick. The treasurer of the bank declined to pay it without authority in writing from Michael Airey, and finally drew a paper, which was signed by him. The writing (Exhibit A) is as follows, viz.: "Treas. of Wayne County Savings Bank: Allow Mary Airey, my wife, to sign yr. books, and allow her to draw any and all money standing in my name as de-
his
positor. Michael X Airey. Witness: Mrs.
mark

J. Lund. Miss Mamie Airey." It is claimed by the executor of Mrs. Airey, the wife, that it was understood that this paper was made for use only after the death of John Airey, and that she did not want the money until after his death, and that the bank so understood it. Some of the defendants claim that this writing was an assignment of the money to Mary Airey. The others deny it, and claim it to belong to the estate of Michael Airey. Demand was made by each administrator upon the officers of the bank, who thereupon filed this bill, which was dismissed upon the hearing.

The defendants George and Mary E. Airey, representing the interest of Mary Airey, deceased, claim that the bill should be dismissed, for the reasons: (1) That the paper writing, Exhibit A, transferred the title to the money to Mary Airey; (2) that the bank is estopped from denying their right, because its officers drew this paper for the express purpose of so transferring the title that the money could be drawn after the death of Michael Airey; (3) that the payment of \$300 that was used for the burial expenses of Michael Airey constitutes such estoppel. The order, Exhibit A, is upon its face no more than an authority to his wife to receive money for him, which prudent banking would require before paying out money. It imports nothing more, and alone would be no more effective in transferring a title to the fund than would have been a direction to the wife to take money from

the sick man's pocketbook effective to give her the title to all money therein. It is possible that, taken in connection with the circumstances of the transaction, an assignment of the fund may have been intended and effected, as seems to have been contemplated by the bank. That is one of the questions—perhaps the only one—to be tried upon the interpleader, a question which the bank cannot safely settle, because events have since transpired which lead the bank to fear that it was not so intended by Michael Airey when he signed the paper. The rational view of the matter appears to be that the bank was willing to pay the money upon the order of Michael Airey, after his death, upon the assumption that the order should be made with the expectation and intention on the part of Airey that it should be so paid. Whether it was so made the bank had no means of knowing beyond the representations of others, and, when this is denied, or the legal effect of the instrument, in view of Airey's death, is questioned, the bank may well hesitate about assuming the responsibility of settling the question. It is contended that because the bank drew the order upon which it was willing to pay, and did pay something after Airey's death, it should be estopped to deny the sufficiency of the order, or its own obligation to pay; but, unless we are to hold that it must guaranty the efficacy of the paper, regardless of surrounding circumstances, to do just what Mary E. Airey was desirous of having done, viz. to obtain the money from the bank after her father's death, we cannot sustain the claim. The bank did not undertake to act as the professional adviser of these people further than to oblige them by drawing a paper upon which it was willing to pay the money after the death of the father. Now, when others assert a title to the money, and forbid its payment upon the order, it would be inequitable to require payment at the risk of the bank. The quarrel is that of these brothers and sisters, and the bank ought not to be compelled to shoulder the expense of it. We think there is no room for the application of the doctrine of estoppel in this case. All of the parties must be presumed to know the law. The holder of Exhibit A cannot claim a right to this money under it, unless it was given under circumstances which transferred the title to the money. The bank cannot justly refuse if it was so conveyed, but when the fact is brought in question by other claimants the bank may properly ask the claimants to settle the question. The decree dismissing the bill will be reversed, and a decree of interpleader entered here in favor of the complainant, with costs from the fund.

GRANT, J., did not sit. The other justices concurred.

PEOPLE v. WOLF.

(Supreme Court of Michigan. June 1, 1893.)

MURDER—INTENT TO KILL—EVIDENCE—MOTIVE.

1. On a prosecution for murder, proof that the wounds which caused death were inflicted with a deadly weapon by the accused raises an inference, in the absence of explanatory circumstances, that there was intent to take life, which will justify a verdict of murder in the first degree.

2. Evidence that a couple of weeks before the murder accused stated that he must hurry to get some money, as he was going to get married, was admissible when followed by evidence that accused supposed deceased to have money at the time of the killing.

Error to circuit court, Ontonagon county; John W. Stone, Judge.

August Wolf was convicted of murder in the first degree, and brings error. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

The respondent was convicted of murder in the first degree. The name of the murdered man was August Smith. Wolf had been employed by one Kleinlein, who had located a homestead in Ontonagon county, to clear some land at an agreed price per acre. April 5th he employed Smith to work with him. Smith worked there until he was killed, April 14th. They boarded at Kleinlein's. On the morning of the 14th they went to work about 7 o'clock, about four rods from the house. Between 9 and 10 o'clock they moved to a point from 12 to 28 rods from the house, where they could not be seen from the house. Mrs. Kleinlein and her children were alone. About 11 o'clock she heard a scream down where Wolf and Smith were at work. A few minutes after she heard another, which lasted several minutes. Before she heard the screaming she saw Wolf carrying his coat and an iron wedge from the place where they were first at work towards the place where Smith was murdered, and afterwards saw him going in the same direction, with a shovel upon his shoulders. Shortly before 12 o'clock Wolf came into the house. He had a cut upon his forehead, and both his hands were cut and bleeding. He said that his hand was pinched between the tree and the saw, and that Smith had left him, and run away, and that a limb from a tree struck him on the forehead. There was blood on his shirt in front, on one sleeve of his shirt, and on the sleeves of his coat. She dressed his wounds, after which he went to a neighbor's, Mr. Brown, and returned in about a quarter of an hour. He then ate his dinner, and returned, apparently, to his work. He repeated the story to her while in the house. He was trembling while eating. About 2 o'clock she went out after the shovel. She saw blood spots, and called his attention to them. She asked where the stump was where he was pinched. He showed it to her. There was blood on the stump, and on the slivers that stood out of the stump, and on the butt end of the tree.

She remarked that it was not very much, to which he replied, "The sap on the tree wash it off." She asked him how he could get his fingers pinched there. He replied that he had his fingers loose, and the tree fell over, the slivers caught his fingers and fastened them, and when he began to pull it hurt him so awful that it made him scream. It was impossible for his hand to have been caught in the manner stated, and the entire statement was a pure fabrication. She wondered what made Smith run away. Wolf said he didn't know; all he could remember he looked as white as snow. Wolf then went to the house with her, and when she next saw him he was coming towards the house with Mr. Brown and two men by the name of Manning. He told Brown and the Mannings substantially the same story that he had told Mrs. Kleinlein, though differing in some particulars. He went away that evening, saying that if he did not come home that night they need not wait for him; he would be back to-morrow. He did not return, however, and was afterwards arrested in Warsaw, Wis., about 300 miles from the scene of the murder. Before his arrest the officer asked him when he was in Michigan, and he replied, "Some time ago." On being asked if he was at Bruce's crossing on the 14th he hesitated, but finally said, "Yes." He said he knew Smith, and had worked at Kleinlein's with him. The next morning he said that Smith was at Warsaw, and, being asked why he did not say so last night, he made no reply. When arrested he had only a dollar bill and a copper coin upon his person. The next day after Wolf left, suspicion being aroused, search was instituted. A few feet from the stump on which blood was found was a pile of brush. The brush was removed, and underneath was found a pool of blood. A few feet from this pile was another, and blood stains were found underneath it. About 10 feet from this second pile was another, on removing which they found blood stains and snow and sand mixed. There Smith's body was found, buried under about a foot and a half of snow and dirt. The face was very much discolored around the eyes. The entire portion of the occipital bone was cut off, exposing the brain, and was held by a piece of the skin at the top of the head. There was a cut in the back between the shoulder blades an inch and a half in length. There were three blows upon the left side of the face, evidently made with an axe transversely across the lip. One of these wounds extended along the neck, and reached the spinal column, but did not sever it. The physician testified that these wounds would have caused instant death. When the wounds were made upon the face the deceased was evidently lying on his back. The blow which cut the occipital bone was evidently made while he was prostrate, and lying upon his side. Mrs. Kleinlein, under objection and exception by respondent's counsel, testified

that about a couple of weeks before the murder Wolf said he "must hustle up to get some money; that he was going to get married; that one month's wages would take him to buy his sweetheart some clothes; another month's work would buy him some clothes." On the day of the murder, while eating dinner, Mrs. Kleinlein said to Wolf: "I wonder if Smith has his dinner. Perhaps the poor man ain't got any money, and he run a long while without anything to do." Wolf replied: "He has his dinner on the crossing. He got money on the crossing." After his arrest, Wolf wrote a long letter, detailing the circumstances of the killing of Smith, and charging that it was done by a stranger, in his presence; that the stranger spared his life only upon condition that he would leave the state within 24 hours, should stay away 10 days, after which he might return and tell everything; that he told the stranger that he did not have money enough to get out of the state so quick; that he had \$11 belonging to Smith, and he did not want to keep it; that he then took the money that Smith had given him, put it on the stump, and told the stranger to give it to Smith; that the stranger took the money, put it in his pocket, and then gave Wolf \$15. The circuit court very fully and carefully instructed the jury as to what constituted murder in the first and second degrees and manslaughter.

R. C. Flannigan, for plaintiff in error. A. A. Ellis, Atty. Gen., and W. W. Wendell, Pros. Atty., for the People.

GRANT, J., (after stating the facts.) 1. The learned counsel for the respondent contends that there was no evidence to sustain the verdict, because there was no proof of previous deliberation or premeditation. This would result in holding that deliberation and premeditation cannot be inferred from the character of the weapon used, the wounds inflicted upon vital parts, the circumstances surrounding the killing, the acts, conduct, and language of the accused before and after the killing, and the improbability of the story told by him. According to respondent's own story, a most brutal murder had been committed in his presence by a stranger whom no one else had ever seen in the vicinity. The jury evidently believed his story incredible. If the accused committed the deed, the facts were sufficient to justify the verdict.

2. Error is assigned upon the following portion of the charge: "In some instances proof of the intent is furnished by the manner of the killing itself; as, when the murder is shown to have been committed with a deadly weapon, or a dangerous weapon, in such a manner that an inquiring mind can come to no other conclusion than that the death of the victim was intended. Thus, if one man shoot another through

the head with a musket or pistol ball, or if he is stabbed in a vital part with a saber, or if he cleave his skull with an axe, or the like, it is almost impossible for a reflecting or intelligent mind to come to any other conclusion than that the perpetrator of such an act of deadly violence intended to kill. In such cases the law presumes every person to intend the usual consequences which accompany the use of the means employed in the manner employed, and casts upon the accused the burden of showing that the intention in using the weapon was harmless, or not murderous." Immediately following the above the court said: "The mere proof of the murder itself, without other proof deduced from the manner of the killing, or from other evidence tending to establish the design to take the life of the victim, would not establish the higher degree of the crime, but would only authorize the verdict of murder in the second degree." The language complained of was quoted verbatim from *People v. Potter*, 5 Mich. 8. The court, in that part of the charge, was instructing the jury as to those acts from which the intent is to be implied. The burden of proving his innocence was not, by this charge, placed upon the accused. When the people rest their case in a criminal prosecution, they must make a case of guilt beyond a reasonable doubt. In this case the prosecution proved the use of a lethal weapon with which the wounds were inflicted, causing instant death, and that they were inflicted by the accused. From these facts the intent to take life was clearly inferable, in the absence of any explanatory circumstances. In such case it is incumbent upon the accused to make the explanation which will relieve him of the consequences of his act. *People v. Miller*, 91 Mich. 644, 52 N. W. Rep. 65. Subsequently in its charge the court told the jury that it was the duty of the people to prove beyond a reasonable doubt every fact essential to make out the guilt of the accused, and that the facts must be inconsistent with any theory except that of guilt; and further told them that they must consider the whole evidence in determining the reasonable doubt. We find no error in the charge.

3. The testimony of Mrs. Kleinlein in regard to her conversation with Wolf about money was competent. We cannot say, as a matter of law, that it had no bearing upon the motive for the murder. It may have been weak, but it was for the jury to determine what weight they would attach to it.

4. The respondent testified that, when the stranger attacked Smith, Smith had just finished filing the cross-cut saw at a stump. One Leo Gleisnar testified that on the day following the murder he was present when the body of Smith was found; that he examined the saw; that two or three teeth were newly filed, and one tooth had two or three strokes of the file upon it, and that

the rest of the teeth were dull. On cross-examination the witness said that if the saw had been used between the time that Smith was killed and the time he saw it the marks of filing would have been obliterated. Counsel for the respondent then moved to strike out the testimony of this witness in regard to the filing of the saw. The court then said: "He should only speak of the appearance of it." Respondent's counsel then asked the witness the question: "You only know what the appearance was, I suppose. Answer. Yea, sir; I can tell the teeth of a saw,—whether they were newly filed or whether they were not. Three or four of them had been just filed, and had not been used." The court thereupon refused to strike out the testimony. It is evident from the record that the reason now urged against this testimony was not raised upon the trial. But, aside from this, we think the objection is without merit. The fair inference from the evidence is that the saw had not been used from the time Smith was killed until it was examined by the witness. We find no error upon the record, and the conviction is affirmed. The other justices concurred.

CITY OF GRAND RAPIDS v. CHICAGO & W. M. RY. CO. et al.

(Supreme Court of Michigan. May 31, 1893.)
CONDEMNATION BY CITY — OPENING STREET — APPEAL.

In proceedings by a city under Laws 1887, Act 48, to condemn land for the extension of a public street, an appeal by the city, after a verdict that the opening of such street is not a public necessity, will be dismissed if no notice of appeal is served on all of defendants, as required by section 21 of the act.

Appeal from superior court of Grand Rapids; Edwin A. Burlingame, Judge.

Petition by the city of Grand Rapids against the Chicago & West Michigan Railway Company and others to condemn land. Verdict for respondents, and petitioner appeals. Appeal dismissed.

Wm. Wisner Taylor, for appellant. T. J. O'Brien and W. A. Smith, for appellees.

HOOVER, C. J. The city of Grand Rapids instituted proceedings under Act 48 of the Laws of 1887 to condemn land for the extension of Allen street in said city across lands of the respondent and three others, all of whom appeared and opposed the condemnation. The jury rendered a verdict against the city "that said opening of Allen street, as petitioned for, was not a public necessity," whereupon an appeal was taken on behalf of the petitioner. On the hearing it was conceded that no notice of appeal was served on three of the defendants, as required by section 21 of said act. A review of the case as against one defendant would afford no relief, as the verdict would stand as to the others, which would prevent the opening of

the street as prayed. The proceeding is a statutory one, and, the notice not having been given to all, the court has no jurisdiction to hear the appeal. *Portage Lake, etc., Co. v. Haas*, 20 Mich. 326; *Canfield v. The City of Erie*, 21 Mich. 160; *People's Ice Co. v. The Excelsior*, 43 Mich. 336, 5 N. W. Rep. 398. The appeal must be dismissed, with costs. The other justices concurred.

BRONSON et al. v. HERBERT.

(Supreme Court of Michigan. May 31, 1893.)
PRINCIPAL AND AGENT — CONTRACTS OF AGENT — WHEN BINDING ON PRINCIPAL — ACTION ON ORDER FOR GOODS — SET-OFF.

1. An order for trees, by a third party, through a general agent of a nursery firm, does not become a binding contract with the firm until the firm, or some one authorized to bind it, assents thereto in writing, and gives such third party notice thereof.

2. Where, in an action by the agent, in the name of the firm, against such third party for the amount of the order, the evidence does not show the agency, defendant may show the negotiations and conditions upon which the order was given.

3. Defendant may show that the agent, and not the firm, is the real party in interest.

4. Defendant may show that some of the trees ordered never came from the firm, and were worthless, and can set off the amount paid for the same as money paid without consideration.

Error to circuit court, Wayne county; George Gartner, Judge.

Action by Eli A. Bronson and Stephen W. Hopkins against Clinton S. Herbert to recover on an order for goods. Judgment for plaintiffs. Defendant appeals. Reversed.

Park & Henderson, for appellant. Corliss, Andrus & Leete, for appellees.

HOOVER, C. J. The plaintiffs are nurserymen of Geneva, N. Y. In 1883 they made the following agreement in writing with one W. W. Essig, viz. (Exhibit B):

"The following agreement, made and entered into this 23d day of March, 1883, between Bronson & Hopkins, of Geneva, N. Y., of the first part, and William W. Essig, formerly of Elmore, Ohio, now of Detroit, Michigan, of the second part, witnesseth: B. & H. agree to furnish the said Essig, for the fall packing of 1883, such nursery stock as the said Essig may require, at the following prices, it being mutually understood by both parties that such varieties of trees and such ornamentals as B. & H. do not grow or have on hand the said Essig shall have the privilege of buying of other parties, unless the said B. & H. prefer to buy such stock of other parties for the said Essig; and, in case of all such purchases by either party, the said Essig shall pay to B. & H. one cent for each tree so purchased, in addition to the cost of the stock, for packing the same. It is understood that the said Essig is to act as general agent for the said B. & H. for the sale of nursery stock, with the privilege of

using orders and letter heads printed in the name of the firm Bronson & Hopkins. [Here follows a list of trees and prices.] All the above stock to be first class, billed upon our (B. & H.) packing ground, and delivered at the depot without extra charge. The said Essig to furnish one man, and assist, himself, in packing. The party of the second part agrees to purchase his nursery stock, as above mentioned, of the party of the first part, and to pay cash for the same (or give acceptable notes) at the time of delivery. The said B. & H. agree to furnish agents' certificates to such men as the said Essig may employ. In consideration of the above-mentioned privileges the said Essig agrees to protect the said B. & H. from all harm and expense of suit in case of prosecutions arising from sales and collections of said nursery stock, or from any other cause, the same as if he was selling in his own name; it being understood that the said B. & H. have no interest or profit from the retail sales of the said Essig. Bronson & Hopkins. W. W. Essig."

"Geneva, Oct. 12, 1883. It is hereby mutually agreed that the above contract, with all conditions and specifications, is renewed and continued for the spring sale of 1884, except the changes in prices in red ink, which are to be the prices for spring. Bronson & Hopkins. W. W. Essig."

"Geneva, N. Y., 4-17, '84. We, the undersigned, agree to renew within contract for the fall of 1884, with the following changes: That dwarf pears are to be at 16, and apples are left open for future agreement. Bronson & Hopkins. W. W. Essig. M. A. McCarthy, Witness."

This action was begun by Essig in the name of plaintiffs. The right to recover is based upon the following writings, (Exhibit A:) "Bronson & Hopkins, Nurserymen, Geneva, N. Y.—You will please have dug and furnish me the following nursery stock, for which I agree to pay the prices set opposite the respective articles, amounting to \$1,255.00, in cash on delivery at Dalton, Mich., in the fall of 1891. Should any part of such stock be omitted, through miscount or otherwise, the price of such part shall be deducted. No countermands accepted. 12 crab apples. 1,800 standard pears. 1,800 dwarf pears. 500 plum trees. It is mutually agreed that the stock in this contract is not warranted further than to be delivered in good condition, and the order not subject to countermand, and must be taken according to the printed condition hereon. Agents not allowed to plant stock when delivered, and no outside agreement or bargain by the agent shall in any way affect this contract. The fruit trees, if any, are to be grafted or budded, and all the above are to be delivered in a thrifty and healthy condition. Standard apple, standard pear, and cherry trees are not to be less than five feet in height; plum trees not less than four feet;

dwarf pear not less than 3 feet. Date, June 10th, 1891. Agent's name, W. W. Essig. Full name of purchaser, C. S. Herbert. Purchaser's signature, C. S. Herbert."

Indorsed on back of paper as follows: "Dwarf Pears: 1,200 Duchess; 600 B. D. Anjou. Standard Pears: 300 Clapps; 300 Bartlett; 600 President; 600 Lawrence. Plum: 200 Niagara; 100 Shipper's Pride; 100 Quackenboss; 100 Quell. Crab Apple: 12 Whitney Cider. Stock to be first class." The words, "In consideration of the foregoing order, we agree to replace at half price at our next delivery all stock that fails to live, provided we are notified of such failure by August following the delivery thereof, and remittance for the stock to be replaced accompanies said notice;" also, "In case you cannot furnish all the specified varieties you may substitute others considered by you equally desirable,"—were erased in the order. Essig testified that the stock was delivered, accepted by defendant, and a settlement made, wherein it was agreed that the amount due was \$1,255; that defendant paid Essig a check for \$500, and took a writing showing that \$750 remained unpaid; that subsequently he obtained from him the draft that Essig had obtained from the bank for the check, under a fraudulent pretext, and afterwards refused to talk about the matter. The defendant, who resides in Detroit, claimed that the order for stock was part of an arrangement made in the spring of 1891 with Essig, whom defendant supposed to be acting for the plaintiffs, to set out fruit trees on 40 acres of land in Muskegon county; that it was not all cleared, and Essig was to set out what defendant had cleared in the spring of 1891, and to furnish the rest when the ground could be prepared. He further claimed that no contract relations existed between the plaintiffs and himself, and, further, that the trees furnished in the spring, and for which he had paid Essig, never came from plaintiffs, and were worthless, by reason of which he sought to set off the money paid for them, as money paid without consideration. The trial judge held that the order was a complete, valid, binding contract, and declined to admit proof of any of the circumstances of its delivery, or the negotiations in relation to it.

We cannot take this view. This paper is an order on the plaintiffs to ship stock mentioned therein. Before it could become a binding contract between these parties, it was necessary that the plaintiffs, or some one authorized to bind them should assent thereto in writing, and give the defendant notice thereof. *Weiden v. Woodruff*, 38 Mich. 130; *Aldine Press v. Estes*, 75 Mich. 100, 42 N. W. Rep. 677. Plaintiffs' counsel allege in their brief that the order was accepted in writing by Essig, who they claim was plaintiffs' agent, but they fail to point us to the evidence showing that fact. His name was appended to the order, but as a

mere memorandum. This being true, it was a right of the defendant to show the negotiations and conditions upon which the order was given. Under his theory the furnishing of the trees in the spring was a part of this transaction, and a recoupment, which in that view would have been possible, is cut off by treating each delivery as a separate contract.

Defendant sought to show that Essig, and not the plaintiffs, was the real party in interest; in other words, that the plaintiffs were not the owners of the claim. No rule is better settled than that a defendant may show in an action at law that the plaintiff has no cause of action against him. *Blackwood v. Brown*, 32 Mich. 104. Hence it was proper cross-examination to ask plaintiffs whether they charged this stock to the defendant upon their books, and whether the defendant ever promised to pay plaintiffs \$1.255 on the order, and where the money would go if paid, and what interest the plaintiffs had in Essig's sales, etc. Again, defendant was entitled to prove his set-off if he could, and have the same submitted to the jury. If he had paid to the plaintiffs \$703.75, without consideration, in a prior transaction, it could be set off in this action. *Petersen v. Door, etc., Co.*, 51 Mich. 86, 16 N. W. Rep. 243; *Murphy v. McGraw*, 74 Mich. 323, 41 N. W. Rep. 917. It is unnecessary to specifically notice the many allegations of error, as the foregoing discussion covers the main question in the case. We feel constrained to reverse the judgment and grant a new trial. Ordered accordingly.

MONTGOMERY, J., did not sit. The other justices concurred.

DETWILER v. CITY OF LANSING.

(Supreme Court of Michigan. May 31, 1893.)

DEFECTIVE BRIDGES—LIABILITY OF CITY.

A city is liable for injuries resulting from the falling of a bridge built by mill owners in a public highway, and by the side of a public bridge, where the public are allowed to use both indiscriminately, without notice as to the private character of the one in question.

Error to circuit court, Ingham county; Rollin H. Person, Judge.

Action by William E. Detwiler against the city of Lansing for injuries resulting from the falling of a bridge. Judgment for plaintiff. Defendant brings error. Affirmed.

Charles F. Hammond, for appellant. Q. A. Smith, (Parkinson & Day, of counsel,) for appellee.

MONTGOMERY, J. Plaintiff sued and recovered for injuries received from the falling of a bridge claimed to be in Wall street, in the city of Lansing. Numerous errors were originally assigned, but all are now abandoned excepting those which relate to the rulings of the circuit judge hereinafter spe-

cifically referred to. The testimony tended to show that Wall street was extended across a mill race many years ago, to connect with a narrow street called "Race Street," on the west bank of the canal. That about the year 1854 a bridge across this canal was constructed, substantially across the center of the street, by the township authorities, which bridge has since been maintained by the township, and later by the authorities of the city of Lansing. Shortly after the completion of this public bridge over the race in the center of Wall street, the owners of a mill called the "Hart Mill," which mill was located on the southerly line of Wall street, constructed another bridge, on the south side of the public bridge, entirely within the lines of the street, and filling the space between the first bridge and the south line of the street. This bridge was evidently constructed with a view to furnishing easy access to the mill. It was usually referred to by the public as the "Hart Bridge." The east end of the bridges rested on the same level. The Hart bridge was raised a little above the public bridge towards the west end. There was evidence tending to show that the public used the Hart bridge and the city bridge indiscriminately, and that the use of the Hart bridge was not confined to those who had business with the Hart mill, but that it was used by the public generally. There was no sign or warning to the public not to make use of the Hart bridge. The approach to the two bridges was equally inviting to the public, as appears by the photographs of the scene which were used upon the trial and have been produced in this court. At the close of the testimony the defendant requested the circuit judge to charge as follows: "The undisputed evidence shows that the adjoining landowner has continuously used the land upon which the bridge in question was located for a period commencing before the building of the first bridge thereon and continuing until the present time; that such landowner has never yielded possession thereof to nor has the city asserted dominion over such land,"—and, in case that request was refused, then the following: "If the jury find from the evidence that the adjoining landowner has continuously used the land upon which this bridge was located for a period commencing before the building of the first bridge and continuing up to the present time, that he has built and maintained a structure thereon, and that he has never yielded the possession thereof to nor has the city asserted dominion over such property, then the plaintiff cannot recover in this suit." The learned circuit judge refused these requests, but did charge the jury as follows: "Even if such bridge [referring to the Hart bridge] was in the public street, it must be conceded that it was built by private individuals, and was maintained by private individuals, and that the city had refused to consider the bridge a public structure; and,

although built in the public street, if it was simply and solely an appendage to Hart's mills, and only useful as connected with Hart's mills, and to the public only as dealing with Hart's mills, and was not, during the time it has stood there and up to the time of the accident, useful to the public generally, and used by them generally, in the course of ordinary travel along said street to and from places other than Hart's mills, then the city would not be liable for the injuries suffered by the plaintiff through the falling of said bridge. But, on the other hand, if said bridge stood in the public highway and appeared to be part thereof, and the approaches from the traveled part of the street led directly thereto, and it appeared to any one traveling along the highway to be a part of the street in ordinary use, and if it had been and was actually in use and utility generally to the traveling public, then the city, if it had erected at or near the bridge no visible sign or monument warning the public that such bridge was not a part of the street, was under a duty, so long as it permitted the bridge to remain in and as a part of the street, subject to such general use and utility, to keep the same, or see that the same was kept, in reasonable repair, so that it would be reasonably safe and convenient for public travel."

We think these instructions embody the law of the case. There was testimony tending to show that the public had, by the continued use of this bridge, acquired a right to use it, and that it was used by the public as a matter of right, and had been for a sufficient period for the public to have acquired a prescriptive right therein, even had the fact been that the owner of the mills was asserting an adverse possession. But the ground upon which the recovery was had in the case was that the circumstances showed that the public were invited to travel over that portion of the highway in which the "Hart Bridge," so called, was located. The duty imposed upon cities is to maintain that portion of the highway in reasonably safe condition which is worked for travel. There is no reason why the same rule should not apply to structures which are built across streams. The general rule is that a liability occurs if one is injured in traveling upon a public highway in that portion of the highway which appears to be open for public travel; in other words, the township is liable if the injury occurs in that portion of the road over which there is an apparent invitation to travel. The ruling of the circuit judge is sustained, we think, by the following cases: *Potter v. Castleton* 53 Vt. 435; *Saulsbury v. Village of Ithaca*, 94 N. Y. 27; *Jewhurst v. City of Syracuse*, (N. Y. App.) 15 N. E. Rep. 409; *Estelle v. Village of Lake Crystal*, 27 Minn. 243, 6 N. W. Rep. 775; *State v. Town of Campton*, 2 N. H. 513; 2 *Thomp. Neg.* 760; *Barnes v. Newton*, 46 Iowa, 567; *Moreland v. Mitchell Co.*, 40

Iowa, 394; *Newlin Tp. v. Davis*, 77 Pa. St. 317; *Shurtle v. Minneapolis*, 17 Minn. 308. (Gil. 284.) See, also, *Thomp. Neg.* 769, where it is said: "Where the limits of the highway are not indicated by any visible objects, and there is nothing to show a person driving thereon in the evening that the course he is pursuing is not within the way intended for public travel, the town is liable for an accident to a traveler resulting from a defect within the general course and direction of travel where travelers are accustomed to pass along the highway, although without the limits of the located way, if so near as to render the traveling there dangerous, in the condition in which it is at the time of the accident, and there is nothing to give travelers notice of the defect until too late to avoid it." So, it has been held that where an open and well-beaten path led from the traveled way to an apparently safe and convenient watering place by the side of the way, and within the limits of the road as laid out, but which was in fact a deep and miry pit covered with water, and the horse of the traveler was turned to it to drink, but fell into it and was drowned, the town was held liable to pay, under the provisions of a statute similar to ours. *Cobb v. Standish*, 14 Me. 198. The jury here found, in effect, that the public permitted the bridge to remain as an apparent and continuing invitation to the public generally to travel over it. We think the city was properly charged with negligence. The judgment will be affirmed, with costs. The other justices concurred.

EVANS v. MONTGOMERY.

(Supreme Court of Michigan. May 31, 1893.)

BUILDING CONTRACT — ACTION FOR MATERIALS AND LABOR — EVIDENCE — INSTRUCTIONS — REMARKS OF COUNSEL.

1. In an action for plastering a house, in which defendant claims the work was done for his contractor, who was to furnish materials, and construct the building, it is not error to admit evidence that plaintiff told defendant at the time of their agreement that such contractor already owed him, and he would have nothing to do with him.

2. Nor is it error to admit evidence that, after the work was completed, defendant's wife, in his presence, stated to plaintiff that the money was in the bank to pay for it, and that defendant made no reply.

3. In connection with such evidence, testimony that the premises belonged to defendant's wife was material, and properly admitted.

4. Where plaintiff claims to have originally agreed to do two-coat work, and that the specifications called for, and he did, three-coat work, it is not error to admit evidence that after he began work such specifications were produced, and he was told to do the work according to them, and he should have his pay.

5. Defendant sought, by cross-examination of plaintiff, to produce evidence of statements made by plaintiff's counsel in his argument to the jury on a former trial, to show that plaintiff then contended for a different state of facts from that claimed on the second trial, but the witness answered that he did not know what his

counsel said. *Held*, that it was proper to refuse to permit the witness to further state whether, if his counsel made such statements, it was not because of something the witness had told him in regard to the case.

6. Evidence of what was said in a conversation between defendant and his architect is not admissible in behalf of defendant.

7. In his opening to the jury, plaintiff's counsel said, "He sends to the slums down here, and gets his bond," but immediately withdrew the statement. The record failed to show in what connection the remark was made. *Held* not reversible error.

8. It is not error to refuse to instruct that the only testimony in regard to making the contract is that of plaintiff himself.

9. Nor is it error to charge a request to charge that the jury are not authorized to find, except on "clear and convincing proof," etc., so that it will read, except on "a fair preponderance of proof," etc.

10. A request to charge that the jury were not to consider whether or not defendant owed the contractor is properly refused.

Error to circuit court, Muskegon county; Albert Dickerman, Judge.

Action in assumpsit by David Evans against A. Schuyler Montgomery for labor done and material furnished in the erection of a house for defendant. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant brings error. Affirmed.

Bunker & Carpenter, for appellant. Chamberlain & Cross, for appellee.

HOOKER, C. J. A large number of errors are assigned upon this record. The action was assumpsit for material, and work and labor performed in plastering a dwelling house. The defendant asserts that the work was done for one John Gilpin, who had contracted to furnish materials, and do the entire work of constructing the building. As a matter of fact, this may have been true, but there was some evidence tending to substantiate plaintiff's claim, which, under the well-settled rule, made it a question for the jury. We cannot agree with defendant's counsel in his claim that there was a mere scintilla of evidence.

The second and third assignments of error relate to what was said by plaintiff to defendant about Gilpin's credit, to the effect that he already owed plaintiff, and that he would not have anything to do with him. This talk was at the time that the contract is alleged to have been made, and the testimony was clearly a part of the *res gestae*.

The first assignment related to a statement of defendant's wife to the plaintiff, after the completion of the work,—that the money was in the bank to pay for it. This talk was in the presence of the defendant, and his silence may be said to be a tacit admission of the fact. As such it was admissible. In this connection the testimony that the premises belonged to defendant's wife became material, as throwing light upon her interest in the subject.

Assignments 5 and 7 relate to talk about the specifications. Plaintiff showed that after he

began work the specifications were produced, and he was told to do the work according to them, and he should have his pay. He claims to have originally agreed to do two-coat work, and that work of a different character was specified, viz. three-coat work. This evidence was admissible as a part of the contract, it being claimed that, in accordance with defendant's request and promise, made at the time the specifications were discussed, the plaintiff did three-coat work.

On cross-examination, defendant sought to show statements made by plaintiff's counsel in the opening before the jury upon a former trial, as tending to show that plaintiff there contended for a different state of facts. We know of no case going to the extent of holding that such statements amount to admissions. The witness said he did not know what he said, and thereupon was asked the following question: "Question. If Mr. Cross so stated, wasn't it by reason of something which you had told him in regard to the case?" We think the answer was properly excluded. Had counsel asked if the plaintiff did not make a particular statement, it might, perhaps, have been admissible, if not a privileged communication. This disposes of the fifth and seventh assignments.

The sixth assignment refers to an attempt to show a talk between defendant and his architect, and the proof was clearly inadmissible.

The sixteenth, seventeenth, and eighteenth assignments relate to remarks made by counsel for plaintiff in his argument. The first two remarks passed without exception, and, while the third may have been unwarranted, it was immediately withdrawn. It was as follows, viz.: "He sends to the slums down here, and gets his bond." The record does not show the connection, and, in view of the immediate withdrawal, we think the judgment should not be reversed for this cause.

The court refused to instruct the jury that "the only testimony offered by the plaintiff in regard to the making of the contract between the plaintiff and defendant is that of the plaintiff himself," also, that "you are not authorized to find, except upon clear and convincing proof," etc. This last was changed to "a fair preponderance of proof." The court committed no error in refusing these requests.

Defendant's counsel requested the court to instruct the jury that "you are not to consider whether or not Montgomery owes Gilpin, or has paid him in full, on his contract. That is a matter immaterial to this issue." We think it was a circumstance which might properly be considered, and that the court did not err in refusing to give the instruction requested. Nor did the court err in refusing to direct a verdict for the defendant.

The record in this cause contains nearly 200 pages, and apparently contains all the

evidence. The only excuse that can be found for it is the fact that counsel for defendant claims that the proofs were insufficient to justify the submission to the jury. Eliminating this, and we have already said that it was without merit, and a few pages should suffice to raise the other questions. We find no error in the record. The judgment, therefore, will be affirmed, with costs. The other justices concurred.

MAY v. NEWMAN.

(Supreme Court of Michigan. May 31, 1893.)

ATTACHMENT—FRAUD — UNCONSCIONABLE AGREEMENT.

1. Plaintiff agreed to indorse for defendant, who was engaged in business, certain notes then indorsed by B. which were represented to amount to about \$1,000; to indorse renewals thereof, and other notes; and to guaranty bills thereafter purchased by her. *Held*, that though plaintiff indorsed notes which had been indorsed by B. to the amount of \$1,800, being ignorant of the fact that there were others of them, amounting to \$1,200, which defendant had secretly paid from the business, the transaction was tainted with fraud, and plaintiff was entitled to an attachment for all sums for which he had become liable; they having, by the terms of the agreement, become due and payable by defendant to plaintiff.

2. The provision in an agreement by which plaintiff undertook to indorse certain papers for defendant, that in case defendant should refuse to secure, on demand, the amount for which plaintiff had become liable, it should be treated as a sum due and payable to plaintiff from defendant, is not unconscionable.

Certiorari to circuit court, Kent county; Allen C. Adsit, Judge.

Action by Abraham May against Kate Newman, commenced by attachment. The attachment was dissolved, and plaintiff brings certiorari. Reversed.

G. A. Wolf, (L. E. Knappen, of counsel,) for appellant. Peter Doran, for appellee.

McGRATH, J. This is certiorari to review the action of the circuit court in dissolving an attachment. Defendant was engaged in the clothing business at Grand Rapids. One B., who had been indorsing her paper, died, and May was approached by defendant, to aid her, as indorser, in taking care of that paper as it matured. A written agreement was finally entered into, which recited that, "Whereas, said first party is desirous of having second party indorse certain notes for her, now indorsed by Jacob Barth, amounting to about one thousand dollars, and also to indorse any renewals of said notes, and indorse other notes for her, and guaranty bills purchased by her in the future." Defendant agreed to secure May by first mortgage on her stock, whenever the latter should so request, and May agreed to indorse "the notes so indorsed by Jacob Barth, and, as long as he feels secure, will indorse such renewals and further indorsements, and guaranty such pur-

chase, as first party may require." It was further agreed that if, at any time, May should feel insecure, "he might demand the instant execution and delivery of said chattel mortgage," and, if defendant "does not execute said mortgage instantly, said party may treat all indorsements and guaranties, as between the parties hereto, forthwith due and payable, and the amount thereof is hereby agreed to be liquidated damages; and he may thereupon instantly begin suit, by attachment or otherwise, for the amount of the notes so indorsed, and accounts guarantied, whether said notes or accounts have then matured or not." Between the time of the execution of this contract and the commencement of this suit, plaintiff had indorsed notes aggregating over \$3,000, some of which, however, were renewals, and others of which had been paid. The court finds "that the plaintiff was induced to enter into said agreement by reason of certain false and fraudulent statements made to him by Harry Newman, the authorized agent of the said defendant, in regard to the assets and liabilities of the defendant at the time of making said agreement; that the plaintiff had notice and became aware that such statements were false on or about the 11th day of March, and before indorsing the note of that date, and note subsequently indorsed, hereinafter described." That at the time of the commencement of this action, July 22d, plaintiff had indorsed the following notes, which were then in the hands of a third party, viz.: "Note dated February 29, 1892, due four months from date, \$190; March 9th, four months, \$300; March 11th, four months, \$400; June 9th, two notes, 60 and 90 days, \$250 each; and June 18th, 90 days, \$338,—making a total of \$1,728. That the notes given of date June 9th and 18th, amounting to \$838, were not then due. That the notes of date February 29th, March 9th, and March 11th, amounting to \$800, had become due and payable, but that neither the defendant nor the plaintiff had paid the same, or any part thereof, to the owner and holder thereof. That the notes of June 9th and 18th were renewals of notes given prior to March 11th." The court further finds, as a matter of law, that at the time of the commencement of this suit the plaintiff was not entitled to an attachment against the defendant. The allegation of the affidavit for the writ upon which plaintiff relied was that defendant had fraudulently contracted the obligation respecting which the suit is brought. The court finds this allegation to be sustained by the proofs, but also finds that plaintiff had notice and became aware that such statements were false when he indorsed the note, on March 11th, and under the rule laid down in *Estlow v. Hanna*, 75 Mich. 219, 42 N. W. Rep. 812, evidently held that that portion of the claim was not affected by the fraud.

The undisputed facts are that, at the time

the agreement was entered into, defendant represented her indebtedness upon notes indorsed by Barth to be \$1,000, and her other indebtedness to be about \$1,200, making a total of \$2,200. Her indebtedness was in fact about \$3,300 on notes indorsed by Barth, independent of the other indebtedness. At the time when this suit was instituted she owed upon notes indorsed by plaintiff \$1,728, and otherwise about \$1,700, or a total of \$3,428. Defendant admits that plaintiff indorsed, of the Barth indebtedness, but \$1,838, and that she had paid, without plaintiff's knowledge, from \$1,200 to \$1,500 of that indebtedness. This was done, in part at least, by the depletion of the stock, and the increase of the other indebtedness. It is true that, as plaintiff was asked to indorse in excess of the \$1,000 to take up Barth notes, he was told that the particular note had been overlooked; but there is no pretense that on March 11th, or at the time of any of the subsequent indorsements, plaintiff knew that the Barth indorsements aggregated \$3,300, or that defendant had been applying the proceeds of stock to the payment of other Barth notes, of the existence of which plaintiff was kept in ignorance, instead of liquidating the other indebtedness. Defendant had on February 6th represented her stock on hand to be worth \$7,000. On March 11th she represented it at between \$6,000 and \$7,000. It was inventoried by the sheriff at \$2,072.50, although it is claimed that the inventory was low. There is no testimony that plaintiff knew the actual amount of stock on hand on March 11th. He made no inventory, but simply gave it a cursory survey, and must be deemed to have relied somewhat on representations made to him by defendant. Had defendant's representations made February 6th been true, the amount secretly paid on undisclosed Barth notes would have reduced the whole indebtedness of the business to between \$700 and \$900, or had they been true, except as to what had been disclosed, defendant's liabilities would have been less than \$2,000, instead of nearly \$3,500. Defendant, during the very period covered by the later indorsements, was applying the proceeds of sales to the payment of an undisclosed indebtedness, to plaintiff's prejudice. Each transaction was tainted with fraud, so long as any part of the truth was concealed, so long as the conditions did not correspond with the representations originally made as modified by what had been actually disclosed. The transactions differed only as to the degree or extent of the fraud practiced. In *Estlow v. Hanna*, supra, the transactions were capable of severance. Here they are not.

Some criticism has been made upon the agreement: Plaintiff does not base his right to an attachment upon the agreement. Creditors are not here complaining. Defendant agreed that, in case she refused to secure upon demand, the amount for which plaintiff

had become liable should be treated as a sum due and payable forthwith. We discover nothing unconscionable in this agreement. It follows that the order vacating the attachment must be set aside, with costs of both courts to plaintiff. The other justices concurred.

IMPERIAL LIFE INS. CO. v. HAMBITZER, State Treasurer.

(Supreme Court of Michigan. May 31, 1903.)

INSURANCE COMPANIES—DEPOSIT WITH STATE TREASURER—WITHDRAWAL.

Under How. St. § 4227, providing that the securities which section 4224 requires an insurance company to deposit with the state treasurer before engaging in business shall remain in his hands notwithstanding the company ceases to do business, and shall only be withdrawn on the order of the supreme court, or when the company shall show to the satisfaction of the insurance commissioner and state treasurer that the risks of the company are less than the securities, in which case the company may be permitted to withdraw the surplus, an order for withdrawal of securities to pay death losses of a company which has ceased to issue policies because its capital has become so impaired as to render it unprofitable and imprudent to continue business will not be made where, from the company's showing, its death claims and policies outstanding approximate the amount deposited, and the death claims may have been increased since such showing, and policy holders express a desire to be heard in opposition.

Petition by the Imperial Life Insurance Company for an order commanding Joseph F. Hambitzer, state treasurer, to deliver to relator certain securities. Petition denied.

Hoyt Post, for relator. A. A. Ellis, Atty. Gen., for respondent.

HOOKER, C. J. The relator insurance company, organized under chapter 131, How. St., asks an order under section 4227 of said chapter to compel the respondent to deliver to relator certain securities now on file in the office of the state treasurer. These securities were deposited by relator in accordance with the statute (Pub. Acts 1887, p. 33) which requires mutual insurance companies, before issuing any policies or assuming any risks, to deposit such securities with the state treasurer, to be held by the treasurer as security for policy holders in such company. How. St. § 4224. Section 4227 provides that the "securities so deposited with the state treasurer shall remain in his hands notwithstanding the company may cease or be prohibited to do business within the state, and shall only be withdrawn on the order of the supreme court, or when the officers of the company shall show by affidavit to the satisfaction of the commissioner of insurance and state treasurer that the risks for which the company remains liable, and for the security of which the same are held, are less than the securities so deposited, in which case the company may be permitted

to withdraw the surplus securities over and above the risks which then remain." The petition shows that about December 1, 1892, it was found by the officers of the petitioning company that the capital of the company had become impaired to an extent that rendered it unprofitable and imprudent to continue business, and it was decided to discontinue the further issue of policies, which it accordingly did on December 5th. 1 How. St. § 4208. It further discloses that the treasurer has a sum exceeding \$100,000 of the securities of the company on deposit, including about \$8,000 in money paid to him on a mortgage. Further, that relator has caused a computation to be made by an actuary employed in the insurance department of this state of the present value of policies issued by relator in force on December 31, 1892, and that the same amount to \$58,250, which, with outstanding claims for death losses upon deaths which occurred prior to said December 31st, of \$27,500, make a total liability on policy holders' account of \$85,752; that the total assets of relator on December 31, 1892, was the sum of \$168,608.90; that it has not the means to pay its losses without using the fund deposited, and that what it has in bank is tied up by garnishee proceedings, and it is left powerless to pay death claims that have been adjusted and are due, which amount to \$30,000; that on February 10, 1893, relator applied to the commissioner of insurance and the state treasurer to withdraw sufficient of said securities to pay the aforesaid death claims; that the matter was referred to the attorney general, and, although the attorney general and commissioner of insurance were satisfied with the showing made, and advised complying with the request of petitioner, the deputy treasurer, acting for the treasurer, declined to deliver over any of the said securities until directed by the court, and therefore relator was compelled to make this application. The petition concludes with a prayer that an order be made, as provided by the statute, directing and requiring the state treasurer to deliver and assign to relator sufficient of said securities to pay the said death claims, and also the surplus of said securities over and above the risks of petitioner remaining. Upon filing this petition an order to show cause was issued to the state treasurer, who answered, admitting many of the allegations of the petition. He admits that he has securities and moneys arising therefrom amounting to \$101,988.29, belonging to the relator. He does not admit the statement of the outstanding indebtedness, or of the assets beyond the amount deposited. He asserts that he is informed that there are divers other claims pending against the company, and that there are persons claiming interests in the securities on file by reason of endowment policies, which they affirm should be an existing liability against said securities. He further

alleges that application was made to him about February 10, 1893, by petitioner to pay over to a trustee the sum of \$34,000, to be applied to death claims of \$30,500 and other claims that might arise. He denies that application was made for simply the amount of excess over claims and liabilities, but for the delivery of an amount with which relator might pay the outstanding liabilities, and thereby reduce them, which the deputy treasurer, acting for and on behalf of respondent, refused. Respondent further alleged that he was in receipt of numerous protests from persons claiming to be policy holders in said company against the withdrawal of said securities, and that although at first the commissioner of insurance was inclined to take a bond and deliver said securities, upon further consideration he and respondent concurred in the opinion that the application of relator should be denied, and leave relator to its remedy before the court. Respondent further alleges that several policy holders desire to have a hearing before an order for the withdrawal of said securities shall be made.

The treasurer was right in declining to permit the withdrawal of the fund, both for the reason that the application contemplated by the statute was not made, and because of the critical condition of relator's affairs. From the showing here made that the relator's officers determined that its affairs were in such a condition as to render further business imprudent, the fact that it has death claims and policies outstanding, which, according to its own estimate, approximate the amount deposited, the further fact that this aggregate may be largely increased by deaths since December 31st last, and the desire of policy holders to be heard, we think that an order permitting the relator to withdraw its fund should not be made by this court. While it may be entirely satisfactory to relator to settle with such policy holders as they may admit to have claims against the company upon a basis satisfactory to the company, the policy holders, and other creditors, if there be any, have a right to be heard. We think we must leave the fund where it is until by proper legal proceedings it may be lawfully distributed. Petition dismissed. The other justices concurred.

BEDIER v. REAUME et al.

(Supreme Court of Michigan. May 31, 1893.)
VACATION OF DEED FOR FRAUD—LACHES—ESTOPPEL.

Where an heiress conveys her interest in the estate of decedent, takes mortgages in payment, and assigns the mortgages, and, after discovering that the deed has been procured from her through fraud and for an inadequate consideration, with the advice of counsel, pursues the assignee for several months to recover the amount to be paid for the mortgage, it amounts to a ratification of the

sale, and she is not entitled, eight months thereafter, without tendering the amount received by her, in a suit against the grantee, assignee, and administrator, to have the deed vacated.

Appeal from circuit court, Wayne county, in chancery; Cornelius J. Reilly, Judge.

Bill by Josephine Bedler against Denis J. Reaume, J. Fuller, and Hiram D. Willmarth to vacate a deed given by her to defendant Reaume. From a decree, complainant appeals. Affirmed.

F. A. Baker and Walter Barlow, for appellant. Griffin, Warner & Hunt, for appellees.

HOOKER, C. J. Joseph Coon died intestate, at Dearborn, Wayne county, Mich., on February 11, 1889, leaving a widow and several sons and daughters, among the latter being the complainant, who at that time lived in Montana. Defendant Fuller was appointed special administrator, and later was regularly appointed administrator of the estate. Defendant Willmarth was his bondsman in relation to the estate to a large amount. He was also one of the commissioners on claims. The estate consisted of a farm of about 400 acres, near Dearborn, some real estate in Detroit, and some personal property. The real estate was inventoried at \$78,007, and the personal property at \$1,054.45. On October 3, 1889, the complainant executed a deed of her interest in the estate to defendant Reaume, which was recorded December 7, 1889, on which last-mentioned day Reaume executed a mortgage to her upon the city property, of \$4,000. He also executed a mortgage for \$500 to Mrs. Kenney, receiving from her \$500, which, with the \$4,000 mortgage, was forwarded to complainant in payment for the deed. The \$500 mortgage was recorded with the deed; the \$4,000 mortgage was recorded by the complainant at a later date. The negotiations for the purchase were made by defendant Fuller, the administrator, who went to Montana and saw her, and completed the transaction by correspondence. Soon after these transactions the complainant came to Detroit, where she has since resided, and about the middle of February, 1890, she gave an assignment of the mortgage to Willmarth, and received \$1,000, the remainder to be paid within a short time. Not receiving it, she employed a lawyer to get it for her, which resulted in the payment to her of the whole amount. The transaction is not free from suspicion, but it clearly appears that after the complainant's return to Michigan she was informed of the true condition of the estate. She says that she saw that a fraud was being perpetrated upon her, on her return about February 2, 1890, and was told that she had sold too cheap. She appears to have made up her mind to wait, and see how things turned out. She assigned the

mortgage, and pursued Willmarth during a period of several months until he paid for it in full, and about eight months later filed her bill, without making a tender of the money received, praying that her deed be canceled, and that the premises be reconveyed to her subject to the outstanding mortgages. Having, under the advice of counsel, deliberately affirmed her contract by the sale of her mortgage, she cannot now obtain the relief prayed. *Carroll v. Rice*, Walk. (Mich.) 373; *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. Rep. 716; *Mason v. Bovet*, 1 Denio, 69; *Cobb v. Hatfield*, 46 N. Y. 533. The decree dismissing complainant's bill will be affirmed.

GRANT, J., took no part in the decision of this case. The other justices concurred.

LEIDLEIN v. MEYER.

(Supreme Court of Michigan. June 1, 1893.)

SURFACE WATER — RIGHTS OF FLOWAGE ON ADJOINING LAND — NATURAL SERVITUDE — PRESCRIPTION — ACTION FOR WRONGFUL OBSTRUCTION — EVIDENCE.

1. The natural flowage of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, though the flowage be not in a natural water course with well-defined banks.

2. When surface water from plaintiff's land has been carried off for 20 years through a ditch maintained for that purpose on defendant's land, plaintiff has a prescriptive right to the unobstructed use of such ditch for that purpose.

3. In an action for the wrongful obstruction of a natural flow of surface water from plaintiff's to defendant's land, under a declaration framed on the theory that there was an original channel through which the water flowed, which had been widened, deepened, and used for more than 30 years, a recovery could be had, whether the proofs showed a natural water course, an artificial one to which plaintiff had obtained a right by use, or a natural flow without any channel whatever.

4. Photographic views of the premises which would not have assisted the jury, which were taken over a year after the cause of action arose, and of the accuracy of which there was no proof, were properly excluded.

5. It was within the discretion of the lower court to refuse to allow the jury to take a view of the premises.

Error to circuit court, Saginaw county; Chauncey H. Gage, Judge.

Action by Michael Leidlein against George L. Meyer for obstructing plaintiff's right of drainage. From a judgment for plaintiff, defendant appeals. Affirmed.

Holden & Bradt and G. W. Davis, for appellant. James H. Davitt and Frank E. Emerick, for appellee.

GRANT, J. Plaintiff and defendant are the owners of adjoining farms, which they purchased in 1853. They are separated by a highway running east and west, known as the "Vassar Plank Road," plaintiff's lands being south, and defendant's north, of this

highway. The land over which the controversy arises is low and flat, but the plaintiff's land is a little higher than that of the defendant. This highway was constructed at a very early day, and at this point was what was known as a log road, composed of logs placed close together. Plaintiff charges the defendant with having constructed a dam along the side of the highway, causing the water to back up on his land, and injuring his crops. He avers in his declaration that, for more than thirty years, waters accumulating upon his lands, from storms and other natural causes, were carried away and drained therefrom across said highway, and upon and over the defendant's land; that plaintiff has a lawful easement and right of way across said highway, and upon and over the defendant's land, for the purpose of draining waters so accumulating; that for upwards of 35 years a sluice or culvert has been maintained across said highway, connecting with an open channel which runs through and across defendant's lands; that said channel was originally a natural one, and for more than 21 years past has been kept open by the efforts of the plaintiff and defendant and certain of their neighbors, and with the consent, knowledge, and acquiescence of the defendant; that the drainage so furnished had always been sufficient for the purpose; that there was no other outlet for the drainage of such waters; and that on May 1, 1890, defendant unlawfully obstructed such right of way and easement, thereby intercepting the flow of water, and injuring the plaintiff's crops. Defendant pleaded the general issue, and gave notice of a special defense that he was a married man, and that the land described in the declaration as occupied by him constituted a homestead. Plaintiff gave evidence tending to show that the old log road was constructed at a very early date; that a culvert was made across it; that in 1866 a plank road was constructed instead of the log road; that the culvert was reconstructed in the same place as in the old road, and has continued so till the present time; that some rods to the east and west of the culvert the land rises; that the natural flow of the water is, and always has been, from the plaintiff's lands northerly, across the defendant's lands, into what is known as "Blumfield Creek;" that the culvert was at the lowest point; that, about the year 1870, plaintiff, defendant, and their neighbors cleaned out this "water course," as they called it, across the defendant's land, making it a ditch about four feet wide and two deep; that they had cleaned it out on various occasions since, usually in the spring; that defendant filled up the ditch, and made an embankment about one foot above the level of the ground, and extending from three to four rods on each side of the ditch. Defendant denies that there was any natural water course, but it

appears from his own testimony that the water from rains and melting snows has, in its natural state, always flowed from plaintiff's land onto his own; that the ditch, which he claims is artificial, was dug before the culvert was put in the plank road; that he himself constructed it; that the ditch was connected with it; that the ditch was dug by his consent and assistance 20 years before this suit was brought, and before he obstructed it, in May, 1890. He admits the obstruction, and did not make it to prevent any damage to his land, but because plaintiff would not clean out the ditch where he (defendant) wanted him to. There is no evidence that plaintiff turned upon the defendant's land any more than the natural flow of water. At the conclusion of the evidence the learned circuit judge left but three questions to the jury, viz.: (1) The character of the dam; (2) the effect it had to raise the water upon the plaintiff's land; and (3) the amount of damages. Plaintiff recovered verdict and judgment for \$287.25.

1. From the view we take of the case, it will be unnecessary to review in detail the 86 assignments of error. If the plaintiff has stated a case in his declaration, the instruction of the circuit judge is correct. We need not refer to the decisions of other courts, where there is great conflict of authority as to the rights of the flowage of water from the upper estate over the lower. It is the settled law of this state that the natural flowage of water from the upper estate is a natural servitude which the owner of the lower estate must bear. *Boyd v. Conklin*, 54 Mich. 583, 20 N. W. Rep. 595. In that case Justice Campbell ably and exhaustively discussed both the principle and the authorities, and arrived at the conclusion that "the adjoining owners owe mutual duties,—the one to receive the natural flow, and the other not to injuriously change its condition." The facts in that case are similar to those in the present case. We are in entire accord with the rule there laid down, which seems to us to be founded in good sense and reason. It is not necessary that this flowage be in a natural water course with well-defined banks. If this were so, the plaintiff's case would be somewhat doubtful. It is sufficient if the water, in its natural flowage, spreads over the land of the lower estate; otherwise, the owner of the lower estate might construct a dam which would entirely ruin the upper estate. There is nothing to indicate that the plaintiff has increased the natural flowage of water, or has in any manner changed its condition to the detriment of the defendant.

2. As already intimated, we think the proofs hardly sustain the allegation of a natural well-defined water course. If there were such a water course, then the plaintiff's right to its use, under all the authorities, would be undoubted. This ditch, or artificial water course, was made more than 20 years before the alleged trespass was committed, by the

acquiescence of the defendant, by a common agreement between him and others interested, and at the common expense of them all. The construction of a highway rendered the culvert necessary to carry the water from the plaintiff's land. The ditch was connected with the culvert for that purpose. At various times plaintiff and others assisted in cleaning it out for the common benefit of all, including the defendant. Without objection defendant permitted this water to so flow for over 20 years. Under these circumstances we think the plaintiff acquired a right by prescription to have the water from his land flow through the ditch. *Gregory v. Bush*, 64 Mich. 37, 31 N. W. Rep. 90. That, also, was a case of the flowage and disposition of surface water. A sluice or culvert had been maintained for upwards of 25 years, through which the water had flowed onto Gregory's land through a ravine. It was there held that there was no natural water course, but that the complainant had a right by prescription. We think that case rules this.

3. At the commencement of the trial, defendant objected to the introduction of any evidence on the ground that no cause of action is stated in the declaration. The objection was not well founded. The declaration alleges (1) a natural flow from plaintiff's land over those of the defendant; (2) that plaintiff had a lawful easement and right of way for that purpose; and (3) quite minutely sets forth facts upon which the right is claimed. The declaration was framed upon the theory that there was an original channel, which had been widened, deepened, and used for more than 30 years. Under it a recovery could be had, whether the proofs showed a natural water course, well-defined, or whether it were an artificial one, to which the plaintiff had obtained a right by user, or whether there was a natural flow over the land without a channel, natural or artificial. It was entirely proper to set forth all these claims in the declaration. If the defendant had desired more specific allegations, he should have demurred.

4. There was no variance between the declaration and the proof. It requires no argument to show that the latter sustain the former.

5. Defendant offered in evidence, three photographic views of the culvert and vicinity, but they were rejected. The ruling was correct. These views are not made a part of the bill of exceptions, and therefore need not be considered. They were produced by the defendant's counsel upon the hearing, and an examination convinces us that they would have been of no assistance to the jury. Moreover, they were taken over a year after the cause of action arose, and there was no proof of their accuracy. The ruling of the court rejecting them was therefore correct.

6. At the close of the proofs the defendant requested that the jury take a view of the premises. Such view was not a matter of

right, but was in the discretion of the court. It was not, therefore, error to refuse it. We deem it unnecessary to refer to the other assignments of error. A careful examination convinces us that there is no error in the record. Judgment affirmed. The other justices concurred.

LOTH v. FRIEDERICK et al.

(Supreme Court of Michigan. June 1, 1898.)

MERGER—EQUITABLE MORTGAGE—RIGHT OF REDEMPTION—EVIDENCE.

1. A bill alleged that defendant's ancestor, F., had taken in his own name, as security for a loan, certain property bought by complainant, and that a land contract was executed by which F. agreed to sell the property to plaintiff on payment of the sum loaned. *Held*, that such arrangement, if made, was merged in a lease of the property made by F. to complainant, and in a release by which the latter, in terms, released F. "from all the conditions and covenants on his part to be performed, contained" in said contract, and the intention of which release was stated to be "to cancel and annul the said contract wholly."

2. The attorney who drew the lease and release testified that the lease was substituted for the contract by mutual consent, and that he explained to complainant that thereafter he would have no legal rights in the premises. The attorney also testified that at that time F. verbally agreed to convey the land to complainant if he should pay the money paid out by F. within the time limited by the former contract of sale, but that it was understood that this agreement did not legally bind F., and that complainant must depend on F.'s word of honor. Complainant made no offer of payment within the time limited by the contract. *Held*, that complainant was not entitled to the land on payment of the sum advanced by F.

Appeal from circuit court, Marquette county, in chancery; John W. Stone, Judge.

Bill by Gustave M. Loth against Eleanora Friederick, John Friederick, Henry Friederick, and Anthony Friederick. From a decree for defendants, complainant appeals. Affirmed.

The material allegations of the bill filed in this cause are as follows: In 1882 complainant applied to one Ignatz Friederick for a loan of \$1,100 to purchase lot No. 28 in the village of Ishpeming, and for a further loan to assist him in erecting a store building on the lot. Friederick loaned him the \$1,100, taking the title in his own name as security. Afterwards Friederick loaned him \$1,800 for the erection of the building, and, in addition thereto, complainant used \$600 of his own money for the same purpose. Complainant took possession of the property, and, after the erection of the building, moved into it, using the first floor as a store, and the second as his dwelling. February 1, 1883, Friederick and complainant executed the ordinary land contract, by which Friederick agreed to sell to complainant the lot for \$2,900, to be paid in six equal annual payments, the first to become due and payable February 1, 1884,

with interest at 10 per cent. When the first two payments became due, Friederick waived them. September 2, 1885, Friederick asked complainant to surrender the contract, and accept a new one, calling for a monthly, instead of a quarter-yearly, payment of interest. Complainant expressed his reluctance to so change the contract, and thereupon Friederick threatened to forfeit the contract, and put him and his family into the street, without a home. Fearing that Friederick would carry out his threat, he consented to change the contract, and went with Friederick to the office of A. B. Eldridge, where it was arranged that Friederick should thereafter pay the taxes and insurance, and complainant should pay a fixed sum per month, sufficient to cover the taxes and insurance, and 10 per cent. interest on the \$2,900. A release of the old contract was agreed upon, and Mr. Eldridge was to at once prepare the release and the new contract, as agreed upon. Eldridge prepared the release, but, instead of preparing a new contract, prepared a lease for six years at a monthly rental of \$30. The release was signed by complainant and his wife, and contained the following language: "We have released, and by these presents do release, the said Ignatz Friederick from all the conditions and covenants on his part to be performed, contained in a certain land contract bearing date February 1, 1883, * * * it being the intention hereby to cancel and annul the said contract wholly." The lease was executed at the same time, but it is unnecessary to state its provisions. At the same time complainant executed to Friederick a note for \$190.19, which was then due for interest, taxes, and insurance. When said note fell due, complainant resisted payment on the ground that Friederick had not delivered to him a new contract, as agreed upon. Friederick refused then to give a written promise, but made a verbal promise to convey, and acknowledged that he held the title to said premises as security, and promised that complainant might have six years in which to pay the debt, and he thereupon paid said note. Friederick died June 20, 1886. Complainant paid the rent, and, at the expiration of the lease, defendants, who are the heirs at law of Friederick, refused to recognize his rights therein, and commenced proceedings to eject him from the premises. The prayer of the bill is that defendants be decreed to convey to him, upon payment of the said debt, the lot in question. The answer admits the execution of the deed to Friederick, the contract, the release, and the lease, but denies all the other material allegations in the bill. The case was heard in the open court, and a decree entered, dismissing the bill.

W. S. HILL, for appellant. Ball & Hanscom, for appellees.

GRANT, J., (after stating the facts.) Mr. Friederick paid the entire purchase price for the land in question, after having taken an option for which he paid \$50. It is evident that he intended to convey the title to Mr. Loth, with whom he was very friendly. Mr. Loth's testimony as to the arrangement, and as to what was said between him and Friederick, is incompetent, under the statute, because of the death of Mr. Friederick. Aside from this, the evidence is not entirely satisfactory that Mr. Friederick loaned the money, and took the title as security. It is unnecessary, however, to determine this question, because the arrangement, whatever it was, became merged in the release and lease of September 1, 1885. Stronger language than that of the release could not well be used to indicate the intention of the parties to surrender all the rights that either had under the land contract, and any verbal arrangement made in connection therewith. Complainant was at that time behind in the payment of both principal and interest to an amount exceeding \$1,000. According to his own testimony he had expended upon the property but \$450. He introduced a bill of items for this, made up entirely from memory, and without a single date to show when they were furnished, or when the work he charged for was done. The proofs fail to sustain the allegation in his bill that he was induced by fraud or duress to sign the release and lease, or that there was any agreement at that time to give him a written contract for a deed from Friederick for \$2,900. The note was given by him to Friederick in settlement of past-due interest, taxes, and insurance. Mr. Eldridge, the attorney who drew the papers, was present at their execution, and took the acknowledgment of both complainant and his wife. The negotiations were entirely friendly. Mr. Eldridge explained to complainant the effect of the papers. Mr. Friederick said to complainant that he did not believe he would be able to carry out his contract, and proposed that he would give him a lease for six years, if he would surrender it. After considerable talk this was agreed to, and Mr. Eldridge went to his office, and drew the papers. He explained to both complainant and his wife that they would have no legal right in the premises after the papers were executed. Mr. Friederick then promised complainant, verbally, that if he would pay the \$2,900 within the time provided by the contract of sale he would convey the land to him. But it was expressly understood and explained that there was no legal obligation to do so, and that he must depend entirely upon Mr. Friederick's word of honor. The contract at that time had about four years to run. Complainant made no offer of payment, either to Mr. Friederick, in his lifetime, or to his heirs, at the expiration of the four years. Mr. H. O. Young, who was the attorney for complainant in the suit brought upon the note, and who is a witness

for complainant in this suit, testified that complainant then claimed that Mr. Friederick was to have incorporated in the lease an agreement giving him a certain length of time to redeem the property. Mr. Friederick denied this: "He said he wanted to make an end of the other contract. He said that is what he made the change for,—to get an end of the contract. Loth was behind in making his payments, and he wanted to end it, and still kept saying: 'If you want it now, you can have it at that price.' * * * I know I didn't tell complainant that any promise that Friederick had made verbally—a promise to give a contract—was good, and am very certain that Friederick never made any at that time, but kept refusing to." This note was due in 60 days, and was paid November 27, 1885. Complainant, upon the advice of his attorney, then paid the note. He then knew that the verbal promise was void, and could not be enforced. If, by mistake or fraud, the agreement to convey was omitted from the lease, complainant should promptly have taken steps either to reform the lease, or to surrender it, and rely upon the original contract. But, as already stated, there was no agreement to insert it in the lease. The decree is affirmed, with costs. The other justices concurred.

PEOPLE v. WHEELER.

(Supreme Court of Michigan. June 1, 1893.)

INTOXICATING LIQUORS—SALE ON SUNDAY—COMPLAINT—PREJUDICE OF JUROR.

1. 3 How. St. § 2283e, requires saloons and other places, except drug stores, where intoxicating liquors are sold, to be closed on the first day of the week, commonly called "Sunday." *Held*, that a complaint for violation thereof is sufficient which charges that defendant was the proprietor of a place where intoxicating liquors were sold, said place not being a drug store, and that on a stated day, which was the first day of the week, commonly called "Sunday," she kept her said place open, and did not keep it closed, as required by law.

2. In a prosecution for keeping a saloon open on Sunday, a juror testified on his voir dire that he had always been "down on liquor selling;" that, when sitting as a juror in a case where a liquor seller was interested as defendant or a witness, he had a prejudice against such person, and that, in the case of respondent, he could not say that such prejudice would be entirely removed. To the court he said that he would not be prejudiced against a liquor dealer by reason of his business; but he was prompted by the prosecuting attorney, who stated that it was his understanding that the juror was prejudiced, not against the person, but against the business. *Held*, that a peremptory challenge to the juror should have been allowed.

Error to circuit court, Hillsdale county; Victor H. Lane, Judge.

May Wheeler was convicted of keeping a saloon open on Sunday, and she appeals. *Reversed*.

Ware & Price and Wm. C. Chadwick, for appellant. A. A. Ellis, Atty. Gen., and Spencer D. Rishopp, Pros. Atty., for the People.

MONTGOMERY, J. The respondent was convicted of keeping open a saloon on Sunday. She has appealed to this court, and assigns numerous errors.

1. It is contended that the complaint charged no offense. The complaint charged that she was the proprietor of a place where spirituous and intoxicating liquors were by her kept to be sold, said place not being a drug store, and that she did, on the 29th day of November, 1890, that being the first day of the week, commonly called "Sunday," keep her said place, where said spirituous and intoxicating liquors were by her aforesaid sold, open, and did not keep her said place of business closed, as required by law. This charges the offense substantially as described by the statute. Section 2283e, 3 How. St., provides as follows: "All saloons, restaurants, bars, in taverns or elsewhere, and all other places, except drug stores, where any of the liquors mentioned in this act are sold or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called 'Sunday.'" This complaint was sufficient. *People v. Robbins*, 70 Mich. 130, 37 N. W. Rep. 924. The cases cited by counsel in support of the objections—*People v. Cummons*, 56 Mich. 544, 23 N. W. Rep. 215; *People v. Haas*, 79 Mich. 409, 44 N. W. Rep. 928—have no application, as they were prosecutions for carrying on the business without having paid the tax required by law, and were under other sections of the statute, requiring different averments.

2. Exception was taken to the refusal of the trial judge to allow a peremptory challenge to certain jurors on the ground of bias. The case of Juror Metcalf will be sufficient to illustrate the tendency of the rulings. On his examination on the voir dire he was asked: "Question. Have you any prejudice against persons engaged in the liquor traffic? Answer. I don't know but what I have. Q. You think you have, do you? A. Yes, sir; I might, a little of that nature. Q. Well, would you, if that appears here, would that prejudice you against her, and against her testimony, for instance, if she should be sworn as a witness? A. No, sir; I don't think it would. Q. You think you have a prejudice against persons engaged in that business? A. Yes, sir. Q. Why do you think you have such prejudice, and state that you would not have prejudice against the respondent if you should find that she was engaged in the same business? A. Well, I have always been down on liquor selling. Q. I suppose you mean by that you are down on liquor selling any way, whether it is legal or illegal; isn't that true? A. Yes, sir; it is, to a certain extent. Q. Now, you don't feel free and unbiased towards the people who are engaged in selling liquor? A. No; I don't know as I do. Q. Have you a sort of prejudice against such people? A. Yes, sir. Q. Now, if that is so, why is it

that you say here now that you would not have a prejudice against the respondent if you should learn from the evidence here, or otherwise, that she was engaged in the same business,—why would not that prejudice extend to her as it does to others engaged in that business? A. Well, I don't know but what I might be a little prejudiced. Q. Mr. Metcalf, when I first asked you about this matter, not a very great while ago, you said you were prejudiced against people who were engaged in selling liquor. Then you further said that you would not be prejudiced against this respondent if you should learn that she was engaged in the same business. Then afterwards you said, in your last answer, that you might be prejudiced against her somewhat, or a little prejudiced against her, or words to that effect. Now, is there anything special in the case which would lessen your prejudice against this respondent particularly? A. I don't know as there is. I have always been down on liquor selling. Q. Now, when you are sitting upon the trial of a case where a liquor seller is interested as a defendant or a witness, do you not, on account of the business in which they are engaged? A. Yes, sir. Q. And you can say, can you, that that prejudice would be removed entirely, or at all, in the case of this respondent? A. I don't hardly believe it would be." On a further examination by the court he somewhat modified his statement, and stated, in answer to a question by the court, that if the rights of such a person came up to be adjudicated, and he was called upon to pass upon such rights as a juror, he would not be prejudiced against them by reason of the fact that they were engaged in that business; but before this answer was given he was prompted by the prosecuting attorney by the statement, "I don't understand he has a prejudice against the person, but the business." We feel constrained to hold, under the rulings of this court in *Thelsen v. Johns*, 72 Mich. 285, 40 N. W. Rep. 727, and *Brockway v. Patterson*, 72 Mich. 122, 40 N. W. Rep. 192, that this juror was rendered incompetent by his voir dire examination, and that the challenge for cause should have been allowed. The other questions presented are not liable to arise upon a new trial. The judgment is reversed, and a new trial ordered. The other justices concurred.

JENKS v. HORTON.

(Supreme Court of Michigan. June 1, 1893.)

LIFE TENANT—LIABILITY FOR TAXES—RECEIVER.

1. The fact that a reversioner, occupying jointly with a life tenant, mortgages the reversion, agreeing with the mortgagee to pay the taxes, does not relieve the tenant of that duty.

2. A receiver should not be appointed on account of unpaid taxes in such a case.

Appeal from circuit court, St. Clair county, in chancery; Arthur L. Canfield, Judge.

Bill by William L. Jenks against Rebecca Horton to establish a lien for taxes paid by complainant on certain premises, and to compel the payment of other taxes assessed on said premises. Decree for complainant. Defendant appeals. Modified and affirmed.

The agreed facts in this case are as follows: (1) Prior to May 8, 1869, the ownership of the land was in Rebecca Horton, as widow of Nelson D. Horton, deceased, and Carlos D. Horton and Mary E. Beard, the children and heirs at law of Nelson D. Horton, and that the property was the homestead of Nelson D. Horton. (2) May 8, 1869, the said Carlos D. Horton and Mary E. Beard gave to Rebecca Horton a life lease of said premises. (3) By sundry and meane conveyances the title of Carlos D. Horton was conveyed to Frances S. Farrand. (4) May 22, 1884, Frances S. Farrand conveyed the interest acquired from Carlos D. Horton to Etta M. Beard, and upon the same day the said Etta M. Beard gave to B. C. Farrand a mortgage on the entire reversion for \$918.90, to secure the purchase price of the interest conveyed to her; that said mortgage contained a covenant on the part of the mortgagor to pay all taxes assessed upon said premises. (5) Said mortgage was assigned, June 16, 1884, to George S. Barrett, and by him foreclosed for the interest accrued and unpaid; the sale taking place February 27, 1886, and a sheriff's deed being made to George S. Barrett. Redemption expired. (6) May 7, 1887, the said George S. Barrett conveyed, by ordinary quitclaim, the said premises to B. C. Farrand and W. L. Jenks, and on the 18th day of September, 1889, the said Barrett executed in person a conveyance by quitclaim, in usual form, of the said premises to the same grantees, and the said Farrand conveyed by ordinary warranty deed, except as against existing tax claims and mortgages, his interest in the said premises to Sheldon A. Wood, on September 23, 1889, and after the filing of the original bill in this case the said Sheldon A. Wood conveyed, without covenants, his interest in the said premises to complainant. (7) September 20, 1886, the said George S. Barrett redeemed the said premises from the sale made for unpaid taxes of 1882 and 1883, paying therefor, for the taxes of 1882, the sum of \$84.90, and, for the taxes of 1883, \$71.14. (8) September 27, 1887, the said B. C. Farrand and W. L. Jenks redeemed for the taxes of 1884, paying therefor \$62.94; September 25, 1888, the said parties redeemed for the taxes of 1885, paying therefor \$68.70; September 27, 1889, the said Jenks and Wood redeemed for the taxes of 1886, paying therefor \$71.56; and all the rights of said Barrett for taxes paid were transferred to said Farrand and Jenks, and the rights of said Farrand and Jenks transferred to Jenks and Wood, and the rights of said Wood trans-

ferred to said complainant by assignment. (9) At the time of filing the original bill there were the ordinary city, state, and county taxes assessed upon said premises for the years 1887, 1888, and 1889, in all amounting to upwards of \$161, unpaid. (10) Said Rebecca Horton has occupied a portion of the premises continuously since the life lease given to her in May, 1869, and has not paid any taxes assessed thereon, beginning with the year 1882. (11) From September 1, 1885, to January 20, 1890, Etta M. Beard and her family occupied the property described in the bill as a home; Mrs. Horton also living there during the same time. The court entered a decree that the complainant had a lien upon the life estate of the defendant for the taxes of 1882 to 1886, inclusive, which had been paid by the complainant and his assignors, and for the unpaid taxes of 1887, 1888, and 1889; that she pay the amount of such taxes within 60 days after service upon her of a certified copy of the decree, and that, in default thereof, her interest be sold by the sheriff of the county, in the manner provided for the sale of real estate on execution, for the taxes to and including the year 1886; and that, in default of the payment of the taxes for the subsequent years above named, a receiver be appointed to receive the rents and profits of the premises for the purpose of paying such taxes.

A. E. Chadwick, for appellant. P. H. Phillips, for appellee.

GRANT, J., (after stating the facts.) Defendant's counsel insist (1) that complainant has no lien or right of action for the taxes prior to and including 1886; and (2) under our system of taxation complainant is not entitled to a receiver for the unpaid taxes.

1. It is conceded that the law imposes upon a life tenant the duty to pay the taxes assessed upon the land. It is insisted, however, that the personal covenant of the reversioner in the mortgage to Frances S. Farrand to pay the taxes, and the joint occupancy of the premises by the defendant and her daughter, the reversioner, operated to relieve the defendant from the payment thereof. The defendant, however, was a stranger to the agreement between the reversioner and B. C. Farrand. The fact that a reversioner mortgages his reversion, and in the mortgage agrees with the mortgagee to pay the taxes, is not of itself a release of that duty on the part of the life tenant. Had there been a contract between the defendant and her daughter by which the daughter had agreed to pay the taxes, a different question would have been presented, which we are not now called upon to determine. A purchaser of a reversion, either by mortgage or absolute conveyance, is subrogated to all the rights of the original reversioner as against a life tenant. The agreed facts contain nothing showing any

intention or agreement to release defendant from this duty to pay the taxes. The decree, therefore, covering the taxes which the complainant and his assignors have paid, is affirmed.

2. In New York the practice of appointing receivers in similar cases prevails, (Cairns v. Chabert, 3 Edw. Ch. 312; Sidenberg v. Ely, 90 N. Y. 257;) but under our method of enforcing the collection of unpaid taxes upon real estate, and under our system of foreclosing liens, we do not think the appointment of receivers the proper remedy. When it is determined by adjudication that defendant is under obligation to pay the taxes, it is quite probable that she will do so. The appointment of a receiver is a harsh proceeding, and should be resorted to only in extreme cases. In this respect the decree will be modified. The taxes, however, for the years named are past due, and, if not paid within 60 days after service upon the defendant of a certified copy of this decree, the complainant may pay them, and include the amount thereof in the sale ordered by this decree. The complainant will recover costs of court below, and the defendant costs of this court. The other justices concurred.

DAVIDSON v. KOLB et al.

(Supreme Court of Michigan. May 31, 1893.)

CONVERSION—EVIDENCE—INSTRUCTIONS.

1. In an action for the conversion of timber, and iron dogs used to hold it together, which plaintiff claimed had been stolen, defendants admitted purchasing seven pieces of the timber from one G., but denied plaintiff's claim as to the balance. *Held*, that it was not error to permit G. to testify that he was paid \$15 by defendants for the seven pieces.

2. Where, in such case, the court charges that there is evidence also that some iron dogs went along with the timber, and got into defendants' possession, and that "I think in fact defendants acknowledge that there are some of these articles in their possession, and have been," plaintiff has no ground for complaint.

3. Nor is it error to charge in such case that such articles "follow the same rule as the timber. The damage was just what they were actually worth at that time and place. I do not know how many you will find that the defendants have ever had anything to do with."

4. There is no merit in an objection to a charge, in such case, that defendants cannot be chargeable with damages on account of any part of the timber except such part as they have actually had some connection with.

5. Where, in such case, the jury are told that the burden is on plaintiff to prove his case by a preponderance of evidence, and expressly directed that they are to judge of the facts, the fact that in several instructions they are told that they must be "convinced" of certain facts to entitle plaintiff to recover is not necessarily misleading.

Error to circuit court, Bay county; George P. Cobb, Judge.

Action by James Davidson against George Kolb, Jr., and Adam Kolb, as Kolb Bros., for damages for the conversion of certain

personal property. There was a verdict in favor of plaintiff for a part only of his claim, and he brings error. Affirmed.

McDonell & Hall, for appellant. T. A. E. & J. C. Weadock, for appellees.

HOOKER, C. J. Plaintiff brought trover against defendants for a quantity of timber, and some iron dogs used to fasten the timber together in cribs, which were lost from his storing boom in the river. The defendants admit purchasing seven pieces of the timber from one McGuffin, but deny having anything to do with any other timber belonging to the plaintiff. There was testimony tending to show that timber to the amount of several hundred dollars was stolen from plaintiff's boom, and that considerably more than the seven sticks were put into defendants' building. The judge directed the jury to find a verdict for the value of the seven sticks, and for the value of as much more timber, if any, as the defendants were shown to have converted. The jury returned a verdict for the plaintiff for the sum of \$57.18, the amount which the seven sticks admitted to have been converted were shown to be worth. The plaintiff appealed.

John McGuffin, a witness sworn on behalf of the defendants, testified that he sold the seven sticks of timber to the defendants, and was permitted to state, against the objection of plaintiff's counsel, that he was paid \$15 for them by defendants. Inasmuch as the plaintiff's counsel were contending that the defendants were dishonestly converting the timber, it was proper for them to show how much they had received, and that they got it in an apparently honest transaction, instead of by theft, as seems to have been contended. It was a part of the *res gestae*.

A number of errors are assigned upon the charge. Among other things said in the charge is the following: "Now, there is evidence also—whatever you may think of the evidence—that some articles, called 'iron dogs,' went along with the timber, and got into the possession of the defendants. I think, in fact, the defendants acknowledge that there are some of these articles in their possession, and have been." Certainly this does not discredit plaintiff's witnesses, as counsel assert. And the judge proceeds as follows: "They follow the same rule as the timber. The damage is just what they were actually worth at that time and place. I do not know how many you will find that the defendants have ever had anything to do with." No error can be found in this. The judge practically told the jury to give plaintiff the value of such dogs as they should find defendant to have had. The third objection made to the charge, viz. "that defendants could not be chargeable with any damages on account of any part

of the timber except such part as they have actually had some connection with," is without merit. The judge instructed the jury that actual possession of the timber by the defendants was not necessary to create a liability, and that, if they in any way abetted or connived with Mr. McGuffin in the taking of the timber, they were liable. In several places the judge instructed the jury that they must be convinced by the evidence, e. g.: "The only evidence there is of that matter is the evidence which the plaintiff's counsel have sought to show, and may be drawn from the circumstances surrounding the case. You must take into consideration, and see whether there is enough in it to convince you that defendants had any connection with it whatever." Here the assignment of error stops in the middle of a sentence, which continued as follows: "Because, if some one was taking timber out of there nights, and removing it away, and these defendants had anything to do with it, although not personally present themselves, if they were in any way assisting or conniving with the parties that were doing it, * * * they are liable in this action." Again: "If you do not find that the proper deduction from the evidence shows you and convinces you that they had something to do with those other sticks that he says he lost, then you must throw them out of the case." Similar use of the term "convince" was made in other portions of the charge, but as a whole the charge was fair. The judge said to the jury that the burden of proof was upon the plaintiff, who must prove his case by a preponderance of evidence. He asked the jury if a fair preponderance of the evidence convinced them, and said that, if not, the other timber must be dropped out of their calculation entirely. He expressly called attention to the fact that the jurors were to judge of the fact, with which he had nothing to do, and there is no reason for a juror of average intelligence being misled. Perhaps the eleventh assignment of error is as well founded as any. The court said: "Now, the question comes up as to how particular the proof of the amount lost must be to authorize a recovery. It is claimed on the part of the plaintiff that they are not held to very close proof of the amount they have lost. All that I can say about that is—and it is included in the general rule that I have given you here—that it must be proved in such a way as to satisfy your judgment of the fact. You must be able to say, after looking over the evidence, and putting the evidence all together, and looking it all over, 'I am convinced from that evidence that there is just so much,' and the amount that you arrive at from that process is the amount for which you can render a verdict, if you can find that any verdict should be rendered at all, for that part of the property." Perhaps the statement that plaintiff could recover for

no more timber than the jury could find that he had lost would have been better than the statement that the juror must be able to say that "I am convinced from the evidence that there is just so much." It is not easy in the midst of a lengthy charge to always choose the best method of expressing an idea, or to speak with absolute accuracy, and it is enough if the language used is such that we may fairly assume it to have been correctly understood. We think the jury could not have been misled by it.

The judgment will be affirmed.

MONTGOMERY, J., did not sit. The other justices concurred.

FINK v. CHAMBERS.

(Supreme Court of Michigan. May 31, 1893.)

NOTES—BONA FIDE PURCHASERS.

Plaintiff purchased from her grandson, at a discount of 27 per cent., several notes, of like amount, given by different persons to a firm consisting of the grandson and his wife, paying therefor chiefly in other notes. The notes were executed in consideration of agreements appointing the makers agents for a patent fencing which the firm agreed should be manufactured in that locality by the firm and plaintiff's son, and out of the commissions on which the notes were to be paid. At the time these agreements were made the grandson was living with plaintiff, or with her son, near her. She claimed to have known nothing about the makers of the notes, except what her grandson told her. Though she denied any knowledge of the contracts, there was evidence that she had stated that she knew there were contracts behind the notes. *Held*, that there was evidence to go to the jury on the question of the bona fides of plaintiff.

Error to circuit court, Ingham county; Rollin H. Person, Judge.

Action by Mary Fink against Charles Chambers. Judgment for defendant. Plaintiff appeals. Affirmed.

Howard Wiest, (W. F. Atkinson, of counsel,) for appellant. E. D. Lewis, (S. L. Kilbourne, of counsel,) for appellee.

McGRATH, J. This is an action upon the following promissory note: "\$120.00. Leroy, Oct. 8th, 1888. On or before the seventh day of October, 1890, I promise to pay to F. H. Leavenworth & Co., or order, one hundred twenty and no one-hundredths dollars, value received, with interest at six per cent. per annum from Oct. 7, 1889, payable at Williamston Fence Factory. C. Chambers. E. A. Leavenworth, Witness." Plaintiff, the indorsee of the note, is the mother of H. A. Leavenworth. H. A. is the father of E. A. Leavenworth. E. A. Leavenworth and his wife, F. H., constituted the firm of F. H. Leavenworth & Co., the payees named in the note. Plaintiff and H. A. Leavenworth reside in the township of Locke, Ingham county, and F. H. Leavenworth & Co. reside in Omaha. In August, 1888, E. A. Leavenworth and

his wife spent a few months in Michigan, making their home a part of the time with H. A., and a part of the time with plaintiff. Plaintiff and H. A. lived about half a mile apart. E. A. Leavenworth, for the firm, proceeded to make certain contracts with various persons, establishing township agencies, with power to contract, build, and sell certain manufactured fences, covered by letters patent, claimed to be owned by F. H. Leavenworth & Co. To induce parties to enter into contracts of agency, E. A. exhibited to each party an agreement purporting to have been made with H. A. Leavenworth, by the terms of which a manufactory was to be established at Williamston. H. A. was to have charge of the same, manufacture the fences, fill all orders, use his own best endeavors to sell the fence, and credit the township agent with the commission on such sales. He also exhibited a "manufacturers' certificate" signed by H. A. Leavenworth, setting forth that he, for the firm, was to operate the manufactory, pay all commissions to agents appointed by F. H. Leavenworth & Co., and fill all orders, "guarantying to do all who obtained an agency for the sale of said fences fair and honest terms, and square dealing." A number of agents were appointed, one of whom was defendant. On the 7th day of October, 1888, an agreement was entered into between F. H. Leavenworth & Co. and defendant which recited the intention of establishing a permanent industry at Williamston for the purpose of manufacturing and selling said fences, the appointment of defendant as their lawful agent to sell the same, and the fact that the manufactured fence was to be kept in stock by the manufacturing agent at Williamston, and at all times to be furnished to the defendant at certain prices given, concluding as follows: "The manufacturing agent has also bound himself, by contract, to use his endeavors to sell the fence, and on all sales made by him, or at the factory, to credit the township agent wherein the fence goes with all in excess of wholesale prices. The same to be sold so that the net profits to the agents shall at all times be fifteen cents per rod, or \$48 per mile. The party of the second part, for and in consideration of the rights and privileges herein granted, does hereby agree to use his endeavors to sell the fence in the above-named territory, keep a true account of the same, and remit by draft or postal order, to the first parties, five cents per rod of the commission, after he has received all of the commission, amounting to \$360, on the first seven and one-half miles that are sold, as he has this day paid \$120 to the first parties by the execution of his obligation, the commission on two and one-half miles of fence; said two and one-half miles of fence to be sold in one year from the above-named date, as said obligation is given in consideration of the township, two-thirds interest in the business, and privileges herein granted; and, if said two and one-half miles of fence are not sold

at the expiration of one year, said F. H. Leavenworth & Co., or their authorized representatives, are unconditionally empowered to cancel said contract of said agent, and appoint another agent in his stead, returning to said agent the original obligation, of even date herewith, of \$120, or the amount thereof, but not the amount of the commission paid thereon. The second party has the right to use, on all his own lands, the fencing, at factory prices, and the exclusive management of the business in his territory, and is to report amount of business, by letter, to the first parties, at their general office, in Omaha, Nebraska, semiannually, on or before January and July. If seven and one-half miles of fence is not sold in one year, time extended two years." The proofs clearly tended to show that no manufactory was established at Williamston; that defendant had in good faith taken orders, and had endeavored, on several occasions, to have them filled, but without success; and there was abundant testimony to warrant the jury in finding that these preliminaries involved a fraudulent scheme to get possession of these notes without any consideration whatever. A number of notes were secured. Three of them were turned over to plaintiff, and one to the wife of H. A. Leavenworth. The plaintiff claimed to be a bona fide holder for value. The jury found a verdict for defendant, and made the following special findings upon questions submitted by plaintiff: "First. Did plaintiff pay a valuable consideration for the note? No. Second. Did plaintiff, at the time of her purchase, have knowledge of such facts and circumstances as would make her purchase of the note, with the intention of enforcing it, an act of bad faith on her part? Yes. Third. Did plaintiff, at the time of her purchase, know of any matters or circumstances impairing the note's validity in the hands of F. H. Leavenworth & Co.? Yes."

The sole question in the case is whether or not there was any evidence to support the findings. Plaintiff testified that she paid \$100 for this note, about two weeks after the date of its execution. On cross-examination she testified that she had at about the same time taken two other notes of this same character, made by other agents, whom she did not know, and of whose responsibility she knew nothing, except what her grandson had then told her. These two notes were of the same amounts, and were taken by her at the same discount, and for these two notes she exchanged notes which she held against other parties. One of the notes so exchanged was for \$110, and for that note she received one of the fence notes, and \$10 in cash. She claims to have had no knowledge of the business of F. H. Leavenworth & Co., or of its nature, or of the nature of the contracts which were entered into by said firm with agents; but the defendant offered testimony tending to show that on the trial in the justice court she had testified that she knew at

the time she took this note that there was a fence contract behind the note, and another witness testified that she had told him, in effect, that her grandson had agreed to protect her in the matter. F. H. Leavenworth was at plaintiff's house, more or less, during these deals, for three months. E. A. Leavenworth had made her house the base of his operations for a part of that time. The extreme ignorance which she professes to have dwelt in concerning the business carried on from her own house, by her own kith and kin, is in itself suggestive. She was contradicted by several witnesses upon material points. All of these notes appear to have been made by responsible farmers. The three taken by her were discounted at the rate of 27 per cent. The very first note taken by her, and one of the others, she exchanged other notes for, so that the apparent object of the deals was not cash. There was testimony tending to show that plaintiff knew that the note was a contract note; that there was a contract behind it. We think that there was sufficient to go to the jury upon the question of the bona fides of the plaintiff. That another had actual knowledge can only be shown by proof of facts from which such knowledge may be fairly inferred. If plaintiff knew that there was a contract behind this note, there was certainly sufficient, taking that knowledge in connection with the other circumstances, to put her upon inquiry. The consideration of this note was the agreement. Both must be construed together. The consideration having failed, plaintiff could not recover. *Sutton v. Beckwith*, 68 Mich. 303, 310, 36 N. W. Rep. 79. We find no error in the record, and the judgment is affirmed. The other justices concurred.

RUDDIMAN v. TAYLOR.

(Supreme Court of Michigan. June 1, 1893.)

HIGHWAYS—DEDICATION AND ACCEPTANCE.

Where a person made and executed a plat of land by his duly-authorized attorney in fact, and after the recording thereof sales were made of lots therein described and houses built on them, streets opened, and highway labor performed on them, such acts constituted a dedication and acceptance thereof by the public of such streets, and it was immaterial that such person did not himself sign and acknowledge the certificate attached to the plat.

Error to circuit court, Muskegon county; *Albert Dickerman*, Judge.

Action by *Mary Ruddiman* against *Michael Taylor* to recover for an alleged entry and breaking of plaintiff's close. There was judgment for defendant, and plaintiff brings error. Affirmed.

J. E. Sullivan, for appellant. *De Long & O'Hara*, for appellees.

LONG, J. This case was commenced in justice's court, and under plea of title certified to the circuit court for trial. Plaintiff

was in possession of the premises described, and had them inclosed by a fence. The defendant, who is commissioner of highways of the township of Muskegon, claimed that the parcel inclosed was a public highway, and gave notice under the statute to remove the encroachment. The plaintiff refusing to remove the fence, defendant entered the close and removed it. It appears that prior to 1873 William Ruddiman was the owner in fee of a portion of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 36, in the township of Muskegon, Muskegon county. On July 14, 1873, by his attorney in fact, he caused the lands to be platted and called "Ruddiman's Addition to the City of Muskegon." The plat was filed in the register's office of that county on that date, and shows the lands divided into 12 blocks. Between these blocks streets are platted. The parcel of land in controversy in this suit is between blocks 4 and 8, and forms a part of Lincoln street, as shown on the plat. This street is four rods wide, and extends northeasterly and southwesterly through the entire addition. The plaintiff is the owner of the entire block 4 and that portion of block 8 adjoining Lincoln street. She procured her title through several mesne conveyances from William Ruddiman, who platted this addition. The plaintiff, or some of her grantors, in the year 1879 built a fence across Lincoln street upon each side of blocks 4 and 8, so as to inclose this portion of the street within those blocks. The fences remained there until 1891, when they were taken away by the defendant. On the trial of the case in the court below the court submitted to the jury the question whether there had been an acceptance of this street by the public under the dedication by William Ruddiman in filing this plat in the register's office. The jury found in favor of the defense. The plaintiff brings error. She contends (1) that the plat was improperly received in evidence, for the reason that the certificate attached to it was not signed and acknowledged by the proprietor, but by his attorney in fact, and that the plat and the certificates in several other respects were not in conformity with the requirements of the statute authorizing the recording of plats in the office of the register of deeds; (2) that though the plat may have been sufficient to show the dedication of the street to public uses, yet there was no evidence upon which the jury had a right to pass, showing an acceptance of the dedication by the public. The plaintiff is not in a position to question the validity of this plat. It is well settled in this state that persons who have dedicated or platted lands and sold lots on streets cannot thereafter withdraw or change the use of such public streets to the detriment of their grantees, especially where the public have evinced an acceptance of the dedication by performing highway labor on such street. *Sinclair v. Comstock*, Har. (Mich.) 404; *Smith v. Lock*, 18 Mich. 56; *White v. Smith*, 37 Mich.

291; *Railroad Co. v. Helsel*, 47 Mich. 393, 11 N. W. Rep. 212. It appears that William Ruddiman owned all the lands covered by the plat. He made and executed the plat by his attorney in fact. The power to make the plat is set out in the power of attorney given to George Ruddiman. After the plat was recorded, sales were made to different parties of many of the lots, as described in the plat; and it was conceded on the argument that the parties had built upon these lots. The plaintiff's title came to her through several mesne conveyances, all of them describing the property as a part of Ruddiman's addition to the city of Muskegon. These streets were all opened and used for public travel outside of the small portion of Lincoln street between blocks 4 and 8; and as to that portion of Lincoln street it is contended on the part of the defendant that it was not only opened, but that the public had accepted the dedication by doing highway labor upon it between the time of the filing of the plat in 1873 and the year 1879, when the plaintiff claims to have fenced it in, as a part of her close, with blocks 4 and 8. The question whether the public had performed highway labor upon this portion of the street, which amounted to an acceptance of the dedication, was fairly submitted to the jury. We think there was some evidence introduced warranting the court in submitting this question to the jury. The case differs from *Bell v. Todd*, 51 Mich. 21, 16 N. W. Rep. 304. In that case it appeared that, though the parties bought in reference to the plat, the plat was never acknowledged, nor the dedication thereby accepted, nor the streets laid out, used, or capable of being used. It also appeared that these streets were not ways of necessity or convenience. In the present case this street was opened and used by the public, and highway labor performed on the part sought to be inclosed. The judgment must be affirmed, with costs.

MONTGOMERY, J., concurred in the result. The other justices concurred with LONG, J.

WYLIE et al. v. GAMBLE et al.

(Supreme Court of Michigan. June 1, 1893.)
VENDOR AND PURCHASER—FRAUDULENT REPRESENTATIONS—WAIVER BY PURCHASER.

Where the purchaser of pine lands procures an extension on deferred payments, and attempts to make contracts with the vendors for permission to lumber the land, and otherwise treats it as his own, after he knows that certain representations of the latter as to the amount of pine thereon were false, and were fraudulently made to induce the purchase, he is precluded from setting up such fraud in avoidance of the contract of sale.

Appeal from circuit court, Alger county; Joseph H. Steere, Judge.

Action by Robert Wylie and James M. Wylie against Henry Gamble, Archibald G.

Lindsay, and U. Grant Race, administrators of the estate of Patrick M. Gamble, deceased, to foreclose a contract of sale of pine land by plaintiffs to defendant Gamble. From a judgment for plaintiffs, defendant Gamble appeals. Affirmed.

Tarsney & Weadock, (W. W. Wicker, of counsel,) for appellant. William H. Sweet, (Benton Hanchett, of counsel,) for appellees.

LONG, J. This bill was filed to foreclose a contract between the complainants and defendant Henry Gamble for the sale by complainants to Gamble of certain pine lands situate in Alger county. The bill alleges that the contract was entered into September 13, 1886, the contract price being \$80,000. The cash payment was \$10,000, the balance to be paid in four installments, the last of which was due September 13, 1889. The first two installments were paid, and the last two remained unpaid, amounting at the time of the filing of this bill to \$61,646.82, together with \$875 as taxes. Lindsay and Race were made parties defendant by reason of an interest in the contract under an assignment from Gamble. The bill asks specific performance of the contract, payment of the amount due, and that defendants be foreclosed, and the lands sold under the order and direction of the court. Defendants, answering, admit the execution of the contract, and that Gamble has not paid the last two notes; admit the assignment to Lindsay & Gamble of an interest in the contract. It is alleged by the answer that defendant Gamble, at the time of making the contract, had the greatest confidence in the integrity and ability of complainants, and in any statements made by them, or either of them, in connection with pine timber or lumber business; that, before entering into the contract, complainants represented in writing to defendant Gamble that there were 19,740,000 feet of merchantable pine timber on said lands, and that such timber would overrun sufficiently to make upwards of 20,000,000 on the tract; that complainant Robert Wylie represented that he had personally examined a large part of the land to ascertain the quality and quantity of the timber thereon, and that the statement was made from his personal examination; that representations were made by complainants, both at and after the time of making such sale, that there was standing, growing, and being upon said land the quantity and quality of pine timber stated in the written estimate. It is alleged that the representations of Robert Wylie were false, and made with intention to cheat and defraud the defendants as to the quantity and quality of pine on said lands, and that, by reason of such false and fraudulent representations, Gamble was led to believe, and did believe, that the quantity and quality of timber was as represented; that the purchase price asked was

agreed upon on the basis of \$4 per 1,000, stumpage, the figures being approximately 20,000,000 feet, merchantable pine; and that in the summer of 1890, defendant Gamble caused an examination to be made of the lands, and then first learned of the quantity and quality of the pine upon the land. Defendants ask that they be credited on the purchase price for the difference between the price as stated in the contract on the basis of the estimate, and the actual quantity of merchantable pine upon the lands, which they claim, by their proof, did not exceed 12,000,000 feet. The court below found due to the complainants upon the contract, together with the interest and taxes, the sum of \$70,287.25, and awarded a decree of foreclosure and sale of the lands after July 1, 1892. Defendant Gamble appeals.

It appears from the testimony that complainants and defendant Henry Gamble are all experienced lumbermen and estimators of pine timber. The complainants were the owners of large tracts of pine lands in the upper peninsula. Defendant Gamble was also the owner, with others, of large tracts of pine lands situated there, near the lands in controversy. Correspondence commenced between the parties in reference to these lands as early as February 17, 1885. On that day, complainants wrote defendant Henry Gamble that they had the list of lands, fixing the price at \$80,000; cash payment, \$25,000 down, and balance on time. On the 9th of March following they gave Gamble the refusal of the lands for 60 days, reserving the right to sell at any time to a Mr. Randolph, as talked. Nothing further appears to have been done between the parties, so far as any writings passing between them, until the 1st of February, 1886, when they again gave Gamble the refusal of the lands for 30 days from March 1st, reserving the right to sell to other parties. Mr. Gamble testified that, a few days before the contract of purchase of the land was entered into, Robert Wylie, one of complainants, came to his office, and stated that he had been offered \$90,000 for the land, and if he (Gamble) wanted the deal he must take it at once, and he then and there agreed to take it at the sum of \$80,000; that at the time the only information he had of the quantity of the timber was an estimate given him by Mr. Wylie; that this estimate was in writing, and showed that the land contained 20,000,000 feet of merchantable pine, or within a few thousand feet of that amount. The witness was asked to state what Mr. Wylie said concerning his knowledge of the quantity of timber upon the land, and in answer said that Wylie had repeatedly told him that he had examined the land, all but about 2,000,000; that he had looked this land over himself, and it would easily cut 5,000,000 more than the estimate; that Mr. Wylie claimed at the

time that he was selling on the basis of \$4 per 1,000, stumpage; that the bargain was then closed, and he and Wylie went to the office of complainants' attorney, and gave him the minutes to draw the contract, and the contract in this case was executed two or three days thereafter. Mr. Gamble further testified that in making the purchase he did not rely upon anything else than the representations made him by Mr. Wylie concerning the quantity of the timber, and the written estimate which had been given him by Wylie. He also testified that up to September 30, 1890, his attention had not been seriously called to the fact of a large deficit in the quantity of the timber on the lands. George Gamble, the son of Henry Gamble, testified to Mr. Wylie's coming to his father's office, and stating that he had been offered \$90,000 for the land, but explained that he would only get \$80,000,—the other \$10,000 going to parties making the sale; that Wylie then told his father, if he wanted the land, he must take it at once, and that if he did he would take cash payment of \$10,000 down, and give time for the balance; that during this conversation his father asked him (the witness) to get the estimate out of the safe, which he did; that this was a written estimate which Mr. Wylie had before that time given his father; that thereupon his father stated that he knew nothing about the timber, and asked Mr. Wylie how much of it he had examined himself, and how much he had depended upon his helpers and land lookers, when Mr. Wylie said he had all but 2,000,000 of it, which was on the other side of the sheet of estimates, but that the 17,000,000 he had looked over and examined personally, and seen it all; that there was a large quantity which the estimate did not show, as they had taken the timber only down to a certain size; that the quality was the same as he had shown in the estimate; and that the estimate of amount was correct, so far as it went, but it would overrun on account of the small timber, which had not been estimated. The witness claimed that the purchase was really closed upon that occasion. Defendants also called seven witnesses, who were either land lookers, or engaged in lumbering, who testified to statements made by the complainants, or one of them, that the land contained upwards of 20,000,000 feet of merchantable pine; that these statements were made during the time complainants owned the land, and before Henry Gamble purchased. Several other witnesses testify that Robert Wylie stated that he had examined it personally with a view of estimating the quantity of timber. The average of 10 estimates made by defendants' witnesses places the quantity at 11,377,100. The average of four estimates made by complainants' witnesses places it at 16,632,000. The court below found that the tract contained less than

15,000,000, and that it was represented to contain 20,000,000 or more, though, from the view taken by the court below upon another point, which will be presently mentioned, a decree was made as prayed in the bill, so that it did not become important for the trial court to ascertain the exact quantity.

The complainants contended in the court below, and contend here: (1) That the contract of sale was completed on August 4, 1886, by an acceptance of their proposition in writing by the defendant Henry Gamble. (2) That Wylie did not make the representations claimed, and that he never turned over the written estimates to defendant Gamble until nearly a year after the contract was entered into, and that they were given to him at his request. (3) That, long prior to the time the contract was made, Gamble had caused estimates to be made, and purchased from such estimates, and not in reliance upon any statements made by complainants, or any estimates made by them, or under the written estimates. (4) That whatever complainants did say to Henry Gamble was the expression of an opinion, and so understood by Gamble. (5) That Gamble had ample opportunity to make examination of the lands before the contract was closed, and that no obstacle was placed in his way of so doing; that the price was given him on February 17, 1885, at \$80,000, and never changed; and during all the time from that date down to September 13, 1886, he was engaged in a lumber business near the lands, and was personally present in the neighborhood of the lands.

Robert Wylie testified that the complainant bought the lands on the estimates made by others, who claimed that the timber thereon would go over 20,000,000; that in his first talk with Henry Gamble he told Gamble he had not estimated the timber, but thought the tract would go from 16,000,000 to 20,000,000, and would not be surprised if it went up to 20,000,000, which was his candid judgment at the time; and that that was the only way he represented the amount to Gamble. Mr. Wylie denied the statements made by Henry and George Gamble as to the representations claimed to have been made by him just before the contract was finally signed. In explanation of the estimates being in Mr. Gamble's hands, he testified that in July or August, 1887, he met Mr. Gamble on the street, and was asked by him if he had ever estimated the timber by 40's; that he had a chance to sell it by putting in his other lands. He told Gamble he had an estimate made by 40's before he (complainant) purchased, which he would give him, but no timber under 20 inches was included, and that the timber had grown some since; that Mr. Gamble asked him then to have his man copy it off, and have him add what it had grown, which he agreed to do. When he returned to his office,

he had his clerk make a copy of the Foster estimates, and told him to add what he (the clerk) thought it had grown since, and let Gamble have the copy so made; that this was the last he ever heard of the estimates or the copy. He never saw the copy made by the clerk until he saw it on the trial of the cause. This is the paper which Mr. Gamble and his son George testified they had received just before the contract was signed, on September 13, 1886, and which George Gamble says he took out of the safe at his father's request, and produced to Mr. Wylie, and in reliance upon which, with the oral representations made by Wylie, the defendant made his purchase. Robert Wylie also denied that any price per 1,000, stumpage, was ever agreed upon. Complainants' clerk corroborates Robert Wylie,—that he was directed to add the figures to the Foster estimates, and give a copy to defendant Gamble. He says that he made the copy as directed, added his estimates for growth of timber, and mailed it to Mr. Gamble. He does not fix the time definitely when this was done. On his cross-examination it appeared that he knew nothing about timber, had never seen this land, and without any assistance had placed the figures there, swelling the amount of the Foster estimates by several million feet. Mr. Heath, a witness called by the defendants, testified that he went to examine these lands in the last of August, 1886, and that at that time he was shown by Gamble the paper called the "Foster Estimates," which had been added to by complainants' clerk, swelling the amount of the estimates to nearly 20,000,000. There is some testimony showing that Henry Gamble had the lands examined before the purchase; but it does not very satisfactorily appear that such estimates were made with intent to rely upon them in making the purchase, or that they were so thoroughly made that he was able to judge of the exact amount of timber, or that he could tell approximately the quantity. It is undoubtedly true that Gamble regarded it as a valuable tract, from what he had seen of it, and what others had reported to him, and he made representations regarding its value, and the quantity of timber, both before and after his purchase. It is also quite apparent that Gamble had ample opportunity to examine the lands before the purchase, and while negotiations were pending; but it is not so clear that he did examine them, so that he was willing to purchase without further information from the complainants, and apparently he sought such information from them before closing the contract. After the written refusals above referred to were obtained from the complainants, he wrote them, as follows: "East Saginaw, Mich., Aug. 4, 1886. Messrs. Wylie Bros.—Sirs: I take your lands at the price named, \$80,000. Have depended upon them, as I wanted to put with other lands in making trade with parties who are pur-

chasing from us. I have been greatly delayed on account of prolonged absence, but I am ready now to close the trade at any time. Very truly yours, Henry Gamble. By Harris." Complainants' counsel claims that this letter of acceptance of the complainants' proposition closed the deal; that by it all the terms of the contract were agreed upon; and that this was written before the written estimates came into the hands of Gamble, and before any oral representations are claimed to have been made, thus showing conclusively that Gamble did not rely upon the Foster estimates, as fixed up by complainants' clerk, or upon the oral representations made by Robert Wylie. It was undoubtedly upon this theory of the case that court below made its decree, for it was there found that the lands contained less than 15,000,000 of timber. We find in the brief of defendants' counsel a copy of a portion of the opinion of the court below, which it is claimed by counsel was filed in the cause, in which it is said: "A careful examination of the voluminous and conflicting testimony as to the amount of pine on the tract leads us to the conclusion that the estimates contained in Exhibit A, which is the written memorandum Gamble claims to have received from complainants, are excessive. In conversation with defendant Gamble and with others, complainants have overestimated the stumpage, as did also defendant Gamble himself, both before and after the time he states he learned of the deficiency. The testimony, taken as a whole, leads to the inevitable conclusion that the tract contains less than fifteen millions of merchantable pine. Both complainants and defendant Gamble appear to have repeatedly and invariably represented it at twenty millions feet or more. * * * The correspondence between the parties shows that on February 17, 1885, complainants, by a letter, offered the tract to Gamble for \$80,000. On August 4, 1886, he accepted the offer, in the following letter: [Here the trial court sets out the letter of August 4, 1886, written by Gamble to the complainants, and which has been set out above.]" The trial court then concludes: "This gave him, according to the dates of those letters, nearly a year and a half to look over the land, and decide whether or not he would make the purchase. His acceptance of the offer in writing made a legal, binding sale of the lands, and, except as to the details of the times of payment, concluded the sale, as afterwards embodied in the written contract. This was all prior to the time Exhibit A, the estimates defendants rely upon, was received by Gamble from the complainants."

The court was in error in supposing that the contract was fully completed and closed by this written acceptance. The price was agreed upon, but the times and terms of payment had not been agreed upon, and the clause in reference to cutting timber not yet

settled. The parties themselves did not seem to so construe it, for on August 23, 1886, we find the complainants giving defendant Gamble another refusal to purchase, in the following terms: "We hereby give Henry Gamble the refusal of our land in the upper peninsula from Aug. 29 to Sept. 7, included, providing we don't sell it by Aug. 29." We think the evidence shows conclusively that the contract was not completed until within two or three days before September 13, 1886, and was finally reduced to writing on that day. If the case rested here we should be strongly impressed with the claim made by the defendant, that he was deceived by the representation made by Mr. Wyllie, and the Foster estimates, as it would appear from the testimony and the surrounding circumstances that, while Gamble had ample opportunity to examine the lands before purchasing, yet he must have relied upon the representations of Mr. Wyllie, and the Foster estimates, rather than solely upon the information he possessed aside from that. In considering these questions, however, some force must be given to the conduct of defendant Gamble. The contract was made in September, 1886. Some time in August, 1887, Mr. Gamble, not having the money to meet the second and third payments, went to Lindsay & Gamble, of Detroit, and offered to sell them an interest in the contract. He completed an arrangement with them about that time, and borrowed \$26,000, assigning the Wyllie contract to secure the payment, and assured them that the land contained about 20,000,000 feet of merchantable pine. He at that time showed them the estimates furnished by Wyllie. With a view of making a purchase, Lindsay & Gamble employed two land lookers to examine them in the latter part of August, 1887. They made the examination, and reported their estimates at about 10,000,000 feet. Mr. Lindsay testified that he thereupon told Gamble of this report, and that he would not take an interest in the land, for the reason that the pine was not there, as he had been led to expect by the inspection of the estimates of Mr. Wyllie. Gamble also, in the fall of 1888, made an effort to sell the land to Tousey & Turner. He furnished them with an estimate. They made an examination, and found no such quantity of pine, and they declined to take it, stating to Mr. Gamble that no such quantity of pine could be found. In December, 1889, Gamble again offered the land, to Ellsmore & Hunt. They examined it, and found only about 11,000,000 feet of pine, and it is evident that Gamble knew of this estimate. Gamble's testimony shows that after all this information was imparted to him he spent much time in the immediate neighborhood of

the lands, and was several times upon them, showing them to purchasers, and yet he made no complaint to the complainants about the quantity of timber being less than represented at the time of the purchase, and treated the contract as being in full force; and on September 16, 1889, just before the last two notes became due, he obtained an extension to March 15, 1890, to meet them. He also applied to Mr. Wyllie in September, 1890, to be permitted to cut 8,000,000 feet of the logs from the land, and offered to guaranty the payment of \$40,000 on the contract before the logs should be removed. He testified that he would have carried out this agreement if these foreclosure proceedings had not been commenced. He also made a proposition to the complainants to lumber the lands just prior to the commencement of these proceedings. If he had set up the claim of fraud and misrepresentations at the outset, as soon as it came to his knowledge that the land contained much less timber than he claims he was led by Mr. Wyllie to believe it did, his claim would have some foundation for equitable relief, but his conduct from the fall of 1887 to the time the foreclosure proceedings were commenced contradicts such claim. Instead of making complaint, he still treated the land as his, obtained extension of time of payment, and attempted to make contracts with complainants for permission to lumber it, knowing all the facts which he now sets up to avoid the contract for fraud. This must preclude him from making such a defense. If he desired to rescind on the ground of fraud, it was his duty, upon the discovery of the facts, at once to announce his purpose to do so, and adhere to it. As was said in *Grymes v. Sanders*, 93 U. S. 62: "If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted." This is but the statement of the same rule laid down by this court in the following cases: *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. Rep. 716; *Galloway v. Holmes*, 1 Doug. (Mich.) 330; *Jewett v. Petit*, 4 Mich. 508; *Disbrow v. Jones*, Har. (Mich.) 102; *Street v. Dow*, Id. 427. This rule is also followed in *Schiffer v. Dietz*, 83 N. Y. 300; *Baird v. Mayor, etc.*, 96 N. Y. 567; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. Rep. 29,—and laid down in 1 Story, Eq. Jur. § 203a. The claimed defense, we think, is not made out. The decree of the court below must be affirmed.

GRANT, J., concurred in the result. The other justices concurred with LONG, J.

VILLAGE OF HIGHLAND PARK v. DETROIT & B. PLANK-ROAD CO.

(Supreme Court of Michigan. May 31, 1893.)

OBLIGATION OF CONTRACTS—PLANK-ROAD COMPANIES.

Since the plank-road act of 1848 gave to companies organized under it a right to build and maintain their gates where they may deem necessary, Pub. Acts 1879, p. 197, which prohibits them from maintaining tollgates within the limits of any city or village, is unconstitutional, as impairing the obligation of contracts; and such a company, notwithstanding the act of 1879, may erect a tollgate within the limits of a village at a place where none had previously existed. *Detroit v. Detroit & H. Plank-Road Co.*, 5 N. W. Rep. 275, 43 Mich. 140, followed.

Appeal from circuit court, Wayne county, in chancery; Cornelius J. Reilly, Judge.

Bill by the village of Highland Park against the Detroit & Birmingham Plank-Road Company to restrain defendant from maintaining a tollgate within the limits of the village. Decree for complainant, and defendant appeals. Reversed.

Frank B. Leland, (Sidney T. Miller, of counsel,) for appellant. H. E. Spalding, for appellee.

HOOKER, C. J. The defendant, a plank-road company, has for many years maintained a tollgate at a point south of the village of Highland Park, a suburb of Detroit. In consideration of the sum of \$5,000, it agreed to remove said tollgate, and thereafter to maintain no tollgate within five miles of the city hall in Detroit, and to collect no tolls of persons travelling over the portion of the road south of the gate to be established beyond said five-mile limit, except such as should pass through said gate. Complainant, through its officers, thereupon filed the bill in this cause to restrain defendant from establishing, keeping, or maintaining a tollgate within the limits of said village of Highland Park, which it alleged defendant was about to do. A temporary injunction was allowed, which upon the hearing of the case was made permanent. From this decree the defendant appealed.

The defendant corporation was organized under the general act for the establishment of plank roads, passed in 1848. The complainant relies upon an amendment to said act passed in 1879, (Pub. Acts 1879, p. 197,) which provided, among other things, that "No plank-road company organized subject to the provisions of this act shall, without the consent of the local authorities, keep or maintain a tollgate within the present or future corporate limits of any city or village." Under another provision of this amendatory act, requiring plank-road companies to discontinue and remove tollgates existing within the limits of any city or village to points beyond their limits, within 60 days after being notified to do so by the

authorities thereof, the city of Detroit attempted to compel the removal of a tollgate beyond its limits, but upon a hearing of the case the court held the law unconstitutional, in that it impaired the obligation of contracts, and sought to divest plank-road companies of property which they had rightfully acquired. *Detroit v. Detroit & H. Plank-Road Co.*, 43 Mich. 140, 5 N. W. Rep. 275. Counsel attempt to distinguish that case from the present on the ground that the defendant proposes to erect a tollgate where none had previously existed. We see no difference in principle between the cases. The plank-road act gave to the defendant a right to build and maintain its gates where it might deem necessary, which is as much one of its contract rights as to maintain an existing gate would be, while to compel it to surrender half a mile of its road in Highland Park is, in principle, exactly the same as to take two or more miles from the Detroit & Howell Company, in the city of Detroit. 1 How. St. § 3582; *Detroit v. Detroit & E. Plank-Road Co.*, 12 Mich. 333; *Chope v. Detroit & H. Plank-Road Co.*, 37 Mich. 197. The agreement by which defendant removes its tollgate, and refrains from collecting tolls over a portion of its road, does not injure the public, but may reasonably be supposed to be beneficial. It is a matter in which the complainant has no concern, and it cannot compel the defendant to yield more of its privileges because it has seen fit to yield some of them. The decree of the court below must be reversed, and complainant's bill dismissed.

LONG, J., did not sit. The other justices concurred.

BICE et al. v. MARQUETTE OPERA-HOUSE BLDG. CO.

(Supreme Court of Michigan. June 1, 1893.)

STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CONSIDERATION ACCRUING TO PROMISOR—LIS PENDENS.

1. Defendant's contract for the erection of an opera house provided that, if the contractors failed to furnish material, defendant could supply the material, and deduct the cost from the price. Plaintiffs, after furnishing certain material on the contractors' credit, refused to furnish more, and an arrangement was made whereby, on the contractors' written order to defendant, the architect was to make the estimates and payments directly to plaintiffs. *Held*, that the agreement was not within the statute of frauds, as it was not a promise to pay plaintiffs' debt, but to benefit defendant, by the immediate acquisition of materials for the building. *Calkins v. Chandler*, 36 Mich. 324, followed.

2. Where an action was commenced to recover the value of the material, the fact that plaintiffs had instituted suits against the contractors, and to enforce a lien, did not affect plaintiffs' rights, so long as the judgments therein remained unsatisfied.

Error to circuit court, Marquette county; John W. Stone, Judge.

Action by Sampson Bice, Joseph H. Bice, and Clarence E. Bice against the Marquette Opera-House Building Company to recover the value of certain building material. There was a judgment for plaintiffs, and defendant brings error. Judgment affirmed.

Clark & Pearl, for appellant. Ball & Hanscom and Egbert J. Mapes, for appellees.

LONG, J. On August 4, 1890, the defendant company entered into a contract with Wilson & Moore by which they were to erect for defendant an opera-house building for the sum of \$45,000, to be completed July 1, 1891. The contract provided that should the contractors at any time refuse or neglect to supply sufficient material of the proper quality, or fall in any respect to prosecute their work with promptness and diligence, or fall in the performance of any of the agreements on their part, such failure being certified by the architect, the owners should be at liberty to supply the materials, etc., and deduct the costs of the same from any moneys due or to become due to the contractors. The contract also contained the following provision: "Before each payment, if required, the contractors shall give the architect good and sufficient evidence that the premises are free from all liens and claims chargeable to said contractors; and, further, that if at any time there shall be any lien or claim, for which, if established, the owners of the said premises might be made liable, and which would be chargeable to said contractors, the owners shall have the right to retain, out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify them against such lien or claim, until the same shall be effectually satisfied, discharged, or canceled." Bice, Pendill & Co. were merchants doing business at Marquette, and the plaintiffs in this suit are the successors to that firm, and have succeeded to all their rights by assignment. On August 28, 1890, and after the contract above specified had been made between defendant and Wilson & Moore, that firm submitted to Wilson & Moore a proposition to furnish certain materials for the building for the sum of \$3,456.45. Their proposition was accepted, and the firm of Bice, Pendill & Co. furnished materials up to March 1, 1891, when they refused to furnish any more material upon the credit of Wilson & Moore unless the estimates for the material should be made directly to them, and the defendant should pay them directly therefor. Mr. Pendill called upon the architect, Mr. Charlton, and stated to him that they declined to furnish more materials unless they could see their way to get their pay. Mr. Charlton, who audited all the bills, advised Pendill that if he would get an order from Wilson & Moore he would have the estimates made

direct to the firm of Bice, Pendill & Co. The order was given by Wilson & Moore upon the defendants. This order became lost, and was not produced on the trial; but Mr. Pendill testified that it was an order for the architect to make the monthly estimates for materials furnished by Bice, Pendill & Co. directly to them each month, and to pay to them directly upon such estimates; that he gave this order to Mr. Charlton, the architect, who agreed to make the payments directly to Bice, Pendill & Co. The whole of the materials were thereafter furnished, and on August 1, 1891, the following certificate given:

"Marquette, Mich., Aug. 1, 1891. Bice, Pendill & Co. in account with Wilson & Moore, Contractors and Builders:

Due Bice, Pendill & Co. for furnishing materials for opera house.....	\$3,595 51
April 1. Less estimates.....	933 00
Bal.	\$2,662 51

"The above bill is correct. Wilson & Moore.

"I certify that the above material has been delivered, and has been built in the Marquette Opera-House Block, and is satisfactory. D. Fred Charlton, Architect."

Mr. Charlton testified that he did not remember distinctly about the order, but had a faint recollection that he saw it, or was told the amount. He admits, however, that he certified the bill above set out. This action is brought against the defendant company for the amount of the claim of Bice, Pendill & Co. for such materials. On the trial before a jury the plaintiffs had verdict and judgment for the amount of the claim. The court directed the jury that it was not claimed on the part of the plaintiffs that the defendant company furnished the materials from them, or Bice, Pendill & Co., as the plaintiffs' firm was then known, "but that fact might not be controlling in this case. Did the defendant make the agreement that is claimed by the plaintiffs? That is, did the defendant agree to pay direct to Bice, Pendill & Co.? If you find that such agreement was made, the court advises you that it was not within the statute of frauds." Substantially, the court advised the jury that if such an arrangement was made with the architect as plaintiffs claimed, and the architect had authority to buy materials, and pay for materials furnished by plaintiffs to Wilson & Moore, the plaintiffs might recover.

It is first contended by counsel for defendant that there is no proof to sustain the declaration. The declaration contains the common counts and a special count. The special count alleges, substantially, that the plaintiffs refused to supply materials to Wilson & Moore unless the defendant would promise and agree to pay directly to Bice, Pendill & Co. the entire amount which might accrue and be owing for such materials as the said Bice, Pendill & Co. should thereafter furnish

for the construction of said building, and to be paid to said Bice, Pendill & Co., according to estimates of the architect thereafter from time to time, etc., and that thereupon, at the request of said Wilson & Moore, and in consideration of the premises aforesaid, and that the construction of said building might not be delayed, the said defendant agreed with the said Bice, Pendill & Co. to pay to said Bice, Pendill & Co., direct, all such sums of money as might be owing them for materials thereafter furnished by said Bice, Pendill & Co. in the aforesaid Marquette Opera-House building, from time to time, according to estimates made as aforesaid. The court then sets out the furnishing of the materials according to such agreement, and that such materials were used in the construction of the building. The court stated the plaintiffs' claim to the jury substantially as the claim is laid in the declaration, and directed them that the question in the case was whether the defendant made the agreement claimed in the declaration, and, if such agreement was made, plaintiffs could recover. The plaintiffs' proofs, we think, tended to sustain this theory of the case. It is shown that the architect promised plaintiffs to make the estimates directly to them thereafter, provided they obtained an order from Wilson & Moore. Some dispute arises over this order, but the proofs tend to show that the architect was satisfied with the arrangement, and did make the estimates as agreed, and paid the April estimate of \$933, and certified to the delivery of the balance of the material used in the building, furnished by the plaintiffs. The plaintiffs' proofs tended to sustain the theory of the declaration, and the court was not in error in stating that the case was not within the statute of frauds. The defendant company had a right, under their contract with Wilson & Moore, at any time when the contractors failed to prosecute the work with diligence, to provide materials themselves, and deduct the costs from the moneys due on the contract. Before it made any payments on estimates to the contractors the defendant company had also the right to know of any liens or incumbrances which might be put upon the property, for which the company would be liable, and, if any such claims existed, to retain sufficient moneys out of any payment to meet such claims. Under these circumstances, when the defendant company found that plaintiffs would furnish no more materials to Wilson & Moore, or upon their credit, it agreed to make the payments for such material direct to plaintiffs. The case, in principle, falls within the rule laid down in *Calkins v. Chandler*, 36 Mich. 324; *Bates v. Donnelly*, 57 Mich. 521, 24 N. W. Rep. 788. It was not a promise to pay the debt of Bice, Pendill & Co., but a promise to pay, for the material put into the building, directly to Bice, Pendill & Co., and which Wilson & Moore promised they might do. As was said by Chief Justice Shaw in *Nelson v. Boynton*,

3 Metc. (Mass.) 396: "The rule to be derived from the decisions seems to be this: That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object or promise is to obtain the release of a person or property of the debtor, or other forbearance or benefit to him, it is within the statute." The object to be accomplished by the defendant company was the immediate acquisition of those materials to put into the building. The purpose was not to benefit Wilson & Moore, or to obtain any forbearance for them, but to benefit the defendant company.

Some other questions are argued and urged in this court, why the judgment should not stand. It is contended that the court was in error in leaving to the jury the question whether Charlton, the architect, had authority to make the agreement relied upon. We think the evidence justified the charge and the verdict. It was shown on the trial that the plaintiffs, before the trial of the present case, had commenced suit against Wilson & Moore, in which they had judgment, and garnished the defendant company for the price of these materials, and had also, in another proceeding, sought to obtain a lien upon the opera-house building, and that such proceedings conclusively negative the claim now made. The fact that the plaintiffs still made a claim against Wilson & Moore could not affect their rights in the present proceeding. It is not claimed that Wilson & Moore were released from their indebtedness, and a judgment against them would not bar the plaintiffs' claim against the opera-house company unless there was a satisfaction of the judgment. It was not the theory of the plaintiffs that the defendant purchased the materials of them, but that the defendant agreed to pay to them, direct, for the material, if the plaintiffs would furnish it on the contract with Wilson & Moore; and under the rule in *Calkins v. Chandler*, supra, it would not matter whether Wilson & Moore remained liable or not. We need not discuss the other errors assigned. We have examined them, and they are overruled. The judgment must be affirmed, with costs.

GRANT, J., did not sit. The other justices concurred.

PENDILL et al. v. MARQUETTE COUNTY AGRICULTURAL SOC.

(Supreme Court of Michigan. May 31, 1893.)

ESTOPPEL BY DEED—ADVERSE POSSESSION—QUESTION FOR JURY.

1. A deed reciting that the parties have by amicable arrangement divided among themselves the property of their father's estate, and that, to carry the agreement into effect, and in consideration of one dollar to each in hand paid, the parties have granted, sold, and conveyed "all their right, title, and interest"

in the land mentioned, does not carry on its face, either in express terms or by necessary implication, a statement that the grantors or their ancestors were seised of a title in fee in the premises, and hence does not estop one of the grantors from asserting an after-acquired title in fee against one claiming under the grantee.

2. In an action involving the issue as to whether defendants, and those under whom they claim, have acquired title to land by adverse possession, where there is evidence showing that the property was unoccupied during a portion of the time relied on by defendants, it is error for the court to direct a verdict in their favor, though a great preponderance of the evidence shows the possession claimed, since it is for the jury to determine, on conflicting evidence, whether there has been an actual, continued, visible, notorious, distinct, and hostile possession.

Error to circuit court, Marquette county; John W. Stone, Judge.

Ejectment by Frank P. Pendill, Joseph Neidhardt, and James E. Sherman against the Marquette County Agricultural Society. The court directed a verdict for defendant, and plaintiffs bring error. Reversed.

Hayden & Young, for appellants. Ball & Hanscom, for appellee.

HOOKER, C. J. Plaintiffs brought ejectment, claiming title in fee to the premises described in their declaration, and proved a perfect title from the federal government. The defenses made are (1) that plaintiffs are estopped from asserting their title against defendant; (2) that defendant has acquired title by adverse possession. The ancestor of plaintiff Pendill, one John Pendill, was the owner of a tax title covering the land in controversy, upon which an auditor general's deed had issued to him. After his death, plaintiff Pendill, and the other heirs and widow of the decedent, joined in a partition deed reading as follows, viz.: "This indenture, made," etc., "between Frank Pendill" (and the other heirs) "who are the sons and heirs at law of James Pendill, deceased, witnesseth, that the said parties, as such heirs at law and widow, have by amicable arrangement divided among themselves the property of said estate: Now, therefore, in order to carry into effect the said agreement and division, the said parties, in consideration of the sum of one dollar to each in hand paid, the receipt whereof is hereby confessed and acknowledged, have granted, sold, and conveyed all their right, title, and interest in and to the following described land," etc., (here follows description of land conveyed to the several parties,) "to have and to hold to each of said grantees the lands above described, as conveyed and set off to them in severalty, and to their heirs and assigns, forever." It is defendant's theory that under this partition deed, any title to the premises, subsequently acquired by Frank Pendill inured to the benefit of the grantee named in that deed, James Pendill, and through him to defendants. In the case of *Jackson v. Waldron*, 13 Wend. 178, it is said that "the prin-

ciple of an estoppel, as applicable to deeds, is to 'prevent circuity of action, and to compel parties to perform their contracts.' Thus, a party asserting in a deed the existence of a particular fact, and thereby inducing another to contract with him, cannot by a denial of that fact compel the other party to seek redress against his bad faith by suit," etc.; and this doctrine is well supported. So, where the deed imports to convey a fee, though it lacks a covenant of warranty, the doctrine of estoppel permits the grantee to have the benefit of such titles as the grantor may subsequently acquire. In the case of *Van Rensselaer v. Kearney*, 11 How. 326, it is said by Mr. Justice Nelson that "the principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance." We may then inquire whether the partition deed relied on carries on its face, by way of recital or averment, the statement that the grantors or their ancestor were seised of a title in fee in the premises, either in express terms or by necessary implication. After naming the parties, the deed recites the fact that they "have by amicable arrangement divided among themselves the property of the estate." The consideration is "one dollar to each," for which they "have granted, sold, and conveyed all their right, title, and interest" in the land mentioned. If there is an assertion of any particular interest or title, either express or by necessary implication, it is limited to that belonging to the estate, of which it may be presumed that all were equally cognizant. We see no opportunity for the application of the doctrine of estoppel to this case.

The question of adverse possession remains. Defendant purchased the premises from James Pendill, to whom this tax title was conveyed by the partition deed. Defendant claimed that it and its grantors had been in possession, claiming under this tax deed, for upwards of 10 years before this action was brought. The court instructed the jury that the evidence established such claim, and directed a verdict for defendant. The question, then, is, was the court justified in holding, as a matter of law, that the facts shown constituted adverse possession, instead of submitting the fact to the jury? In the case of *Yelverton v. Steele*, 40 Mich. 541, Mr. Justice Graves, in stating the law upon the subject of adverse possession said: "The doc-

trine which sanctions the divestiture of the true owner by hostile occupancy is to be taken strictly, and the case is not to be made out by inference, but by clear and cogent proof,"—supporting his opinion by numerous authorities. He quotes with approval the language of Mr. Justice Duncan where he says that "it must be an actual, continued, visible, notorious, distinct, and hostile possession." While it would have been the duty of the court to have directed a verdict for the plaintiffs in case of the absence of clear and cogent proof upon any one of these six requisites, he could not properly have directed a verdict for the defendant, unless each and every one of them were established by such proof, uncontroverted; for, the moment that any evidence fairly tending to disprove one of them was given, a question of fact for the jury arose, whether it was shown by plaintiffs, or appeared from the examination of defendant's witnesses. The partition deed was executed August 3, 1885, at which time James Pendill succeeded to the tax title of his ancestor. He was called upon rebuttal, and testified as follows: "Question. You made your contract with Maynard in the summer of 1886,—July or June, 1886. What do you say with respect to your drawing rent, or there being anybody in occupation of the property, up to that time? Answer. I am certain it ceased before that time." On cross-examination the same witness was questioned, and answered as follows: "Q. The slaughterhouse he [meaning the ancestor] had there was occupied by him, was it not, up to the time of his death? A. Not all the time, sir. Q. I mean he had something there, he kept something there, and looked after it. A. I don't think—not at the time—he had anything there before it burned. Q. I mean up as long as he lived. Didn't he have some tools? A. I don't believe anything was ever kept there for some time. We had no use for it. Q. He still retained charge of it, and looked after the property, I suppose, did he not? A. In what way? Q. Well, looked after it to see there were no trespasses committed on it. A. I don't believe he had been there for some years. Q. Don't you think he was out there the season before he died? A. No, sir; I don't think he had any occasion to go there. Q. He had tenants living in the house? A. I don't think he did at that time. Q. Do you know about it? A. Well, I can't state positively just when they came and went, but I know the house was vacant a large part of the time." Again, the witness Prentice, who went in 1881 to look at the old house with a view to using it as a pesthouse, says that he found the house unoccupied, windows out, and the doors down, and the floor about used up. All this was evidence bearing on the question of whether there was actual or visible or notorious or continued occupancy; and though the court may perhaps properly have felt that the great preponder-

ance of evidence showed the possession claimed, in which opinion the jurors might have concurred, it was their province to deal with the question, which could not properly be taken from them. We see no alternative but to reverse the judgment, with costs. Ordered accordingly.

GRANT, J., did not sit. The other justices concurred.

CORBY v. WAYNE PROBATE JUDGE.

(Supreme Court of Michigan. June 1, 1893.)

MANDAMUS—WHEN LIES—AUTHORITY OF PROBATE JUDGE—SETTING ASIDE ORDERS.

1. Mandamus will not lie to compel a probate judge to vacate an order admitting a will to probate.

2. A probate judge has no authority to review or set aside an order admitting a will to probate.

Mandamus by Adelaide Corby to compel the Wayne county probate judge to vacate an order admitting a will to probate. Writ denied.

Atkinson & Atkinson, (Don M. Dickinson, of counsel,) for relator. De Forest Palne, for respondent.

HOOKER, C. J. Relator asks a mandamus to compel the probate judge to vacate an order admitting to probate the will of relator's father, Richard Trombley. This order was made in 1872, by respondent's predecessor, and relator claims to have been ignorant of the proceedings until recently, and that the will is fraudulent; that a petition was filed by herself and sisters with the probate court, alleging these facts; and that the probate court did not obtain jurisdiction in the original proceedings; concluding with a prayer that the order admitting the will to probate be vacated, and petitioners permitted to contest the will. After a full hearing the probate court denied the relief prayed. Relator has mistaken her remedy. If not satisfied, she should have appealed from the order of the probate court. How. St. § 6779. It is possible that relator may have her remedy in equity, but we do not decide that question. A mandamus will not be granted where another adequate legal remedy exists. *People v. Jackson* Circuit Judge, 1 Doug. (Mich.) 302; *People v. Wayne* Circuit Judge, 1 Man. (Mich.) 359, 19 Mich. 296; *Wiley v. Allegan* Circuit Judge, 29 Mich. 487.

A further reason for denying the relief prayed is the want of power in the probate court to vacate its decree admitting the will in question to probate. In *Grady v. Hughes*, 64 Mich. 545, 31 N. W. Rep. 438, it is said that "the probate court derives none of its jurisdiction or power from the common law, but must find the warrant for all of its doings in the statute. Its jurisdiction, powers, and duties are prescribed by law. Article

6, § 13, Const.: How. St. c. 248. * * * We find no authority given to the probate court to review such decree, or set the same aside." We do not decide that the jurisdiction of equity is not broad enough to furnish relief in such a case as this is claimed to be. The writ will be denied, with costs. The other justices concurred.

BEMIS v. CONLEY.

(Supreme Court of Michigan. June 1, 1893.)

EJECTMENT—DEFENSES—RES JUDICATA.

Where a widow, in ejectment, has recovered a judgment for her dower, and in partition has the land assigned to her as her dower interest, defendant, who was a party to both suits, cannot, in a subsequent action for possession of such land, interpose a defense that he had homestead rights in the lands, and that his wife was not a party to the former suit in ejectment, as it was his duty to so plead in the former suit.

Error to circuit court, Tuscola county; Watson Beach, Judge.

Ejectment by Anna Bemis against William R. Conley. There was a judgment for plaintiff, and defendant brings error. Judgment affirmed.

The other facts fully appear in the following statement by GRANT, J.:

In 1867 certain lands, including that here in controversy, were conveyed by deed to Jane Conley and her two sons, William R. and John. September 15, 1868, William R. and his wife conveyed these lands to his sister Margaret Conley. Margaret and John were in possession. In August, 1877, plaintiff brought suit in ejectment to recover her dower interest as the widow of John Conley, who died January 21, 1869. This suit was tried, and judgment rendered in her favor October 28, 1879. Defendant took a new trial under the statute, and judgment was again rendered in her favor in May, 1881. Margaret and William R. Conley were the defendants in that suit. Plaintiff also recovered judgment May 10, 1881, for mesne profits, which judgment was appealed to this court, and affirmed. Bemis v. Conley, 49 Mich. 392, 13 N. W. Rep. 789. Plaintiff then filed a bill in chancery for partition, in which all the parties interested in the lands were made parties. The defendant, with others, appeared and defended. The suit resulted in a decree for complainant. Commissioners were appointed to partition the lands, their report was confirmed, and the land described in the declaration in this suit was assigned to plaintiff as her dower interest. The defendant refused to comply with the terms of that decree and surrender possession to the plaintiff. She thereupon instituted this action of ejectment. The sole defense now made is that the defendant had homestead rights in the lands, and that his wife was not made a party to the former suit in ejectment, and that the judgment rendered therein, and the decree, are void.

Huston & Spears, for appellant. T. W. Atwood, for appellee.

GRANT, J., (after stating the facts.) The defendant cannot now be heard to interpose this defense. He had no title of record. He occupied jointly with the one who had the record title. If he claimed to be the owner of the property, and to have homestead rights, it was his duty to interpose this claim in the former suits. It would be a reproach upon the law to permit him to now interpose a defense, after two suits and three trials, in which he might have interposed it if it were available. The injustice of such a defense now further appears from the fact that no part of the land assigned to plaintiff is upon the 40 acres where the homestead is situated, and in which, alone, a homestead right could be claimed. The judgment is affirmed. The other justices concurred.

PIERSON v. CONLEY.

(Supreme Court of Michigan. June 1, 1893.)

RES JUDICATA — ADVERSE POSSESSION — PAROL TRUST—MESNE PROFITS AND IMPROVEMENTS.

1. In a suit by the grantee of complainant in partition to recover the land awarded complainant, defendant, having been made a party to the partition suit, cannot claim title by adverse possession, as he should have set up such title in the partition suit; and, the pleadings and proof in such suit not being before the court, it will be presumed that such defense was made.

2. Possession by a tenant in common and joint tenant is not adverse where no claim is made adverse to the titles of the other tenants, and they are in possession with him; and it is immaterial that, under such circumstances, he pays taxes and makes improvements.

3. Where a conveyance of land is made to put it beyond the reach of the grantor's creditors, a secret trust and agreement, resting in parol, to reconvey, is void under the statute of frauds.

4. A party to a partition suit is estopped, in a subsequent action against him to recover land awarded to complainant, to claim compensation for improvements, such defense not having been made in the suit for partition.

5. Where defendant has had the benefit of the use of land for about 25 years, which is sufficient to offset improvements made by him, on being evicted he is not entitled to compensation for the improvements.

Appeal from circuit court, Tuscola county, in chancery; Watson Beach, Judge.

Suit by Martha R. A. Pierson against William R. Conley. From a decree for complainant, defendant appeals. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

Complainant has title by conveyance and by inheritance to 34-35 of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 36, township 13 N., range 8 E., and defendant is the owner of the remaining 1-35. In like manner the complainant also is the owner in fee simple of 1-7 of the W. 1-8 of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the same section, and also has a life

estate in 34-35 thereof, and defendant is the owner of the remaining 1-35. Complainant, being in possession, filed her bill in equity for partition, and for an order restraining defendant from interfering with her possession of the property. In 1867 the premises here in controversy, together with other lands, were conveyed to defendant and Jane and John Conley, who thereby became tenants in common. Jane was the mother of William and John. They all lived upon the premises until the deaths of Jane and John. Jane died intestate May 8, 1868, without having made any conveyance of her interest in the land. She left five children,—Margaret, William R., the defendant, John, David, and Martha, the complainant. November 5, 1868, David died, intestate and unmarried. January 20, 1869, John died, leaving a widow and four children. The widow afterwards married, and is now Anna Bemis. Neither John nor David had made any conveyance of their interest in the land. September 15, 1868, the defendant and his wife conveyed their entire interest in the land to his sister Margaret for the recited consideration of \$1,000. On the same day Margaret conveyed to defendant by deed, for the like recited consideration, certain lands situated in Caro, not far distant from the other lands. June 13, 1884, Margaret deeded to the three children of complainant certain of the land now in controversy, subject to a life estate in complainant. April 26, 1890, Margaret executed a deed of the 40-acre tract now involved to complainant. After the conveyance by defendant to Margaret, she continued to occupy the property jointly with him until her death, sometimes living in his family, and at other times occupying a house by herself, with the exception that for a short time he lived upon the land deeded to him by Margaret, and until he sold the same for \$1,050. Martha has lived upon the property since 1884. Mrs. Bemis, by ejectment and partition suits, established and secured her dower interest. These proceedings are stated in *Bemis v. Conley*, 55 N. W. Rep. 387, (just decided.) It was decreed in the partition suit that Margaret was entitled to an 87-180 part of the land, defendant William R. to 28-180, 25-180 of which was subject to the dower of Mrs. Bemis, and that Margaret Pierson was entitled to 15-180, and Ida Hyser and Albert Conley were each entitled to 25-180. Certain of these interests were also decreed to be subject to the dower of Mrs. Bemis. The land which was the subject of controversy in the suit was the S. E. $\frac{1}{4}$, and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of section 36. The defendant in his answer admits all the above conveyances, but insists that he paid the entire purchase price of the lands which were conveyed to him and his mother and brother; that the deed by him to Margaret was made without consideration, and upon the agreement to reconvey it to him at any time when he should demand it; that he

was induced to make the deed to her by her solicitation, and the advice of others upon whom he relied; that at the time of such conveyance he was under arrest on charge of having robbed the safe of the county treasurer, on which charge he was subsequently acquitted; that Margaret alleged there was a conspiracy to get his farm from him, and that she was afraid an attempt would be made to seize his farm for the money the county had lost; that being frightened and bewildered in mind, and relying upon the promise of his sister to reconvey the property, he deeded it to her; that he has paid the taxes, made valuable improvements, and has had exclusive and adverse possession for more than 20 years; that complainant knew all these things, and that she is therefore estopped from setting up any claim in the property. He also asserts that the partition proceedings brought by Mrs. Bemis are void because his wife was not made a party to the ejectment suit upon which those proceedings were based. Proofs were taken in open court, and decree rendered for the complainant.

Huston & Spears, for appellant. T. C. Quinn and F. S. Wheat, for appellee.

GRANT, J., (after stating the facts.) 1. We have already disposed of the claim that the partition proceedings are void, in *Bemis v. Conley*, 55 N. W. Rep. 387. After the dower right of Mrs. Bemis had been established by her ejectment suit, she filed her bill in equity to secure the benefit of that right. All persons interested in the land were necessarily parties to that suit. The defendant was there made a party, as were all the other persons interested. He has therefore had his day in court. Whatever defense he had should there have been made. If he claimed title by adverse possession, he should there have set it up, and had the claim adjudicated. Margaret might have joined as complainant in the partition proceedings. In a partition suit it is immaterial whether the tenants in common are parties complainant or defendant. When their rights have been determined by the decree they are res adjudicata, and can only be reviewed upon appeal. It was there determined that Margaret was the owner of the interest which she conveyed to this complainant. The pleadings and proofs in that suit are not before us, and we are not, therefore, informed whether this defense was there made; but in this collateral attack we must assume that it was.

2. The defendant has failed to make out a title by adverse possession. He was a tenant in common with other owners of the land. He had no adverse possession as against Margaret, because she was in joint occupancy and possession with him, and with the record title as against him. There was nothing in his occupancy to show any

open, notorious, and hostile possession. While his mother and his brothers, John and David, were living, he claimed neither title, interest, nor possession hostile to their interests. By their deaths he and Margaret became the owners of the greater part of the land. Their possession continued the same as before. Paying taxes and making improvements, under these circumstances, are no evidence of adverse possession or adverse claims, or of an actual ouster required by How. St. § 7812, and which is necessary to set in operation the statute of limitations. *Campau v. Campau*, 44 Mich. 31, 5 N. W. Rep. 1062; *Fenton v. Miller*, (Mich.) 53 N. W. Rep. 957.

3. Whatever view may be taken of the proofs in the case, the defendant stands in the position of attempting to enforce a secret trust resting entirely in parol, which is void under the statute. How. St. § 6179. No parol trust is claimed as against John or his mother, the two original cotenants with him. As to them he insists that he paid the entire consideration, and that therefore, in equity, the land belongs to him. Title to land cannot be divested in this manner. If he paid for his cotenants, he had a claim against them which could have been enforced either against them or their estates. It is manifest from his own testimony and that of his wife that the deed to Margaret was executed for the purpose of placing the land beyond the reach of his creditors. He made no effort to have the land redeeded to him until about two years before the death of Margaret, and when it was apparent that she could not live long. Margaret's verbal statements, therefore, if she made any, that the land was his, and that she had no claim to it, are of no consequence. If the legal title could be diverted by such assertions, the statute would be of no force or effect. Defendant had no right which he could have enforced against Margaret in her lifetime, nor against her heirs and grantees after her death. The wisdom of the statute cannot be better exemplified than by the present case, where one is seeking to set aside the muniments of title after the expiration of more than 20 years, and after the death of all the other parties to the transactions, by parol statement, in contravention of his own solemn deed. But it is difficult to reconcile the testimony of defendant and his wife with the deed from Margaret to him on the same day as the deed by him to her. It is a fair conclusion that there was a bona fide exchange of properties.

4. Defendant claims that he is entitled to the value of improvements made by him. This defense should have been made in the first partition suit, when, if it were available, each owner could have been decreed to pay his and her proportionate share. There is no evidence in this record to show that this claim was not then made and ad-

justed. But, aside from this, defendant has had the benefit of the use of the land for about 25 years, which would certainly offset all the improvements he, himself, has made. It is time that the litigation between these parties was at an end, if any of them are to receive any benefit from the land during their lives.

The decree is affirmed, with costs, and the case remanded, with directions to the court below to proceed to a partition of the land under the terms of the decree.

MONTGOMERY, J., did not sit. The other justices concurred.

MAIRE v. KRUSE.

(Supreme Court of Wisconsin. May 23, 1893.)

HIGHWAYS—ABANDONMENT.

Owing to a hill at the point where two roads came together at right angles along section lines, travel had diverged, leaving one road and entering the other a few rods from the junction. *Held*, that the parts of the roads which had ceased to be used were not discontinued and abandoned within Rev. St. § 1294, as amended by Laws 1882, c. 253, (1 Sanb. & B. Ann. St. 801,) providing that any highway which shall be entirely abandoned as a route of travel, and on which no highway tax has been expended for five years, shall be considered legally discontinued, and the land shall revert to the owners.

Appeal from circuit court, Grant county; George Clementson, Judge.

Action by Michael Maire to enjoin August Kruse from obstructing a highway. Judgment for plaintiff. Defendant appeals. Affirmed.

T. D. Cleary, for appellant. Carter & Burns, for respondent.

ORTON, J. The statement of the facts of the case is not long or complicated. Section 10 of township 1, range 2, in Grant county, lies west of and adjacent to section 11, and section 14 lies south of and adjacent to section 11, and section 15 lies south of and adjacent to section 10. The plaintiff's land lies in the northwestern central corner of these sections, and the defendant's lands lie in the three other corners. There was formerly a highway on the east and west section line between the sections, and a highway on the north and south section line between sections 10 and 11, coming down to said center corner of the sections, and there forming a junction with said east and west highway. A short distance above this junction of the two highways, at the central corners, there was an uneven elevation, or side hill, difficult to work or travel on, and the line of travel diverged to the east of the central section line north and south, and formed a junction with said east and west highway about six rods east of the section corners, and made a hypotenuse of a triangle, which was worked and used as the

highway; and the other two sides of the triangle were fenced up by the defendant when he became the owner of this small corner of land, which adjoined his lands in the other two corners as above. The said east and west highway was vacated by the supervisors of the town from the center of the sections west on the section line between section 15 and section 10. This left the plaintiff's land without any connection with a highway that was opened for travel, and he has been compelled to find an irregular way by permission across the corner of the defendant's land on the east, until he could strike the highway eastwardly. The plaintiff, it will be seen, has been thus cut off from any connection with either the north and south or the east and west highways. The plaintiff complains that the defendant, without right, keeps the highway obstructed by his fences, and will not allow him to have access to it in either direction. The defendant claims that such parts of the highway north and east from the section corner that he has so obstructed were abandoned and have been discontinued by nonuser of over five years, and that such parts thereof have ceased to be any parts of the said highways. The plaintiff prays that the court may ascertain and determine whether these parts of the two highways are still lawfully so, and, if they are, that the defendant be enjoined from obstructing them; and, if they are not, then that he may have a way over the defendant's land to some highway from necessity. This is an action in equity, and the jurisdiction seems not to have been questioned by the defendant, and therefore this case will not form a precedent. There is really only one question to be determined, and that is a question of law,—whether those parts of the highways which the defendant has obstructed are yet lawfully parts thereof. The circuit court decided this question in the affirmative, and, in effect, adjudged that the highway from the east line of section 15 on the east and west section line, or from the center corner of said sections east to the east line of the town, remains and exists as a public highway, and every part thereof; and that all persons have the right to travel thereon, without any let or hindrance whatever, from the east line of said town of Jamestown across section 14 to the east line of section 15 in said town, four rods wide; and that defendant be enjoined from obstructing it, and especially the north and south highway, in any manner whatever; and that the plaintiff recover his costs and disbursements. This is an abbreviation of the judgment, and perhaps not critically correct, but this is the substance of it. This triangle or corner contains only about half an acre of land, and the two pieces or parts of the highways cut off by it are only a few rods in length. The commencement of this deviation from the highway is stated in the brief of the de-

fendant's counsel as follows: "This corner was fenced up in 1881, and the north and south highway joined the east and west highway east of this fenced-up corner. This corner was cut off because it was so side-lining that instead of the travel running up to the section line, and running along a side-lining road on a steep hill, it turned at the foot of the hill, and cut off that corner." This is the beginning and cause of the nonuser of these small parts of the highway, which the learned counsel of the appellant claim are now discontinued and abandoned, by virtue of section 1294, Rev. St., as amended by chapter 253, Laws 1882, (1 Sanb. & B. Ann. St. 801.) The language of this statute is: "Any highway in this state which shall have been, or may hereafter be, entirely abandoned as a route of travel, and on which no highway tax has been expended for five years, shall be considered legally discontinued, and the land of said highway shall revert to the owners," etc. The language of the Revised Statutes is, "every public highway," etc. It is quite evident that this language does not mean that any part of a highway, however small, that has not been traveled or worked for five years, shall be considered legally discontinued. It is a highway, *eo nomine*, as a generic term, to which the statute relates; at least enough of any public road or thoroughfare to be called in ordinary parlance a "highway," or as is meant by the statute when it provides for laying out a "highway." This highway, as such, has not ceased to be traveled. It is traveled all the time, with this slight variation. It is the same highway as it was before the defendant cut off the plaintiff from its use at this place by fencing it up for a few rods. The highway runs along that side hill, which the town, on account of the expense, failed and neglected to excavate and grade so that it might be traveled and used; and the traveling public was compelled to go around it. The highway must be "entirely abandoned as a route of travel." The abandonment of a highway as a route of travel implies that such highway is not needed for travel, and therefore disused and abandoned as a highway. But this highway, even along the side hill, is needed as much as ever, and it was the duty of the town to have made it fit for travel. Whatever abandonment of this little piece of the highway there was consisted in the neglect of the town to make it passable; and the public has been compelled to go around it. Such a construction of the statute as is claimed is utterly unreasonable, and would work great mischief to our highways. By what authority was the hypotenuse of that triangle made a highway? The traveling public was forced to go around that side hill, and that is all there is of it. That does not make it a part of the highway by any competent authority. The legal highway runs along the section

lines, and there it was and is the duty of the town to make it passable throughout. It would be the same if the town should neglect to open and make fit for travel only two rods of a highway, or less than four rods wide, and it should be used that way for over five years; and this is common in many of the newer portions of the state. Are such excluded portions of the highway forever abandoned and discontinued as any part of the highway? It is merely the neglect of duty on the part of the town, and, the longer such neglect, the more imperative the duty becomes to improve and work the highways and make them fit for travel on the lines established by authority throughout. The principles established in *Reilly v. City of Racine*, 51 Wis. 523, 8 N. W. Rep. 417, in *Childs v. Nelson*, 69 Wis. 125, 33 N. W. Rep. 587, and in *Witter v. Damitz*, 81 Wis. 385, 51 N. W. Rep. 575, govern this case. The circuit court properly held that the lawful highway is still on the section lines. There is not any merit in the defense. The plaintiff has been wronged a long time by being fenced off from the highway, and it is time that he should be restored to the use of it. On principles of law as well as equity it should take more than five years for such a wrong to grow into a right. The judgment of the circuit court is affirmed.

RAMSEY et al. v. HOLMES ELECTRIC PROTECTIVE CO.

(Supreme Court of Wisconsin. May 2, 1893.)

DAMAGES FOR BREACH OF CONTRACT — PROSPECTIVE PROFITS — EVIDENCE — ADMISSION OF AGENT — COMPETENCY.

1. Plaintiffs contracted with defendant to solicit orders for its electric protective system and furnish all necessary appliances for use, in connection with such offices of plaintiffs as might be thereafter designated; plaintiffs agreeing to maintain such apparatus, and serve defendant's customers according to the contract between defendant and such customers, and to receive as compensation 50 per cent. of the rentals. The contract was for three years. *Held*, that where defendant, after procuring several customers, refused to go on with the contract, though the profits were wholly prospective, plaintiffs were entitled to damages.

2. Evidence of the cost of running such business was competent, in estimating the amount of damages, to show whether or not any profits were made.

3. The contract provided that, at the expiration of the three-year term, plaintiff should have an option to renew it for five years. *Held* that, there being no evidence that such option had been converted into a contract, it was error to allow damages for profits which might have accrued during the additional term of five years.

4. It was error to admit in evidence a letter from defendant's manager to plaintiffs' attorney brought, stating that he was sorry the business had ever been taken out of plaintiffs' hands, in that it was not within the scope of his authority to make such statement, it being in relation to a past transaction.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Thomas Ramsey and another

against the Holmes Electric Protective Company. There was judgment for plaintiffs, and defendant appeals. Reversed.

The other facts fully appear in the following statement by PINNEY, J.:

The plaintiffs, Ramsey and McGuckin, partners under the name and style of the Milwaukee District Telegraph Company, brought their action against the Holmes Electric Protective Company to recover damages for the breach of a contract made between the parties, by which the latter company agreed to solicit orders for the use of its protective system, furnish all apparatus and materials pertaining thereto, right of way for wires excepted, and the labor necessary to put it in effective operation, in connection with such offices of the plaintiffs as might thereafter be designated by the parties to the contract, and the plaintiffs agreed to maintain said apparatus, connections, and appliances in good order, serve the users thereof promptly and properly, in accordance with the contract between the company defendant and its customers, (a copy of which was annexed to the contract between the parties,) and collect the rentals, and keep the accounts incident to the conduct of such business, and pay over to the company defendant one-half of the gross sum that might be derived from said rentals monthly, and accept the other half of the rentals as full compensation for their services. All contracts were to be made in the name of the company defendant, and the entire plant pertaining to the service was to continue to be its property, and the plaintiffs were to grant it the right of way for its wires as it might be required on such fixtures, or otherwise, as were or might be controlled by the plaintiffs, provided the use of such fixtures should not interfere with the business of the plaintiffs. The agreement was to remain in force for the term of three years from May 15, 1886, at the expiration of which the plaintiffs were to have the privilege of a further continuance of five years, and thereafter, until ninety days' notice in writing by either party to the other of its desire to discontinue the same; and the agreement was not to be transferable without the consent of both parties. The plaintiffs alleged that they entered upon their employment September 3, 1886, and discharged all its duties until October 3, 1886, when the company defendant refused, and still refuses, to allow them to perform all the conditions of the agreement on their part, although they were, ever since have been, and still are ready and willing to do so. The defendants answered, putting these matters in issue. At the trial, evidence was given tending to show what amounts had been paid by the customers of the defendant company for its protective service, which payments had been in the main made to the Wisconsin Telephone Company, which had its office in the same building as the Western Union Telegraph Company. One

McLeod, as a witness for the plaintiff, testified, in substance, that the Wisconsin Telephone Company operated the defendant's system for it from October, 1886, to December, 1887, and, against the objection of defendant, was allowed to testify that the gross receipts for one year of that time were \$1,321.30; that the expense of operating it might have been \$10 a month. He did not include in this, care, risk, and responsibility independent of any cash disbursements, and said he did not know how to calculate that factor in the question, and, being asked to give his best judgment, the court directed him not to answer. He was asked if it would be something, and the court refused to permit him to answer. He was asked what, in his opinion, would be the expense of caring for the electrical galvanometer mentioned in the contract, but the witness was not allowed to answer. Evidence was given to show other gross receipts by the defendant from its customers down to March, 1892. One of the plaintiffs testified, in substance, that they started to perform the contract, and got the apparatus, etc., in working order in their office at 89 Michigan street, in the offices of the Western Union Telegraph Company. That a Mr. Roome, on behalf of the defendant, came into the office in September, 1888, and said he had orders from it to take the apparatus out; that the president had made a new contract with the Wisconsin Telephone Company; and they took the apparatus to the Wisconsin Telephone Company. That the plaintiffs were anxious, ready, and willing to go on with their part of the contract at the time they did this. That they forbade the plaintiffs going on with their work. That the defendant offered them the contract in 1890 under the same arrangements under which it is carried on now by Mr. Weller. That they did not take it, because Mr. Weller would not allow them to take it. "He put us out of the office." Considerable testimony was given on the subject of the right of the plaintiffs to keep said apparatus in the office of the Western Union Telegraph Company, and it appeared, in substance, that in the first instance they had permission of the officers of that company to keep it there, but it was subsequently, and before the apparatus was taken out, revoked. They had a mere license, and the plaintiffs were under contract with the said telegraph company to deliver, day and night, including Sundays and holidays, with diligence, etc., all telegraphic messages received by that company at the main office, or such other places as it might elect, in the city of Milwaukee, and turned over to them for that purpose; plaintiffs agreeing to continue to furnish and pay the salary of a clerk in the telegraph company's main office, who should receive messages through the telephone in said office over the telegraph company's lines. The provisions of these agreements were to be in force from

the 1st of April, 1884, thereafter, until after written notice had been given by one of the parties thereto of its intention to terminate the same. They ceased to work in the office of the telegraph company in December, 1887. One of the plaintiffs testified that no other place than the Western Union Telegraph Company was ever designated by the plaintiffs to the defendant as a place to carry on this business; that the business did not necessarily require a night watchman, but a night clerk, there; that it required some one to watch the instrument in the nighttime, and also some one to look after the lines; that, before then, there had never been any business of this kind carried on in the city. He identified the letter said to be a proposal for again employing them, dated November 22, 1888, signed by H. C. Roome, general manager of the defendant, addressed to the plaintiffs. It was offered in evidence on behalf of the plaintiffs, and is as follows: "Gentlemen: We are thinking of removing our system of protection from the Wisconsin Telephone Company. Will you take it under the same terms as they have it? The terms are the same as in your contract; that is, with the exception you are to receive sixty per cent. of the rental instead of fifty per cent., and to furnish lines instead of us. Have you any means of crossing the Milwaukee river other than that of the Western Union cable? I understood from you, when I was there, that the wires in that cable were all in use. I am sure, if you take hold of it, you can make it a success, and, as you are aware, I am very sorry that it was ever taken out of your hands. An early reply will oblige. Yours," etc. The plaintiff Ramsey testified that it would be necessary to have some one to look after the lines in order to carry out the contract; that it required some one to be there to receive the signals as they came in. No evidence was given to show that the plaintiffs ever elected to extend said contract beyond the three-year term specified in it. The testimony showed that the defendant had but two contracts when the business was commenced. On behalf of the defendant, evidence was given to show that the defendant did not make, or attempt to make, any arrangement with the telephone company for transacting its business until after they were required to get the apparatus out of the office of the Western Union Telegraph Company, and that previous to that time no arrangement had been made with any other person for any office in which to set up the apparatus and carry on the business; that, on the 8th of September, plaintiffs told the defendant's general manager that the Western Union Telegraph Company refused them permission to use its offices and poles for the apparatus and wires necessary in their business; that he went immediately to Chicago to see Mr. Tubbs, the superintendent, and Gen. Stager, his superior officer, to obtain

permission, and each of them refused to give it; that he afterwards saw one of the plaintiffs, McGuckin, and "explained to him the result of that interview, and requested him to allow me to take out the apparatus which belonged" to the defendant. Mr. Tubbs, the superintendent of the Western Union Telegraph Company, testified that he had ordered the machinery to be taken out of the office of that company, and directed that it be not permitted in the office. In 1886, plaintiffs were in the employ of the Western Union Telegraph Company. McGuckin was delivery clerk, and Ramsey was receiver of messages from the public at the counter, and cashier, and they had no office in the city of Milwaukee. The defendant offered to show, at the time the instrument was put in there, that there had not been any established business in the city of Milwaukee by the defendant, or any other company, of a protective system of this kind; that the Holmes Company had no such business in the city prior to that time; and that this system of protection, as testified to by the plaintiffs, in 1886 was an entirely new business in the city. These several tenders of proof were objected to by the plaintiffs, and the objections were sustained, but proof was allowed to show that the plaintiffs had no established business of the same kind or nature in the city of Milwaukee. Mr. Weller, a witness for the defendant, who testified that he was familiar with the business, was asked, "What, under such a contract as has been offered here in evidence between the plaintiffs and defendant, are the legitimate expenses of carrying on that business?" but objection thereto was sustained. In like manner it offered to show that it would be necessary to employ an electrician to care for the galvanometer. The defendant also offered to prove by Mr. Weller, who, it appeared, was familiar with the cost and method of operating such business, what would be a reasonable sum to be allowed for the care of the instrument or galvanometer; also whether it would be necessary to employ the line man and night watchman to take care of the instrument, and if he knew what would be the reasonable and legitimate expense of conducting the business under this contract between the plaintiffs and the defendant. These several offers were objected to, and the objections sustained. The plaintiff McGuckin, being recalled, presented a computation, stating that their share of the amount which would have been earned under these contracts from the 15th of May, 1886, to the 4th of August, 1888, when the suit was commenced, was \$765.25; and that the amount that would have been earned from the 15th of May, 1886, to the 15th of May, 1890, would be \$2,092.50, and their proportion would be \$1,046.25; that the gross amount up to May 9, 1892, was \$4,221, and that their share would be \$2,110.50. All of this proof was allowed, against the defendant's objection.

The court instructed the jury that, under the provision of the contract that "such offices may be designated by the parties hereto," the contract implies that either of these parties had the right to designate where this business should be carried on, and, if the plaintiffs failed to secure the right to remain in the Western Union Telegraph Company's office, then it was incumbent upon the plaintiffs and the defendant both to designate an office where the business should be carried on and the apparatus located; that, if the plaintiffs failed to do so, then it was the duty of the defendant to designate the office, and, if it failed to do so, then it was no excuse for its breaking the contract, and letting the contract to other parties, and taking it away from the plaintiffs; that, if the plaintiffs kept and performed the contract, or were ready and willing and able to do so, the contract, so far as they were concerned, existed during the whole term of five years, even though it were broken on the part of the defendant, and the plaintiffs had a right to claim the benefit of all subcontracts that were taken under that contract during its continuance; that the jury were to ascertain from the evidence what profits would have been made by the plaintiffs under these subcontracts if they had been permitted to continue in the business, and that those profits they were to assess from the time of the commencement of the contract during the whole continuation of the term of five years, and that they were to ascertain what those profits were from the evidence. The court was requested to instruct the jury that they were to determine what would have been the necessary expense in conducting the business in the office of the Western Union Telegraph Company, and, in addition to that, to determine what would be a reasonable allowance, under all the testimony, for the release of the plaintiffs from the care, risk, and trouble in attending to said business, and for the less time engaged by the plaintiffs, and to take into consideration these facts in determining what amount of damages should be assessed against the defendant if the jury found against it. The court refused this instruction, but told the jury that they might take into consideration all these facts in determining what would have been the profits from these contracts. A verdict was found for the plaintiffs in the sum of \$1,545.02. A motion for a new trial was denied, and judgment was given on the verdict for the plaintiffs, from which the defendant appealed.

Glenway Maxon, for appellant. Henry L. Buxton, for respondents.

PINNEY, J., (after stating the facts.) 1. It is contended on behalf of the appellant that the plaintiffs' claim is based wholly upon the loss of prospective profits, and

that the contingencies were so numerous, and the uncertainties so great, that prospective profits could not be allowed as damages; and it rested its defense in this regard upon the ground that the right of the plaintiffs to use the office of the telegraph company for their business was that of mere licensees, and might be terminated at any time, as it was in fact, in October, 1886, and that no business such as the one in question had ever been established or carried on in Milwaukee, and the profits that might be made depended largely upon the skill and fidelity of the persons operating the business, and the confidence the public might have in their integrity and ability. If this contention could be sustained, and the defendant violated the contract, the defendant would still be liable for nominal damages, at least. By the contract the defendant was to solicit and procure the orders and subcontracts of customers, and the plaintiffs were certainly entitled to receive 50 per cent. of the gross sum that might be realized by performing those already secured. To the extent that profits were realized in the execution of these contracts, three in number, damages might and should be awarded to the plaintiffs; and their claim in this respect rests on a plain and reasonable foundation, and is not fairly subject to the objections of the defendant. After the license to use the office and facilities of the telegraph company where the plaintiffs were employed on salaries as clerks had been terminated, there was no joint action of the parties in respect to selecting or securing by the plaintiffs a new office and other facilities for carrying out the contract. The evidence does not show that the plaintiffs were ready and willing, or offered, to make any other provision in this respect, but said they would sue the defendant. Probably such failure on their part, after reasonable notice and opportunity to perform, might have been treated as a withdrawal from the contract on their part, and as ground for rescinding it. It does not seem reasonable to hold that the defendant alone was entitled or bound to select and procure another office and other facilities. It was their duty to provide these, but both parties were entitled to be consulted in respect to their character and location. The subject-matter of the contract was such that any unreasonable delay would operate as a violation of the defendant's contracts with its customers, who were entitled to prompt and continuous service. On the other hand, the defendant would be in fault if it withdrew from the contract, and entered into another with the telephone company, without notice and reasonable opportunity to the plaintiffs to secure other means or facilities on their part for performing the contract. After the alleged breach of the contract on the part of the defendant, and while operating under its new contract with the telephone com-

pany, the defendant secured, prior to the commencement of this action, five other customers and like subcontracts, and still others thereafter, before the expiration of the three-year stipulated duration of the contract between the parties, and in performing these contracts the plaintiffs claim, and have been allowed, damages for the supposed profits made by the telephone company as in some sense a criterion by which the profits which the plaintiffs might have made may be estimated. Whether this claim can be sustained is a question open to considerable doubt, and which we will not now determine, as it was not very fully discussed at the argument. In the case of *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. Rep. 500, the subject of prospective profits as damages is fully considered, and many cases on the subject are cited. The evidence shows that the plaintiffs went about other pursuits after their license to use the office and facilities of the telegraph company was terminated, and the evidence upon which to make an assessment of profits was very meager. It is evident that it would have cost the plaintiffs much more to carry out their contract in any other room or place than that where they were then employed on salaries by the telegraph company. The proper measure of damages would not in any event be 50 per cent. of the gross receipts from such contracts. That portion thereof which could be fairly called "profits" would be that which would remain after deducting the cost and expense of performing the contract on their part. These observations in respect to the number of contracts upon which the plaintiffs may recover substantial damage, as well as in respect to the rights and duties of the parties when the license of the plaintiffs to use the office and facilities of the telegraph company was revoked, are made with a view to elicit further discussion upon the new trial in respect thereto, which we grant upon other grounds, and not with a view of concluding the parties.

2. Evidence was tendered to show the fair cost and expense of performing the contract in question in respect to all the subcontracts mentioned, and was excluded. Without resting our conclusion in respect to the ruling of the court upon the examination of Mr. McLeod, we refer to the offers to prove by Mr. Weller, manager of the telephone company, who testified that he was familiar with what it would cost to run the business which plaintiffs had undertaken. The court refused to permit him to testify what were the legitimate expenses of carrying it on, whether it would be necessary to employ an electrician to care for the galvanometer, what would be a reasonable amount for the care of that instrument, whether it would be necessary to employ a line man and a night watchman, and whether, under Mr. Weller's management of the business contemplated

by the contract, there had been any profits. The exclusion of the evidence thus offered was error. If admitted, it would have had a material bearing on the question of what ought to have been allowed as profits by way of damages. The burden of proving what profits had or might have been realized was on the plaintiffs. They could not recover as profits the entire half of the gross receipts. The court properly instructed the jury to this effect, but the defendant was denied the benefit of this ruling by the exclusion of the evidence offered by it, tending to show what profits the plaintiffs had really been deprived of. The plaintiffs had no right to assume that gross receipts were the measure of profits that were or might have been gained, and it was their duty to have produced proper evidence on that subject. A careful examination of the case fails to show that they offered any evidence on this point at all, beyond proof of gross receipts. It is plain that these rulings are erroneous, and that the plaintiffs failed to produce evidence justifying so large a recovery.

3. The court left it to the jury to give a verdict not only as for profits on all the subcontracts mentioned for the three years during which the contract between these parties was to continue, but for the five years thereafter, during which period the plaintiffs had an option to extend the contract. There is no proof tending to show that the plaintiffs ever exercised this option, or elected to make the contract operative beyond its legal term. This mere option as to the five years mentioned was not a contract, but might have been made one by the choice or election of the plaintiffs; and, in the absence of any proof showing that this option was converted into a contract, no recovery can be had for future profits, as damages, which might be realized after the expiration of the three years named in the contract.

4. It was error to permit the plaintiffs to read in evidence the letter written November 22, 1888, after this action was commenced, by Roome, the defendant's general manager, to the plaintiffs, proposing to enter into another contract with them on more favorable terms, and to remove the system from the telephone company, and in which he said: "I am sure that, if you take hold of it, you can make it a success, and, as you are aware, I am very sorry that it was ever taken out of your hands." This letter was a written statement made to the plaintiffs, not while he was performing any act for the defendant company, or as a part of any communication which it was his duty to make for the company as its manager. It was not within the scope of his authority to make statements, oral or written, in relation to past transactions of the defendants, and with which it did not appear that he had any present concern. It is easy to understand

that this letter may have had a prejudicial effect on the rights of the defendant. That it was improperly admitted is clear. *Mechem, Ag. § 539; Randall v. Telegraph Co., 54 Wis. 140, 11 N. W. Rep. 419; Railroad Co. v. Finney, 10 Wis. 330; Livesley v. Lasallette, 28 Wis. 41.* For these reasons the judgment of the superior court must be reversed.

The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded to that court for a new trial.

BROWN v. BROOKS et al.

(Supreme Court of Wisconsin. May 23, 1893.)

FIRE—BURNING HAYSTACKS — REASONABLE CARE — QUESTION FOR JURY.

Defendants, who owned hay about a mile from plaintiff's stacks, in order to protect them from prairie fires, burned the stubble around them. The fire escaped, and burned plaintiff's hay. There had been fires raging in the vicinity for days, and plaintiff saw the fire which escaped from defendants' stack more than 24 hours before it reached his hay. He apprehended danger, but he did not burn or mow the stubble around his stacks, but attempted to haul his hay away. *Held*, that the question whether plaintiff used reasonable care to protect his hay was for the jury, and that it was to error to charge that his failure to remove the stubble was not negligence.

Appeal from circuit court, Fond du Lac county; N. S. Gilson, Judge.

Action by George W. Brown against Clinton Brooks and others for the value of hay destroyed by fire. Judgment for plaintiff, and defendants appeal. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action to recover the value of hay and grass destroyed by fire. A sufficient statement of the facts is as follows: Horicon marsh covers an area of about 15 miles in length by 3 miles in width, in Dodge county, and is used only for the raising of hay. The season of 1891 being dry, a number of farmers in the vicinity leased portions of the marsh for the purpose of cutting the hay thereon. The plaintiff leased something over 60 acres for this purpose, and cut the hay, and stacked it, thereon, to the amount of about 40 tons. The defendants, Brooks, Fairbanks, and Odekirk, also severally leased tracts of land upon the marsh, and cut and stacked hay thereon. The defendants' stacks were in close proximity to each other, and were about a mile south of plaintiff's stacks. The defendants were not jointly interested in the hay, but each cut and stacked his own hay. The plaintiff's stacks were destroyed on Saturday, September 26, 1891, by a prairie fire which swept over the marsh from the south. The evidence shows that there had been fires on the marsh for some days before the last-mentioned date, though at some distance from the stacks of all the parties. On Thursday of the same week the defendants, Brooks, Fairbanks, and Odekirk, each mowed

a large belt of grass around their respective stacks, and at night they proceeded to burn a wide belt of stubble and grass around each stack, for the purpose of protecting them against the fires which they could see at some distance to the south. They seemed to have helped each other at this work, and had a number of men and boys to assist with water, and wet bogs, etc., to fight the fire, and keep it within bounds. They commenced with Brooks' stacks, then took Fairbanks' and lastly Odekirk's. Before commencing at Odekirk's stacks, Brooks was obliged to leave, and did not participate personally in the Odekirk fire. There was some evidence of admissions made by Brooks to the effect that there was an agreement among defendants to burn around all their stacks, thus making it a joint enterprise. The burning was successfully accomplished, and all the men, except Odekirk and his hired man, left the grounds at about 3 A. M. Friday, the fires being apparently entirely out. At about 7 A. M. Friday, Odekirk discovered some fire smouldering in the peat south of his stack. He fought it all day Friday, with the aid of two men, and at 8 o'clock Friday evening went home, supposing that the fire was entirely out. During this day the wind was in the northwest, and the fire consequently worked to the south, away from plaintiff's stacks. The plaintiff testifies that he saw this fire spreading from Odekirk's stack on Friday. He went to his stacks at about 10 o'clock A. M. He was informed in the morning that there was a fire down around Odekirk's stack, and that it had got into the peat. He thought there was danger, and he thought he would get his hay out on that account. He did not attempt to burn or mow around his stacks, but, with several men and teams, proceeded to haul his hay away. On Saturday the wind had shifted to the southeast, and a fire was seen approaching from the south, which destroyed plaintiff's stacks at about 2 o'clock P. M. Plaintiff had removed several loads on Saturday morning, but had not attempted to burn around the stacks, or take any other means of prevention, except to attempt to plow a single furrow. There was some evidence on the part of the defense that the fire which destroyed plaintiff's stacks was an independent fire, not starting from any of the fires kindled by them. At the close of plaintiff's evidence a motion for nonsuit was made and overruled. A special verdict was called for, which, with the answers of the jury, is as follows: "First question: Was the fire set at Odekirk's stacks in pursuance of a joint arrangement and understanding between the defendants that they would work and act together in burning around their several stacks? Answer. Yes. Second question: Did the defendant Fairbanks countenance and approve of, and aid in, burning around the stacks of the defendant Odekirk? A. Yes. Third question: Did the defendant Brooks countenance and

approve of the burning around the defendant Odekirk's stacks, and intend to participate in this act if he had not gone to look after his horses? A. Yes. Fourth question: Was it an act of ordinary care and prudence to attempt to burn around the defendant Odekirk's stacks at the time such burning was done? A. No. Fifth question: Did the defendants, or such of them as participated therein, use ordinary care and prudence in setting the fire, and burning around the defendant Odekirk's stacks? A. No. Sixth question: Did the defendant Odekirk use ordinary care and prudence in watching the fire at his stacks after it was set, and preventing it from getting beyond control? A. No. Seventh question: Did the defendant Fairbanks use ordinary care and prudence in watching the fire at the defendant Odekirk's stacks after it was set, and preventing it from getting beyond control? A. No. Eighth question: Did the defendant Brooks use ordinary care and prudence in watching the fire at the defendant Odekirk's stacks, and preventing it from getting beyond control? A. No. Ninth question: Did the fire set at the defendant Odekirk's stacks get beyond control, spread over the marsh, and cause the destruction of the plaintiff's hay and grass? A. Yes. Tenth question: Was the fire set at the defendant Odekirk's stacks the direct and proximate cause of the burning of the plaintiff's hay and grass? A. Yes. Eleventh question: Did another fire arise in the forenoon of Saturday, September 26, 1891, north of where the Odekirk fire swept across the marsh on Friday, and not caused by the Odekirk fire, which extended to, and burned, the plaintiff's hay and grass? A. No. Twelfth question: Would men of ordinary intelligence and prudence have reasonably expected, under all the circumstances of this case, that if the fire at Odekirk's stacks got beyond control it would extend to, and destroy, the plaintiff's hay and grass? A. Yes. Thirteenth question: Could the plaintiff, by the exercise of ordinary care and prudence, have saved his hay and grass, and prevented the same from being burned, after he saw or knew that there was danger of its destruction by fire? A. No. Fourteenth question: What was the plaintiff's hay and grass, destroyed by fire on Saturday, September 26, 1891, reasonably worth? A. Two hundred dollars, (\$200.)" Judgment for the plaintiff was rendered on the verdict, and defendants appeal.

O. E. Hooker, Maurice McKenna, and Coleman, Sutherland & Huier, for appellants. Duffy & McCrory, for respondent.

WINSLOW, J., (after stating the facts.) We are satisfied that the motion for a nonsuit was properly overruled. Careful perusal of the evidence leads us to agree with the circuit judge in his conclusion that there was sufficient evidence to go to the jury on the questions of the alleged negligence of the

defendants in starting and handling the Odekirk fire, and whether it was the Odekirk fire which destroyed plaintiff's hay, as well as on the question whether the burning was a joint undertaking, so as to render Brooks liable for the acts of the others, though not personally assisting at the Odekirk fire. It was not of itself an unlawful or negligent act for the defendants to burn the grass around their stacks, for the purpose of preventing a prairie fire from destroying them. If such fire is kindled at a suitable time and place, and due and reasonable diligence be taken to prevent its spreading to the property of others, there is no actionable negligence. *Fahn v. Reichart*, 8 Wis. 255.

A question of some difficulty arises, however, upon the instructions given and refused by the court upon the question of contributory negligence of the plaintiff. The thirteenth question of the special verdict was as follows: "Could the plaintiff, by the exercise of ordinary care and prudence, have saved the hay and grass, and prevented the same from being burned, after he saw or knew that there was danger of its destruction by fire?" The question was answered in the negative. The court charged the jury upon this question as follows: "The failure of the plaintiff to remove the dry grass around his property, in order to prevent the spread or communication to fire set or spread by the fault or misconduct of others, was not wrongful and improper on his part,—not culpable omission of duty, by which he may have been said to have co-operated in the destruction of his own property. The law imposes no such duty on him. In the exercise of his lawful rights, every man has a right to act on the belief that every other person will perform his duty, and obey the law, and it is not negligence to assume that he is not exposed to danger which can only come to him through a disregard of law on the part of some other persons. As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff, as negligence, that he did not anticipate culpable negligence on the part of the defendants, if there was any." This was substantially an instruction that the plaintiff's failure to remove, or attempt to remove, the grass around his stacks, by mowing and burning, was not negligence. Is this correct? The general and frequently applied rule is that the question of negligence or not is for the jury. There are exceptions to the rule, and where the facts are undisputed it frequently becomes the duty of the court to decide the question. It is practically claimed by plaintiff that this is such a case. It is said that it is a case where plaintiff's property was placed in sudden and imminent danger by the negligence of defendants, and that negligence is not to be imputed to plaintiff because he made an error in judgment, and attempted to remove his hay, rather than to protect it by burning around the stacks. The

principle that one who, by another's negligence, is suddenly placed in a situation where he must adopt a perilous alternative, does not adopt the safest or wisest course, and is injured, is not to be charged with negligence, is well recognized. It is plain, however, that this case does not come within this principle. The rule is based upon the fact that the plaintiff encounters, without warning, a sudden emergency and imminent peril, when cool judgment cannot be expected nor demanded. Manifestly, it cannot and ought not to apply where the danger is simply a danger to property, which has been seen and apprehended, or ought to have been apprehended, for days prior to the event. Here there had been fires raging upon parts of the marsh for days. The plaintiff himself saw the fire which escaped from the Odekirk stack more than 24 hours before the fire reached his ground, and apprehended danger therefrom. There was ample time for him to exercise his judgment and discretion. It was clearly not a case of a sudden emergency and peril.

But it is claimed that the instruction is justified by the principles laid down in the case of *Kellogg v. Railway Co.*, 26 Wis. 223. It is well to note, in the first place, the exact question in issue, and decided, in that case. It was a case where fire was kindled in the dry grass and weeds on the right of way of a railroad by sparks from an engine, and escaped to plaintiff's land, and was carried, by dry grass and weeds thereon, to the stacks and barns of the plaintiff. The trial court charged that it was for the jury to say whether the plaintiff was negligent in leaving the dry grass and weeds on his own land, and refused to instruct the jury that it was negligence per se, which would defeat a recovery for plaintiff, to leave the grass and weeds uncut on his land. It was held that there was no error in thus instructing the jury. These were the points actually decided, so far as necessary to be stated in this connection, and it is manifest that they do not reach the question here raised. It is true that, in the opinion of the court, language is used which seems to indicate that negligence is not to be imputed to a man, so long as he uses his own property in a lawful manner, whatever may be the negligence of others; but that language was not essential to the questions involved, and has been, in effect, disapproved by this court in *Murphy v. Railway Co.*, 45 Wis. 222. Furthermore, it is evident from the opinion filed upon the motion for rehearing in the *Kellogg* Case that the principles laid down were not intended to have any such sweeping effect as is contended for in this case. It is there said, (page 257:) "A man in his senses, in face of what has been aptly termed a 'seen danger,'—that is, one which presently threatens and is known to him,—is bound to realize it, and to use all proper care, and make all reasonable efforts, to

avoid it, and if he does not it is his own fault; and, he having thus contributed to his own loss or injury, no damage can be recovered from the other party, however negligent the latter may have been." A distinction is then drawn between this "seen danger" and a danger which exists in anticipation merely, and the danger in that case of a possible fire at some time was held to be one of anticipation merely. The danger in this case was as certainly a "seen danger" as any which could be imagined; and on the basis of the law, as finally declared in the Kellogg Case itself, the rule here must be that it was the duty of plaintiff to use all proper care and reasonable effort—namely, the care and effort which reasonably prudent men, under like circumstances, would use—to save his hay from fire; and whether he did so or not, and whether, if not, his failure so to do directly contributed to the destruction of his hay, was a question for the jury to decide, and they should not have been instructed, as matter of law, that the failure to remove the grass around the stacks was not negligence. This rule is substantially recognized in *Murphy v. Railway Co.*, 45 Wis. 222, and *Mills v. Railway Co.*, 76 Wis. 422, 45 N. W. Rep. 225. This substantial error necessitates a reversal. Judgment reversed, and cause remanded for a new trial.

FISCHER v. LAACK et al.

(Supreme Court of Wisconsin. May 23, 1893.)

DEEDS—REFORMATION.

A person owning lots 6, 7, and 8, facing M. street on the north, and lying side by side, with S. street as the east boundary of lot 6, sold lot 8 to plaintiff, and, as the parties supposed, a perpetual right of way over the south 12 feet of the lots to S. street. The deed, however, provided: "Except the south 12 feet of said lot, to be used as an alley to adjoining lots, and leading east to S. street." Next he deeded the west half of lot 7, "with the exception of the south 12 feet, to be reserved for a private alley." Thereafter he deeded lot 6, and the east half of lot 7, to defendant L., without any reservation or exception; but prior to the sale to L. the grantees of lots 7 and 8 had raised the grade of the rear 12 feet of the lots about 2 feet, and were in constant use of the strip as an alley, claiming a right of way over it by purchase, to the knowledge of L. Held, that L.'s knowledge of the facts was sufficient to bind him to a reformation of plaintiff's deed giving him a right of way over the south 12 feet of the lots, and to cause him to hold his title subject to the deed of plaintiff as reformed, and that the judgment might properly require him to remove obstructions of the alley at the rear of his lots, but that it could not reform the deed to L., to which plaintiff was neither party nor privy.

Appeal from circuit court, Sheboygan county; N. S. Gilson, Judge.

Action by Henry W. Fischer against Henry C. Laack, impleaded with William Schwartz and Theresa Schwartz, for reformation of deeds, etc. Judgment for plaintiff. Defendant Laack appeals. Modified.

M. C. Mead and Seaman & Williams, for appellant.

Walker, Brown & Wahl, for respondent, in support of the proposition that in the premises the power of the court was properly exercised in ordering a reformation of the deed, cited *Bates v. Bates*, (Mich.) 23 N. W. Rep. 63; *Gregg v. Hamilton*, 12 Kan. 333; *Dane v. Derber*, 28 Wis. 216; *Lundgreen v. Stratton*, 73 Wis. 659, 41 N. W. Rep. 1012; *Canal Co. v. Hewitt*, 62 Wis. 316, 21 N. W. Rep. 216, 22 N. W. Rep. 588. See, also, *Brinkman v. Jones*, 44 Wis. 498, and cases cited.

ORTON, J. Lots 6, 7, and 8, in block 19, in the village (now city) of Plymouth, in Sheboygan county, are bounded on the north by Mill street, and on the east by Stafford street, and run lengthways north and south, and lie side by side with lot 6 on Stafford street. Before June, 1883, all these lots belonged to William Schwartz, one of the defendants in this action, and he evidently intended, if he sold them, or parts of them, to different persons, to reserve and establish the south 12 feet of them as an alley for the joint use of the owners forever, from lot 9 to Stafford street. In June, 1883, the plaintiff purchased from Schwartz lot 8, and, as both of them evidently intended and supposed, also a perpetual right of way over said south 12 feet to Stafford street as an alley; but in the deed of lot 8 the following language is used to give the plaintiff this right of way: "Except the south 12 feet of said lot, to be used as an alley to adjoining lots, and leading east to Stafford street." In April, 1884, Schwartz sold to one Frederick Behnke the west half of lot 7, and in the deed the following language is used to give Behnke the right of way over the same south 12 feet of the lots to Stafford street: "With the exception of the south 12 feet, to be reserved for a private alley." In December, 1887, Schwartz sold and conveyed to the defendant Laack the east half of lot 7, and the whole of lot 6, without any reservation or exception, and soon thereafter the defendant Laack closed up said alley by placing a building across the same. Thereupon the plaintiff brought suit against the defendant Laack, under section 3180, Rev. St., as amended, to require him to open the alley and remove the said obstruction as an abatement of the private nuisance, and for damages, and recovered in the action. On an appeal from said judgment this court reversed it, on the ground that the plaintiff's said deed gave him no right to the alley, and that the exception in said deed is, in effect, a reservation of the alley to the grantor, Schwartz, and that in an action at law the plaintiff had no remedy; but this court reversed the judgment without prejudice to the right of the plaintiff to bring an action in equity to reform said deed, so

as to convey to the plaintiff such right of way over said south 12 feet of the lots to Stafford street. *Fischer v. Laack*, 70 Wis. 313, 45 N. W. Rep. 104. In accordance with such intimation the plaintiff has brought this action in equity against the defendants Schwartz and Laack, and asked that his said deed be reformed so as to give him a perpetual right of way over the south 12 feet of said lots to Stafford street, to be used as an alley. The plaintiff asked, also, that the said deed from Schwartz to Laack be modified and reformed, so that the plaintiff's perpetual right of way over the south 12 feet of lots 6 and 7 be secured to him, and that the defendant Laack be required to remove said building and obstruction from said alley, and pay the plaintiff damages. The circuit court found that it was the intention of the parties to the deed of lot 8 that said deed should convey to the plaintiff a perpetual right of way over the south 12 feet of all of said lots to Stafford street, and that, prior to the purchase of the east half of lot 7 and of lot 6 by the defendant Laack, both the plaintiff and said Behnke were in constant use of said alley, and frequently worked and improved it, and at all times claimed a right of way over it. The court further found that, when the defendant Laack purchased lot 6 and the east half of lot 7, he knew that the plaintiff and Behnke had purchased from Schwartz the right to the perpetual use of said alley, and well knew the existence of said alley, and the improvements thereof by the plaintiff and Behnke, and that the plaintiff claimed the right to the perpetual use of said alley. The court rendered judgment according to the demand of the complaint, except as to damages, and requiring the defendant Laack to remove said building and obstruction off and away from said alley within 60 days after service of a copy of the judgment.

The evidence shows that the ground on the south ends of the lots is low and swampy, and that the plaintiff, Schwartz, and Behnke filled this 12 feet for an alley, and graded it about 2 feet above the ground adjoining, and covered it with gravel, so as to make a good roadway for wagons and for other uses, and that it was plainly marked and well defined as an alley, besides its constant use as such. From the testimony, as well as the peculiar form of the reservation in the deed and the improvement and use of the alley, it seems very clear that it was the intention of both Schwartz and the plaintiff that the deed should secure to the plaintiff a perpetual right of way over the south 12 feet of all of the lots as a private alley to Stafford street, and there was the same intention in respect to the deed to Behnke. The evidence tends strongly to prove that the defendant Laack, before he purchased, knew all about the rights of the plaintiff in respect to the alley. He knew that the plaintiff had improved and used it,

and that it was indispensable to his use of the lot. He must have known that, if there was an alley on the south end of lot 8, to be of any use it must run through to Stafford street. His knowledge of the facts was sufficient to bind him by such a reformation of the plaintiff's deed as to give him a right of way over the south 12 feet of his lots as an alley, and cause him to hold his title subject to the deed of the plaintiff so reformed. The judgment based on such knowledge may properly require him to remove all obstructions from the alley at the south ends of his lots which he has placed there. *Honzik v. Delaglise*, 65 Wis. 494, 27 N. W. Rep. 171; *Cable v. Ellis*, 120 Ill. 130, 11 N. E. Rep. 188; *Lundgreen v. Stratton*, 73 Wis. 659, 41 N. W. Rep. 1012. The plaintiff seems to have made a very clear case for the reformation of his deed from Schwartz, as found and adjudged by the circuit court. *Sawyer v. Hanson*, 48 Wis. 611, 4 N. W. Rep. 765; *Grossbach v. Brown*, 72 Wis. 458, 40 N. W. Rep. 494; *Kyle v. Fehley*, 81 Wis. 67,¹ and other cases cited in respondent's brief. The defendant Laack took his deed from Schwartz with notice that his grantor had already sold and parted with the south 12 feet of the lots conveyed to him to be perpetually used as an alley to the plaintiff, and he obstructed the alley with knowledge of the plaintiff's right to it. He may therefore be required to remove said obstruction, and he must not hereafter interfere with the plaintiff's use of the alley. He will hereafter hold his deed and title subject to the prior deed of the plaintiff, reformed according to his contract of purchase. But this is as far as the court could properly go, and as far as necessary in giving the plaintiff a remedy in this case. The plaintiff is neither a party nor privy to the contract of purchase, or to the deed from Schwartz to the defendant Laack. He cannot, therefore, bring an action to reform that deed in any respect whatever. The deed of Schwartz to Laack is an absolute deed of the whole of lot 6 and the east half of lot 7, with full covenants. The liability of Schwartz on the covenants is a matter solely between him and Laack, and it is the sole right of Schwartz to have that deed reformed, and he has not asked for such a reformation of said deed, but stands here with the defendant Laack, denying and contesting the plaintiff's rights in this case. That part of the judgment must therefore be reversed, but without costs, and the judgment, with this exception, will be affirmed. That part of the judgment of the circuit court that reforms the deed of Schwartz and wife to the defendant Laack, of lot 6 and the east half of lot 7, in block 19, as aforesaid, is reversed, without costs, and the judgment of the circuit court, with this exception, is affirmed, with costs.

¹51 N. W. Rep. 257.

HARRAN v. HARRAN.

(Supreme Court of Wisconsin. May 23, 1893.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE—
DIVORCE—ALIMONY.

1. A judgment will not be disturbed on appeal because of conflicting evidence.

2. Where, in an action for divorce, and for a division of defendant husband's estates between the parties, it appeared that defendant owned a homestead worth \$1,800, furniture worth \$850, and other personal property worth \$925, over all indebtedness, and that he could earn \$1,000 per year over his expenses; that plaintiff had \$780, and that she was of an age to render her incapable of engaging in any work which would bring in much income,—an award to plaintiff, on granting her a divorce, of the homestead, furniture, and \$100 attorneys' fees, is not excessive.

Appeal from circuit court, Kewaunee county; N. S. Gilson, Judge.

Action by Mary Haran against Dominick Haran. Judgment for plaintiff. Defendant appeals. Affirmed.

Ellis & Merrill, for appellant. Wigman & Martin, for respondent.

LYON, C. J. This is an appeal by defendant from a judgment of divorce on the ground of cruel and inhuman treatment, and for a division between the parties of the estate of the husband. The testimony, although conflicting, is sufficient to sustain the finding that the defendant is guilty of the cruel and inhuman treatment of plaintiff charged in her complaint, which is sufficient, if true, to support the judgment; hence the judgment granting the divorce cannot properly be disturbed.

The principal controversy relates to the division of the husband's estate. The court found on sufficient evidence that defendant owned a homestead, at Green Bay, of the value of \$1,800; furniture and household effects, including a piano, of the value of \$850; and money and other personal property of the value, above his indebtedness, of \$925. Also that he is a strong, able, and energetic man, capable of earning in his business at least \$1,000 per annum over and above his expenses. The court further found that the plaintiff had \$780 in money, and a note for \$300, "which may or may not be good," and that she is able to perform housework, and take care of her home, but is unfitted for other work, and is not capable at her age (which is about 50 years) of engaging in any work or business which will bring her any considerable income. Based upon the above findings, the court awarded the plaintiff the homestead, furniture, and household effects mentioned in the findings, and \$100 solicitors' fees to be paid to her attorneys for carrying on the action, over and above the taxable costs which he was adjudged to pay. Pending the suit, and after the court had announced its judgment fixing the value of the homestead at \$1,800, a barn, part and parcel of such homestead, was destroyed by

fire, and the defendant collected \$470 insurance thereon. The defendant neglected to pay the taxes on the homestead for 1891, and the property was sold for nonpayment thereof. The plaintiff paid \$89.74 to redeem the same. These facts are stated in the findings, and the defendant is also required by the judgment to pay those two sums to plaintiff. The judgment bears date October 17, 1892. Thus it appears that the judgment, in effect, gives plaintiff the unincumbered homestead as it stood at the time of the trial, the furniture, and household effects, the taxable costs of the action, and \$100 solicitors' fees over and above such costs, and leaves to the defendant \$925 in money, and other personal property, over and above his indebtedness, and his ability to earn at least \$1,000 a year over and above his expenses. It must be admitted that the circuit court dealt very liberally with the plaintiff in making its judgment, yet it must also be admitted that the provision thus made for her will afford her but a very moderate support. Under the judgment she will have a home and the appliances for housekeeping, and about \$500 in money, besides her separate property; but, unless she leases or sells some portion of the property thus awarded her, there seems no way for her to meet her current expenses after the \$500 is exhausted, other than by paying them out of her very limited separate estate. Without capacity to earn any income, her \$780 will soon be exhausted. Although the judgment leaves the defendant but little property, he has the ability to earn a very comfortable income, out of which, but for his misconduct, his wife would have received her support. It must also be remembered that he, and not the plaintiff, has wrecked their home, and driven her to seek and obtain a divorce from him. All these circumstances are proper to be considered in making division of her husband's estate, and the terms of such division are largely in the discretion of the trial court. Under the rulings of this court in Webster v. Webster, 64 Wis. 438, 25 N. W. Rep. 434, and in other cases there cited, we cannot say that the circuit court improperly exercised its discretion in making division of the husband's estate between the parties. The judgment must therefore be affirmed, and the defendant must pay the taxable costs in this court. The motion heretofore made and argued for an allowance for suit money in this court is denied.

Judgment affirmed.

KOEFFLER v. CITY OF MILWAUKEE.

(Supreme Court of Wisconsin. May 23, 1893.)

PRELIMINARY INJUNCTION.

The action of the trial court in granting a preliminary injunction to restrain defendant city from proceeding, under a void statute and ordinance, to make changes in the curbing and sidewalk in front of plaintiff's premises, will

not be disturbed on appeal; it being proper to restrain defendant from proceeding thereunder to plaintiff's injury until its right to do so is established by testimony regularly introduced on a trial of the cause on the merits.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by C. A. Koeffler against the city of Milwaukee to obtain an injunction restraining defendant from making changes in the curbing and sidewalk in front of plaintiff's premises. From an order denying defendant's motion to vacate a preliminary injunction granted plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by LYON, C. J.:

Under chapter 56, Laws 1832, (subchapter 10, § 18,) and chapter 184, Laws 1874, (subchapter 7, § 8,) the city of Milwaukee is liable for damages resulting to the owners of lots injured in consequence of a change of grade of any street in that city, if such original grade was established since February 20, 1832, and the street actually graded thereto. By chapter 254, Laws 1891, the legislature attempted to take a specified district in that city, consisting of about 50 blocks, out of the operation of the above acts, and to authorize the common council to change the grade of streets in such district without petition therefor, as required in other cases, and without liability of the city to compensate owners of lots injuriously affected by such change of grade. On May 18, 1891, the common council passed an ordinance, without petition, based in terms upon chapter 254, Laws 1891, changing the grade of divers streets in such district. In *Auderton v. City of Milwaukee*, 82 Wis. 270, 52 N. W. Rep. 95, this court adjudged chapter 254, Laws 1891, unconstitutional and void, and upheld a preliminary injunction restraining the city from executing the ordinance of May 18, 1891, on a street and sidewalk abutting Auderton's premises. This action was brought to restrain the city from curbing and raising a sidewalk in front of plaintiff's premises in such district, under and by virtue of the same statute and ordinance. The plaintiff obtained a preliminary injunction to that effect, which the city moved to dissolve. The court denied the motion on the ground expressed in the order,—that "the proceedings of said defendant, with reference to the change of grade in said complaint alleged, are void, and contrary to law and the charter of said city of Milwaukee, and that said city had no jurisdiction to so make said change of grade." The city appeals from the order denying the motion to dissolve the preliminary injunction.

Conrod Kres and V. W. Seely, for appellant. C. A. Koeffler, Jr., for respondent.

LYON, C. J., (after stating the facts.) It is claimed in the answer of the city and in the argument that the proceedings for the

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change of grade in question were not taken under chapter 254, Laws 1891, but under the general charter of the city. The record fails entirely to support this contention. It is also claimed that by acquiescence in the paving of the street at the grade established by the ordinance of May 18, 1891, in front of his premises, the plaintiff is estopped to object that the city has no authority to curb and raise the sidewalk to that grade. We do not deem it necessary, on this appeal, to go into this question of estoppel. The court should not be required to determine the facts on which the claim of estoppel is rested upon mere disputed averments in pleadings, or conflicting *ex parte* affidavits. Such facts should be established by testimony taken in due course on the trial of the issues, before their existence is assumed. The same observations are applicable to the claim on behalf of the city that the street in front of plaintiff's premises was never graded to, or the sidewalk constructed on, any established grade. In this preliminary proceeding it is sufficient to know that the city is acting under a void statute and ordinance, and it would be most unjust to allow it to proceed thereunder, to the manifest injury of plaintiff, until its right to do so is established by testimony regularly introduced on a trial of the cause on the merits. The city must proceed under its charter, without regard to chapter 254, Laws 1891, or the ordinance of May 18, 1891, to make the threatened change in the curbing and sidewalk in front of plaintiff's premises, or it must wait until the determination of this action in its favor, before it can be allowed to inflict the threatened injury to plaintiff's property. We conclude that the circuit court exercised its discretion properly when it refused to dissolve the preliminary injunction, and hence that the order in that behalf should not be disturbed. Order affirmed.

CLARK v. BURR.

BURR v. CLARK.

(Supreme Court of Wisconsin. May 23, 1893.)

SALE OF LAND—CONTRACT—OFFER AND ACCEPTANCE.

Plaintiff agreed with defendant to sell him certain land for \$23,500 at any time within the next nine months, giving him, in effect, an option for that time. Improvements on the property having been burned, defendant accepted the option, and at the same time, and as a part of the same transaction, demanded the insurance money on the property destroyed by fire, claiming that it should be applied on the purchase price. Plaintiff refused to deed the property on such condition, but offered to make the deed on payment of \$23,500, and this defendant refused. Plaintiff did not tender a deed of the property at this time, but later, having discharged a mortgage on the property with the insurance money, tendered a deed for \$23,500, which defendant refused to accept. *Held*, that there was no completed contract of sale.

Appeal from circuit court, Portage county; Charles M. Webb, Judge.

Action by Owen Clark against Emmons Burr. From a judgment for plaintiff, defendant appeals. Reversed. Action by Emmons Burr against Owen Clark. From a judgment for defendant, plaintiff appeals. Affirmed.

Cate, Jones & Sanborn, (Gabe Bouck, of counsel,) for appellant. James O. Raymond and Edward S. Bragg, for respondent.

ORTON, J. On the 3d day of January, 1891, the respondent signed, sealed, and delivered to the appellant the following agreement or option: "Witnesseth, that for and in consideration of the sum of one dollar paid by the said second party to said first party, receipt whereof is hereby acknowledged, said first party does hereby agree to sell, transfer, and convey to said second party, by a good and sufficient deed of warranty, free and clear of all liens and incumbrances of any nature whatever, at any time within nine months from this date, upon the payment to said first party by said second party of the sum of twenty-three thousand and five hundred dollars (\$23,500) cash, the following real estate situated and being in the city of Stevens Point, county of Portage, and state of Wisconsin, to wit: [Here follows a long description of the property by metes and bounds, lying on the Wisconsin river, and a dam across the river, with its appurtenances, rights, and privileges, the piers and booms in the river, the said mill thereunto belonging, and tools, machinery, rights, and franchises thereunto belonging, with reservations of the property belonging to the Jackson Milling Company, known as the "North Star Mills," and the right of way of a railroad company.] It is hereby agreed and understood that said second party shall have the exclusive right to purchase the above-described property upon the terms hereinbefore mentioned, at any time within nine months from this date. [Signed] Owen Clark. [Seal.]" It is alleged in the complaint that the appellant made a written acceptance of this option or proposal, and unconditionally, on the 7th day of July, 1891, and that on the 3d day of September, 1891, the respondent (the plaintiff) tendered and offered to the appellant (the defendant) a warranty deed of the premises, in accordance with the terms of the aforesaid contract, with the usual covenants as to title, possession, and against incumbrances, duly executed, witnessed, and acknowledged by the plaintiff and his wife, and at the same time demanded the said sum of \$23,500, the consideration therefor, and the defendant refused to pay the same. The answer of the defendant states substantially the following facts: (1) There was another action pending in the same court between the same

parties, and for the same cause of action. (2) The option or proposal was made as alleged. (3) There was a sawmill on the premises, with all the necessary tools and machinery, of the value of \$12,000, when said option was given, and the same were insured for the sum of \$9,500. (4) On the 25th day of May, 1891, the said mill, tools, and machinery were destroyed by fire while the same were still insured, and the plaintiff received said insurance money. (5) On the same day the defendant accepted the said option or proposal, and as a part of the same transaction he served upon the plaintiff a demand in writing for the deed, according to said offer, and for said insurance money in lieu of the part of said property so destroyed by fire, which he had received, and claimed that said insurance money should be credited upon the said \$23,500, or deducted therefrom, and that he was ready and willing to pay the said consideration, less said \$9,500, and is still ready; and he then and there tendered the same to the defendant, and the defendant refused to receive the same, and refused to deed the premises on said condition, but offered to deed the premises, as they then were, to the defendant, on his payment in full of the said \$23,500, and the defendant refused to accept said offer. The defendant demands that the plaintiff convey said premises to him upon the payment of said consideration, less said insurance money, or upon the payment of the whole of said consideration, and the plaintiff be required to pay over to him said insurance money. The matters of this answer were set up in the other action pending in the complaint by the defendant against the plaintiff, and the issues and findings are the same in both actions, and the two appeals were heard together. In the other action the defendant here, as the plaintiff, demands the specific performance of the contract, as modified by said condition of acceptance, and in this action the plaintiff demands judgment for the whole of \$23,500 on a tender of the deed of the premises as they now are, and obtained judgment accordingly. In the other action the court rendered judgment against the plaintiff. Among other findings of the above facts the circuit court found "that all of said transactions were had at one and the same interview between said parties on the 9th day of July." These transactions are found immediately above, and are the written acceptance of the offer, and the written demand of the defendant to have the said \$9,500 insurance money credited on or deducted from the said \$23,500, the consideration of the offer. They being one and the same transaction, and such we understand to be the above finding, there was no unconditional acceptance of the option or offer made by the defendant. The acceptance was conditional upon the deduction of the insurance money from the consideration of

\$23,500, and an offer to pay the balance. The finding is supported by the evidence. It is certain that the defendant never offered to pay to the plaintiff the whole of the \$23,500 for the property as it then was. The defendant alleges in his answer that the written acceptance and the written demand for said deduction were made at the same time. The plaintiff does not pretend that on the 9th day of July, when he claims that the defendant made an unconditional written acceptance of his offer, he then offered to convey, or that he was ready to convey, the premises to the defendant. There was a mortgage on the property, and he afterwards paid and discharged it by applying on it said insurance money, which was payable to the mortgagee. Then, and not until then, was he ready to make the deed, and on the 2d day of September, 1891, he first tendered the deed to the defendant on his payment of the whole \$23,500; and the defendant refused to accept the deed on that condition, and refused to pay the money. This was virtually a renewal of the proposal of January 3, 1891, and a refusal to accept it.

The facts and the findings of the court clearly show that there never has been a contract of the parties for the purchase of the property. The minds of the parties have never met upon the subject. The condition of the property had materially changed after the option was given, and the so-called "acceptance" of it was burdened with a condition suitable to such changed condition of it. The defendant refused to accept the option, and proposed to buy the property for the same price, deducting the insurance, and the plaintiff refused to sell on this condition, or to accept the defendant's proposal. After the plaintiff was able to make the deed, he renewed the first proposition, and the defendant refused to accept it. And so the matter stands, and such were the conclusion and end of the whole transaction, and neither party is bound by any completed contract. A contract of purchase is the first necessity of an action for specific performance, or for the purchase money, and there is no contract. The court cannot advise the parties what they had better do under the circumstances. It has no such jurisdiction. The parties must come before the court with a contract to be enforced, or to recover damages for its breach. The position of the respondent before this court is that there was a completed contract upon the acceptance of the offer, and that of the appellant is that there was a completed contract in some way, and that in equity he is entitled to have the deduction of the insurance money made from the \$23,500 consideration. But we cannot take cognizance of the case upon such a voluntary and mutual submission of it, against the facts and finding of the court. The acceptance, by letter, of a pro-

posal by letter to sell land at a certain price, with direction to deliver the deed and pay the money otherwise than directly to the party, was held no acceptance. *Iron Co. v. Meade*, 21 Wis. 474. In the recent case of *Wilkin Manuf'g Co. v. H. M. Loud & Sons L. Co.*, (Mich.) 53 N. W. Rep. 1045, the acceptance of a proposal by letter changed its terms very slightly, and it was held that the minds of the parties had never met, and there was no contract. This was so held by the supreme court in a case where both parties proceeded to enforce the contract, and the judgment was consistent only with there being a contract, as in this case. "If the acceptance is not the exact thing offered, or if it is accompanied by any conditions, qualifications, or reservations, however slight in time, or otherwise, no contract is made." *Bish. Cont.* §§ 321-323; *Eskridge v. Glover*, 26 Amer. Dec. 348, and note; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. Rep. 796. B. telegraphed to A. an offer to sell him a large quantity of coal at a certain price. A. telegraphed B.: "You consider the coal sold. Will be in Cleveland and arrange particulars next week." It was held not to be a completed contract. *Martin v. Fuel Co.*, 22 Fed. Rep. 596. An acceptance of an offer to sell land, "provided the title is good," does not make a binding contract. *Corcoran v. White*, 117 Ill. 118, 7 N. E. Rep. 525. The acceptance of an offer upon terms varying from those of the offer, however slight, is a rejection of the offer. *Bank v. Hall*, 101 U. S. 43-50; *Baker v. Johnson Co.*, 37 Iowa, 186; *Cartmel v. Newton*, 79 Ind. 1-8. The acceptance in this case is accompanied by a demand widely and essentially different from the offer, suited to the changed condition of the property, and for deduction of nearly half of the consideration. It is not an acceptance, but a new proposal or offer by the defendant, which is also rejected by the plaintiff. The law in such a case is too well settled and apparent to require the citation of more authorities. The judgment of the circuit court in the case of *Emmons Burr v. Owen Clark* is affirmed, and the judgment in the case of *Owen Clark v. Emmons Burr*, in which this opinion is filed, is reversed, and the cause remanded, with direction to dismiss the complaint.

OSBORN et al. v. DOBRINZ et al.

(Supreme Court of Wisconsin. May 23, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RELEASE—RES JUDICATA.

A creditor who has appeared and objected to the discharge, as against his claim, of an assignor for the benefit of creditors, and after the granting of such discharge has accepted a dividend, and neglected to appeal, cannot maintain an action for the balance of his claim, on the ground that he was not bound by the discharge, since he was a nonresident creditor, and the statute purporting to make the

discharge effective against nonresident creditors was not retroactive, and, if retroactive, was unconstitutional, as the judgment of discharge was *res judicata* as to these questions.

Error to superior court, Milwaukee county; F. L. Gilson, Judge.

Action by Clark D. Osborn and another against Charles H. Dobrinz and another. Judgment for defendants. Plaintiffs bring error. Affirmed.

Shepard, Haring & Frost, for plaintiffs in error. Rietbrock & Halsey, for defendants in error.

ORTON, J. The plaintiffs in error, as a partnership, brought this suit in the superior court of Milwaukee county against the defendants in error as a copartnership, to recover the sum of \$375.50 for goods sold and delivered in October, 1888. The defendants answered in bar of the action, setting up their voluntary assignment of all their property for the benefit of creditors, without preference, to one Edward Upson on the 22d day of January, 1889, under chapter 80, Rev. St., and their discharge from all of their debts as such assignors and insolvent debtors by the circuit court of Milwaukee county, on July 15, 1889, under chapter 385 of the Laws of 1889, which took effect April 18, 1889. The plaintiffs appeared in said assignment proceedings, and, as creditors of the assignors, filed, proved, and insisted upon their said claim in this action, and as entitled to their equal share in the proceeds of the property of the defendants under said assignment, and received a dividend of 25.92 per cent. declared on the same, being the sum of \$97.27 from the said assignee, with full knowledge of all said proceedings, July 29, 1889. The defendants made and filed their applications for discharge under said assignment from all of their debts on July 15, 1889, and the plaintiffs appeared thereto, objecting to said discharge, on the ground that they were foreign creditors, and that the defendants were not entitled to their discharge as against their claim. The plaintiffs admitted that all the proceedings in said assignment, including the discharge of the defendants thereunder, were regular and in conformity with the statutes. The plaintiffs were merchants in Chicago, Ill., when said debt was contracted; and the defendants were merchants in Milwaukee, in this state, at that time. The plaintiffs set up and claimed in the trial court that they were not bound by said discharge: First, because they were nonresident creditors; second, because the said act of 1889 is not retroactive, so as to affect their claim contracted before it took effect; third, because, if it is retroactive in effect, then said act is for such reason unconstitutional and void. The superior court, on these facts, on motion, directed a verdict in favor of the defendants, and rendered judgment accordingly, from which the plaintiffs have appealed.

There was no error in this. The court

ruled properly in so directing a verdict for the defendants, if for no other reason, because the said order or judgment of the circuit court of discharge under said assignment is final and conclusive, and *res adjudicata* of the same matters of this action, and therefore a bar. The circuit court, both under chapter 80, Rev. St., and the act of 1889, had full and final jurisdiction of every question involved in this action, and its judgment in the matter is final and conclusive, and a bar to an action on all claims adjudicated therein. This is the effect given to the discharge in sections 15 and 18 of said act. In section 14 of said act the judgment of the court is made as effectual against the claims of nonresident creditors who have appeared in the assignment proceedings, proved their claims, and received any dividend thereon, as against the claims of resident creditors. By section 16 an appeal may be taken to this court from said judgment in the same manner and within the same time, and bills of exception settled, as in ordinary civil actions. The plaintiffs appeared and submitted to the jurisdiction of the court in that case, and waived any advantage they had as nonresident creditors by appearing, proving up their claim, and receiving a dividend thereon; and they are as effectually bound by said judgment as any resident creditor.

The plaintiffs raise the question of the constitutionality of said act. That was properly a question in that case, and is presumed to have been decided by that court as well as all other questions involved, and on an appeal from that judgment of discharge the question might have been considered by this court. As to that question, as well as all other questions in the case, the judgment of discharge is *res adjudicata*, and cannot be reconsidered except on appeal. The time of appeal having expired, it was proper for the court to render judgment for the defendants as a final disposition of the case, with all the questions involved in it, including those raised in this case. The plaintiffs have lost their only and last chance to have these questions reviewed by their failure to appeal from the judgment of discharge. This court held in *Re Baker*, 72 Wis. 395, 39 N. W. Rep. 764, that on an appeal from the final order of settlement under section 1701, Rev. St., any antecedent orders in the matter can be reviewed as on an appeal from a final judgment. In *Thomas v. Jones*, 39 Wis. 124, it is held that a certificate of discharge in bankruptcy cannot be impeached in another action. The party questioning it must go into the same court, and move to have it set aside; otherwise it is final as to all questions involved in it, if the court had jurisdiction of the case. In *Magnus v. Sleeper*, 69 Wis. 219, 34 N. W. Rep. 149, it is held that a creditor who is a party to the proceeding is concluded by the final order of settlement, under section 1701, Rev. St., from proceeding by petition to have the assignee removed on account of certain

misconduct or neglect of duty. The present chief justice said in the opinion: "The order [of settlement] adjudicated and negatived every charge against the respondent [assignee] contained in the petition for his removal, whether of neglect of duty or actual maladministration of his trust. The order has never been reversed or vacated, but remains in full force. * * * The appellant's only remedy was by appeal from the order." The judgment of discharge of the insolvent assignor from all of his debts, under the act of 1889, is a much more important adjudication than the order of settlement under the Revised Statutes, and more in analogy with other final judgments. The only remedy is by an appeal, as in other cases of final judgments. *Sallsbury v. Chadbourne*, 45 Wis. 74; *Briggs v. Seymour*, 17 Wis. 256; *Barnes v. Schmitz*, 44 Wis. 482. This is a very plain question, and the principles of law governing it are elementary, and require no other authorities than the above, if any are needed. The judgment of the superior court is affirmed.

FAWCETT v. FAWCETT et al.

(Supreme Court of Wisconsin. May 23, 1893.)

ACTION AGAINST HUSBAND'S HEIRS TO ENFORCE TRUST—LACHES—STATUTE OF LIMITATIONS.

1. Where a man purchases land with his wife's money, and, contrary to her direction, takes the title in his own name, and they occupy the land as a homestead for more than 20 years after the wife discovers that the title is in him, laches will not be imputed to the wife, so as to defeat an action by her against his heirs to enforce the resulting trust, because she failed to bring such action against him in his lifetime, unless it is barred by some statute of limitations.

2. Where it appears that the husband, from the inception of the trust until his death, always admitted the trust, and never asserted any interest in, or exercised any control over, the land, hostile to such trust, the statute of limitations did not run against the wife prior to his death.

Appeal from circuit court, Grant county; George Clementson, Judge.

Action by Elizabeth Fawcett against Joshua Fawcett and others, heirs of Joshua Fawcett, deceased, to enforce a trust in certain real estate. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by LYON, C. J.:

The case made by the complaint is substantially as follows: The plaintiff intermarried with one Joshua Fawcett, the ancestor of the defendants, in 1867. She had separate estate. In 1868 she gave her husband the money with which to purchase a certain 40-acre lot of land in Grant county, and directed him to take the conveyance thereof in her name. Her husband thereupon purchased the land with her money, but took the conveyance thereof in his own

name. The plaintiff first learned in 1869 that he had done so. She at once disapproved his act, and requested him to cause the title to the land to be vested in her. He promised to do so, but died in 1890 without performing his promise. He left a will, which has been duly probated in the proper court, devising and bequeathing his property, in general terms, to his widow and lawful heirs in the manner prescribed by law. Such 40-acre lot was the homestead of plaintiff and her husband until he died. It does not appear that he ever asserted any right to the land, or denied that the same equitably belonged to his wife, or that he devised it specifically in his will. This action is to enforce the execution of the trust resulting to the plaintiff from the transactions stated in the complaint, and to procure the judgment of the court vesting in her the absolute title in fee to such land. The heirs at law of plaintiff's husband are the defendants to the action. It sufficiently appears from the complaint that the action was brought after the death of the plaintiff's husband, in 1890. The defendants demurred to the complaint on several grounds, among which are that the right of action is barred by the limitations contained in sections 4211, 4213, 4215, 4222, Rev. St. The circuit court sustained the demurrer on the sole ground that the action was thus barred by the statutes of limitation. The plaintiff appeals from the order sustaining the demurrer.

Bushnell & Watkins, for appellant. Clark & Taylor and P. A. Orton, for respondents.

LYON, C. J., (after stating the facts.) There can be no doubt the complaint states facts sufficient to show that the plaintiff is entitled to enforce a resulting trust in the land in controversy; that is to say, she is entitled to have vested in her the absolute title to such land, unless she is excluded from such relief by the statutes of limitation, or by her laches in the enforcement of her right. Before the enactment of our statute of uses and trusts, she would have been entitled to assert and enforce such trust, even though she consented that the land for which she paid should be conveyed to her husband, or had she personally taken the conveyance thereof in his name. In such cases, however, the statute abolishes the trust, except as to creditors of the person paying for the land, but saves it to such person where, as in this case, the grantee named in the conveyance took it as an absolute conveyance in his own name, without the knowledge or consent of the person paying the consideration, unless a bona fide purchaser has intervened. Rev. St. §§ 2077-2088, inclusive. If this action is not barred by some statute of limitation, we do not think, under the circumstances of the case disclosed in the complaint, that laches should be imputed to the plaintiff to defeat it. Al-

though, during more than 20 years before her husband died, she knew he had taken the conveyance in his own name, yet she was residing with him upon the land, using it as the family homestead, and, so far as it appears, he recognized and admitted her right to the land, and asserted no interest in or claim to it, hostile to her absolute ownership thereof, and the rights of no other person have intervened, to render it inequitable to enforce the trust in her favor. The heirs of her husband (the defendants) have no greater equities against the enforcement of the trust than her husband would have had if the action to enforce it had been commenced against him in his lifetime. Under these circumstances it should not be held that she ought to have endangered the peace and comfort of the family—perhaps the very existence of their home—by engaging in a lawsuit with her husband over the title to the land in question, and that her right thereto is defeated because she did not do so. Courts of equity do not impute laches by any iron rule, but allow circumstances to govern their decision in every case. And it is said: "Where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin; certainly, as between the immediate parties to the transaction." 13 Amer. & Eng. Enc. Law, 674; U. S. v. Alexandria, 19 Fed. Rep. 609, and cases cited. The controlling question in the case is, therefore, does any statute of limitation bar the plaintiff's right to maintain this action?

It is now thoroughly well settled, by authorities too uniform to require citation, and too numerous to cite here, that as between a trustee of an express trust, cognizable only in a court of equity, and his cestui que trust, concerning matters connected with the trust relation, no statute of limitation, nor any bar by analogy thereto, can be relied upon to defeat the execution of the trust, unless the full period of limitation has elapsed since the denial or repudiation by the trustee of the trust obligation. If any one desires to consult the cases holding this doctrine he will find many of them cited in the volume of the Encyclopedia of Law above cited, in note 4, on page 683. The reason and grounds of the above rule are thus stated by Mr. Justice Gray in *Spedel v. Henricl*, 120 U. S. 377, 386, 7 Sup. Ct. Rep. 610: "Express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the cestui que trust." Hence it would seem that in order to set the statute running against such trust a surrender of the trust property is essential, because without such surrender there can be no effectual repudiation of the trust. It is freely conceded that there are many authorities which, in general terms, assert the rule that the statute of limitations runs against all

implied, resulting, or constructive trusts. But it is apprehended that the court would fall into serious error were it to accept and apply that rule, without qualification, to all cases involving the enforcement of such trusts. The trust here sought to be enforced is not an express, but a resulting, trust. Yet it is enforceable only in equity, and the alleged trustee, (plaintiff's husband,) from the inception of the trust until he died, freely admitted, and never denied, the trust claimed, and never had any adverse possession of the property; for he and his wife always occupied it jointly as their homestead, and it does not appear that he ever asserted any interest in, or exercised any control of, the land, hostile to the trust here sought to be enforced. Thus we find in this resulting trust every element which operates to take an express trust out of the statutes of limitation, and prevents the statute from running against it until after the trust has been effectually repudiated. Under these circumstances it would be illogical to hold the resulting trust within the statute, and the express trust not within it. We do not believe the law makes any such imaginary distinction. In the leading case of *Kane v. Bloodgood*, 7 Johns. Ch. 90, decided by Chancellor Kent in 1823, no distinction seems to have been made between express trusts and any other kind of trusts, in respect to the effect of statutes of limitation upon them. Whether, in any given case, the trust was or not affected by those statutes, was made to depend entirely upon the presence or absence of the qualities and elements above mentioned. The doctrine of the case seems to be correctly stated in a headnote as follows: "Those trusts which are mere creatures of a court of equity, and not within the cognizance of a court of law, are not within the statute of limitations. As long as there is a continuing and subsisting trust, acknowledged or acted on by the parties, the statute does not apply; but if the trustee denies the right of his cestui que trust, and the possession of the property becomes adverse, lapse of time, from that period, may constitute a bar in equity; but other trusts, which are the ground of an action at law, are not exempted from the operation of the statute." To the same effect are the cases of *Elmendorf v. Taylor*, 10 Wheat. 152; *Dow v. Jewell*, 18 N. H. 340; *Taylor v. Holmes*, (N. C.) 14 Fed. Rep. 498, 508; *Springer v. Springer*, 114 Ill. 550, 2 N. E. Rep. 527; *Reynolds v. Sumner*, 126 Ill. 58, 18 N. E. Rep. 334; *Otto v. Schlappkahl*, 57 Iowa, 226, 230, 10 N. W. Rep. 651; *Gebhard v. Sattler*, 40 Iowa, 152; *Lakin v. Mining Co.*, (Cal.) 25 Fed. Rep. 337, 347. In the case last cited, Judge Sawyer said: "Upon well-settled principles of law the statute [of limitations] does not begin to run against a cestui que trust in possession until the date of his ouster therefrom, no matter whether the trust be express or implied. *Love v. Watkins*, 40 Cal. 509; *McCauley v. Harvey*,

49 Cal. 497; *Altschul v. Polack*, 55 Cal. 633." In *Howell v. Howell*, 15 Wis. 55, Chief Justice Dixon said, of the claim that the statute of limitations does not commence to run until the trust is denied, that the doctrine was applicable only to express or acknowledged trusts. This remark evidently implies that the chief justice was of the opinion that an acknowledged trust, though not an express one, is on the same footing in respect to the statute as an express trust, upon which, as we have seen, the statute does not commence to run until the trust is denied and repudiated. Much doctrine will be found laid down in the text-books, and in many other adjudications, in the same direction, but the view we have taken of the question involved seems so well grounded in principle that we do not care to further comment upon or cite the authorities. We hold, therefore, that because it appears from the complaint that the trust in question is cognizable only by a court of equity, because the trustee always confessed the trust, because he never had any adverse possession of the trust property, and because his heirs have no equities superior to those of the trustee when living, the complaint does not show that any statute of limitation has run against the cause of action therein stated. We thus reach the conclusion that the complaint states a valid, subsisting cause of action in favor of plaintiff, against defendants, without resorting to the rule stated in *Bank v. Merrill*, 81 Wis. 151, 50 N. W. Rep. 505, to the effect that statutes of limitation do not run against claims between husband and wife. For authorities to that proposition, in addition to those cited in the opinion of Mr. Justice Orton, see cases cited in 13 Amer. & Eng. Enc. Law, p. 711, note 3. The order of the circuit court, sustaining the demurrer to the complaint, must be reversed, and the cause will be remanded, with directions to overrule such demurrer.

WHEREATT v. ELLIS.

(Supreme Court of Wisconsin. May 23, 1893.)
APPEAL—REVERSAL—MANDATE AND PROCEEDINGS
BELOW.

Under Sanb. & B. Ann. St. § 3072, providing that where the supreme court orders a new trial the record shall be transmitted to the lower court, and proceedings had thereon, within a year of the order, and section 3072a, providing that it shall be plaintiff's duty, when a judgment in his favor is reversed on defendant's appeal, to pay the costs and procure the cause to be remitted to the trial court, and bring it to trial within a year, plaintiff's duty is waived where, within the year, defendant voluntarily pays the costs, procures the record to be transmitted to the lower court, and there takes proceedings for reference and trial of the cause.

Appeal from circuit court, Trempealeau county; A. W. Newman, Judge.

Action by George W. Whereatt against J. F. Ellis. From orders denying a motion to

dismiss the complaint, defendant appeals. Affirmed.

The other facts fully appear in the following statement by J. YON, C. J.:

On November 22, 1887, an order of the circuit court in this action, in favor of plaintiff, was reversed by this court on the appeal of defendant, and the cause remanded with directions to award a new trial. 70 Wis. 207, 35 N. W. Rep. 314. On January 27, 1888, the defendant paid the clerk's fees in this court, and procured the record to be transmitted to, and filed in, the circuit court. Various proceedings were thereafter taken in the circuit court by both parties, commencing with a notice by defendant requiring the plaintiff to appear, and submit to an examination, under section 4096, Rev. St., on January 7, 1888, and terminating with an order dated December 11, 1888, made on motion of defendant, referring the cause to a referee to hear, try, and decide the issues therein. On the same day the court denied defendant's motion to dismiss the complaint for noncompliance with the requirements of sections 3072 and 3072a, Sanb. & B. Ann. St. In December, 1891, defendant renewed his motion to dismiss the complaint for the same cause, and on January 16, 1892, the court made an order denying such motion. This appeal is by defendant, from both orders denying his motions to dismiss the complaint.

Ellis & Allen, and F. J. Lamb, (M. D. Bartlett, of counsel,) for appellant. L. A. Doolittle and A. J. Sutherland, for respondent.

LYON, C. J., (after stating the facts.) The motions of defendant to dismiss the complaint are based upon the following statutes: "Sec. 3072. In every case, in error or on appeal, in which the supreme court shall order a new trial or further proceedings in the court below, the record shall be transmitted to such court, and proceedings had thereon, within one year from the date of such order in the supreme court, or in default thereof the action shall be dismissed, unless, upon good cause shown, the court shall otherwise order. Sec. 3072a. It shall be the duty of the plaintiff in any action or proceeding, when a judgment or order in his favor therein is reversed by the supreme court on defendant's appeal, to pay the taxable costs on such reversal, and procure said cause to be remitted to the trial court, and bring the same to trial within one year after such removal, unless the same be continued for cause, and if he fail so to do the complaint shall be dismissed: provided, however, that no complaint shall be dismissed until the expiration of six months after the passage of this act, nor until at least one term of the trial court has been held, at which the same could be moved." As was intimated in *Puckard v.*

Backus, (Wis.) 53 N. W. Rep. 450, the word "removal" in section 3072a should probably be read "reversal." The latter section is chapter 478, Laws 1887. The above statutes are highly penal, in that for noncompliance with their requirements the plaintiff must lose his action. Of course such statutes must be strictly construed in favor of the party charged with violations of them, and waivers of those requirements by defendant should be strictly enforced. Under this rule of construction we think the obligation upon the plaintiff to pay the taxable costs in this court, to procure the cause to be remitted to the circuit court, and to bring the same to trial therein within one year after reversal, unless continued for cause, were effectually waived by defendant when, within the year of the statute, he voluntarily paid the clerk's fees, procured the record to be transmitted to the circuit court, and took proceedings in that court entirely inconsistent with the right claimed by him to have the complaint dismissed. To obtain the benefit of the statute the defendant should wait until the expiration of the year after reversal, and then, if the plaintiff fails to do so, he may procure the cause to be transmitted to the trial court. He will then be in a position to move in that court for the relief given by the statutes, to wit, the dismissal of the complaint. See *Packard v. Backus*, supra. We reach the conclusion, therefore, that the defendant waived the benefit of the above statutes, and the cause stood thereafter in the circuit court the same as though such statutes had not been enacted. It follows that the circuit court properly denied the motions to dismiss the complaint. At the last term a motion to dismiss this appeal was argued, but not decided. It is desirable that the questions involved in the appeal should be determined on the merits. We therefore assume that the appeal was properly taken, and deny the motion to dismiss the same. Orders affirmed.

WENDLANDT v. CAVANAUGH.

(Supreme Court of Wisconsin. May 23, 1893.)

NUISANCE — INJUNCTION TO RESTRAIN — DISCHARGING WATER ON LAND — REVIEW ON APPEAL — HARMLESS ERROR.

1. Error in sustaining a demurrer to a counterclaim is harmless where the alleged facts on which it is based are negated by the findings of fact.

2. Under *Sanb. & B. Ann. St. § 3180*, an action to restrain defendant from maintaining a ditch through which water from his land is discharged on that of plaintiff is, if the injury is "continuous and constantly recurring," an equitable action, and it is immaterial that damages for past injuries resulting from such overflow are claimed and awarded.

3. In a suit to restrain a discharge of water on plaintiff's land, it appeared that there was a basin on defendant's land in which water from rain and melting snow collected, and that ditches were dug which conducted water from

springs to such basin; that defendant also dug a fountain, which increased the water therein; and that he dug a ditch through an elevation on his own land, and through it precipitated the water from such basin on plaintiff's land, which was greatly injured by such discharge. *Held*, that an injunction was properly awarded.

Appeal from circuit court, Green Lake county; George W. Burnell, Judge.

Action by Gottlieb Wendlandt against James Cavanaugh to restrain defendant from discharging water on plaintiff's land, and for damages. From a judgment for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by LYON, C. J.:

Plaintiff is the owner in fee of the east half, and the defendant of the west half, of a certain quarter section of land. This is an action in equity to restrain the defendant from maintaining a ditch dug by him on his own land, through which the waters gathered on his land are discharged upon and injure the land of plaintiff, and to recover damages for past injury caused thereby. The complaint alleges that, in 1888, defendant dug and constructed a fountain upon his own land, and thereby caused the subterranean waters to come to the surface, and dug and constructed a ditch to the line between the lands of the parties, in which he collects the waters which flow from such fountain and certain springs, together with the surface water on his land, and discharges the same upon the land of plaintiff, destroying the grass growing thereon, and spoiling his meadow land. The complaint further alleges that "said fountain will continue to flow, and the said waters of springs and other fountains and surface water continue to be collected in said ditch, and caused to flow in, upon, and over the plaintiff's lands, to his great damage in the future, unless the defendant be enjoined and prohibited from so causing the waters aforesaid to flow through said ditch and upon said lands, and said lands of this plaintiff will become entirely worthless and of no value." The relief demanded is that defendant be restrained by the judgment of the court from permitting such water to be thus emptied through the ditch upon plaintiff's land, and that the plaintiff recover his damages and costs. The answer contains a general denial, and also special averments, as follows: (1) That the ditch in question was dug to straighten a natural water course; (2) that defendant had a right by prescription to flow such waters across plaintiff's land through a ditch and water course on the line between the lands of the parties, but that, eight or nine years before, plaintiff built a dam across such ditch and water course, and caused the water, which otherwise would have passed off through the same, to flow back upon defendant's land, whereby it became necessary to dig the ditch complained of to get rid of such water; and (3) that plaintiff consented to the dig

ging of the same. The answer also contains a counterclaim for damages caused defendant by the building of such dam by plaintiff across such ancient ditch and water course. The court sustained a general demurrer to such counterclaim. At the commencement of the trial the defendant demanded that the cause be tried by a jury, as an action at law. The court refused the demand, and thereupon defendant demurred ore tenus to the complaint, for that it states no cause for equitable relief. The court overruled the demurrer, and the trial proceeded before the court without a jury.

With the above preliminary statements, the case, as it stood upon the proofs, will be best understood by inserting the principal findings of the court. These are as follows: "(1) That, except as herein specifically found, all the allegations of the complaint are true. (2) That, except as herein specifically found, no allegation of the defendant's answer is true. (3) That the lands of the defendant are generally higher than the lands of the plaintiff, and that a larger part of the defendant's lands are nearly level, and that there are thereon several low places or swales. That near the west line of defendant's land, and within about two rods of where the defendant dug the fountain, there is a low place or basin into which the water caused by rain and the melting snow were wont to collect, and, for some years last past, the water from a spring situated about eighty-six rods northwest of this sink hole had also emptied into this pond, following down to the pond in ditches dug on the line between adjacent landowners, and mingling with the surface water collected in such ditches. That the water so collected could not all run off. Some stood stagnant, or soaked into the ground, or evaporated, and in high water a part thereof ran over the surrounding marsh, and settled in other low places, and some soaked into the ground, some was taken up by evaporation, and some passed off generally in a southeasterly course, and across the plaintiff's land, about twenty rods south of the mouth of the ditch dug by defendant. (4) That in June, 1887, the defendant dug the fountain mentioned in the complaint, and the subterranean waters therefrom ran into the sink hole or pond mentioned in the third finding of fact. (5) That in June, 1888, the defendant dug the ditch described in the complaint, running through such pond or sink hole as far west as the west margin or edge thereof, and, from the sink hole or pond, running easterly to a line ditch situated on or near the north and south line between plaintiff's and defendant's lands, which line ditch empties into an east and west ditch running through the plaintiff's land towards his meadow and pasture land. (6) That there were natural embankments or ridges on defendant's land, running north and south, which theretofore

prevented the water from running in the place or course taken by said ditch dug by defendant. (7) That the immediate result of digging such ditch was to empty the water from said sink hole or pond onto the plaintiff's meadow and pasture land, and the same overflowed and destroyed the grass on thirteen acres of meadow, and soaked and made wet plaintiff's pasture lands, and the continued running of the water from said fountain, from the marsh, and from the spring, through such ditch, drained such sink hole, and created a new pond or reservoir down upon the plaintiff's land, and will, if continued, destroy about thirteen acres of his meadow, and injure his pasture, keeping the same soft and wet." The remaining findings relate to damages, which are found to be \$30. The conclusions of law are as follows: "(1) That the plaintiff is entitled to recover the relief demanded in his complaint; (2) that the plaintiff is entitled to a permanent and mandatory injunction, as prayed in his complaint, restraining the defendant from permitting the water hereinbefore mentioned to be emptied or caused to flow in, upon, or over the land of the plaintiff, through or by means of said ditch dug by him, and from permitting the ditch dug by him to be used for conveying water to and upon plaintiff's land described in the complaint; (3) that plaintiff is entitled to judgment for his damages, assessed at thirty dollars, and for his costs and disbursements in this action, to be taxed." From the judgment for plaintiff, entered in accordance with the above conclusions of law and order for judgment, the defendant appeals.

Niskern & Engelbrecht and Gabe Bouck, for appellant. J. H. Davidson, for respondent.

LYON, C. J., (after stating the facts.) Much testimony was introduced on the trial, and there is considerable conflict in the statements of some of the witnesses. We have examined the testimony sufficiently to satisfy us that it supports the findings of the learned circuit court. Statement and discussion of the testimony in this opinion would be profitless, and we refrain therefrom. Three questions must be determined, and it is believed that they cover the whole case. These are: (1) Was the demurrer to the counterclaim properly sustained? (2) Did the court properly deny the demand of defendant for a jury trial, and properly overrule his demurrer ore tenus to the complaint? Or, stated in another form, was the action properly brought in equity? And (3) is the judgment supported by the findings?

I. Was the demurrer to the counterclaim properly sustained? The counterclaim is for damages accruing to defendant by reason of the dam alleged to have been built by plaintiff, in 1880, across the ditch on the line be-

tween the lands of the parties, and to restrain plaintiff from maintaining such dam. If a proper counterclaim, it is so because it states a cause of action arising out of the transactions set forth in the complaint as the foundation of plaintiff's claim, or is connected with the subject of the action. Rev. St. § 2656. Such transactions are the raising to the surface of the subterranean water by digging the fountain, and gathering the same, and water from certain springs, and the surface water in the sink hole or basin, and then precipitating all of it in a body upon plaintiff's meadow through the ditch dug by defendant in 1888. The subject of the action is the damage caused thereby to plaintiff's land. It is difficult to perceive the connection between the act of plaintiff in 1880 and the acts of the defendant in 1888, or how one can properly be said to arise out of the other. But, however this may be, there is a feature in the case which prevents a reversal, even though the demurrer to the counterclaim should have been overruled. The alleged facts which are the foundation of the counterclaim were also pleaded as a defense to the action, and are negatived by the court in the second finding of fact. Hence, had the demurrer been overruled, still the counterclaim would have failed, and the error in sustaining the demurrer thereto (if it was error) thus became entirely immaterial.

II. Does the complaint state a valid cause of action in equity? The action was brought under section 3180, Rev. St. as amended by chapter 190, Laws 1882, (Sanb. & B. Ann. St. § 3180.) In *Remington v. Foster*, 42 Wis. 608, it was held that an action under the corresponding section in the former statutes was an action at law, and that, because the statute corresponding with section 3181 gave the remedy of abatement of the nuisance complained of in such action, no action in equity for such abatement could be maintained. Thus the law remained until the enactment of chapter 190 of 1882, which restored the equitable remedy in the several cases therein specified. One of these is, "when the injury is continuous and constantly recurring." The court has found substantially that this is such a case. We conclude the action was properly brought in equity. *Denner v. Railway Co.*, 57 Wis. 218, 15 N. W. Rep. 158; *Fraedrich v. Flieth*, 64

Wis. 184, 25 N. W. Rep. 28. It is none the less an action in equity because damages for past injury by reason of the nuisance are claimed and awarded. *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297, 48 N. W. Rep. 371.

III. Is the judgment supported by the findings? Such findings are to the effect that there was a low place or basin on defendant's land in which water caused by rains and melting snow was wont to collect, much of which soaked into the ground or was wasted by evaporation; that ditches were dug which conducted the water from springs into such basin; that the quantity of water therein was also increased by a fountain dug by defendant, which brought the subterranean water to the surface, and into such basin; and that the defendant dug a ditch through an elevation of the ground on his own land near the plaintiff's line, and through it precipitated the water thus collected in such basin or pond directly upon plaintiff's land, creating a new pond of water thereon, greatly injuring his meadow, and threatening 13 acres thereof with destruction. The findings negative any consent by the plaintiff to the digging of such ditch or the existence thereof of any water course. The above findings bring the case directly within the rule of *Pettigrew v. Evansville*, 25 Wis. 223. That case has been much discussed, and somewhat criticised, in many cases before this court since it was decided, and in some respects the doctrine thereof has been modified, especially as regards the rights of municipalities to dispose of surface water in the improvement of streets. Most of these cases and numerous others are cited by Justices Cassoday and Pinney in the opinion of the former in *Heth v. Fond du Lac*, 63 Wis. 228, 23 N. W. Rep. 495, and of the latter in *Champion v. Crandon*, (Wis.) 54 N. W. Rep. 775. But in an action between private individuals, in which no question of public duty or authority is involved, none of these cases question the accuracy of the rule of *Pettigrew v. Evansville*, correctly stated in a headnote to that case, as follows: "The owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it through an artificial channel directly upon the land of another, greatly to his injury." Under that rule the findings herein fully support the judgment. The judgment of the circuit court is affirmed.

¹Sanb. & B. Ann. St. § 3180, provides that "the circuit courts shall have jurisdiction of actions to recover damages for and to abate private nuisance, or a public nuisance from which any person suffers a private or special injury peculiar to himself, so far as necessary to protect the rights of such person, and to grant injunctions to prevent the same; and in case such nuisance may work an irreparable injury, interminable litigation, or a multiplicity of actions, or either, or when the injury is continuous and constantly recurring, * * * then an action in equity may be brought and maintained, and an injunction may be issued therein."

ERON v. TOWN OF STEVENS' POINT.

(Supreme Court of Wisconsin. May 23, 1893.)

DEFECTIVE STREETS—SUFFICIENCY OF COMPLAINT—GENERAL DENIAL—ISSUES RAISED—MATTER IN BAR—WHAT CONSTITUTES.

1. A general denial in an action against a town for injuries resulting from a defective street puts in issue an allegation in the complaint that a statement was filed with the town clerk to be placed before the town board,

and hence the burden of proving the same is on plaintiff.

2. The filing of such statement is matter in bar, and not in abatement.

Appeal from circuit court, Portage county; Charles M. Webb, Judge.

Action by Anthony Eron, as administrator of the estate of Adolph Belka, deceased, against the town of Stevens' Point, to recover for the death of plaintiff's intestate, resulting from a defective street. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by CASSODAY, J.:

The complaint alleges, in effect, that Adolph Belka died intestate, October 22, 1889; that the plaintiff was, upon due application, appointed administrator of his estate, December 3, 1889, and qualified as such; that October 22, 1889, there was a certain public highway in the defendant town leading from Stevens' Point, first in a northwesterly direction, and then in a westerly direction, as described, and which highway had been duly laid out and traveled and worked for more than 10 years prior thereto; that at a point in said highway 30 rods west of where the same crosses Mill creek in said town there is a large stump standing within the limits of said highway, and near and adjacent to the traveled part thereof, and so near to such traveled part that, in order to pass said stump, there is a crook or turn in the traveled track of said highway opposite said stump, which stump constitutes a defect in said highway, and which defect had existed therein for a long time prior to said last-named date, and which defect was well known to the officers of the defendant; that October 22, 1889, the said Belka was riding in a lumber wagon drawn by a pair of horses then being driven by him in a careful and prudent manner, and lawfully traveling upon said highway, when his horses, without any fault or neglect upon his part, shied slightly to the left, thereby causing the wheels of his wagon to strike said stump, and thereby the said Belka was thrown out of said wagon violently to the ground, whereby he received great and severe injuries, which caused his death within a few hours thereafter; that said death was caused wholly by the neglect of the defendant in not keeping said highway in a good and safe condition, and by reason thereof, and without any negligence or fault upon the part of said Belka; that January 7, 1890, a notice in writing, signed by the plaintiff's attorney, was duly served upon the supervisors of said town of said defect, as required by statute; that March 25, 1890, a statement of said claim was duly laid with the town clerk of said town, to be laid before the town board of audit, as required by statute; that more than 10 days had elapsed since the annual town meeting after such filing of said claim, and prior to the commencement of this action, and that the

defendant wholly refused to settle with the plaintiff for said claim; wherefore he prayed judgment, etc. The answer admits that the defendant is a municipal corporation, as set forth in the complaint, and, except as thus admitted, it denies each and every allegation in the complaint. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at \$1,500. From the judgment entered upon said verdict in favor of the plaintiff, the defendant brings this appeal.

Raymond, Lamoreux & Park, for appellant. Cate, Jones & Sanborn, for respondent.

CASSODAY, J., (after stating the facts.) Error is assigned because at the close of the testimony the court refused to grant the defendant's motion to direct a verdict in its favor on the ground that the evidence was insufficient to establish a cause of action against the town. Error is also assigned because, upon the rendition of the verdict, and before judgment, the court refused to grant the defendant's motion to set aside the verdict and grant a new trial, for the reason, among others, that there was no proof in the case, and that no evidence had been offered, "tending to show that any bill or statement of the claim or demand of the plaintiff was ever filed with the town clerk of the defendant town, to be laid before the town board of audit, as required by section 824 of the Revised Statutes." It is conceded that no such proof was made in the case, but it is contended that, because the complaint alleges the filing of such statement, and the same is not specifically denied, the defendant must, under the statute, "be deemed to have waived the same." Section 2654. In other words, counsel contend that the failure to file such statement was at most matter in abatement, and hence was not put in issue by the general denial contained in the answer, and that the same could only be put in issue by special denial or plea. That such is the rule, as to matters merely in abatement, seems to be firmly sanctioned by the decisions of this court cited by counsel for the plaintiff. But under another line of decisions of this court we are forced to hold that the filing of such statement is not a matter merely in abatement, but a matter in bar. The section of the statute last cited, and relied upon by counsel, in effect declares that "the defendant shall be deemed to have waived" any objection to certain matters in abatement, unless "taken either by demurrer or answer," and expressly excepts therefrom "the objection that the complaint does not state facts sufficient to constitute a cause of action." This court has frequently held that a complaint in a case like this does not state facts sufficient to constitute a cause of action if it omits to allege the filing of such

statement. *Benware v. Town of Pine Valley*, 53 Wis. 527, 10 N. W. Rep. 695; *Chicago & N. W. Ry. Co. v. Town of Langlade*, 55 Wis. 117, 12 N. W. Rep. 357; *Wentworth v. Town of Summit*, 60 Wis. 281, 19 N. W. Rep. 97; *Watson v. City of Appleton*, 62 Wis. 267, 22 N. W. Rep. 475; *Koch v. City of Ashland*, (Wis.) 53 N. W. Rep. 674. Some of these cases went to the extent of holding that the omission to allege such filing in the complaint rendered the same bad on demurrer ore tenus. This could only be on the theory that such filing is essential to the cause of action, and a condition precedent to the right to maintain the same. *Welsh v. Town of Argyle*, 55 N. W. Rep. —, (decided herewith.) We must hold that the general denial put in issue the allegation of the complaint of the filing of such statement. Being thus put in issue, the burden of proving the same was on the plaintiff. Having failed to make such proof, the verdict should have been set aside. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WELSH et al. v. TOWN OF ARGYLE.

(Supreme Court of Wisconsin. May 23, 1893.)
DEFECTIVE HIGHWAY—INJURY TO TEAM—ACTION FOR DAMAGES—PARTIES—PLEADING.

1. In an action against a town for injury to a team from a defective highway while being properly driven by one who had hired it, such person is not a proper or necessary party.
2. Under Rev. St. § 824, providing that no such action against a town shall be maintained unless a statement of the claim be filed with the town clerk, to be laid before the town board, nor until 10 days after the next annual town meeting thereafter, it is not necessary for the complaint to state that the action was not commenced until the expiration of the 10 days after such meeting.

Appeal from circuit court, La Fayette county; George Clementson, Judge.

Action by John Welsh and another against the town of Argyle for damages to a team from a defective highway. A demurrer to the complaint was overruled, and defendant appeals. Affirmed.

The other facts fully appear in the following statement by CASSODAY, J.:

The complaint alleges, in effect, that the plaintiffs were at the times therein stated co-partners engaged in a general livery business; that February 25, 1891, there was a public highway in the defendant town, therein described; that at the date named said highway was greatly and wholly insufficient, defective, and out of repair in many respects, especially in that there was a natural stream of water which ran along in and on the west edge of said highway at the place described for the distance of about 18 rods next south of the point where said stream crossed said highway; that at that point there was a bridge over said stream, constituting a part of said highway; that at said point said

stream curved eastward, and projected into said highway about 2 rods at the point where the injury mentioned was sustained, the same being about 130 feet south of said bridge; that the embankment of said stream on the west edge of the highway at that point was about 4 feet high,—that is to say, there was a drop of about 4 feet from the surface of the highway to the bed of the stream,—and there were about 7 feet in depth of water and mud from the surface of the highway to the firm bed of the stream, besides a quantity of surface water 4 or 5 inches in depth, crusted thinly over with ice, which surface water was running eastward across the surface of said highway from and beyond the west edge of said highway; that said embankment existed all along said highway, a distance of 18 rods next south of said bridge; that said defect also consisted in the fact that at the times therein mentioned there was no fence, railing, guard or guards, or structure of any kind or description whatever along the edge of said stream and embankment; that said defects and want of repair existed for several years prior to February 25, 1891, and were well known to the defendant, its supervisors, officers, and overseers of the road district; that through their negligence and failure to repair the same and to construct a fence, guard, guards, or railing or other structure along the edge of said stream the same was a dangerous defect in said highway; that at the time named one Fisher, who had hired a livery rig and outfit of the plaintiffs, consisting of buggy and a span of mares and the usual accompaniments, all of which were the property of the plaintiffs, was driving on said highway, and while so doing, and in the exercise of due care, and without any negligence whatever, and in and near the center of said highway, and without fault on the part of said team, harness, or vehicle or on the part of said Fisher, the said team, in going directly in said highway, stepped and fell into and over the embankment and precipice 6 or 7 feet in depth down into the bed of the stream of water, and were then and there engulfed in said ditch, channel, and stream of water, and were then and there drowned, to the damage of the plaintiffs in the sum of \$200; that May 21, 1891, the plaintiffs caused to be served on the then chairman of the town board of supervisors of said town a notice, in writing, of said defect, as required by statute; that May 21, 1891, the plaintiffs also duly filed with the town clerk of said town a written statement of their said claim to be presented to and laid before the town board of audit of said town, as required by statute; that said town board of audit wholly disallowed said claim, and on the first Tuesday in April, 1892, (that being the next annual town meeting of said town,) said claim was not then allowed, and no action was taken for the allowance of the same; wherefore, judgment was demanded in the amount stated. To such complaint

the defendant demurred, on the ground that there is a defect of parties plaintiff, in not making said Fisher a party plaintiff in this action; and, second, on the ground that the complaint does not state facts sufficient to constitute a cause of action. From the order overruling that demurrer the defendant brings this appeal.

Orton & Osborn, for appellant. Willson & Martin, for respondents.

CASSODAY, J., (after stating the facts.) It does not appear that Fisher, who hired the team of the plaintiffs, and was driving the same at the time of the accident, is a proper, much less a necessary, party to this action to recover damage to the property of the plaintiffs. Nor does it appear affirmatively from the complaint that he was guilty of contributory negligence. It is to be remembered that such negligence, when not disclosed by the complaint or testimony on the part of the plaintiff, is purely a matter of defense. *Hoth v. Peters*, 55 Wis. 406, 13 N. W. Rep. 219; *Hoye v. Railway Co.*, 67 Wis. 15, 29 N. W. Rep. 646; *Gill v. Homrighausen*, 79 Wis. 634, 48 N. W. Rep. 862. It is, in effect, conceded that the notice of the defect of the highway, required by section 1339 of the statutes, is sufficiently alleged in the complaint. The same is true respecting the filing of the statement of the claim with the town clerk, to be laid before the town board of audit, as required by section 824, Rev. St. It is contended, however, that the complaint is defective because it fails to allege that the action was not commenced "until ten days after the next annual town meeting" held after such filing of the statement of such claim. True, we have frequently held that a complaint, in such a case, is fatally defective, unless it alleges such filing of such statement, as well as the giving of the notice of such defect. *Benware v. Town of Pine Valley*, 53 Wis. 527, 10 N. W. Rep. 695; *Railway Co. v. Town of Langlade*, 55 Wis. 117, 12 N. W. Rep. 357; *Wentworth v. Town of Summit*, 60 Wis. 281, 19 N. W. Rep. 97. These rulings are upon the theory that such notice of defect and such filing of such statement are conditions precedent to the right to maintain the action. It is true the statute declares, in effect, that no such action "shall be maintained" unless such statement is so filed, "nor until ten days after the next annual town meeting thereafter." Section 824. But it will be observed that such notice of defect and such filing of such claim are each affirmative acts on the part of the claimant for the benefit of the town, in order to bring home to its officials full knowledge of the claim made, so as to enable them to investigate the same, and determine upon their line of conduct; whereas the time for holding such annual town meeting is a fact which everybody is bound to know, and hence, to allege such delay of 10 days thereafter would, in effect, be nothing more than

to allege the time when the suit is commenced,—a fact necessarily known to the defendant, and appearing of record in the cause. Here it appears of record that this suit was commenced May 17, 1892, which was more than a month after the holding of such next annual town meeting. To hold the complaint defective for not stating that fact would be too finical for the practical administration of the law. True, the cases cited by counsel, and others which might be cited, hold, in effect, that, upon demurrer to a complaint for insufficiency, all the facts constituting the cause of action must appear upon the face of the complaint; and that the court will not examine the record to find facts to help out a defective complaint. But we are constrained to hold that the mere failure to state when the action was commenced is not a defect. Such allegation would not go to the cause of action, but at most would merely show whether the suit had or had not been prematurely commenced. This court has gone to the extent of holding that a complaint alleging the sale and delivery of property by the plaintiff to the defendant at an agreed price is sufficient, although it does not allege that no part of such purchase price has been paid. *Rosster v. Schultz*, 62 Wis. 655, 22 N. W. Rep. 839. The allegations of the complaint as to the defect in the highway are unnecessarily prolix, repetitious, and confused, and more or less uncertain; but we think it states a good cause of action. *Jung v. City of Stevens Point*, 74 Wis. 547, 43 N. W. Rep. 513; *Wiltse v. Town of Tilden*, 77 Wis. 152, 46 N. W. Rep. 234.

The order of the circuit court is affirmed.

JONES et al. v. PIENING.

(Supreme Court of Wisconsin. May 23, 1893.)
ASSIGNMENT FOR BENEFIT OF CREDITORS — CLAIM AGAINST ESTATE — RIGHT OF SET-OFF — DISALLOWANCE — TIME FOR APPEAL.

1. Under Rev. St. § 1699, providing that an appeal from an order allowing or disallowing a claim against an estate in the hands of an assignee for creditors shall be taken, "within 30 days from the entry of the order," an appeal from an order dated October 15th may be perfected November 12th, though the order states that it is "as and for September 19th," when the meaning of this is merely that the order appealed from is a modification of an order of the earlier date.

2. A depositor in a bank which makes an assignment for the benefit of creditors may set off against his deposit the amount of his note held by the bank, though the note is not due at the time of the assignment.

Appeal from circuit court, Manitowoc county; N. S. Gilson, Judge.

Petition by G. W. Jones and Frank P. Jones against Adolph Piening, assignee of the T. O. Shove Banking Company, to set off money due petitioners by defendant's assignor against the amounts owing by them to said assignor on certain notes. From an order disallowing their petition in part, petitioners appeal. Reversed.

The other facts fully appear in the following statement by CASSODAY, J.:

It appears from the record, and is in effect found, that April 12, 1892, the T. C. Shove Banking Company made a voluntary assignment for the benefit of its creditors to the defendant, Plening; that at the time of making said assignment the said bank was indebted to the plaintiffs upon an open and running account for deposits therein in the sum of \$4,198.96; that the bank also held in trust, for the purpose of paying a premium on insurance for the plaintiffs, the sum of \$47.50, and also held in trust for collection a draft belonging to the plaintiffs for \$163.22, making a total of \$4,409.68; that the plaintiffs were at the same time indebted to the bank in the sum of \$7,357.22, of which sum \$3,357.22 was past due and payable, and the balance of \$4,000 did not become due until some time after said assignment; that June 28, 1892, the plaintiffs petitioned the circuit court to allow the said \$4,409.68 to be set off against the amount due from the plaintiffs to said bank upon said five notes, aggregating the amount of \$7,355.50; that the assignee answered said petition, and on the trial thereof the court found, in addition to the facts stated, and as conclusions of law, that the plaintiffs were entitled to have allowed, as a set-off against the \$4,198.96 so on deposit, the amount due prior to said assignment on said notes, to wit, the sum of \$3,357.22, leaving a balance due to the plaintiffs upon such deposits of the sum of \$841.74, and that the plaintiffs were also entitled to have allowed as an offset on their three notes, aggregating the amount of \$4,000, which did not mature until after said assignment, the said sum of \$47.50 so held in trust by the bank to pay insurance, and said sum of \$163.22 so held in trust by the bank for collection, making an aggregate of \$210.72, but that the plaintiff was liable to pay the balance of said \$4,000, with the interest from the time said notes respectively matured, to the assignee, and that the assignee was only liable to pay to the plaintiffs their pro rata share of the said \$841.74, being the balance of said deposits; and the court ordered judgment accordingly. From that order the plaintiffs bring this appeal.

Goldberg & Hoxie and Turner & Timlin, for appellants. Schmitz & Kirwan and G. G. Sedgwick, for respondent.

CASSODAY, J., (after stating the facts.) It is claimed that the appeal should be dismissed because it was not taken "within thirty days from the entry of the order," as required by the statute. Section 1699. It is true that section provides, in effect, that such appeal shall not be taken after the expiration of such 30 days. Here the order is dated October 15, 1892, and was entered October 21, 1892, and it is therein stated to be as and for September 19, 1892. The fact is

that the order so entered was a modification of a prior order of such former date. This appeal was perfected November 12, 1892, which was within 30 days from the entry of the order appealed from, and hence was within the time prescribed by the statute. At the time the bank assigned to the defendant it was indebted to the plaintiffs, as mentioned in the foregoing statement, and such indebtedness was then due and payable. At the same time the plaintiffs were indebted to the bank in a large amount, a part of which had become due and payable before the making of such assignment, and the balance thereof did not become due and payable until after the making of such assignment. The trial court allowed the plaintiffs to set off so much of their indebtedness as became due before the assignment, but refused to allow such set-off as to any portion of their indebtedness which became due after the making of the assignment. The correctness of such ruling is the important question presented for determination. Undoubtedly the rights of the creditors and debtors of an insolvent assignor, as to set-offs, become fixed immediately upon the completion of the assignment, in analogy to the rule applicable to debtors and creditors in the case of a deceased insolvent. *Bank v. Hloks*, 67 Wis. 192, 30 N. W. Rep. 234. Accordingly it has been held by this court that "a bank cannot set off, against a deposit to the credit of an assignor for the benefit of creditors, a note held by it against him, but not due at the time of the assignment." *Oatman v. Bank*, 77 Wis. 501, 46 N. W. Rep. 881. For the reasons for the rule see the opinion of Mr. Justice Orton in the case last cited. To the same effect is the decision of this court in *Kinsey v. Ring*, (Wis.) 53 N. W. Rep. 842; and see, also, *Fera v. Wickham*, 135 N. Y. 223, 31 N. E. Rep. 1028. The case at bar differs widely from that class of cases, and turns upon a different principle. Here it was not the indebtedness of the insolvent debtor that was not due when the assignment was made, but a portion of the indebtedness from the plaintiffs to the assignee of the insolvent debtor. An assignee of such insolvent debtor has no authority to waive the time of credit secured for the sole benefit of his assignor, and pay a debt not due, with credits, or the avails of credits which are due to the assignor at the time of making the assignment, for to do so would tend to prejudice the creditors of the insolvent's estate; but a debtor to such estate, whose debt was not due at the time of the making of such assignment, has the authority to waive the time of credit which was secured for his own benefit, and pay the same at once in money, or by way of set-off of the amount due him from such estate. This rule is firmly settled in other states, and has, in effect, been sanctioned by this court. *Lindsay v. Jackson*, 2 Paige, 581; *Smith v. Felton*, 43 N. Y. 419; *Smith v. Fox*, 48 N. Y.

674; *Rothschild v. Mack*, 115 N. Y. 1, 21 N. E. Rep. 726; *Richards v. La Tourette*, 119 N. Y. 54, 23 N. E. Rep. 531; *McCagg v. Woodman*, 28 Ill. 84. The case last cited is very much like the one at bar, and it was held that "where a party has funds deposited with a banker, who holds the promissory note of the depositor, the latter may insist that his note shall be satisfied out of the deposit, although the banker, before the note became due, had voluntarily assigned all of his effects for the benefit of creditors." So, in *Smith v. Felton*, supra, it was held "that the amount of a partnership deposit with an insolvent banker was a proper subject of set-off in an action brought by the assignee in trust for creditors of such banker, on a note held by the banker, made by one of the partners, and indorsed by the other for partnership purposes, although such note was not due at the time of the assignment." As pointed out by Chancellor Walworth in *Lindsay v. Jackson*, supra, and in the opinions of the courts in some of the other cases cited, a court of equity will permit such equitable set-off whenever justice requires it, even in a case not coming within the statute of set-off. Thus, it has been held by this court that "a judgment against an insolvent firm is a good equitable set-off to a debt to one of the partners from the judgment creditor of his assignee." *Seligmann v. Clothing Co.*, 69 Wis. 410, 34 N. W. Rep. 232. We are forced to conclude that the plaintiffs, or petitioners, were entitled to the set-off, as prayed. The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

VALLEY LUMBER CO. v. HOGAN et al.
(Supreme Court of Wisconsin. May 23, 1893.)

TRIAL — EXCEPTION TO FINDING — FAILURE TO MAKE — ASSIGNMENT FOR BENEFIT OF CREDITORS — RIGHT OF ASSIGNEE TO MAINTAIN ACTIONS.

1. Though there is no exception to the finding of the court, an exception to an erroneous refusal to find is available as ground for reversal.

2. Under Laws 1882, c. 170, Laws 1883, c. 349, and Laws 1885, c. 292, relating to assignments for the benefit of creditors, which give the assignee the right to maintain actions to avoid transfers fraudulent as to creditors, the right of the assignee is exclusive, and a creditor cannot sue the debtor and garnish a mortgagee of chattels who collusively withheld the mortgage from record in order to sustain the mortgagor's credit.

3. The fact that the prosecution of a cause of action would not benefit all the creditors, but only a part, is immaterial.

Appeal from circuit court, La Crosse county; A. W. Newman, Judge.

Action by the Valley Lumber Company against Donald A. McDonald and Charles M. McDonald, partners as McDonald Bros. James J. Hogan was garnished by plaintiff. Judgment was rendered against defendants and the garnishee, and the latter appeals. Reversed as to garnishee.

The other facts fully appear in the following statement by PINNEY, J.:

The defendant Hogan was summoned by the plaintiff in this action as garnishee of Donald A. McDonald and Charles M. McDonald, partners, etc., and as being indebted to them, and having possession and control of property belonging to them. Judgment was rendered against the principal debtors, and the sole question was whether the defendant Hogan was liable to the plaintiff as garnishee upon the following facts, namely: On the 14th of October, 1891, the defendants McDonald Bros. mortgaged lumber then in their possession, of the value of \$11,000, to the garnishee, Hogan, to secure a debt of \$10,000 and interest, and at the time it was agreed between them that the mortgage should not be put upon the record except on failure of McDonald Bros. to pay the notes it was given to secure at their maturity, 30 and 60 days from said date. The indebtedness to the plaintiff upon which its judgment was rendered against McDonald Bros. was a loan of \$5,000, obtained by them from the plaintiff November 23, 1891, in good faith, and upon the faith, strength, and representation that their property was not incumbered. On the 17th day of December, 1891, Hogan filed his mortgage, and took possession of the property covered by it, and has ever since held it. The plaintiff had no notice of the existence of the mortgage when it made the loan to McDonald Bros., nor until it was so filed, and the mortgage was kept from the record to prevent any injury to the credit of McDonald Bros. The court, as a conclusion of law upon these facts, held that the mortgage to the defendant Hogan of October 14, 1891, was void as to the plaintiff, and gave judgment charging the latter, as garnishee, for the lumber so taken by him under his mortgage. From a bill of exceptions it appears that McDonald Bros. executed to George H. Ray a general assignment, which was filed in the office of the clerk of the circuit court of La Crosse county on the 17th day of December, 1891, four hours after the garnishee defendant so filed his mortgage and took possession of the lumber, and he requested the court to rule that the action should be brought only by the assignee, or in his name, for the benefit of creditors, and that the present action should be dismissed, but the court declined to so rule, and exception was taken by Hogan. The assignment was given in evidence, but no finding was made in respect to it, and no exception was taken to the finding. The garnishee appealed from the judgment.

Thomas A. Dyson and Lusk, Bunn & Hadley, for appellant. E. C. Higbee, for respondent.

PINNEY, J., (after stating the facts.) 1. It is contended on behalf of the respondent that, as the finding of the court contains

all the facts necessary to charge the garnishee, and does not make mention of the general assignment to Ray, and as no exception was taken to the finding, the record does not present any question for review, and that the judgment must be affirmed. The facts stated in the bill of exceptions, and the request that the court should rule that the action should have been brought only by the assignee, as well as the exception to the refusal of the court to so rule or find, have been made and are a part of the record, as well as the finding of the court. The request was substantially to find that upon all the evidence the action could not be maintained, and the exception to its denial presents the question whether upon the whole record the plaintiff was entitled to bring and maintain the action. Although there may be no exception to the finding, an erroneous refusal to find may be excepted to and made available as ground for reversal of the judgment.

2. It is provided by the statute (chapter 80, § 1693, Sanb. & B. St.) that "the circuit court, or the judge thereof in vacation, shall have the supervision of the proceedings in all voluntary assignments made under the provisions of this chapter, and may make all necessary orders for the execution of the same." This chapter provides, in substance, that the assignment, with bond of the assignee, together with an inventory of assets and list of creditors, is to be filed with the clerk of the circuit court of the county where the assignor resides. Notice is to be given of the making of the assignment to all creditors of the assignor to file their claims by a day named, or be barred from all dividends; and the merits of any claim may be litigated upon objections filed, and a trial by jury may be had, and an appeal taken from the order made thereon to the supreme court. Creditors not filing their claims may be barred, and debts to become due, as well as debts due, may be allowed with rebate of interest to the time of making dividend, which the assignee may pay, or it may be ordered by the court; and the accounts of the assignee are to be settled upon notice before the court, when the assignor may file his petition therefor, and obtain a discharge from his debts, as provided by chapter 385, p. 541, Laws 1889. Chapter 170, p. 566, Laws 1892, provides that in all cases of voluntary assignments made for the benefit of creditors "the assignee or assignees shall be considered as representing the rights and interests of the creditors of the debtor or debtors making the assignments, as against all transfers and conveyances of property which would be held to be fraudulent or void as to creditors, and shall have all the rights which such creditors would have to bring and maintain an action to avoid such fraudulent conveyances and transfers." In *Vernon v. Upson*, 60 Wis. 423, 19 N. W. Rep. 400, it was said that this statute "makes the

assignee the representative of creditors in respect to all fraudulent transfers of property by the assignor, and gives the assignee the right to maintain actions to avoid the same." Chapter 349, p. 309, Laws 1883, was enacted to prohibit debtors giving preferences, and to secure the equal distribution of property assigned for the benefit of creditors, and the assignee in any such assignment is granted "all the powers thereunder necessary to institute any action or proceeding to set aside and avoid any levy, sale, mortgage, hypothecation, lien, or other security" named in the act. In *Batten v. Smith*, 62 Wis. 92, 98, 22 N. W. Rep. 342, in speaking of the two acts cited, this court said that, "under the law as it now stands, [1885.] an assignee for the benefit of creditors stands in very much the same attitude and is possessed of quite similar powers to an assignee in bankruptcy under the act of congress of 1867. By these two recent enactments the legislature have manifested the purpose of upholding general assignments so made for the benefit of all the creditors of the assignor, and to prevent all indirect methods of obtaining any preference through the active agency of the debtor at any time during the 60 days immediately preceding the assignment, and to enable the assignee, as the representative of such creditors, to avoid such illegal transfers, and to recover back for their benefit the property so fraudulently disposed of by the assignor." In *Kloeckner v. Bergstrom*, 67 Wis. 197, 30 N. W. Rep. 118, and *Charles Baumbach Co. v. Miller*, 67 Wis. 449, 30 N. W. Rep. 850, it was held that an assignee for the benefit of creditors does not take title to property fraudulently conveyed by the assignor prior to the assignment, and that such assignee could not maintain replevin, or an action for the conversion of such property, but could only attack such prior fraudulent transfer or conveyance as the representative of the other creditors by "an action in equity to avoid such fraudulent transfers, and subject the property so fraudulently transferred, so far as may be necessary, to the execution of the trusts of the assignment." In this condition of the law, chapter 202, p. 262, Laws 1885, (Sanb. & B. St. § 1693b,) was enacted, by which it is provided that, "whenever an insolvent debtor has made any conveyance or transfer of his property, with intent to hinder, delay, or defraud his creditors, or any conveyance, transfer, or charge upon his property, which is void by reason of being preferential or otherwise, and shall thereafter make a general assignment for the benefit of his creditors, if the assignee named in such assignment shall neglect for sixty days after the delivery thereof to institute proper suit to vacate such fraudulent or preferential conveyance, transfer, or charge, it shall be lawful for any creditor of the assignor, having first proved his claim as required by law, to institute and prosecute to judgment any such

suit in the name of the assignee and for his benefit, upon giving to the assignee bond in the sum of one thousand dollars, with sufficient surety, resident in this state, to hold said assignee harmless from said loss, costs, or expense to arise or accrue to him in case said suit shall be decided adversely to him. In case of recovery in such action the creditor so prosecuting the same shall be allowed out of the estate all reasonable costs and charges which he has paid or become liable for in respect to the prosecuting of said suits, the same being for the common benefit of the creditors; such costs and expenses to be determined by the court." It will be seen from this general statement of the statutes that two general purposes are contemplated, and sought to be accomplished, namely, the prohibition of preferences, and an orderly, systematic administration of the estate of the assignor by an assignee under the direction and control of the circuit court, having plenary equity powers which may be exercised in a summary way subject to appeal, and the proceeding may culminate in a discharge of the assignor from his debts. The purpose of the proceeding is to get in all the property and property rights of the assignor, and exercise all the rights of his creditors in respect thereto, and convert the same into money, and distribute the same as equally as may be, through the assignee, under the authority of the court. It would be contrary to the plain purpose and spirit of the law for each individual creditor to attempt to litigate and enforce in his own name rights which the law contemplates shall be litigated and enforced only by or in the name of the assignee. Any other course would be productive of those preferences which the law is designed to prevent in the administration of the estate of the assignor, and would lead to a multiplicity of suits and needless litigation, as well as embarrassment and delay, by which the effects of the assignor would be in a large degree wasted by unnecessary costs and charges. It was not intended that the rights of the assignee, who represents the creditors as provided in the statute, should be brought in conflict with rights asserted by individual creditors, and that they should be allowed to work at cross purposes to him, which would be productive of conflict and confusion. The framers of the statutes intended them to operate as a uniform system, and could not have contemplated such a result. A careful consideration of these acts, which are in pari materia, and must therefore be construed together, and as constituting a consistent system, has satisfied us that the important rights of action which the assignee may exercise under this statute were intended to be exclusive, and not cumulative to those of individual creditors, and which, if exercised and put in use, would so far defeat the plain purposes of the statute. Evidently the right of action of the assignee must take the place

of and exclude that of the several creditors in these respects. They cannot be considered as consistent or concurrent rights, for the right of action of the creditor looks to the application of the fruits of his action exclusively to the payment of his own debt, and to obtaining an advantage and priority over all other creditors; and the results of the action of the assignee are required to be applied to the benefit of the creditors generally. The rights of the individual creditor are fully secured against want of action by the assignee, by allowing the creditor, upon the terms prescribed in section 1693b, to institute and prosecute to judgment the proper action in the name of the assignee; and this of itself implies a denial of the right to sue in respect to the causes of action specified in the statute in his own name. It is, however, urged that this construction should be allowed only where the cause of action will, if put in force, operate to the common benefit of all the creditors; and that, as the chattel mortgage in question is void only as to the plaintiff and others who became creditors of McDonald Bros. while it was collusively withheld from record, and so affects only a class, or perhaps but one, of their creditors, therefore the case is not within the statute. The same reasons exist for a fair and equal application of the provisions of the act and distribution of the effects to be realized for a class as for all the general creditors of the assignor, and transactions which are void as to the class, as preferential or otherwise, are clearly within the meaning of the law. The principal or greater power contains the less. Nor should the operation and effect of this remedial act be unduly narrowed and restrained by the provisions added in respect only to the costs of actions prosecuted by a creditor in the name of the assignee, and not to actions prosecuted by the assignee. As a matter of course, the assignee will be allowed the costs of all actions prosecuted by him out of the general fund, whether successful or not, and, if a special fund results, or is increased, then out of that fund. A creditor can have costs only in case he is successful, and out of the general fund, if it is increased; and if the result is for the benefit of a less number than all the creditors, then it is within the spirit and meaning of the act that the costs shall be charged to the fund which is the result of the action. It is argued that the present case is not within the statute, because it presents a question of estoppel merely, resulting in favor of the plaintiff by the collusive withholding of the mortgage from McDonald Bros. to Hogan from the record, and the case of *Paper Co. v. Guenther*, 67 Wis. 101, 30 N. W. Rep. 298, is relied on. But it is evident that the estoppel in that case was founded on and by reason of fraud. It was held in *Hungerford v. Earle*, 2 Vern. 201, approved by Chancellor Kent in *Hildreth v. Sands*, 2 Johns. Ch.

*48, "that a deed not at first fraudulent may afterwards become so by being concealed, or not pursued, by which means creditors are drawn in to lend their money;" and *Smythe v. Sprague*, 149 Mass. 312, 21 N. E. Rep. 383, cited by respondents' counsel, recognizes the law to be that a mere failure, not collusive, to record a deed, renders it constructively fraudulent as to subsequent purchasers or creditors. That the facts may give rise to a personal right of estoppel falls short of showing that the collusive withholding of the chattel mortgage from record did not render it fraudulent as to all creditors misled thereby, so as to bring it within the category of conveyances, transfers, or charges upon the property of the assignor, "void by reason of being preferential or otherwise," and which are mentioned in the statute as "fraudulent or preferential." *Blennerhassett v. Sherman*, 105 U. S. 100, 117; *Blackman v. Preston*, 123 Ill. 381, 385, 15 N. E. Rep. 42; *Bank v. Housman*, 6 Paige, 526. We therefore hold that the cause of action in question could be prosecuted only by the assignee, or in his name, for the benefit of creditors. The conclusion at which we have arrived is supported by decisions in other states under statutes of similar scope and purpose, (*Root v. Potter*, 59 Mich. 498, 26 N. W. Rep. 682; *Angell v. Pickard*, 61 Mich. 561, 28 N. W. Rep. 680; *Sweetzer v. Higby*, 63 Mich. 13, 29 N. W. Rep. 506; *Manufacturing Co. v. Langdon*, 44 Minn. 39, 46 N. W. Rep. 310; *Baker v. Pottle*, 48 Minn. 479, 51 N. W. Rep. 383), and is not, we think, in conflict with *Brown v. Brabb*, 67 Mich. 17, 34 N. W. Rep. 403. The judgment of the circuit court is reversed, and the cause is remanded, with directions to dismiss the action as to the appellant Hogan.

BLACK RIVER IMP. CO. v. HOLWAY et al. (Supreme Court of Wisconsin. May 23, 1893.)

LOGS AND LOGGING — ACTION BY IMPROVEMENT COMPANY FOR TOLLS — PLEADING — COUNTERCLAIM — ESTOPPEL.

1. Plaintiff company, in an action to recover tolls for driving logs, alleged its incorporation; that it made expenditures in improving a named river, and prescribed tolls which it required owners of logs to pay; that during the years 1886, 1887, 1888, and 1889, defendant's decedent was a stockholder in said company, and during the years 1887 and 1888 was a director, and had knowledge of the tolls, and during all such years paid tolls so fixed; that in April, 1890, the executive committee fixed the toll for 1890, which was subsequently adopted by the board of directors; that, in the season of 1890, decedent, with such knowledge, drove a stated number of feet of logs; that in April, 1891, the board of directors prescribed tolls for 1891; and that, in said season, decedent drove a stated quantity of logs. The amount for which decedent was indebted for each season was alleged. The answer denied the existence of the corporation; that decedent was a stockholder prior to December 13, 1886; that he was a stockholder exceeding the nomi-

nal value of \$2,605.10; any knowledge of the fixing of tolls prior to May, 1891, and the ratification thereof by the board of directors. It denied that plaintiff ran any logs of defendant since 1888, and each and every allegation of the complaint not specifically denied, except that decedent owned a large quantity of logs on the river during the time mentioned, and that he was a stockholder from 1886 to 1890. *Held*, that since the general denial covered all allegations of the complaint in respect to decedent running logs by the assistance of the improvement in the years 1890 and 1891, and the tolls on the same, and the amount thereof, and in respect to the improvement of the river by plaintiff, and since the ratification of the tolls in 1890 by the board of directors was denied, the answer should not have been stricken out as frivolous.

2. An action by a river improvement company to recover tolls on logs driven on the river improved, being in its nature an action of assumpsit, damages sustained during the years the services were rendered, by the owner of the logs, in consequence of the company's failure to perform its obligations under its charter, and running booms entirely across the river, and closing booms, and delaying the running of logs by such owner, are a proper subject of counterclaim.

3. Where the charter of a river improvement company required tolls for driving logs to be fixed by the directors, it is sufficient that they are fixed by an executive committee, and ratified by the board of directors.

4. Where, in an action by a river improvement company to recover tolls for driving logs, it is alleged and admitted that the owner of the logs was a stockholder in the company, and had received dividends on his stock, defendant is estopped to insist that the company has no corporate existence because of the unconstitutionality of an act extending the time for the expiration of its charter.

5. Defendant is also estopped by counterclaiming, and asking judgment for damages against plaintiff as a corporation.

Appeal from circuit court, La Crosse county; A. W. Newman, Judge.

Action by the Black River Improvement Company against Jessie M. Holway and others, administrators of Nymphus Holway, deceased. From a judgment for plaintiff, defendants appeal. Reversed.

M. P. Wing and Winkler, Flanders, Smith, Bottum & Vilas, for appellants. Losey & Woodward and E. C. Higbee, for respondent.

ORTON, J. This action is brought by the plaintiff company against the defendants, as administrators of the estate of Nymphus Holway, deceased, to recover tolls for the use of the works of said company in driving logs on the Black river in the years of 1890 and 1891. The defendants answered, and set up a counterclaim to the action. The company plaintiff moved to strike out the answer on the grounds of its frivolousness, and irrelevancy, and demurred to the counterclaim on the grounds that the matters therein are not pleadable as a counterclaim, and that it does not state facts sufficient to constitute a cause of action. The court sustained both the motion and the demurrer, and the defendants have appealed from both of said orders. The complaint states, substantially,

the following facts: The plaintiff company was organized and exists under and by virtue of chapter 84 of the Private and Local Laws of 1864, and an amendment thereof by chapter 447 of the Private and Local Laws of 1866, and an amendment thereof, extended the time of its continuance, by chapter 263 of the Laws of 1882. During the year 1864 more than 200 shares of its capital stock were subscribed and paid up, and all other requirements were complied with as conditions precedent, and the company became duly organized, and thereupon entered upon the work of improving the navigation of said Black river, and the lakes within its limits, and thereafter, and prior to the 1st day of January, 1890, expended, in good faith, upon said improvements, the sum of \$100,000. Thereupon the company prescribed a tariff of prices or tolls for running logs in said river, and thereafter the owners of logs run in said river have been required to pay the same. Since the year 1884, and up to the year 1890, such tariff or tolls were fixed by the executive committee of the board of directors, duly appointed and authorized to perform that duty; and their action in respect thereto was duly ratified and confirmed by the corporation, and such tolls have been regularly paid by the owners of logs. During the years 1886, 1887, 1888, and 1889 the said Nymphus B. Holway, since deceased, was a large stockholder in said company, and from December, 1887, to December, 1888, was a member of its board of directors, and had knowledge of the fixing of said tolls by said executive committee, and made no objection thereto, and in each of said years received, without any objection, the dividends declared upon his said stock, derived from the proceeds of such tolls so fixed by the executive committee, and during all said years he was the owner of large quantities of logs run in said river, upon which he paid tolls so fixed, without objection. On the 26th day of April, 1890, said executive committee regularly fixed and determined and prescribed the tariff of prices or toll to be paid for running logs in said river, by the owners thereof, during the season of 1890, at 30 cents per 1,000 feet for sound logs, and 15 cents per 1,000 feet for culls, board measure. On the 9th day of June, 1891, the board of directors of said company, by a resolution duly passed and recorded, adopted and ratified said fixing of the tariff of prices and tolls by the executive committee on the said 26th day of April, 1890, and determined and prescribed that such should be the tariff of prices or tolls for running logs in said river during said year 1890. On the opening of navigation of said river in the spring of 1890 the said Nymphus B. Holway, deceased, was the owner of a large quantity of saw logs, which he had placed in said river for the purpose of running the same to the mouth of the river, at La Crosse, with full knowledge of said tariff of prices or tolls, and drove or ran on the river to

its mouth aforesaid, by the means, benefit, and assistance of said improvements, during the season of 1890, 15,097,820 feet of good logs, and 3,655,670 feet of culls; and the defendants became indebted to the plaintiff therefor in the sum of \$5,077.58, on which payments have been made to reduce the same to the sum of \$3,390.60. On April 26, 1891, the company, through its board of directors, prescribed a tariff of prices or tolls for running logs on said river by the use of said improvements during the season of 1891, at 25 cents per 1,000 feet, board measure, for good logs, and 12½ cents per 1,000 feet, board measure, for culls. The said Nymphus B. Holway, deceased, ran during that season on said river, by the use of said improvements, and with knowledge of such tariff of prices or tolls, 7,496,860 feet of logs, board measure, of which 5,893,880 feet were good logs, and 1,602,980 were culls, for which the defendants are indebted in the sum of \$1,673.82, or, deducting payments, \$1,433.22. The plaintiff demands judgment for these amounts and interest. The complaint is quite long, but this is believed to be the substance of it. The following is the substance of the answer: The existence of the corporation is denied. That said Nymphus B. Holway was a stockholder in the company prior to December 13, 1886, is denied. (The complaint states that he was a stockholder during that year.) It is denied that he was a stockholder exceeding the nominal value of \$2,605.10. (The complaint does not state the amount.) Any knowledge of the fixing the tolls by the executive committee prior to the month of May, 1891, is denied, as also the ratification thereof by the board of directors. It is denied that the plaintiff has run any logs of the defendant since the year 1888. (It is not so stated in the complaint.) Each and every allegation not specifically denied is denied, except that he (the deceased) owned a large quantity of logs on Black river at the times mentioned, and that he was a stockholder from 1886 to the end of the year 1889, and received dividends on his stock, and made the payments credited to him; and it is averred that he disposed of his stock on the 4th day of January, 1890. The general denial in the answer covers all the allegations of the complaint in respect to the said Nymphus B. Holway running logs in the river by the means, assistance, and use of the plaintiff's improvements on the river in the years 1890 and 1891, and the tolls on the same, and amount thereof, and in respect to the plaintiff's improvement of the river. The fact that the board of directors ratified the fixing of the tolls in 1890 and 1891 is specifically denied. These are essential and issuable facts of the complaint. Although a part of the answer raises mere questions of law, such as the power of the executive committee to fix tolls, and the power of the legislature to extend the time of the existence of the corporation, etc., there are yet in the answer the denial

of issuable facts which should make the motion to strike it out as frivolous untenable. That order, therefore, is clearly erroneous, on the mere inspection of the pleadings.

The counterclaim first states the situation of the decedent on the river at the city of La Crosse, as a mill owner, with all the accompanying works, and his large expenditures therein, and the necessity of using the Black river for the running of logs to his mills, and that he had in the river, during the years between and including 1885 and 1891, 120,000,000 feet of logs, to be run down the same to his mills, to be manufactured into lumber. It then states that the plaintiff company, during the years from 1835 to 1891, inclusive, took possession of the river for the purpose of improving the same for the running of logs under claim of right. It then states what the charter of the company required it to do in the premises, and that it has failed to perform its obligations therein, and, besides, run booms entirely across the river, so as to prevent its use by any one else, and thereby hindered and delayed the running of the logs of the decedent, and by its neglect to perform its obligations in the construction of its works, and by improper and unnecessary booms and improvements in the river, hindered the running of logs by the decedent. The company failed to employ a sufficient number of men to take care of the works and facilitate the running of logs. During the season for running logs in the years 1889, 1890, and 1891, and for the years 1885, 1886, and 1887, the plaintiff, without reasonable cause, kept the "Jack boom," and other booms above and below, closed during a running stage of water for 30 days in each year, so as to prevent the decedent running logs down said river, and caused the same to form into jams, which also prevented them from running down the river to his said mills. Said jams raised the water above the same so that it made cuts and openings in the banks of the river, whereby the logs of the decedent, many of them, were forced out of the river into them, which caused their delay in running down the river, and their injury in quality. During said years 1889, 1890, and 1891, at least 5,000,000 feet of the decedent's logs were detained and prevented by such booms and other obstructions from running down the river, and were injured and damaged in value in the sum of \$10,000; and during said years he was delayed in the use of his mills from said causes, and the decedent was compelled to shut down his mills for 13 days, and keep his men on expense, and he was damaged thereby in the sum of \$2,500; and in 1890 and 1891 he was compelled to shut down, by the same causes, 25 days, to his loss and damage of \$3,500; and during the years 1885 and 1887, inclusive, and in the years 1889 and 1891, inclusive, from the same causes, the decedent lost 10,000,000 feet of logs, of the value of \$50,000. In 1889

the decedent paid tolls to the company of \$3,801.10 under protest, in order to protect himself, and in 1890 he paid tolls of \$698.54; and, in 1891, \$965.06, also under protest, and without any consideration therefor; and defendants demand that they be restored and returned to them, and the defendants demand judgment for \$71,767. The counterclaim is of great length, and I have abridged it without omitting the main facts. The demurrer to the counterclaim is carried by the defendants to the complaint, so that the sufficiency of both is in question, and very important questions are raised by the demurrer.

First, the counterclaim attempts to set up two distinct causes of action. The first arises during years antecedent to 1890 and 1891, the only years when the tolls sued for were claimed to have been earned by the company. It is self-evident that such damages constitute an independent cause of action, not arising from, or connected with, the cause of action in the suit. But this does not make the counterclaim subject to general demurrer, if it declares for damages arising from, or connected with, the cause of action which arose during the years 1890 and 1891, and, of the damages claimed, at least a large part of them arose during those years, and are charged to have been caused by the company while earning the tolls sued for. If this action had been brought by a company not authorized to charge tolls for the use of its improvements of the river in running logs, and merely for the use of the same by the defendants by contract, or on a quantum meruit, then it would seem quite clear that the defendants might recoup or counterclaim any damages caused by the dereliction of the company in not furnishing the proper facilities by its improvement, or in impeding or preventing by it the running of the logs of the defendants, while rendering the services for which he has brought the suit. When the running of logs in a river is the subject of contract between two persons, and the one who has contracted to run the logs for the other sues for the consideration named in the contract, the defendant may counterclaim for the damages caused to his logs by loss or injury by the plaintiff in rendering such services. In such case the counterclaim arises from, and is connected with, the contract and cause of action. *Schweickhart v. Stuewe*, 71 Wis. 1, 36 N. W. Rep. 805; *Muth v. Frost*, 75 Wis. 168, 43 N. W. Rep. 655; *Butler v. Titus*, 13 Wis. 429; *Eaton v. Woolly*, 28 Wis. 628. This being an action for tolls, is it different for that reason from an action for the services of the company in assisting the defendant in running his logs down the Black river by the means and use of its improvements? If it is not, then the damages complained of as having been suffered during the years of 1890 and 1891, the time when the tolls are claimed to have been earned, are the proper subject of a

counterclaim. The tolls, although arbitrarily fixed by the company under its charter, represent the services of the company, for which they are claimed to have been earned, and an action of assumpsit will lie to recover them; and in such action "they may be described to express the services, or the like, for which the tolls are allowed." *Railroad Co. v. Flak*, 33 N. H. 297. When one accepts and enjoys the services of a corporation, for which tolls are allowed by law, there is an implied assumpsit that he will pay the same, and such an action will lie as for the services rendered. *Bridge Corp. v. Abbott*, 4 Cush. 473. "Assumpsit will lie for tolls, and the law will imply a promise to pay." *Turnpike Road v. Taylor*, 6 N. H. 499; 1 Chit. Pl. 114; 2 Chit. Pl. 248. This, in reason as well as by authority, is the nature of an action for tolls. There is really no difference between such an action for services at the price of the tolls fixed, than for services at the price fixed by the contract, or for what they are reasonably worth. It follows, therefore, that the damages claimed to have been suffered during the years when the services were rendered—1890 and 1891—are the proper subject of a counterclaim to this action for the tolls earned by the services of the company during those years. The demurrer to the counterclaim was erroneously sustained.

The questions raised by the demurrer to the complaint, are:

1. Were the tolls of the company properly fixed by the executive committee, and ratified or approved by the corporation, or by its board of directors? The last tolls, in 1891, were alone fixed by the directors. Section 9 of the charter requires the tariff of prices or tolls to be prescribed by the directors. The complaint states that the first tolls were fixed by the executive committee appointed by the directors, and duly authorized to fix such tolls, and that they were ratified and approved by the company. The second tolls were fixed by the executive committee, and they were ratified and approved by the directors. We are of the opinion that the tolls were lawfully prescribed. "They may be established by the directors, or by their agents under their authority, and the assent of the directors may be presumed, if nothing appears to the contrary." *Railroad Co. v. Flak*, *supra*. "The corporation may ratify the acts of its agents, which are within the corporate powers, and such ratification may be inferred, and the averment that an agent acted by due authority is sustained by proof of subsequent ratification." *Hoyt v. Thompson*, 19 N. Y. 207. The action of the executive committee in fixing the tolls may be ratified by the directors, and thus made their act. *Palmer v. Yates*, 3 Sandf. 137. "The board of directors may delegate their authority to a committee of their own members." *Burrill*

v. Bank, 2 Metc. (Mass.) 163; *Cook, Stock, Stockh. & Corp. Law*, § 715.

2. The learned counsel of the appellants contends that before the plaintiff corporation earned the tolls sued for it had ceased to be a corporation by the expiration of the time for which its charter was granted, and the existence of the corporation is denied in the answer. The charter was granted by an act of the legislature, approved February 23, 1864, to continue 25 years. By an act of 1882 such time was extended for another 25 years. When the services were rendered for which the tolls are demanded, in 1890 and 1891, the corporation existed only by virtue of said act of extension, and such act is claimed to be unconstitutional and void. On the other hand, the learned counsel of the respondent claims that the defendants are estopped from raising the question because the decedent was a stockholder in said corporation, and sold his stock in January, 1890, after the extension of the charter had taken effect, and when he had been a long time such stockholder, and had been one of the directors of the company, and had received many dividends on his stock, and had been one of the promoters of the corporation and its objects. All this is shown by the defendants' answer, as well as by the complaint. We are disposed to take this view of the case, and hold that the defendants cannot raise the question of the existence of the corporation on the ground of estoppel. As to the defendants the plaintiff, as a corporation de facto, is sufficient. "As against a subscriber to its capital stock, it will be held a corporation de facto upon proof of user." *Railroad Co. v. Cary*, 26 N. Y. 75; *Stout v. Zulick*, 48 N. J. Law, 509, 7 Atl. Rep. 362. It is sufficient in this case that the corporation is such, de facto. *Hudson v. Seminary Corp.*, 113 Ill. 618; *Stockton & L. Gravel Road Co. v. Stockton & C. R. Co.*, 45 Cal. 680; *National Docks Ry. Co. v. Central R. Co.*, 32 N. J. Eq. 755.

There is another sufficient reason why the defendants cannot raise this question, and that is because they have counterclaimed for damages, and asked for judgment therefor against the plaintiff as a corporation. The defendant who pleads a set-off against the corporation cannot deny its existence. *McKnight v. Mineral Point*, 1 Pin. 99. The counterclaim is virtually a cross action against the corporation, and it estops the defendants from questioning its existence. *Williams v. Lumber Co.*, 72 Wis. 487, 40 N. W. Rep. 154. We do not think the complaint is demurrable. The pleadings on both sides appear to be sufficient. The order of the circuit court sustaining the motion to strike out the answer as frivolous, and the order of the court sustaining the demurrer to the counterclaim, are both reversed, and the cause remanded for further proceedings according to law.

WHITWORTH v. BROWN et al.

(Supreme Court of Wisconsin. May 23, 1893.)

MASTER AND SERVANT — CONTRACT OF EMPLOYMENT—PAROL EVIDENCE TO EXPLAIN WRITING.

1. On the employment of plaintiff by defendants for a stipulated term it was agreed that, if defendants continued in the manufacturing business after such term, plaintiff's services should be retained. In an action for wages for such further term, on the issue whether defendants continued manufacturing, it appeared that, when the contract was made, defendants were manufacturing four-horse eveners. After the original term, plaintiff worked for defendants 10 days, during which they were manufacturing, as plaintiff testified, three-horse eveners in the same way, and for the same purposes, as they had been manufacturing the others. There was evidence that such three-horse eveners were made only as an experiment, and that there was no continuation of manufacturing. *Held*, that the court properly refused to direct a verdict for defendants.

2. There was no error in an instruction that if, "to the knowledge of plaintiff," the making of such additional implements was an experiment, it would not be a continuation of the manufacturing business, as, unless plaintiff was informed that such work was experimental, he had a right to assume the contrary.

3. Plaintiff contracted in writing to work for defendants for a stated term, it being agreed that, if defendants continued "in the manufacturing business" after the expiration of such time, plaintiff should be employed for a further term. *Held*, in an action for wages for such further term, the issue being whether defendants continued in the manufacturing business, that the contract was unambiguous, and parol evidence was not admissible to explain it.

Appeal from circuit court, La Crosse county; A. W. Newman, Judge.

Action by Joseph Whitworth against Alfred Brown and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The other facts fully appear in the following statement by LYON, C. J.:

The action is upon the following contract in writing, signed by the parties: "La Crosse, April 22d, 1889. Contract between Brown and Boynton, partners, of the first part, and Joseph Whitworth, party of the second part. (1) Party of the second part hereby agrees to work for party of the first part 6 months from April 22d, 1889, ten hours per day at blacksmith work, boarding himself meanwhile. (2) In consideration of the above, parties of the first part agree to pay said party of the second part sixty dollars per month, payable on the first day of every month. (3) It is further agreed by both parties to this contract that, if parties of the first part continue in the manufacturing business after the expiration of the above-mentioned six months, party of the second part is to work twelve months more at seventy-five dollars per month, payable monthly." The complaint alleges that the plaintiff worked for defendants under the above contract until November 6, 1889, for which services defendants paid him; that defendants have continued in the manufacturing business ever since the contract was made, and plaintiff has been ready and will-

ing, and has offered, to perform his part thereof; and that there is due him by the terms of the contract \$300, which defendants refuse to pay him. The answer of defendants is that the contract expired by its terms October 22, 1889, and was then abandoned by the parties, and the defendants did not continue in the manufacturing business after that time. At the conclusion of the testimony the court refused to instruct the jury to return a verdict for defendants. The jury found for the plaintiff, and assessed his damages at \$300, which was the amount of damages agreed upon by the parties in case the plaintiff should recover. A motion by defendants for a new trial was denied, and judgment for plaintiff entered pursuant to the verdict. The case is further stated in the opinion. Defendants appeal from the judgment.

Winter, Esch & Winter, for appellants. C. L. Hood, for respondent.

LYON, C. J., (after stating the facts.) There is no ambiguity in the terms of the contract between the parties. The defendants employed plaintiff, unconditionally, to work for them six months for \$60 per month, and conditionally to work for them a year longer at \$75 per month, the condition being that defendants should continue in the manufacturing business after the expiration of six months,—that is, after October 22, 1889. The plaintiff continued to work for defendants ten days after the expiration of the six months, and he testified on the trial that during such time the defendants continued in the manufacturing business. This testimony was controverted, or attempted to be explained, by testimony on the part of defendants tending to show that during the first six months of the contract they were engaged in the manufacture and sale of an implement known as a "four-horse evener," the manufacture of which turned out to be unprofitable, and thereupon at the termination of the six months they engaged in making, as an experiment merely, three-horse eveners, and continued making them for such purpose alone while plaintiff worked for them after the expiration of the six months. The testimony on behalf of the plaintiff is to the effect that the defendants were engaged in manufacturing the three-horse eveners in the same way, and for the same purposes, they had theretofore been engaged in manufacturing the others. The learned circuit judge instructed the jury, in substance, that the right of plaintiff to recover depended upon his proving to their satisfaction that the defendants continued in the manufacturing business after the expiration of the first six months of the contract, and, further, that if, to the knowledge of plaintiff, they were merely experimenting to learn whether they had an implement worth manufacturing, that would not be a continuance in the manufacturing business,

within the meaning of the contract, and that in such case the plaintiff could not recover. The only criticism on this portion of the charge is the qualification that if defendants were merely thus experimenting, to the knowledge of plaintiff, he could not recover. We think there is no force in this criticism. If defendants continued to manufacture eveners right along, no matter whether four or three horse eveners, the plaintiff had the right to assume that they were continuing in the manufacturing business, unless informed to the contrary. There are certain other criticisms upon portions of the charge not excepted to. These do not require notice. There is testimony which, standing alone, is sufficient to support the verdict, and, although controverted, it was competent for the jury to believe it, and predicate their verdict upon it. Having done so, the verdict cannot be disturbed, even though we might think the testimony preponderates against it. In this condition of the testimony it would have been error had the court directed a verdict for defendants. Error is assigned upon certain rulings of the court sustaining objections to testimony offered by defendants. The avowed purpose of such testimony was to explain certain alleged ambiguities in the contract upon which the action is based. It has already been observed that there is no ambiguity in such contract; hence it admitted of no explanation. The testimony was properly excluded. The record discloses no reversible error. The judgment of the circuit court is affirmed.

PITTENGER v. TOWN OF HAMILTON.

(Supreme Court of Wisconsin. May 23, 1893.)

DEFECTIVE STREETS—UPTURNED NAIL.

Whether a board with an upturned nail is attached to, and constitutes part of, a sidewalk, makes no difference as to the liability of the town with respect to injuries sustained by one crossing the street to the walk, and stepping on the nail, as the town is liable for any defect so near the traveled portion of the walk or street as to endanger persons thereon.

Appeal from circuit court, La Crosse county; A. W. Newman, Judge.

Action by John F. Pittenger, administrator of Minnie E. Pittenger, deceased, against the town of Hamilton, to recover for injuries resulting in deceased's death. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by CASSODAY, J.:

The amended complaint alleges, in effect, that for a long time prior to March 6, 1890, the sidewalk described had been in a dangerous and defective condition, and that several weeks prior to said date, in patching up said sidewalk, a board or plank had been placed lengthwise, and along the top of the outside stringer, to nail the planks of said sidewalk to; that said plank, so laid

lengthwise and along said stringer, projected some inches outside of said stringer, and outside of the ends of the sidewalk planks, and in the exposed portion thereof there were left several old, rusty nails sticking out, with their points upward, upon which persons stepping along or upon said sidewalk were liable to tread; that such sidewalk and said plank, with said nails sticking up therefrom, had been carelessly and negligently suffered and permitted by the officers of said town to remain in said dangerous and defective condition for a long time prior to said March 6, 1890; that in the evening of said day, while said plank and sidewalk were in such dangerous and defective condition, the said Minnie E. Pittenger, then in her lifetime, but since deceased, was lawfully and carefully passing along and crossing said street, and in stepping upon said sidewalk from the street at the point aforesaid, without any fault or negligence upon her part, stepped her foot upon one of the nails so sticking up out of said plank, which nail penetrated and passed through her shoe, and into her foot, from the result of which she died March 21, 1890; that, at the time of such injury and death, said Minnie E. was a minor daughter of this plaintiff, and about 17 or 18 years of age, and unmarried, and resided with him; that she was strong and in good health, and that the plaintiff, her father, was and is old, in poor health and indigent circumstances, and was largely dependent upon said Minnie for support, and for care of his household; that May 23, 1890, the plaintiff was appointed administrator of the estate of said Minnie; that July 9, 1890, notice was given, as required by statute, and a claim was filed in the office of the town clerk, to be laid before the board of audit, but that the defendant had neglected and refused to pay said claim,—and demanded judgment for the amount. The answer admits the existence of said public street, and denies all allegations of the complaint as to the condition thereof, and the manner of the alleged accident, or any negligence on the part of the defendant, or any of its officers, or of any actual or constructive notice of the existence of the defect alleged. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at \$1,000. From the judgment entered upon said verdict the defendant brings this appeal.

Losey & Woodward, for appellant. Bleekman & Bloomingdale, for respondent.

CASSODAY, J., (after stating the facts.) In view of the issue presented by the pleadings, as mentioned in the foregoing statement, it is claimed that the trial court committed an error in charging the jury that "so far as the liability of the town is concerned, I do not see as there is much difference—or any difference, perhaps—whether

the board was fast to the sidewalk or not. It was not in the line of the sidewalk, and a person going across the street in the way this young lady is represented to have gone would be, for anything that I can see, just as liable to get hurt on a nail in one position as in the other. So I do not think that it is very material which view of the question obtains." The court had already told the jury that: "No one claims, I believe, that the cause of this injury was a part of the sidewalk. It was outside of the sidewalk, and the only dispute in the evidence about this, I think, is whether the board which contained the nail which did the damage was fastened to the sidewalk or not; that the nail, by all accounts, was outside of the line of the sidewalk. And that circumstance is proper for you to consider in determining whether that sidewalk or highway was reasonably safe, in respect to its causing that accident. That involves the question whether any one passing along the sidewalk would be reasonably safe from any injury by this nail. That is involved in the question of whether that sidewalk, considered as a part of the street, was reasonably sufficient and safe." In view of the undisputed evidence, we perceive no error in the charge. The chairman of the town, who saw the locus in quo just after the accident, testified to the effect that at the point in question the walk was constructed of 2-inch plank laid upon three stringers; that the ends of the planks projected over the stringer, on the side towards the street, from $2\frac{1}{2}$ to 3 inches; that the dirt or ice of the street was about 4 inches below the under side of the planks, as they extended over the stringers; that the board lay flat on the ground, and extended lengthwise down the sidewalk about 4 feet; that the south end of it extended out into the street 10 inches or a foot; that it might have gone up an inch under these planks that ran over, or nearly to the edge of it, and lay bedded in the ground; that it lay flat on the ground, and looked as if it had lain there for some time; that it was bedded in there a quarter or half an inch; that it had a regular bed there; that it was not frozen in at the time, but was bedded there. It will be observed that Minnie was crossing the street at the time she stepped upon the nail and was injured, and by reason of which she soon after lost her life. Counsel seem to think that unless the board with the nail projecting upward was attached to, and constituted a part of, the sidewalk, there could be no recovery. But it is well settled that where the defect is so near the traveled portion of the walk or street as to endanger travel thereon the town is liable. *Fitzgerald v. City of Berlin*, 64 Wis. 203, 24 N. W. Rep. 879; *Hay v. Weber*, 79 Wis. 590, 48 N. W. Rep. 859. We find no error in the record. The judgment of the circuit court is affirmed.

BOSWORTH et al. v. HOPKINS et al.
(Supreme Court of Wisconsin. May 2, 1893.)

PARTNERSHIP PROPERTY.

Plaintiffs' testator took defendants into partnership, furnishing most of the capital. Several years later testator retired from active business, and went to Europe, where he resided until his death. Defendants were left in charge, and one of them was also confidential adviser and agent with respect to certain large interests of testator outside the firm, which he managed satisfactorily. The articles were silent as to the right of any partner to withdraw money, either profits or otherwise, from the firm. On going abroad, however, testator wrote that he wished defendants to allow him to do most of the drawing "for extraordinary purposes" for a year or two, "after which you can change it, if you desire." Nothing further was said about the matter on either side. Testator drew each year an amount exceeding his share of the profits. Meanwhile defendants bought some land, drawing \$16,000 from the firm's money, and taking the title in their names. The profits undrawn, standing to their credit, at the time were about \$75,000. The transaction was not entered in the personal ledger in defendants' respective accounts, but in the sales ledger, in a joint account. The account extended through a number of ledgers, until the deferred payments were all made, and appeared, presumably, on the balance sheets sent regularly to the testator. One of the defendants testified that he never gave any directions as to where the account should be opened, and the bookkeeper testified that he never received any. There had been no examination by testator of his separate interest for sixteen years previous to his death, and none was attempted for five years afterwards. *Held*, that defendants were not trustees of the firm as to the land, but were entitled thereto in their own right.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Howard F. Bosworth and others against Bedford B. Hopkins and others. Judgment dismissing the complaint. Plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

This action was brought to obtain a judgment establishing that the legal title to a certain 80-acre tract of land in the town of Greenfield, Milwaukee county, held by the defendants, Bedford B. and Edward C. Hopkins, is held by them in trust for the firm of H. Bosworth & Sons, of which they are members, and the plaintiffs are the successors and representatives in interest of Fitch J. Bosworth, the other member thereof, and for a partition thereof, and a sale, if necessary, etc., on the ground stated in the complaint, that November 25, 1875, while Bedford B. Hopkins and Edward C. Hopkins were members of said firm, and had entire charge and management of all its affairs and finances, and while the largest part of the capital of the firm contributed by said Bosworth remained in said firm, and while said Bedford B. Hopkins was the confidential adviser of said Bosworth, they secretly, and without the knowledge or consent of said Bosworth, used the funds of said co-partnership in the purchase of said land, and thereafter, July 30, 1878, took title there-

to in their own names, and have ever since held the same, and claim to be the sole owners thereof. It was also charged in the complaint, among other things, that all of the payments for the said tract of land were made out of partnership funds, were secret, and made without the knowledge or consent of Bosworth, while he was in Europe, and in violation of the duties and obligations of the said Hopkins brothers as managing partners, and of the articles of copartnership, and that such use of said partnership funds constituted said purchase of said real estate a purchase for the use and benefit of the said partnership. It appears from the pleadings, and is not disputed by either party, that Fitch J. Bosworth, since deceased, March 1, 1866, entered into copartnership with the defendants, the Hopkins brothers, in the business of wholesale druggists, at Milwaukee, under the firm name of H. Bosworth & Sons, and in the year 1869 Mr. Bosworth retired from active business, and left Milwaukee and went to Europe. The partnership articles were reduced to writing and executed in 1872, by which Mr. Bosworth was not to devote any time to the business, but that the entire business of the firm was to be conducted and managed by the defendants, the Hopkins brothers. That Bosworth should have up to March 1, 1868, two-thirds of the net profits, and from March 1, 1868, to March 1, 1871, three-fifths thereof, and from March 1, 1871, to March 1, 1876, one-half thereof, and that the balance of the net profits should belong to the said Hopkins brothers, (Bedford B. and Edward C.) That the partnership continued to exist after March 1, 1876, on the same terms, and except that it was then agreed that thereafter said Bosworth should have two-fifths of the net profits, and the Hopkins brothers jointly three-fifths, until it was dissolved by the death of said Bosworth, February 15, 1885. Mr. Bosworth had contributed almost the entire capital of the firm. In October, 1872, his share amounted to \$193,999.18, and that of the Hopkins brothers to but \$15,000, and, as so agreed, the said Bosworth thereafter took no part whatever in the management of the business of the firm, but its affairs were wholly left to and managed by the Hopkins brothers. From October, 1869, up to the time of his death, Mr. Bosworth had other large property interests, consisting of bonds, shares, stocks, and other personal property and valuable real estate, and from that date to the time of said Bosworth's death said Bedford B. Hopkins acted as his confidential adviser and agent in reference to his interests outside of the firm, and Bosworth continued to place the utmost reliance in the business ability and integrity of his partners to the time of his death. After leaving Milwaukee in 1869 he never returned, except for two days in 1874, but lived up to the time of his death almost continuously

in Europe. It appeared that by the last will and testament of Bosworth all his real estate and interests therein were devised to his widow, one of the plaintiffs, and to his son, Howard F. Bosworth, the other plaintiff, and to his daughter, Emma, one-third to each, and that the daughter, Emma, died in 1890, intestate and unmarried, leaving no children, by which her interest in said realty vested in her mother and brother, the plaintiffs in this suit, as her heirs at law. That on March 1, 1885, after the death of Bosworth, it appeared from an inventory and balancing of accounts that the assets of the firm after the payment of its debts, and charging to profit and loss all bad debts, amounted and belonged: To said Bosworth's estate, \$157,303.53; to Bedford B. Hopkins, \$38,702.67; and to Edward C. Hopkins, \$42,296.18; and the plaintiff Howard F. Bosworth purchased of his mother, Frances Bosworth, and his sister, Emma Bosworth, their two-thirds in and to his father's interest in the firm, and October 6, 1885, he entered into copartnership with the Hopkins brothers, dating from March 1, 1885, each contributing his share in the capital and assets of the former firm as above stated, and this copartnership continued until March 1, 1890, since which date its affairs have been in course of liquidation. Soon after, the plaintiffs caused an examination of the books and affairs of said business to be made by an expert accountant, and in June, 1891, as it is alleged in the complaint, it was learned that the defendants, the Hopkins brothers, had used the funds of the said old copartnership in the purchase of the real estate in question and for the payment of taxes, interest on purchase money, and for improvements thereon, in amounts stated in the complaint; the purchase having been made November 25, 1875, of Mrs. Alvira Smith, for \$16,000, only \$1,000 of which was paid down, by check of said firm drawn against its bank account, and the balance was paid when the deed of conveyance was made, July 20, 1878. The defendants in their answer admitted that they made the purchase and received a conveyance of the lands in question at the time charged, and alleged, in substance, that at the time the net profits of said copartnership business to which they were entitled, pursuant to the partnership agreement, over and above their \$15,000 of capital, was about \$85,000, and that in making payment for the land, and on account of it, they from time to time made use, to a small degree and proportion, of their share of the profits of said business, drawing against the same, and charging the sums drawn on the books of the firm, the said sums bearing a very small proportion to the net profits to which they were then entitled; that there was no restraint on their right to so draw, and that their partner, Bosworth, at all times knew and assented that they, or either of them, might at any time draw for purposes of his or

their own use any sums within their discretion; and that said sums so drawn were drawn in good faith, within their lawful right, and without any attempt at secrecy or concealment.

The court found facts, in addition to those already stated, in substance and effect, that the entire care and management of the copartnership business was upon said Hopkins brothers, and that after the year 1869 said Fitch J. Bosworth gave no attention whatever to the same, except that reports and balance sheets prepared by the bookkeepers were regularly and from time to time sent to him; that after that date Bedford B. Hopkins attended to and gave a large portion of his time, care, and attention to managing the individual interests and property of said Fitch J. Bosworth and Frances Bosworth, his wife, one of the plaintiffs, in the state of Wisconsin; that, at the time of the making of the contract for the purchase of said lands, said Hopkins brothers together had credits with said firm of H. Bosworth & Sons amounting to about \$110,000, being about \$95,000 in excess of their capital at the time of the commencement of said copartnership; that the use of said money in making said purchase was not in violation of the articles of copartnership; that from the beginning thereof to the date of purchase said Fitch J. Bosworth had drawn largely from time to time from his capital in said copartnership for private investment and speculation, and that it was understood between said parties that the defendants might also, to a reasonable extent and in their discretion, draw upon their interest in said copartnership for private investment; that the use of said sum of \$1,000 (the first payment) by said defendants was no violation of their duties as partners in said firm, and that they took said money in good faith, for a private investment which they had a right to make; that when the lands were deeded to said Hopkins brothers, in making payments therefor, and on account of the same, said Hopkins brothers did from time to time make use, to a moderate degree, of their share of the profits and their interest in said business, drawing against the same, and charging the sums drawn on the books of the business; that the sums so made use of were a very small proportion of the net profits to which they were then and there entitled, and that the use of said moneys was not in violation of any agreement or stipulation with the said Bosworth, but that they had a right to draw the same, and said moneys were so used in good faith by said Hopkins brothers for their said private investment; that the defendants, the Hopkins brothers, entered into possession of said lands at the time of the contract of purchase, in 1875, and obtained a deed therefor, July 26, 1878; that from the time they so entered into possession to the commencement of this action they were in the actual possession and occu-

pation of said land, through their tenants, claiming title thereto under a land contract for it and deed of conveyance, exclusive of any other right, and that said possession on their part was open and notorious and adverse to any and all claims of any person whatsoever; that said purchase of said lands was in good faith, and free from fraud or any intention to defraud, and that they did not at any time conceal, or attempt to conceal, said transaction. It was found as a conclusion of law that said complaint should be dismissed upon the merits, with costs against the plaintiffs, and judgment was entered accordingly, from which the plaintiffs appealed. Such other facts as are material are stated in the opinion.

Miller, Noyes & Miller, for appellants.
Winkler, Flanders, Smith, Bottom & Vilas, for respondents.

PINNEY, J., (after stating the facts.) It is not claimed that the land in question, purchased, as it is charged, with partnership funds, was purchased for partnership uses or purposes, nor that dealing in real estate was in any sense within the scope of the partnership business. The theory of the case on both sides seems to be that Mr. Bosworth was never consulted and did not concur in or authorize the purchase, or have any knowledge that it had been made, and that the Hopkins brothers intended the purchase for their own personal use and benefit, and not for the use and benefit of the partnership. The testimony shows very clearly that no other intention in point of fact can be imputed to them. It was contended on behalf of the appellants that a trust in invitum should be implied or raised against the Hopkins brothers, on the ground of a wrongful or fraudulent use of the funds of the firm in making the purchase, and that they should be held as trustees ex maleficio of the title thus acquired for the benefit of the firm; and this is in fact the case made by the complaint. But it was also insisted that, as the purchase was made with partnership funds, without the knowledge or consent of Bosworth, a trust on this ground alone would result in favor of the firm, independent of any question of wrongdoing or fraud, by reason of such use of the partnership funds. But we are of the opinion, upon the facts, that there can be no resulting trust in favor of the firm in respect to the premises, by reason of the purchase having been made with partnership funds, and that the title or claim of the partnership in or to the lands depends wholly upon raising an implied trust against the defendants, the holders of the legal title, and on the ground that they purchased the lands by a wrongful or fraudulent use of the funds of the firm, so that a court of equity would impute to them, by reason of their wrongdoing, and as a means of doing justice, an intention directly

opposite to that which they plainly had, namely, that they purchased it for the firm, when they clearly designed it solely for themselves.

The statute of this state (chapter 96) wrought some very important changes in the law of uses and trusts as it existed before it was adopted in 1850. The sweeping provision of section 2071, that uses and trusts, except as authorized and modified in chapter 96, were abolished, did not extend "to trusts arising or resulting by implication of law." This would have left trusts resulting from the ownership of moneys paid on the purchase of lands, in a case like this, as before the statute. Sections 2077-2079 provide, in substance, that when a grant for a valuable consideration shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the person by whom such payment is made, but the title shall vest in the person named as alienee in such conveyance; but every such conveyance shall be presumed fraudulent as against the creditors of the person paying the consideration, and, when a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent it may be necessary to satisfy their just demands; but these provisions do not extend to cases where the alienee named in the conveyance shall have taken the same as an absolute conveyance in his own name, without the knowledge or consent of the person paying the consideration, or when such alienee, in violation of some trust, shall have purchased the lands so conveyed with moneys belonging to another person. The purpose of the statute, which was taken from that of New York, was to prevent a debtor from defrauding his creditors by buying lands and paying for them with his own money, and taking the title in the name of another, for by doing so under this statute he takes the risk of losing all claim to the land, and creates a trust therein in favor of, and enforceable by, his creditors. *Kluender v. Fenske*, 53 Wis. 122, 10 N. W. Rep. 370; *Garfield v. Hatmaker*, 15 N. Y. 475. Section 2077 does not seem to embrace the case of a purchase by one partner without the concurrence of his copartner, using the firm funds therefor, and taking a conveyance of the title in his own name, and without the knowledge and consent of such copartner. Such a purchase does not appear to be a case where the consideration is paid by one person, and the conveyance is taken in the name of another, within the meaning of this statute. *Fairchild v. Fairchild*, 64 N. Y. 471, 479. And, as sections 2078 and 2079 do not seem to have any application to cases not within the purview of section 2077, the question whether there can be any resulting trust where one partner purchases with partnership funds, and takes a conveyance of lands in his own name, without the knowledge of his copartner, remains to be deter-

mined, as before the statute. *Reitz v. Reitz*, 80 N. Y. 538; *Schultze v. Mayor*, etc., 103 N. Y. 308, 8 N. E. Rep. 528. And this is in accordance with *Clarke v. McAuliffe*, 81 Wis. 104, 51 N. W. Rep. 83.

The question, then, to be determined, is whether the purchase in question was made by and through a wrongful and fraudulent application of the partnership funds, and without the implied consent of Bosworth, resulting from the knowledge, fairly to be imputed to him, of all the facts and circumstances of the case, or an implied acquiescence in the appropriation on his part. In *Kelley v. Greenleaf*, 3 Story, 401, Story, J., declared the law to be "that if a partner fraudulently or improperly, without the consent of his partners, applies the partnership funds to his own private purposes, or for his own private profit or emolument, or invests the same improperly in his own name and for his own use, the other parties have a right, if they can distinctly trace the investment, and elect so to do, to follow the partnership funds into the investment, and treat it as trust property held by that partner for the benefit of the firm." In *Shaler v. Trowbridge*, 28 N. J. Eq. 595, it is held that the misappropriation must be fraudulent to give rise to an implied trust in such a case, which may be enforced against the land; and *Partridge v. Wells*, 30 N. J. Eq. 177, 178, will be found, on examination, to be to the same effect. In such a case implied consent, resulting from knowledge of facts and circumstances, or acquiescence in the appropriation, are held sufficient to support the rightfulness of the purchase; and it must necessarily follow that if it is fairly deducible from the evidence that it was within the contemplation or understanding of the parties that Mr. Bosworth on his part, or the Hopkins brothers on theirs, might withdraw moneys from the firm, consisting of profits earned, for private uses and purposes, without encroaching upon the capital stock invested, and the purchase in question was made with moneys fairly and in good faith withdrawn, and charged to the defendants on the books of the firm, then it is manifest that the purchase in question was rightfully made, and with their own money, and they are entitled to hold it for their own benefit. If lands are purchased by one partner in his own name with partnership funds, and he is charged with the moneys thus used on the partnership books, the land is his private property, and not that of the firm, (*Bates, Partn. § 284*), although the money was drawn from the partnership funds. It was so held by this court in *Clarke v. McAuliffe*, 81 Wis. 104, 51 N. W. Rep. 83, and is supported by numerous authorities. *Collumb v. Read*, 24 N. Y. 511; *Hay's Appeal*, 91 Pa. St. 265. "It does not necessarily follow that property bought with the money of the firm is the property of the firm, for it sometimes happens that property, although

paid for by the firm, has been in fact bought for one partner exclusively, and that he has become debtor to the firm for the purchase money." 1 Lindl. Partn. *329; Bank of England Case, 3 De Gex, F. & J. 645-658. It may be shown by express agreement, or from facts and circumstances and conduct of the partners, that land purchased with partnership funds by one partner in his own name belongs to the partner in whose name the legal title was taken, and that he is, or should be, a debtor for the money. *Smith v. Smith*, 5 Ves. 193; *Richards v. Manson*, 101 Mass. 482, 484. And in like manner it may be shown that the party so purchasing had a right to draw out and charge himself with the funds with which the purchase was made. Wherever an equity is attempted to be raised and asserted by parol to modify, affect, or displace the legal title, such equity may be rebutted in like manner by parol. In *Kelley v. Greenleaf*, 3 Story, 93, it was held that there must be some element of fraud in the appropriation to enable the firm, by reason of the use of partnership funds, to claim the equitable title to land purchased with them. Mere overdrafts give no right to proceed against the separate estate of one partner thus acquired. The taking and appropriation must have been fraudulent or in bad faith; but the assent of the other copartners to such drawing and use of partnership funds may be implied from the course of business and the habit of the partners in this respect, and acquiescence in the withdrawal of profits may be made for such time, and under such circumstances, as to justify the inference of a previous understanding or agreement allowing it, (*Bates*, Partn. §§ 318, 319, 545, 546; *Sharp v. Hibbins*, 42 N. J. Eq. 543, 9 Atl. Rep. 113;) and prior similar acts or habit of the firm are evidence of authority for such purpose, (*Maybin v. Moorman*, 21 S. C. 346; *Cabaniss v. Clark*, 31 Miss. 423; *McCormick v. McCormick*, 7 Neb. 440; *Russell v. Miller*, 26 Mich. 1.) Long delay in making proper examinations or investigation, suggested by motives of ordinary business prudence, when the means for making them are readily at hand, extending over a period of many years, until there has been an enormous increase in value of the property claimed, is an important element to be considered as affecting any equity asserted against property so purchased, particularly where, by the death of parties or witnesses, there has been a loss of evidence necessary to a proper investigation of the merits of the claim. The purchase of the property in question not being within the scope of the business of the partnership, and not having been made with the previous knowledge or consent of all the partners, it cannot be maintained that there was any breach of good faith, or of any legal or equitable duty, in the defendants in making it; and the sole question is whether, under the facts and circumstances

appearing in evidence, the drawing and use of the moneys of the partnership to make the purchase in question, and the entry thereof on the books of the partnership, as hereinafter stated, considered in connection with the habit and course of business of the firm, vested the sole beneficial interest in the property purchased in the defendants, or whether any trust can be implied in favor of the firm against the property so purchased, by reason of any secret or fraudulent use of the money of the firm for that purpose.

Whether any trust is to be implied in favor of the firm from the alleged secret or fraudulent use of its funds in making the purchase depends entirely upon the facts as they existed November 29, 1875, when the purchase was made, and the subsequent withdrawal of funds of the firm, and use of the same in payment of the part of the purchase money and interest remaining unpaid, the payment of taxes on and improvement of the land, cannot be regarded as material to the rightfulness of the purchase. *Perry, Trusts*, §§ 126, 133; *French v. Sheplor*, 83 Ind. 266; *Forsyth v. Clark*, 3 Wend. 651; *Botsford v. Burr*, 2 Johns. Ch. 405; *Whiting v. Gould*, 2 Wis. 552. And subsequent wrongful payments on the purchase price from the partnership funds, pursuant to a land contract, but subsequent and prior to the deed, will not be ground for an implied trust, though the firm might, if necessary, have a lien against the land for sums so paid. *Conner v. Lewis*, 16 Me. 274. The payment of the \$1,000 to the vendor, and the execution of the contract for the payment of \$15,000 deferred payment and interest, when the defendants were to have a conveyance of the legal title, made them the equitable owners of the fee, subject to the payment of the balance of unpaid purchase money. They owed the vendor that sum, and the subsequent withdrawal of the money with which the notes were purchased, with a part of which this \$15,000 was paid, was but a method of obtaining means to pay the debt of the defendants, and was not in any just or proper sense for making a purchase of the lands in question. The amount paid at the time of the purchase was but \$1,000, but the entire purchase price was \$16,000, and the conveyance of the legal title to the defendants was made July 20, 1878. In view of the fact that the rightfulness of the purchase depends solely on the withdrawal and use of the \$1,000 paid when the contract was executed, we are relieved from discussing many questions upon which the evidence is lengthy and computations are complex, particularly in relation to the matter of replacement of funds withdrawn to buy the Daniels notes of one Helmer, with part of which the final payment was made, and whether the defendants made a profit on that purchase for which they ought to account to the firm; and so, too, as to the gains made by the de-

defendant Bedford B. Hopkins by withdrawing \$5,000, and using it in a speculation of his own. These are all questions which, in our view of the case, relate solely to an accounting to be had between the parties concerning the partnership business, and are not within the scope of this action. The copartnership commenced March 1, 1866, and continued until the death of Bosworth, February 15, 1885,—a period of nearly 19 years. The business carried on by them was a very extensive one, and most of the time had been a very profitable one, amounting from \$300,000 to \$500,000 per annum. The defendants had only \$15,000 invested in it at first, and Bosworth had contributed the remainder, and nearly the entire amount, so that in October, 1872, when the partnership articles were reduced to writing, the latter had invested in the business \$192,231.17, and in the outset a much greater sum, and the defendants only \$15,000, as capital. By these articles it was stipulated that Bosworth was not expected to devote any of his time to the business; that the Hopkins brothers had conducted and managed it, and were to do so thereafter, and was entirely silent as to the right of either or any of the partners to withdraw and use moneys of the firm, whether profits or otherwise. After the purchase of the land in question in March, 1876, another agreement, like the former in all respects, was made, except that the holdings of capital were stated to be: Mr. Bosworth, \$193,909.18, and B. B. and E. C. Hopkins, \$101,154.20; and this remained in force until Mr. Bosworth's death. The latter, in the fall of 1869, a short time before leaving for Europe, wrote to the defendants a letter from the "Kaw-Kaw Clubhouse," relative to his business matters and those of the firm, giving his ideas as to the manner in which the business should be conducted, and concerning his intended trip abroad, which was expressed in terms of great kindness and confidence, in which he says: "For the coming year or two I want you to allow me to do most of the drawing out of funds for extraordinary purposes, after which you can change it, if you desire." There is no allusion to the subject in subsequent letters on either side, and, in consequence of the fact that death had closed the lips of Mr. Bosworth, the law closed those of the defendants as to any oral understanding or agreement between them. The paragraph above quoted relates to drawing out of money, over and above living expenses, "for extraordinary purposes," and we must refer to it, and the practice and usage of the parties, and all other relevant facts and circumstances, for a solution of the question whether the drawing out of the moneys with which the purchase in question was made and completed was unauthorized and fraudulent. The evidence is clear, in our judgment, that, when the \$1,000 was drawn and used to make the purchase, the Hopkins brothers

had undrawn profits standing to their credit on the books of the firm in the sum of about \$75,000. From 1866 down to the end of the business year 1876 the net profits of the business had averaged over \$45,000 per annum, and for the entire period of the partnership \$35,000 at least. It appears that nearly every year after going to Europe Mr. Bosworth drew out moneys largely exceeding his share of the annual profits, and in some years more than \$20,000 in excess thereof, so that his interest in the firm which stood on the books, March 1, 1871, at \$238,574.75, was reduced to \$187,643.82 by March 1, 1879, and to \$157,303.53 by the end of the partnership term, March 1, 1885, showing that he had not only drawn all his share of the profits, but that his stipulated capital was very considerably reduced below the sum mentioned in the partnership agreement. On the other hand, on the 1st of March, 1879, after final payment had been made for the land, the balance to the credit of the defendants was in excess of their capital as stipulated in the partnership agreement, and at the end of the partnership term was \$80,998.83,—over \$20,000 less. During the entire period of the partnership there appears to have been the most cordial and friendly feeling between the parties, each seeming to have the utmost confidence in the other, and at the end of each business year the defendants sent to Mr. Bosworth what is called in the evidence a "miniature balance sheet" of the affairs of the firm for that year, stating the footings of the personal ledger, and amounts due the firm, and amounts the firm owed, the gross sales, gross profits, expenses, net profits, bills receivable, and stock on hand. Mr. Bosworth knew presumably what he had drawn out each year, and from this data and the "miniature balance sheets" could form a satisfactory conclusion whether the defendants were withdrawing annually their share of the profits or more, or whether they allowed their profits to accumulate, and form a basis with which to carry on the partnership. The evidence wholly fails to show that any complaint was made by either party against the other for drawing more money annually than he or they ought to have taken, or that the capital of either party had been impaired. While Mr. Bosworth was abroad or absent from Milwaukee, during a period of about 16 years, the defendant Bedford B. Hopkins was Mr. Bosworth's business manager of his other important interests in Wisconsin, conducted the business of erecting a large building in Milwaukee, and his speculations in whisky and other deals, and his (Bosworth's) profits in these matters during this period are estimated at over \$50,000; and Mr. Hopkins managed and closed out a transaction in some railway securities, not deemed very secure, in a very profitable and advantageous manner. He also managed and conducted very important business interests for one of the plaintiffs,

Mrs. Bosworth, during the same time. It does not appear that any fault was ever found with, or any complaint was made against, him in respect to his management of any of these affairs, which was, it seems, gratuitous, or in relation to the management of the affairs of the firm by the defendants until about six years after the death of Mr. Bosworth, and just before this action was commenced. It is in evidence that Mr. and Mrs. Bosworth always had prompt and full information in regard to their said business affairs whenever they sought it. In 1882 the defendant Bedford Hopkins saw Mr. Bosworth at the Thousand Islands for eight or ten days. It is difficult, from all the facts and circumstances in proof, to resist the conviction that Mr. Bosworth knew in a general way the extent to which he, and the defendants as well, were drawing and had drawn moneys, from time to time, from the firm, both before and after the purchase. He had the means of ascertaining the real facts, and motives of business prudence and ordinary caution should have prompted him to look after the manner in which the defendants, as managing partners, were conducting the affairs of the firm. The evidence shows that Mr. Bosworth was a competent and successful business man of long and extensive experience, and strict and careful in business methods. If he did not know the facts, he was exceedingly remiss in not investigating, during a period of about 13 years. No examination in behalf of the Bosworth interest of the partnership affairs was made until over five years after his death. The proofs are suggestive of very considerable and long-continued laches in this respect. Laches which will operate to bar relief may well consist in long-continued neglect to investigate and ascertain the rights of a party in respect to important business interests, so that he may be said to have slumbered on his rights quite as well as where a party, having adequate knowledge in this respect, fails to bring his action in proper time for relief.

At the late day when this litigation was instituted, with all the light that can be obtained from the evidence and the course of business and usage of the firm, and in the absence of any evidence or suggestion of complaint at or about the time, and when the evidence of the parties to these transactions cannot now be had, it cannot be said, we think, as an inference of fact, that the drawing out and using of the money of the firm to make the purchase in question, and to pay the deferred payments, interest, taxes, and improvements, was without due and lawful authority. It would be most unreasonable to say that the plaintiffs have shown themselves to be in any position to complain of the drawing out of the \$1,000 used to make the purchase, when the defendants had to their credit for profits the large amount already stated. Is there any reason, in view

of what he said in the Kaw-Kaw letter of 1869, to think that it would ever have occurred to Mr. Bosworth to have made any objection to that transaction? Having drawn so largely on the firm for his share of the annual profits, and even to the extent of materially impairing his capital, did he suppose, or had he any right to think, that the defendants were permitting their profits to accumulate, and serve as a means with which to secure profits to a considerable extent for his benefit; or did he not think, and have every reason to believe and understand, that they were using their share of profits for purposes of investment and for "extraordinary purposes," beyond ordinary living expenses? We feel no difficulty in holding that the \$1,000 with which the purchase was originally made was rightfully and in good faith withdrawn and used for that purpose. In view of all the evidence, we are unable to understand how any motive should exist for attempting to conceal the fact, nor does the evidence satisfy us that any concealment of it was intended or attempted. Whether the withdrawal of funds for the purchase of the Daniels notes, amounting to \$20,000, for \$16,000, with and out of which payment was made of the unpaid purchase money for the land, was an invasion or impairment of the capital of the defendants, was a question much contested, and upon which the finding of the superior court was adverse to the plaintiffs. Our strong conviction is that, if there was any such impairment, it was speedily made good, and that the firm suffered no inconvenience in consequence. But, as already stated, we do not regard this question as important to the real question involved in this action, and will not enter upon an analysis of the computations submitted in favor of the claims of the respective parties on this point, for, with other matters already mentioned, the appropriate method for settling it is in an action for an accounting, for reasons already stated.

It was argued on behalf of the appellants that the drawing out of the \$1,000 with which the purchase was made had been kept secret and concealed, and this furnished evidence of intentional wrong, and improper and fraudulent use of the moneys of the firm, and that the same state of facts is shown to be true as to the withdrawal of the subsequent moneys used to buy the notes used to pay the unpaid purchase money on the land, and to pay interest, taxes, and improvements. As to the \$1,000, the fact is that this amount and a subsequent payment of interest, etc., were not entered upon the personal account of either of the defendants in the personal ledger of the partners, but was kept on a slip of paper in the money drawer or on the cash tickler until the 24th of the following April, when they were entered on the sales ledger of accounts with customers, under the head of "W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, sec. 1, town 6, range 21, Mil. Co., Wis. B. B. & E. C. Hop-

kins, 80 acres, town of Greenfield, Wis." This account was debited with the moneys drawn out and paid for the land, and was credited with whatever had been received from the land. It extends through five ledgers, and it is fair to presume that each of these had an index with which the account could be readily referred to. It would enter into every annual balance sheet as a part of the moneys due, and was in the form of an asset of the firm, though it would be in reduction of the general credits of the defendants, which were kept on the personal ledger. This is the only joint account of the defendants on the firm books, and entries were regularly made on it of all items relating to the land, drawn or paid from the moneys of the firm. In relation to this account one of the defendants testified, in substance, that he never gave any directions to any bookkeeper in what ledger he should put the B. B. and E. C. Hopkins land account; that there are several other accounts on the sales or customers' ledger of a like character; that he never noticed that this account was on the sales or customers' ledger until examined as a witness; that he intended no concealment, and there was no concealment, in leaving the \$1,000 off the cash book from November 25th down to the next April. One Youmans, bookkeeper for the firm in the year 1873, and for 14 years thereafter, testified that the B. B. and E. C. Hopkins land account was opened by him, and that neither of the defendants gave him any directions as to where that account should be opened,—whether in the sales ledger or in the personal ledger; that they never gave any directions upon what ledger any account should be opened. It appears to us that any competent business man,—certainly any bookkeeper,—in looking into the condition and affairs of the firm, could not fail to find this account, or to understand that the amount with which the defendants were debited by it was a proper charge against the defendants, and a set-off against the interest they had in the firm, whether of capital or profits, and, though in form an asset of the firm, was in effect a charge against the defendants. The method of keeping the account adopted may not have been an appropriate one, but it was not calculated to be a very successful device for concealing the account, or the transactions to which it relates; and we are not prepared, in view of all the evidence, to adopt the theory that it was entered in this manner for any such purpose. We do not think the evidence sustains the charge of concealment made in the complaint.

Upon the death of Mr. Bosworth, his son, Howard F. Bosworth, one of the plaintiffs, succeeded to his interest in the firm in the manner already stated. There had been no examination into the separate interest of Mr. Bosworth in the affairs of the firm for nearly sixteen years, and none seems to have been attempted for about five years thereafter.

Howard F. Bosworth neither made nor attempted any until about the time the firm went into liquidation, in 1890. It appears that he had little or no business education or training, or aptitude for business pursuits, and the duties incident thereto appear to have been unsuited and irksome to him. There is no evidence that the defendants, or either of them, refused him proper means and facilities to examine into the business transactions of the former firm, or that any means or device whatever was resorted to in order to mislead or deceive him, or to prevent a thorough examination of its affairs on his part. He had the means at hand to carry it on, and motives of business prudence and caution could not have failed to suggest its necessity. The defendants did not make the fact of their purchase of the property in question a matter of secrecy, and their title to it appeared of record. The great lapse of time, the loss of instruments of evidence perhaps, but particularly the death of Mr. Bosworth, have served to surround the investigation of the case with difficulty and doubt. We ought not to disturb the title of the defendants under such circumstances, and after such a lapse of time, but upon clear and satisfactory evidence, particularly if there has been, as conceded here, an extraordinary increase of the value of the premises in the mean time. Upon the entire case we are satisfied that the case was decided correctly by the superior court, and that its judgment should be affirmed. The judgment of the superior court of Milwaukee county is affirmed.

BARNES v. MUNROE et al.

(Supreme Court of Michigan. June 1, 1893.)
RESULTING TRUSTS—ABOLITION BY STATUTE—EFFECT.

1. Complainant and his mother employed H. to buy land for them, and furnished the money for the first payment, H. taking the contract of sale in his name. Subsequently they paid the balance of the price, whereupon a deed was made to H. by the vendor, with the knowledge and consent of complainant and his mother. The title was put in H. for the sake of convenience, he agreeing to convey to the complainant and his mother, when requested. Held that, under How. St. § 5560, providing that "when a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made," the persons furnishing the money had no rights in the property as against H.'s creditors, and a sale under execution against H. would not be enjoined.

2. The rights of the execution creditors would not be affected by a conveyance of the land, subsequent to the levy, by H. to complainant.

Appeal from circuit court, Kent county, in chancery; William E. Grove, Judge.

Injunction by Urial Barnes against David Munroe, William Neenan, and John McQueen. From a decree for complainant, defendants appeal. Reversed.

Myron H. Walker, for appellants. Maher & Salsbury, for appellee.

GRANT, J. The defendants Munroe and Neenan are judgment creditors of one Thomas B. Haynes. Execution was issued upon the judgment, and placed in the hands of defendant McQueen, who is sheriff of Kent county. He levied upon the land here in controversy. Complainant thereupon filed his bill to enjoin the sale of the land, and decree was rendered in his favor. He alleges in his bill that he is the legal and equitable owner of the land; that the entire N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 17, township 10 N., of range 10 W., was formerly owned by the City Bank of Battle Creek; that prior to May 28, 1885, he and his mother arranged with Haynes to purchase the same for them, and agreed that a division should thereafter be made between them; that Haynes purchased the premises, received a conveyance thereof, and agreed to and with complainant and his mother to make a conveyance of the same to them, as they should agree upon and request of him; that complainant took possession of the land for himself and his mother, has since had possession, made improvements, and paid the taxes; that December 15, 1890, for the purpose of carrying out his agreement, Haynes executed and delivered to each of them a deed, intending to convey to complainant the east half and to his mother the west half of the land; that a mistake was made in the description of the land in the deed to him, by which it was located in the northeast quarter of the section instead of the northwest quarter; that the execution was levied January 15, 1891; and that, after the levy, complainant discovered the mistake, and thereupon Haynes executed to him a deed giving the correct description. The defendants, in their answer, deny some of the material allegations of the bill, and as to others leave complainant to his proofs. They aver that they had no notice at the time of the levy that any person other than Haynes claimed any interest in the land; that Haynes obtained credit on account of the ownership of said land, and the title thereto being in him; that he became insolvent, and that the conveyance was made to hinder, delay, and defraud his creditors; that he was not only the apparent, but the real, owner of the land; and they claim the benefit of a demurrer to the bill. The evidence on the part of the complainant shows that the entire purchase price was paid by complainant and his mother; that the purchase price was \$215, of which \$115, the amount paid in cash, was furnished by Mrs. Barnes, the mother; that a contract was made between the bank and Haynes in 1882; that the other \$100 was paid by complainant; and thereupon, in 1885, the bank executed the deed to Haynes, and that Haynes, after the deed to him, had executed a mortgage upon

the land. Complainant, when asked why the deed was taken in the name of Haynes, testified: "Because it was undivided land. My mother and me bought it together, and she didn't know what part she wanted. I was willing that it should be taken in his name. I supposed it would be in his name until we got ready to divide it." After the levy was made, and on June 22, 1891, complainant made an affidavit, in which he said: "I bought the land through Thomas B. Haynes, agent. * * * The deed from the bank went directly to said Thomas B. Haynes, and through money affairs, etc., it so remained, although I had paid for it, had possession, and paid the taxes. * * * Said Haynes never had a cent in the land, and it has been mine wholly since I bought of the bank through him." July 19, 1891, Haynes made an affidavit, in which he said: "I bought the land on a contract, and when the deed was made I had it given to me as agent for convenience connected with the business. While thus in my name I mortgaged it once by Mahala Barnes' request. That mortgage she paid. * * * I never owned the above property at all, and have not, nor never had, a cent in it except as their agent. The property was theirs from the first, and they arranged and rearranged as to which twenty acres each would have." On June 22, 1891, Mrs. Barnes also made an affidavit, in which she stated that she paid for the land through Haynes, and said: "The deed of said premises above described, for convenience at the time and afterwards, was taken in the name of my son, Thomas B. Haynes, agent."

It is clear that no fraud or deceit was practiced by Haynes upon complainant or his mother, and that there was no mistake; that they paid the entire consideration; and that, with their knowledge and consent, the deed was executed to Mr. Haynes, and the legal title remained in him by their consent for nearly six years. Haynes executed the deed to complainant without his request, and after suit had been commenced against him by defendants Munroe and Neenan. Complainant's own evidence brings his case clearly within the statute in regard to resulting trusts, which reads as follows: "When a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance." How. St. § 5569; *Shafter v. Huntington*, 53 Mich. 310, 19 N. W. Rep. 11, and authorities there cited. Complainant's counsel seeks to bring this case within the authority of *Putnam v. Tinkler*, 83 Mich. 628, 47 N. W. Rep. 687. But the difficulty in the present case is that Haynes had no verbal contract with complainant which could be taken out of the statute by either full or part perform-

ance. He had paid nothing. His supposed beneficiaries had paid the entire purchase price before the deed was made to him. They owed him nothing. No condition was left unperformed by them upon the performance of which he was to make the deed. The title was taken in him by their consent, and for their convenience. His sole agreement was to convey to them whenever requested. Possession would have formed no defense to an action of ejectment brought by Haynes, nor furnished the ground for relief in a suit in equity brought by complainant against Haynes to compel a conveyance to him. In *Putnam v. Tinkler*, Horace Dodge, the father, had paid the entire consideration for the land, and took the title in himself. He agreed to convey it to his son upon payment to him of the purchase price. The son took possession, paid the purchase price to his father, and fully performed the contract. There is no similarity in the facts of the two cases. In the former case there was a parol contract to be performed by the contractee, the performance of which brought the case without the statute, and entitled the party to a specific performance. In the present case complainant had no contract with Haynes imposing any conditions upon him, upon the performance of which he was entitled to the deed. At the time the levy was made the legal title was in Haynes, and the defendants Munroe and Neenan had obtained a lien upon the land. Their rights cannot be affected by the subsequent conveyance by Haynes to complainant by which he attempted to carry out a trust which could not be enforced either in law or equity. Decree reversed, and bill dismissed, with costs of both courts. The other justices concurred.

CRANE v. MICHIGAN TRUST CO. et al.
(Supreme Court of Michigan. May 31, 1893.)
SETTING ASIDE ASSIGNMENT—CONDITIONAL DECREE.

In an action by an heir of a deceased person to set aside an assignment of his interest in the estate, the court made a decree directing defendant to file a reassignment of the interest in question within 40 days after entry of the decree, and directing the plaintiff to pay into court the consideration paid for the assignment within 10 days after the filing of the reassignment, and providing that in case the defendant neglected to file the reassignment the decree should stand in place thereof. *Held* that, where defendant failed to file the reassignment within the time limited, plaintiff's failure to make the payment into court within 10 days thereafter did not put plaintiff in default, as the decree did not require him to pay the consideration until after defendant had filed the reassignment.

Appeal from circuit court, Kalamazoo county, in chancery; George M. Buck, Judge.

Action by Edgar A. Crane against the Michigan Trust Company and another to enjoin the prosecution of an action, and to

remove the effect of a decree. Judgment for plaintiff was rendered on demurrer, and the defendant trust company appeals. Reversed.

Fletcher & Wanty, for appellant. Osborn & Mills, for appellee.

MCGRATH, J. A suit at law has been instituted by the Michigan Trust Company, administrator of the estate of Mary Adele Crane, deceased, against plaintiff, to recover the value of the property which was in controversy in *Beedle v. Crane*, 91 Mich. 429, 51 N. W. Rep. 1070, and this bill is filed to restrain the prosecution of that suit. The administrator demurred to the bill. The demurrer was overruled, and the case is here on appeal from that order.

In *Beedle v. Crane*, the decree directed the defendant to execute a reassignment to Beedle, and file the same with the register of said court, within 40 days after the entry of the decree, and that, within 10 days after the filing of said reassignment, Beedle should pay to said register the amount which had been paid in consideration of the assignment from Beedle to Crane; that such reassignment should not take effect until such payment, and, in case Crane neglected to execute and file such assignment within 40 days, that the decree should stand in the place thereof. The bill in the present case sets up that plaintiff neglected to file the reassignment which he was directed to execute and file in *Beedle v. Crane*; that, after the lapse of the time provided, said decree operated as a reassignment; that it was the duty of Beedle thereupon to make the payment to the register required by such decree; that Beedle failed to do so; that in consequence of such failure the title to the property became absolute in Crane; that the debts of said decedent estate are merely nominal; and that, as plaintiff is the only person really in interest, he is entitled to avoid the expense of administration, and retain possession of the property. Beedle is still insisting upon his right, as heir at law of decedent, to the property of said estate, upon the distribution thereof. The administrator was appointed at the instance of a creditor. *Woolley v. Crane*, 86 Mich. 360, 49 N. W. Rep. 43. The bill in the former case was filed to set aside an assignment fraudulently procured. Plaintiff himself is in default under the decree in that case. It would have been entirely proper, in that proceeding, to have made the delivery over by complainant Crane to the administrator of the decedent's estate of the property belonging to said estate a condition precedent to the payment which that decree required Beedle to make. Two parties are here claiming the right to the proceeds of said estate upon distribution thereof. As to which is the proper distributee is a matter that can only be determined in the proper course. If for no other reason, it is the

duty of the administrator to collect the property, and then proceed in the usual course to have the question as to who is entitled to the property properly determined. The legal title to the effects of the estate is in the administrator. Through him alone can this question be determined. The question of the appointment of an administrator has been passed upon by the probate court, and that appointment cannot be assailed in this proceeding. In the absence of an agreement between contesting claimants, or an adjustment of differences between heirs, the administrator would not be authorized to surrender the estate, or close it up, except in the usual course. The decree below is therefore reversed, and the bill dismissed, as to appellant, with costs of both courts to the defendant the Michigan Trust Company. The other justices concurred.

NEW YORK LUMBER & WOOD-WORKING CO. v. PEOPLE'S FIRE INS. CO.

(Supreme Court of Michigan, June 1, 1893.)

FIRE INSURANCE—CONTRACT—RECALLING POLICY ON SUNDAY.

1. In an action on an insurance policy it appeared that defendant's agent wrote the policy, and forwarded it to one S., for tender to plaintiff, in renewal of an expired policy. In the mean time the property covered by the policy had been burned. The agent heard of this on Sunday, and wired S. not to deliver the policy. On the same day, S. told plaintiff that the policy had been received, and had been recalled. On the next day, plaintiff wired S. to hold the policy. The policy, having been returned, was demanded of the agent, and was afterwards again demanded, when the premium was tendered for the first time. *Held*, that no contract of insurance was made.

2. The agent's act in recalling the policy on Sunday was not the making of a contract, but was an effort to reclaim the property of the company.

Error to circuit court, Bay county; George P. Cobb, Judge.

Action by the New York Lumber & Wood-Working Company against the People's Fire Insurance Company on an insurance policy. There was a judgment for defendant, and plaintiff brings error. Judgment affirmed.

Hatch & Cooley, for appellant. Elbert H. Gary, (O. F. Wisner, of counsel,) for appellee.

MONTGOMERY, J. The plaintiff corporation is engaged in the manufacture of lumber at East Tawas, Mich. On the 1st day of July, 1889, the defendant company issued to the plaintiff a policy of insurance in the sum of \$1,250. This policy was written by Frank L. Wands, the company's agent at Bay City, and was sent to one James H. Schmeck, at East Tawas, for delivery. The policy expired on July 1, 1890, and no application for renewal was made by plaintiff. On the 5th of July, 1890, Mr. Wands prepared a new policy, dated July 1, 1890, for one year, and forwarded it to Mr. Schmeck,

in the expectation that it would be tendered to the plaintiff in renewal of the former policy. At the same time, another policy, of like amount, in another company, in which plaintiff had previously insured, was prepared, and forwarded in the same envelope. These policies were received by Schmeck on Sunday morning, the 6th of July. In the mean time, on Saturday, a fire had occurred, and the property covered by the policies had been consumed. The agent, Wands, learning of this on Sunday morning, telegraphed to Schmeck not to deliver the policies. Schmeck replied: "All right. Will return." On the same day, Smith, an agent of the plaintiff, was seen by Schmeck, and for the first time informed that the policies had been received, and was at the same time informed that they had been recalled. On Monday, July 7th, Mr. Smith telegraphed to Schmeck, "Hold Wands' \$2,500 policy." By mistake of Schmeck's clerk, as it would appear, the policies were not retained, but were returned to Wands. On the 10th they were demanded of Wands by Smith, and on the 12th they were again demanded, and the premium for the first time tendered.

The sole question for our determination is whether a contract of insurance was effected. It is ingeniously argued by the plaintiff's counsel that the case is to be determined solely by reference to what took place in regard to the policy on secular days; and it is urged that as the policy was transmitted to Schmeck on a secular day, and as Smith signified his willingness to accept the policy on a secular day, that this completed the contract; that Wands had no authority to recall the policy by telegram sent on Sunday. We think this a novel application of the Sunday law. The act of Wands in recalling the policy of insurance from Schmeck was not the making of a contract, but was an effort simply to reclaim the property of the company. At that time no contract had been made, and none tendered. But, apart from this, if all that was communicated by Schmeck to the plaintiff is considered, it did not amount on his part to an offer of any contract of insurance to the plaintiff's agent. In the same conversation in which he was advised that he had received a policy, he was told that the policy had been recalled; and it does not appear that he was ever told, either by Wands or Schmeck, that the company would enter into contract relations with him. He could not compel the defendant to contract with him. As was said by the learned circuit judge: "If Schmeck had authority to offer the policy to the plaintiff, he was under no legal obligation to do so, but might lawfully refuse. To make such an offer was not a duty which he owed to either the plaintiff or the defendant. But supposing that such authority was conferred upon him, and he accepted it, yet, until he actually made such an offer on a secular day, the plaintiff could

acquire no rights, as against said defendant, or against said Schmeck." The case does not call for extended discussion. The circuit judge was entirely right in his conclusion that the minds of the parties never mutually assented to the same proposition, and that no contract of insurance was made. The judgment will be affirmed, with costs. The other justices concurred.

LOOSE v. NAVARRE.

(Supreme Court of Michigan. June 1, 1893.)

TAX DEEDS—UNAUTHORIZED ASSESSMENTS—TOWNSHIP TAX—DRAIN TAX—ACTION TO QUIET TITLE—DEFENSE BY HOLDER OF TAX TITLE—RIGHT TO SHOW PLAINTIFF'S TITLE FRAUDULENT.

1. A sale of land for taxes assessed for township contingent purposes, and which were not voted or authorized to be raised in the township for such purposes, is void.

2. Where there is no record of the laying out of any drain in a certain township, on which land is assessed in a certain year, and the tax list does not show for what drain the tax is assessed, a sale of such land for delinquent drain tax of such year, and the tax deed issued in pursuance thereof, are void, when, also, the sale and deed were made by the county treasurer, instead of the auditor general.

3. In an action to quiet title by the holder of the legal title, in possession, against the holder of void tax deeds, defendant cannot set up as a defense that plaintiff derived title from his father's grantee, to whom the land was conveyed in fraud of plaintiff's and his father's creditors.

Appeal from circuit court, Monroe county, in chancery; Edward D. Kinne, Judge.

Action by Cyrus W. Loose against Sylvester P. Navarre to quiet title to certain land. From a decree for plaintiff, defendant appeals. Affirmed.

Gouv. Morris, for appellant. Landon & Lockwood, for appellee.

LONG, J. The bill in this case was filed to remove certain clouds from the title of complainant's land. One is a deed from the auditor general to the defendant for the tax of the year 1885, and the other is a deed from the treasurer of Monroe county to the defendant for a delinquent drain tax for the year 1885. The case was heard on pleadings and proofs taken in open court, and a decree made setting aside the two deeds. Defendant appeals.

It appears that in the year 1885 there was assessed in the township of Monroe, where the land lies, the sum of \$450, for township contingent purposes, and the portion of such amount assessed upon this land was \$9.37. No amount was voted or authorized to be raised in the township for this purpose, either at the annual township meeting, or by the township board. As to the drain tax it appears that there was no record of the laying out of any drain in the township of Monroe upon which this land was assessed, and the tax roll does not show for what the drain tax is assessed; and it further appears that the sale of

the land was made for this tax by the county treasurer, and the deed given by him, and not by the auditor general. It is not very seriously contended by defendant's counsel that either of these tax sales are valid, but he contends that the court below was in error in setting the sales aside, for the reason that complainant, by his proofs, did not show title in himself to the land in controversy. It appears that the lands originally belonged to the father of complainant, who was in business with his father under the firm name of Charles Loose & Sons. The firm becoming indebted, Charles Loose, the father, conveyed the lands in controversy to Ira Grovesnor in trust for creditors of Charles Loose & Sons. Subsequently, Grovesnor conveyed them to the complainant. The defendant sought, upon the hearing, to show that no settlement was ever made with the creditors, and therefore the deed from Grovesnor to the complainant conveyed no title. The defendant is not in a position, claiming under a void tax title, to contest complainant's title to the land. He is in no way interested in the equities existing between the complainant and the creditors of Charles Loose & Sons. It appears that the complainant went into possession under the Grovesnor deed, and was, in fact, at the time of the filing of this bill, claiming title through the Grovesnor deed. This deed conveyed the legal title. His title to the lands is proved unless some equities are shown by the creditors of Charles Loose & Sons, which should operate to set aside the deed. Those equities cannot be set up by the defendant in this case. It needs no citation of authority to show that the tax titles are void, and that the defendant is not in a position to attack complainant's title in the manner sought. The decree of the court below must be affirmed. The other justices concurred.

DUNSBACK v. COLLAR et al.

(Supreme Court of Michigan. June 1, 1893.)

BILL IN AID OF EXECUTION—SUFFICIENCY.

A bill filed in aid of execution, claiming that a deed by the execution defendant to his wife was without consideration, and made in fraud of creditors, alleged that such defendant had "no real or personal estate liable to levy and sale, except the premises aforesaid, on which the sheriff could make a levy." Held, that the bill was not insufficient, as failing to show that said debtor was insolvent.

Appeal from circuit court, Ingham county, in chancery; Rollin H. Person, Judge.

Bill by John Dunsback against Stephen Collar and Emma L. Collar in aid of executions. From a decree for complainant, defendants appeal. Affirmed.

L. T. Hemans, (J. P. Lee, of counsel), for appellants. Arthur D. Prosser, for appellee.

LONG, J. This bill was filed in aid of two executions. Levies were made under the

executions upon certain real estate which the defendant Stephen Collar had transferred to his wife, Emma L., by deed of warranty, prior to the time the judgments were obtained, but after the time the debt for which the judgments were rendered accrued. It was claimed by the bill that the deed was without consideration, and made to defraud creditors. The court below entered a decree in favor of complainant, from which the defendants appeal.

The only contention made in this court is that the complainant did not make a case by his bill showing that Stephen Collar was insolvent, or by his proofs show that the land in question was all the property possessed by Stephen Collar liable to execution. The bill alleges that "Stephen Collar has no real or personal estate liable to levy and sale, except the premises aforesaid, on which the sheriff could make a levy." The lands had been fully described in the bill. We think the bill sufficiently stated the insolvency of Collar. It is stated that this was all the property he had liable to execution, and that the deed was made to hinder, delay, and defraud creditors. The proofs amply support the bill in this regard. The decree of the court below must be affirmed, with costs. The other justices concurred.

REEDER et al. v. MOORE et al.

(Supreme Court of Michigan. June 1, 1893.)

REPLEVIN — DEMAND — WHEN NECESSARY — DESCRIPTION OF PROPERTY — WRIT AND DECLARATION — VARIANCE — WAIVER.

1. Where defendants, in replevin, obtained possession of the goods by fraud, no demand by plaintiff is necessary.

2. Where, in such action, the evidence is conflicting as to whether or not the possession of one of defendants is collusive, it cannot be said as a matter of law that there must be proof of demand by plaintiff.

3. It is too late after plea to take advantage of a variance between the description in the writ and in the declaration of property replevied.

Error to circuit court, Muskegon county; Albert Dickerman, Judge.

Action of replevin by Jobe B. Reeder and others against Jerome B. Moore and others. There was a judgment entered on the verdict of a jury in favor of plaintiffs, and defendants bring error. Affirmed.

Turner, Turner & Turner, for appellants. Peter Doran, for appellees.

HOOKER, C. J. Plaintiffs brought replevin against Jerome B. Moore, his wife and son, for a quantity of shoes claimed by them to have been purchased from them by Moore through misrepresentation as to his financial condition. At the time of the replevin the son was in charge of the goods, and the mother had a mortgage or bill of sale upon them. The plaintiffs assert that the son

was the agent of the father, while defendants claim that he was the agent of the mother, and that the goods were in her possession. We are asked to reverse the judgment upon the ground that no demand was made for the property, before the writ was issued. Shinn, Pl. & Pr. § 156; Wells, Rep. § 845, note. As against Moore, no demand was necessary. Cobbey, Rep. § 503, note; Koch v. Lyon, 82 Mich. 513, 46 N. W. Rep. 779. His wife, on the other hand, was entitled to a demand, if in possession, unless her possession was fraudulent. In such case she would be in no better position than the husband. In this particular this case is distinguishable from the case of Pangborn v. Ruemenapp, 74 Mich. 572, 42 N. W. Rep. 78, where the defendant was in possession under a purchase made in good faith. It cannot be said as matter of law that plaintiffs could not recover without proof of demand, unless it shall be determined that there is no evidence tending to show that the wife's possession was collusive; and, as there was evidence from which collusion might be inferred, it was a question for the jury.

The following differences between the description of the property in the writ and declaration appear, viz.:

Writ.

6 pair men's patrol shoes.
12 pair youths' satin oil shoes.
~~12 pair youths' satin oil shoes.~~
6 pair child's dongola shoes.
6 pair men's kangaroo shoes.
12 pair ladies' glove grain shoes.
12 pair men's dongola shoes.
12 pair men's cork sole calf shoes.
12 pair child's pebble grain shoes.
12 pair men's kangaroo shoes.
12 pair men's rubber snow excluders.
24 pair men's imitation sandals rubbers.
24 pair ladies' croquet sandals.
24 pair men's croquet sandals.

—Being the goods and chattels obtained by Jerome B. Moore from the said firm of Geo. H. Reeder & Co."

Declaration.

12 pair men's satin congress.
~~6 pair child's dongola.~~
12 pair youths' satin oil.
6 pair child's dongola.
6 pair kangaroo congress.
12 pairs ladies' glove grained.
12 pairs men's corked soled congress.
12 pairs child's pebble buttons.
12 pair men's rubber excluders.
24 pair imitation sandals.
24 pair ladies' croquet.
12 pair misses' croquet.
12 pair misses' dongola buttons.
12 pair boys' satin oil.

—Being the goods and chattels obtained by Jerome B. Moore from Geo. H. Reeder & Co."

The jury rendered a verdict in favor of the plaintiff for six cents damages. It will be noticed that neither the word "shoes" nor "sandals" is used in the declaration. It further appears that none of the articles are identical in the descriptions in the writ and declaration. This is claimed to be a fatal

variance. Whether it could not be shown that most of the descriptions were different names for the same articles we need not decide. Since the abandonment of the practice of reciting the contents of the writ in the declaration, and the denial of oyer of the writ, the usual method of taking advantage of a variance between the writ and declaration has been by motion. *Willard v. Missani*, 1 Cow. 37; *M'Farlan v. Townsend*, 17 Wend. 440; 1 Chit. Pl. 244; *Hole v. Finch*, 2 Wils. 393. After plea it is too late to take advantage of such variance. *Garland v. Chattle*, 12 Johns. 429; *Oronly v. Brown*, 12 Wend. 271.

Error is assigned upon the instruction to the jury that "the earnings of the minor sons of the defendants prima facie belonged to the father." We understand this to be the law.

Several other assignments of error are mentioned in the brief of appellants' counsel, but, as the exceptions relied on are not indexed, and the pages are not referred to, either in the assignments of errors or the brief, they are not considered. See rule 61. *Pease v. Munro*, 83 Mich. 475, 47 N. W. Rep. 345. The judgment will be affirmed. The other justices concurred.

CORBITT v. TIMMERMAN et al.

(Supreme Court of Michigan. June 1, 1893.)

APPEARANCE BY ATTORNEY—PRESUMPTION OF AUTHORITY—COLLATERAL ATTACK.

The authority of an attorney who has appeared in an action will be presumed, to the extent that relief against the judgment on the ground that he was not authorized will be granted only in case of direct application.

Appeal from circuit court, Kent county; in chancery; Robert M. Montgomery, Judge.

Suit by Daniel E. Corbitt against Leonard Timmerman and Johanna Timmerman. From a decree for complainant, defendants appeal. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

Complainant obtained a judgment in the circuit court for the county of Kent against the defendant Leonard Timmerman, and William W. Taylor, and execution was duly issued thereon. The sheriff called upon Mr. Timmerman August 6th, and requested payment. Mr. Timmerman promised to call upon the officer a few days after. Instead, however, of keeping his promise, he caused to be recorded, August 8th, a deed from himself to his wife of the premises, which constituted the only property Timmerman had upon which a levy could be made. A levy was made, and complainant filed a bill in chancery to set aside the conveyance as fraudulent. Decree was entered in favor of the complainant.

Frank G. Holmes, for appellants. Daniel E. Corbitt, in pro. per.

GRANT, J., (after stating the facts.) The conclusion reached by the court below, that the conveyance was fraudulent, is correct, and is fully sustained by the evidence. The judgment at law is attacked on the ground that Mr. Timmerman was not served with process, and that he had authorized no attorney to appear for him. Mr. Taylor, the codefendant with Timmerman, was an attorney, and a member of the firm of Taylor & McBride, who appeared for the defendants in that suit. Service was made upon Taylor, and, upon the same day, Taylor & McBride entered their appearance, served notice thereof upon the plaintiff, who was his own attorney, and four days thereafter filed and served a plea of the general issue, with notice of special matters of defense. After the appearance of the defendants by their attorneys, no steps were taken to serve Timmerman with a copy of the declaration and notice to plead,—the process by which suit was commenced. The presumption is that attorneys are duly authorized to appear, even where there is an appearance without service of process. *Arnold v. Nye*, 23 Mich. 286. It is undoubtedly the general rule that a judgment resting upon the unauthorized appearance of an attorney will be set aside upon motion, and that equity will enjoin the collection of a judgment so procured when the right to move to set aside the judgment is lost. These remedies exist regardless of the solvency or insolvency of the attorney. 1 Black. Judgm. §§ 272, 374, 325. Had defendant Timmerman applied to the court to vacate the judgment, the court should have set it aside, upon satisfactory proof that the attorneys appeared without his authority, and that their action was not subsequently ratified by him. The authorities are not uniform as to whether such judgment can be attacked collaterally. Freeman states the rule to be that "this presumption is, in a collateral proceeding, not merely prima facie; it is conclusive." *Freem. Judgm.* § 128. In *Ferguson v. Crawford*, 70 N. Y. 253, after a careful review of the authorities by Justice Rapallo, he says: "It is established by a long line of decisions that, where an attorney of the court appears for a party in an action, his appearance is recognized, and his authority will be presumed, to the extent, at least, of giving validity to the proceedings; * * * and for reasons of public policy the court will hold the appearance good, leaving the aggrieved party to his action against the attorney, granting relief against the judgment only in cases of direct application." We think this rule is founded in reason and good sense, and is supported by the clear weight of authority. It is the plain duty of a defendant, in such a case, upon receiving information of the judgment against him, to proceed promptly to have the judgment vacated. The rights of the parties can thus be most expeditiously and inexpensively determined. The presumption being that the

appearance is authorized, the plaintiff is justified in relying upon it. He is therefore guilty of no wrong, and is entitled to prompt action on the part of the defendant, when he learns that an unauthorized judgment is rendered against him, which is valid upon the face of the proceedings.

Decree is affirmed, with costs.

MONTGOMERY, J., did not sit. The other justices concurred.

HUTCHINSON v. WHITMAN.

(Supreme Court of Michigan. June 1, 1893.)

TRIAL—OBJECTIONS TO EVIDENCE.

Exceptions based on an objection to evidence in the form of "I object" cannot be considered.

Error to circuit court, Lenawee county; Victor H. Lane, Judge.

Action by Silas P. Hutchinson against Ancl K. Whitman. Judgment for defendant. Plaintiff appeals. Affirmed.

Silas P. Hutchinson, in pro. per. Salisbury & O'Mealy, for appellee.

LONG, J. This is an action of trover brought against the defendant, who is the sheriff of Lenawee county, to recover the value of property seized and sold by defendant's deputy by virtue of an execution issued out of the circuit court for that county upon a judgment against the plaintiff. It is conceded that the judgment and all the proceedings thereunder were regular and valid, the one contention being that the property seized was exempt from levy and sale on execution, for the reason that at the time of its seizure the plaintiff—being the defendant in the execution—was a householder, and his principal business farming. The property seized consisted of certain household furniture, some clover seed and bags, canvas elevators for binders, and a sickle for binder. The judgment amounted to nearly \$100, and the value of the property seized aggregated between \$30 and \$40. The court directed the jury, in substance, that if they found the plaintiff was a householder, he was entitled to recover the value of the household property; and also, if the plaintiff's occupation was principally that of farming, he was entitled to recover the value of the other property taken. We think the court properly submitted all the questions of fact arising upon the trial for the consideration of the jury, and we find no error in the charge, although many assignments of error are directed to that part of the case.

Some considerable evidence was given on the trial relative to the plaintiff's business, and it is claimed by him that the court was in error in permitting defendant's counsel, upon the cross-examination of plaintiff, to

go to greater lengths in the examination than the circumstances of the case or the questions involved warranted. Especial attention is directed to the following question put by defendant's counsel to the plaintiff while he was upon the witness stand in his own behalf: "Didn't you, on the heels of that, go right out and incumber your property with a fraudulent chattel mortgage that had no basis, to cheat us out of it?" Other questions of like import were asked and answered. The only objection made by plaintiff's counsel was in the following form: "I object." No other ground of objection is stated, so far as appears by this record. It was claimed by the defendant on the trial that the plaintiff had evaded the payment of the judgment by every means in his power by incumbering his property, and that in the trial of the present case he was attempting to falsely show that he was a householder and a farmer, while in truth and fact he was not a householder, and his principal business was not that of farming.

It is apparent that the trial court permitted the defendant's counsel to go to great lengths in the cross-examination; and, if proper objection had been made to the introduction of this evidence, the court may have been in error in permitting it. But counsel did not state any ground of objection, and no exception based upon the objection as taken can be considered. Hoard v. Little, 7 Mich. 468; Stevens v. Hope, 52 Mich. 66, 17 N. W. Rep. 698; People v. Durfee, 62 Mich. 487, 29 N. W. Rep. 109; Merkle v. Township of Bennington, 68 Mich. 133, 35 N. W. Rep. 846. We find no error in the record. Judgment affirmed, with costs. The other justices concurred.

NORTHERN MICHIGAN LUMBER CO. v. LYON.

(Supreme Court of Michigan. June 1, 1893.)

ESTOPPEL BY SILENCE.

Defendant, in attachment to enforce a logging lien under Laws 1887, (Act No. 229,) made certain objections to the sale of the logs under execution issued on judgment for plaintiff therein. Held, in replevin for the logs by such defendant against the purchaser at the execution sale, that plaintiff's failure to object at the time of the sale that jurisdiction was not acquired in the attachment suit, by reason of the fact that the affidavit and writ did not issue on the same day, did not estop him to raise the point where defendant bid on the advice of his counsel, who had examined the records of the attachment suit, and reported thereon.

Error to circuit court, Emmet county; Jonathan G. Ransdell, Judge.

Replevin by the Northern Michigan Lumber Company against Charles W. Lyon. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

Certain parties commenced suits by attachment to enforce liens for labor and serv-

tees upon certain logs belonging to the plaintiff in this suit, under Act No. 229, Pub. Acts 1887. The affidavits for the attachment were made April 25th, were filed April 27th, and the writs issued. Due service was had upon the principal defendants, and copies of the writs served upon the plaintiff. Judgments were entered in favor of the plaintiffs in the attachment suits, executions issued, and the logs here involved were sold by virtue thereof, and bid in by the defendant. The plaintiff appeared by attorney at these sales, and forbade the same for certain reasons then given.

Lyon & Dooling, for appellant. B. T. Halstead, for appellee.

GRANT, J., (after stating the facts.) The justice acquired no jurisdiction in the attachment suits, because the affidavits were not filed and the writs issued on the same day. *McPherson v. McGillis*, (Mich.) 53 N. W. Rep. 794. It is, however, insisted on behalf of the defendant that plaintiff is now estopped to interpose this objection, because he did not include it in his protest at the time of the sale. It is unnecessary to decide whether this defense is available under the plea of the general issue. The court found that the defendant bid at the sale relying on the advice of his attorney, whom he had employed to examine the records of the suit, and who reported to him thereon. The evidence sustained the finding. Both parties, therefore, were equally cognizant of the facts, and neither the declaration nor silence of plaintiff produced any effect upon the conduct of the defendant. There can be no estoppel where one is not deceived or misled, but acts upon his own judgment, and with knowledge of the facts. *Story, Eq. Jur. § 543; Fletcher v. Circuit Judge*, 81 Mich. 193, 45 N. W. Rep. 641, and authorities there cited. Judgment affirmed. The other justices concurred.

BARNES v. BROWN.

(Supreme Court of Michigan. June 1, 1893.)

NEGLIGENCE—WHAT CONSTITUTES.

In an action for injuries alleged to have been caused by defendant's negligence, it appeared that plaintiff was driving along the road at a walk, when defendant's team, with a rope dragging behind, came up from behind at a trot, and turned out to pass plaintiff. Plaintiff did not see the rope until it was opposite his team, when it was dragged under the horses' feet, making them unmanageable. *Held*, that defendant was liable.

Case made from circuit court, Calhoun county; Frank A. Hooker, Judge.

Action by John Barnes against Frederick C. Brown for personal injuries. There was a judgment for defendant, and a case was made and settled to review the same. Reversed.

Rlenzi Loud, for appellant. H. E. Winsor, for appellee.

LONG, J. This cause was tried in the Calhoun circuit court without a jury, and the following findings of fact and law made:

"(1) Plaintiff, a farmer, was driving his farm team, hitched to a buggy containing himself and wife, upon a highway which was quite muddy. His horses were walking. (2) Defendant had sent his team, in charge of his hired man, upon an errand. A rope, somewhere from 12 to 20 feet long, had been tied to the rear axletree of this wagon, to aid in moving a barn. Before starting, it was thrown into the wagon, except one end, which remained tied to the axletree, for the reason that defendant was unable to untie it. (3) Defendant's team, proceeding upon a trot, overtook plaintiff, and passed him, with the rope dragging behind, it having gotten out of the wagon without the knowledge of the driver. (4) As the rope passed his wagon it was seen by the plaintiff and his wife, and one of the horses, at sight of it, began to kick, and jumped, and said horses ran, breaking loose from the buggy, throwing plaintiff and his wife out, injuring both. (5) Defendant's man, seeing the trouble, tried to avoid a collision by driving to the side of the road, but the buggy wheel struck his outer wheel, at which point the team left the buggy, throwing plaintiff and his wife out. (6) The off whippletree was broken, and the left wheel of defendant's wagon was the one that was hit. (7) Plaintiff's horse did not become unmanageable when he first kicked at the rope alongside of him. Plaintiff did not at that time stop his team, but allowed them to walk on, and the rope drew under his feet, which frightened him, when he kicked again, and became unmanageable, as stated. (8) Had plaintiff stopped his horses when the horse first kicked at the rope, the rope would not have gotten under the horses' feet, as it would necessarily have followed the wagon. (9) As the defendant's wagon began to turn in before the rope had fully passed plaintiff's horses, it was inevitable that the rope would draw into the road under the feet of plaintiff's horses, unless prevented by their stopping, or by the superior speed of defendant's team. Plaintiff was in a position to see and know this, while the driver of defendant's team was not, and was ignorant of the fact that the rope was dragging. Plaintiff and his wife were both injured, whereby plaintiff suffered damage to the amount of \$200.

"(1) Defendant is responsible for the conduct of his servant, the driver, on this occasion. (2) It was not actionable negligence to pass plaintiff in the highway with a rope dragging from the end of the wagon. It was negligence to attempt to turn in before plaintiff under circumstances which would be likely to bring the rope under the feet of plaintiff's horses, if both teams continued to advance at their respective gaits. (3) Plaintiff was legal-

ly required to exercise due care to avoid danger, and was as much bound to know that the rope might frighten his team as defendant's driver, especially after he had seen the rope, and after his horse first kicked at it. By not at once stopping his team, while the rope was yet outside of the wagon track, he contributed to the accident." Judgment for costs for defendant.

Exception was taken to the finding of fact that the plaintiff could have stopped his team in time to avoid accident, and was therefore guilty of contributory negligence in not doing so. Exceptions were also taken to the conclusions of law. The evidence is all returned, and the claim is now made in this court that there is not a scintilla of evidence to support the finding that the plaintiff could have stopped his team before the rope dragged beneath his horses' feet. The plaintiff testified: "I was driving my horses along the track, and this team came along behind me, and as quick as it got up to me, driving a pretty good gait, they hauled out to go by me, and just far enough to skip my wagon, with a rope drawing behind; and when it got up so that my horse saw it, it kicked with one foot, and by that time the team was far enough ahead of me so he turned in to get on the track again, and that pulled the rope under my horses, and then they made a jump to get over it, causing the accident." He was asked, "When did you first see the rope?" and answered: "I didn't see it until it got up opposite my team. At that instant my horse caught sight of it, and kicked with one foot at it, and by that time the team was far enough ahead of me to turn in, and that brought the rope right under my horses, and scared them. They jumped to get away from it." Plaintiff was asked on cross-examination: "Didn't you see the rope before it got under your horses' feet? Answer. I saw it as it came alongside. Question. And you had an opportunity to have swung off to the right and get away from it? A. No, I couldn't. Just as soon as they caught sight of the rope they became unmanageable." This testimony is undisputed. It is contended, however, that, inasmuch as the plaintiff's team was on a walk, he should have stopped at the instant he saw the rope. But plaintiff gives the reason why he could not do this. His team was walking; the defendant's team was being driven by on a trot; and the instant defendant's team got far enough by to turn in, it did so, thereby dragging the rope directly under the feet of the plaintiff's horses. It is possible that, had the plaintiff had sufficient presence of mind or foresight, he might have anticipated, when he first saw the rope dragging, that the defendant's driver would turn so quickly in front of him that the rope would draw under his own horses, unless he instantly stopped them. It must be admitted that the driver of defendant's team was negligent in letting the rope drag and turning in and drawing it under the feet of

plaintiff's horses. It is also quite apparent that the plaintiff, under the testimony, cannot be said to have acted carelessly. There is no testimony in the case by which the court below should have so found. If there could be found a scintilla of testimony to support this finding, it could not be disturbed under our repeated rulings; but from the testimony of the plaintiff—which stands wholly uncontradicted—it appears that the injury was occasioned solely by the negligent conduct of defendant's driver; that the horse kicked, and the team became unmanageable from the instant the rope drew alongside of them; and when the rope dragged beneath their feet they ran away, and injured the plaintiff. The plaintiff was not called upon to exercise any greater degree of care than persons of ordinary care and caution would be expected to exercise under the circumstances. The rule laid down by the learned circuit judge required the plaintiff to exercise a greater degree of care than this. It presumes that a person of ordinary care at the instant would have anticipated the turning in of the defendant's team so that the rope would necessarily drag beneath the horses' feet; and again, it presumes that the plaintiff could have stopped his team when he first saw the rope, while the testimony conclusively shows that the plaintiff's horses became unmanageable and began kicking at the time they saw the rope dragging at their side. The judgment of the court below must be reversed, and new trial ordered.

HOOKER, C. J., did not sit. The other justices concurred.

MCMANARA v. MINNEAPOLIS, ST. P. & S. STE. M. RY. CO.

(Supreme Court of Michigan. May 31, 1893.)

HIGHWAYS—EFFECT OF NONUSER—FENCING BY RAILROAD COMPANIES.

How. St. § 1315, provides that all roads which have been laid out, and not recorded, and which have been used eight years or more, shall be deemed public highways, subject to be discontinued by certain proceedings for that purpose. *Held*, that where a road had been laid out by a township, and actually used for eight years, it became a public highway, and the mere nonuser for a period of two years, in the absence of any proceedings to discontinue it, did not entitle a railroad company crossing the road to exclude the public by fencing in its right of way.

Error to circuit court, Schoolcraft county; Joseph H. Steere, Judge.

Action by Patrick McManara against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company to recover the value of a cow killed by one of defendant's trains. There was a judgment for plaintiff, and defendant brings error. Reversed.

Royce & Walte, (E. C. Chapin, of counsel,) for appellant. C. W. Dunton, (McMahon, Oren & Snell, of counsel,) for appellee.

MCGRATH, J. Plaintiff brought suit in justice court for the value of a cow struck by one of defendant's trains in June, 1891. The declaration alleged that the cow was killed "through the negligence of said railroad company, and because the said track was not there fenced, and because the proper signals were not given, and because of the great speed of said engine and train." The cow was killed at a point which was fenced off as a highway. When defendant built its road, in 1887, it constructed the proper cattle guards and fences on each side of said way. Defendant's counsel announced his inability to prove by record evidence the laying out of the highway, but it was shown that in 1881 a petition for laying out the road had been gotten up, and presented to the highway commissioner; that the road was on the section line; that it was laid out by the highway commissioner; that the contract for its construction was actually made, and the work done; that the township paid \$377 for such work; that the road was known as the "Jamestown Road," and led to the Jamestown steam sawmill; and that the highway was used as such for some years after it was laid out. This testimony was not disputed, nor was it claimed that there had been any discontinuance, by any proper proceedings, of the highway, but it was insisted that its use had been abandoned for some time past. It was shown, however, that it had been used as late as the summer of 1889, and that each year the spring freshets had washed away the planking of the bridge in such highway; that each year the planks had been replaced; and that the last time that the planks had been washed away was in the spring of 1891. Plaintiff was not the original owner of any of the land in said highway, nor was he at the time an abutting owner. In view of this state of facts, defendant was entitled to an instruction that for the purpose of this case the point at which the cow was killed must be deemed a public highway. How. St. § 1315, provides that "all highways regularly established in pursuance of existing laws, all roads that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been, or which may hereafter be, laid out, and not recorded, and which have been used eight years or more, shall be deemed public highways, subject to be altered or to be discontinued according to the provisions of this act." There had been no use of the land inconsistent with its use as a highway. The road having been laid out and constructed by the township, and actually used for at least eight years, it became a public highway, and the mere nonuser for a period of two years, in the absence of any proceedings to discontinue the highway, did not entitle the company to exclude the public by fencing in its right of way at that point. It

is doubtful whether, in any event, the defendant could be bound except by proper proceedings discontinuing the highway, with notice to it. The judgment must therefore be reversed, and a new trial had. The other justices concurred.

CITY OF DETROIT v. MURPHY et al.
(Supreme Court of Michigan. May 31, 1893.)
PROCEEDINGS TO OPEN STREET—CERTIORARI TO
REVIEW—WHEN LIES.

Where an appeal is not taken within five days from a judgment confirming the jury's award in a street opening proceeding, as provided by How. St. § 3064o, certiorari will not lie six months thereafter to review such proceeding on the petition of a part, only, of the respondents therein, in the absence of a statute authorizing such writ in such case, since it must be presumed that the other respondents interested in such proceeding, and who might be prejudiced if the judgment were disturbed, have acquiesced in the result, and complied with all further requirements.

Certiorari to recorder's court of Detroit; F. H. Chambers, Judge.

Petition by Simon J. Murphy and Nancy C. Avery for a writ of certiorari to review the proceeding by the city of Detroit for opening a certain street therein. Writ dismissed.

F. G. Russell, (Wells, Angell, Boynton & McMillan, of counsel,) for appellants. Frank A. Rasch, City Atty., and David E. Heine-man, Asst. City Atty., for appellee.

MCGRATH, J. This is certiorari to review a street opening proceeding had under the general law, (3 How. St. 3064a et seq.) in which there were some 35 respondents. The proceeding was commenced August 25, 1891. The verdict was filed March 5, 1892, and was confirmed March 29, 1892. The writ of certiorari was allowed September 12, 1892. The plaintiffs in certiorari appeared in said proceeding, as did all of the respondents, except six, and all the errors alleged related to proceedings anterior to the verdict of the jury. Indeed, it is conceded by counsel for plaintiffs in certiorari that they are here because of dissatisfaction with the assessment made against them to pay costs and compensation. Section 3064i provides that any aggrieved party may appeal from the judgment of confirmation by filing a written notice with the clerk of the court, within five days after such confirmation. Section 3064o (How. St.) contemplates that after the time for appeal shall have expired the clerk shall transmit to the council a certified copy of the verdict and judgment; that the council shall then determine whether the whole or any part of the cost of the proposed improvement shall be assessed upon the district benefited, and upon what district, and what amount; and that the amount so determined upon shall be levied and collected. Section 3064p contemplates

that within one year after final judgment of confirmation the council shall set apart, and cause to be provided in the treasury, unless already provided, the amount to pay the several awards, and direct such payment, and that whenever said amount is provided in the treasury the council may take possession of and use the property for the purposes for which it was taken. It is conceded that the assessment has been made, and it appears that the amount assessed against plaintiffs in certiorari is less than the amount awarded to them as damages. It does not appear that other persons to whom damages were awarded have not accepted such awards, or that other persons against whom assessments were made have not paid such assessments, or that the city has not taken possession of said property for the purposes of a street. It is alleged that six of the respondents were not properly summoned to appear in said proceedings, but each of said persons was awarded damages, and it does not appear that such awards have not been accepted by such persons. For nearly six months after the judgment of confirmation, plaintiffs in certiorari acquiesced in the judgment which it is here sought to vacate. We must assume that in the mean time the common council had proceeded, under the law, to collect assessments and pay awards. The statute gave to plaintiffs in certiorari a complete and adequate remedy. They contested this proceeding, and the confirmation of the verdict, raising the very questions which are here raised. The statute under which these proceedings were taken makes no provision for review by certiorari. At common law the writ is not one of right, and should not be granted, after any considerable delay, unless the court is satisfied that the delay is not due to the petitioner's negligence. This rule is especially applicable in a case like the present, where there are a large number of co-respondents interested in the proceeding, who must be presumed to have acquiesced in the result, and complied with all further requirements, and who might be seriously prejudiced if the judgment were now disturbed. The cause is ruled by *In re Lantis*, 9 Mich. 323; *Farrell v. Taylor*, 12 Mich. 113; *Bresler v. Ellis*, 46 Mich. 335, 9 N. W. Rep. 439; *Mathias v. Mason*, 68 Mich. 524, 33 N. W. Rep. 412. The writ must therefore be dismissed, with costs.

LONG, J., did not sit. The other justices concurred.

GUTHAT v. GOW.

(Supreme Court of Michigan. May 31, 1893.)
BUILDING CONTRACT—PERFORMANCE—DECISION
OF ARCHITECT.

Where a building contract provides that the work shall be done to the satisfaction of the

architect, and that any dispute as to claims for extra work shall be referred to him, and that his decision shall be final, it is error, in an action by the builder on the contract, to refer to the jury such questions as to extra work and the performance of the contract, in the absence of evidence of fraud, or if the question of fraud is not submitted to the jury.

Error to circuit court, Muskegon county; Albert Dickermann, Judge.

Action by Albert W. Guthat against James Gow. Judgment for plaintiff, and defendant brings error. Reversed.

Smith, Nims, Hoyt & Erwin, for appellant. Turner, Turner & Turner, for appellee.

MONTGOMERY, J. Plaintiff sues upon a written contract, by the terms of which he agreed, among other things, to build, construct, and completely finish for the defendant a two-story frame dwelling house, except as to mason work other than plastering, according to drawings and specifications made by Marc J. Reiseger, architect, in a good, workmanlike, and substantial manner, under the direction of said architect, and to his satisfaction, to be testified by a certificate under his hand; and also, at his own expense, and under the direction and to the satisfaction of said architect, furnish such material, workmanship, and labor of all kinds whatsoever as shall be proper and sufficient for completing all the above-designated work, * * * and to remove all improper materials and work when directed by said architect, and substitute therefor such material and work as, in the opinion of said architect, are required by said drawings and specifications; and deliver said work to first party finished and free from all claims, liens, and charges. To commence said work forthwith, and have the same fully completed within eighty days from the time the stone foundations and basement walls shall be ready for the carpenter work. To produce, when required by the owner, a sworn statement of all the indebtedness for labor or material furnished, used, or expended on said building. Said owner to pay therefor \$2,592.20 upon the presentation of certificates, signed by said architect, of his estimate of work done and material furnished. Such estimates to be made once in each two weeks, fifteen per cent. of each estimate to be retained by the owner until all of said work is completed by the contractor and the architect is satisfied that said work is free from all liens and shall issue said certificate. The agreement contained further provisions as follows: "Should any dispute arise respecting the true construction or meaning of said drawings and specifications, the same shall be decided by said architect, and his decision shall be final. * * * The owner may at any time during the progress of said work make any additions to or alterations in or deviations or omissions from said drawings or specifications which he shall deem proper, and the

architect shall advise, without invalidating this agreement, but the fair value of the same shall be added to or deducted from the sum to be paid by the owner, as the case may be; and, should any dispute arise respecting the fair value of the same, such value shall be determined by the architect, and his decision shall be final and binding upon the parties hereto."

On request of the defendant's counsel the learned circuit judge charged the jury as follows: "Under the contract, which has been introduced in evidence, it was the duty of the plaintiff to build, construct, and completely finish for the defendant a two-story frame dwelling house, with basement, except as to the mason work, according to drawings and specifications made by Marc J. Reisinger, architect, in a good, workman-like, and substantial manner, under the direction of said architect, and to his satisfaction, to be testified by a certificate under his hand, and to have the same fully completed within eighty days from the time the stone foundations and basement walls were ready for the carpenter work; and there can be no recovery by the plaintiff in this case on the contract for work that was not done to the satisfaction of said architect, and testified by a certificate under his hand." And also: "It was the duty of the plaintiff, under the contract, to produce, when required by the defendant, a sworn statement of all indebtedness for labor or material furnished, used, or expended on said buildings; and if you find that the plaintiff was required by notice in writing to furnish such statement, and failed or neglected to comply with such requirement, the defendant would be justified in withholding any moneys that might otherwise be due to the plaintiff until such request has been complied with." And, further: "Under the contract the defendant was required to pay the consideration expressed only upon the presentation of certificates, signed by the architect, of his estimate of work done and material furnished; and the defendant was entitled to retain 15 per cent. of each estimate until all of said work was fully completed by the contractor, and until the architect should be satisfied that said work was free from all liens, and should issue his certificate accordingly."

The circuit judge, on his own motion, instructed the jury as follows: "Now, as to this extra work, the contract provides how that shall be done; that if they cannot agree—if they do not agree about it, and about its value and its price—it is to be referred to the architect, and he is to determine what shall be allowed for extra work; and I do not think there is any testimony here—my recollection of it is that there is no testimony—that this has ever been referred to the architect. * * * There is testimony that he went and showed him something. The architect said he showed

him a paper, and asked him to O. K. it, without showing him what it was. I don't think that would amount to a statement of extra work to the architect, and a request to him to act upon it. My judgment is that this extra work will have to be treated in the same way; that he will be entitled to recover for that extra work,—for such of it as you find is extra work, and you will have to determine how much of it is extra work. The parties differ very widely about these items that are claimed to be extra work; the plaintiff claiming that it amounts to something over \$400, the defendant claiming by himself and his witnesses that a great portion of that is not extra work; that it was work that was required to be done by the terms of the contract; and the defendant claims that there is only about a little over \$100 of those items that in fact is extra work, and that comes outside of the contract. Now, as to that, the plaintiff will be entitled to recover such an amount as you find from the testimony is extra work, what it was reasonably and fairly worth, as you may find from the testimony, and no further; and so as to this contract with reference to the building. My judgment is, you will have to decide this cause upon this theory I am now presenting to you; that the plaintiff is entitled to recover not exceeding the contract price at all. You cannot go outside or ahead of that figure what you may find from the testimony the work that he did was fairly worth, and the material that he furnished was fairly worth, less any damage that you may find the defendant sustained in consequence of any fault in the work, or failure to fulfill or perform the work."

By these instructions the plaintiff was permitted to ignore the provision of the contract which made a decision of the architect both as to the extra work and as to the performance of the main contract final. The parties having agreed upon an arbiter in this matter, the question cannot be transferred to the consideration of a jury unskilled in such matters without doing violence to the contract, unless fraud on the part of the architect be shown. It is not seriously contended in this case that fraud was shown, and, if there was any evidence tending to show fraud, it is enough to say that that question was not submitted to the jury for their consideration. As was said in *Hanley v. Walker*, 79 Mich. 614, 45 N. W. Rep. 59: "When parties capable of contracting have deliberately entered into a written agreement, in which, by all just rules of construction, the certificate of the architect is made a condition precedent to a right of action, such condition must be performed, or its requirements waived." See, also, cases cited in opinion of Mr. Justice Champlin. The other questions presented are not likely to arise upon a new trial. The judgment will be reversed, with costs, and a new trial ordered. The other justices concurred.

LELAND v. TOWNSHIP OF BLAIR.

(Supreme Court of Michigan. May 31, 1893.)

WRIT OF ERROR—DISMISSAL.

An application to dismiss a writ of error for want of prosecution will be denied, where neither party has noticed the case for hearing.

Application by the township of Blair to dismiss writ of error sued out by Clarence J. Deland. Denied.

Statement by the Court:

Plaintiff sued out a writ of error on April 6, 1892, the bill of exceptions having been settled in February previous. The original record was filed in this court on April 27, 1892, since which time plaintiff has done nothing towards prosecuting his appeal. Defendant moved to dismiss the writ for want of prosecution, basing its application upon supreme court rule 59, 53 N. W. Rep. iv., providing that the appellant shall serve upon the opposite party a printed copy of the record at least 25 days before the first day of the term for which the cause is or shall be noticed for hearing.

Covell & Gilbert, for the motion. Pratt & Davis, opposed.

PER CURIAM. The motion in this case is denied, it appearing that neither party has ever noticed the case for hearing.

FLAGG v. CHICAGO, D. & C. G. T. J. RY. CO.

(Supreme Court of Michigan. June 1, 1893.)

RAILROAD COMPANIES — FRIGHTENING HORSES — ERECTION OF FENCE AT STATION—NEGLIGENCE.

1. A railroad company is not guilty of negligence in not erecting a screen or fence at its station between the driveway thereto and the tracks, so that horses standing at the station may not be frightened at approaching trains.

2. Where a young horse, standing at a railroad station at which it had never been before, became restless at the sound of an approaching train before it had come in sight, and those in charge of it, instead of driving away, as they might safely have done, attempted to hold it by the head, and plaintiff, who was in the wagon, remained there, instead of alighting, the action of plaintiff as well as those in charge of the team was negligence.

Error to circuit court, St. Clair county; Arthur L. Canfield, Judge.

Action by Christina Flagg against the Chicago, Detroit & Canada Grand Trunk Junction Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

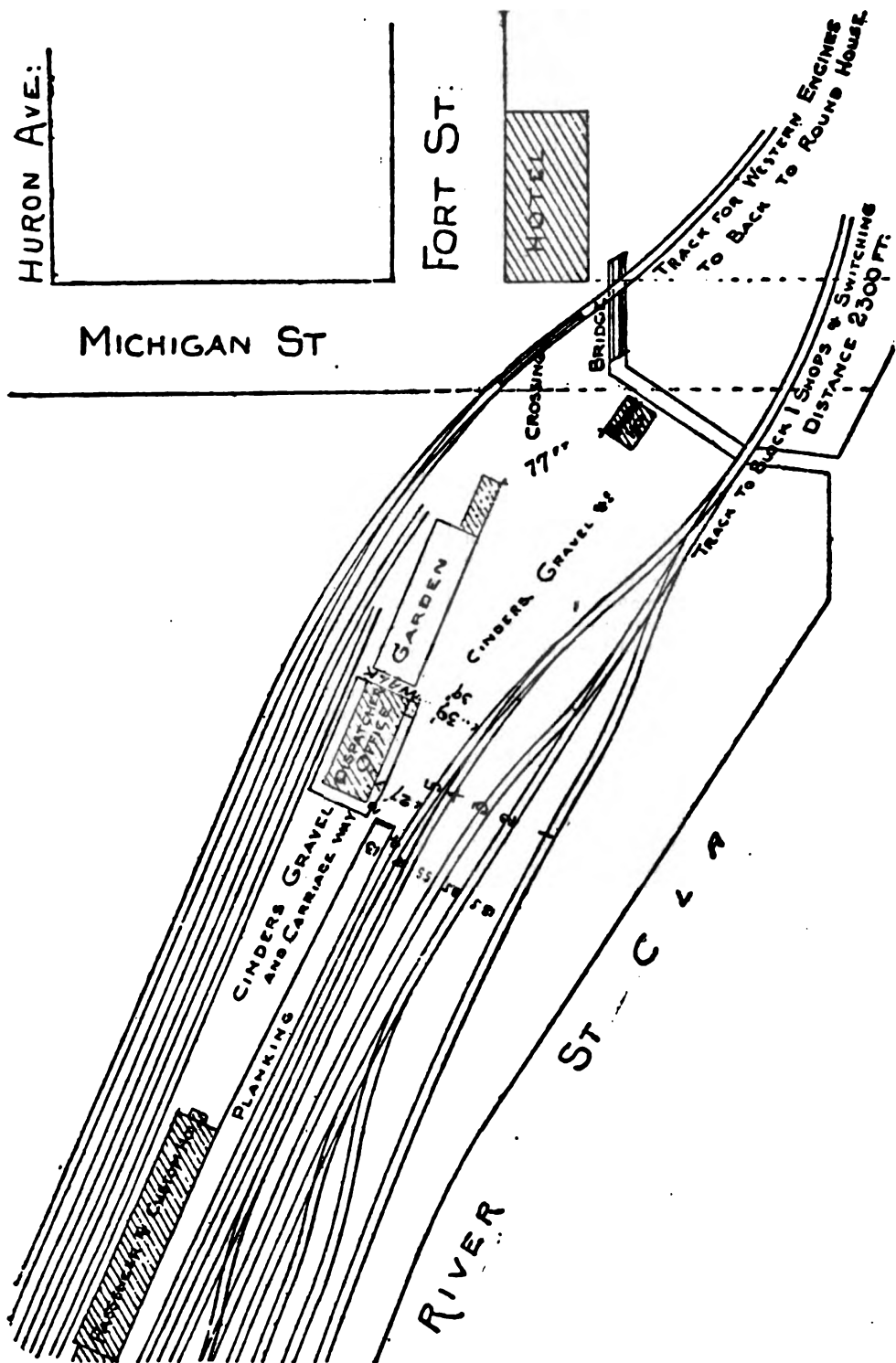
E. W. Meddaugh. (O'Brien J. Atkinson, of counsel), for appellant. J. B. McIlwain, (H. E. Chadwick, of counsel,) for appellee.

LONG, J. Plaintiff lives at Lakeport, about 10 miles from Port Huron. On the day of the accident she was returning from a visit

at Port Huron to her home. She had solicited a ride with two young men by the name of Goodman, one about 19 and the other 14 years of age. They had a light wagon, drawn by one horse. On their way they drove to Ft. Gratiot, to get from the defendant company two trunks belonging to a party in Lakeport, and for which they had the checks. The horse they were driving was four years old, but well broken. Neither of these parties had ever been at the depot at Ft. Gratiot, and the horse had never been driven there. The situation of the streets, railroad tracks, and buildings of the defendant company is shown by the accompanying plat.

They drove down Michigan street to the tracks, and before turning into the depot grounds the older of the two boys got out of the wagon, went to the baggage room, saw the baggage man, who took the checks, and delivered him the two trunks, telling him to drive up to the platform to get them. He put them on a truck, and wheeled them out to the end of the platform, near the train dispatchers' office, and then returned for his horse and wagon. The horse was driven over the first line of tracks through the driveway, and turned round, backing the end of the wagon to the north end of the platform, and opposite the train dispatchers' office. The older boy got out of the wagon, leaving the plaintiff and his brother in the wagon. The horse became restless, and the younger boy got out and took him by the bits. He began to rear, when the older boy went to his head. The horse finally started and ran northward, and, swinging to the right across the tracks, overturned the wagon, throwing the plaintiff out, breaking her leg, and otherwise injuring her. The horse became frightened and unmanageable from the noise of an approaching train coming from the rear, and along the track on the east side of the depot. This action was brought to recover damages for the injury thus sustained by the plaintiff, and on the trial she had verdict and judgment for \$2,000.

The breach of duty alleged in the declaration is that if the defendant had taken proper precaution to protect life and property against such apparent danger as the operating of engines and cars along said mentioned switch tracks, it would have constructed and maintained a high board fence along the westerly side of its main switching tracks from said passenger, freight, and baggage platform, at the southerly end of said building known as the "dispatchers' office," etc.; or, had said defendant kept an employe or servant at said platform to warn strangers coming there with horses to receive or deliver freight or baggage, or to assist in holding such teams, or maintained hitching posts or rings for hitching horses, the accident would not have happened. The breach of duty assigned is as follows: "But,



on the contrary, said yard, on the easterly side, and adjoining said main switching tracks, is wholly unfenced, and said tracks laid level with said yard for the whole distance, and has so existed for more than a year past; while passengers desiring to take said railroad train, or receive or deliver freight from or to said railroad, or to receive or deliver baggage transported over said railroad, are compelled to go by the route aforesaid through the yard aforesaid to said platform as the only means of access for such purposes." There is another allegation of negligence in the declaration, but which seems to have been abandoned on the trial. It was claimed by the declaration that the train was propelled along the tracks with great speed, and without any warning to the plaintiff or those in charge of the horse. On the trial, when proof was offered of this fact, the court stated to counsel that he did not understand that in the operating of the train there was any negligence alleged; and counsel for plaintiff agreed with the court's views, so that we may consider that question settled and out of the case. The only questions, therefore, for our consideration are (1) whether it was negligence on the part of defendant, under the circumstances, not to have built and maintained a fence along the side of these switch tracks; and (2) whether the plaintiff was in the exercise of due care.

The court below, upon the first question, directed the jury if they found that the want of such a barrier left the station grounds in a condition not reasonably safe, and plaintiff's injury would not have taken place except by reason of such insufficient condition, plaintiff and the Goodmans being in the exercise of due care, the plaintiff was entitled to recover. We think this charge was not warranted. Counsel for defendant had asked the court to instruct the jury substantially that the defendant was not bound to fence its depot grounds. This instruction should have been given. It was shown by the testimony of the station agent, and not disputed, that these grounds east of the dispatchers' office and north to Neil creek are used for passengers to get off and on trains; also for conductors leaving trains to go to the dispatchers' office for orders; it is also used by conductors of switch engines to mark the string of cars to be disposed of. It is used by the general public in going to and from the ferry boats plying every 15 minutes from that side of the river to Point Edward, on the opposite side. It appears that it is necessary to have that point open so that the dispatchers may have a view of the yard and of the arrival and departure of trains, and that a fence there would hinder and obstruct the making up and working of trains. On the east side of these tracks, and below the dispatchers' office, are two slip docks where the trains are run onto the transfer boats to be carried

across the river, and frequently from five hundred to a thousand cars a day are in the yard to be carried over, or have arrived in the yard from the other side of the river. The passageway for teams from Michigan avenue to the end of the platform opposite the dispatchers' office varies in width. Opposite the storehouse it is 79 feet east to the tracks, while opposite the dispatchers' office it is 27 feet to the tracks from the platform. Across the tracks the ground is made level and smooth for people to pass over, hundreds of whom pass daily. So far as appears by this record, people have driven their teams in there with safety. In a vast number of railway stations nearly the same state of things exist. Carriages and wagons come to these stations to meet arriving passengers. They draw up and await the arrival of the trains within a few feet of the track, and trains arrive and depart; and no one, so far as my examination has extended, has ever heretofore suggested that a railway company is guilty of negligence in not erecting a screen or fence so that horses standing there may not become frightened at approaching trains, except in the case of *Simkin v. Railroad Co.*, reported in 21 Q. B. Div. 453. It appeared in that case that the plaintiffs were leaving a station belonging to the defendant, in a carriage, when the horse was frightened by the sight and sound of a locomotive engine at the station, which was blowing off steam. The horse upset the carriage, and the plaintiffs were injured. It did not appear that the engine was defective, or that it was used in an improper manner, or that the approach to the station was inconvenient; but the jury found that the defendant was guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident. It was said by the court: "We cannot think that in this case there is any evidence that ought to have been left to the jury of negligence by the defendant in not sufficiently and properly screening its railway from the road." There is no statutory duty cast upon the defendant to place a fence alongside of its tracks, and it is quite apparent that it would not only be a great inconvenience to have such a fence there to the defendant company, but to the public generally. The duty which the defendant owed to the plaintiff was to provide a reasonably safe place of ingress and egress to its station. Negligence would mean the omission by the defendant to do something which persons conducting a railway with reasonable care and caution should do. It cannot be said in this case that there is any such omission of duty. So far as our observation extends, no railroad company has heretofore found it necessary, in the careful management and conduct of its business, to place fences or screens along its tracks for the purpose of preventing the frightening of horses approaching its station. Where passengers are accustomed to be received upon a train,

whether at the station house, at the water tank, or elsewhere, railroad companies are bound to keep in a safe condition for transit the ordinary space in which passengers go to and from the train, and the latter have the right to assume that the grounds adjacent to the car, within the limits in which persons necessarily and naturally go to and from them, admit of their getting safely out and in, even on a dark night; and passengers have a right to assume that no pitfalls are left near the traveled way. In such cases it might be necessary to erect barriers to prevent persons from wandering in the dark out of the traveled way, and falling into pits and getting into dangerous places. Such are the cases cited by plaintiff's counsel. *Hulbert v. Railroad Co.*, 40 N. Y. 145; *Cross v. Railway Co.*, 69 Mich. 363, 37 N. W. Rep. 361. But this case is not within the rule laid down in the cases cited.

2. The plaintiff's own testimony shows that not only were the Goodman boys guilty of negligence in attempting to keep the horse at the platform when it became restless at the noise of the train approaching from the rear, but the plaintiff saw and knew the danger herself, and could have avoided it by the least care on her part. She says she saw the railroad tracks there, and, after the horse had been backed up to the platform, she says she told the boys to hurry up, as she was afraid. She had not seen or heard any train at that time, but saw the track, and was afraid with the little boy in the wagon with her. She had plenty of time to alight from the wagon before any train was heard. After the train was heard, she says, if the boy had done as she told him, he would have driven out, as that was what she would have done. There was nothing unusual in the noise of the train. The horse became restless from the noise of the train before it was in sight, yet the boys, instead of driving out, attempted to hold him there; and the plaintiff, knowing the danger, kept her seat in the wagon. The boys knew the way out, and from the point where they stood it was a smooth driveway from 80 to 100 feet in width, safe to drive over. It appears that the horse first became restless and frightened from the noise, and not from the sight of the train, and yet with a four year old colt, which had never been driven there before, they determined to try to hold him by the head, rather than drive out. The case falls precisely within the rulings of this court in *Gelst v. Railway*, 91 Mich. 448, 51 N. W. Rep. 1112. In that case the driver thought he could get across the track in front of a car going 12 to 15 miles an hour, whipped up his horses to do so, and was struck by the car. This was held to be negligence. In the present case, the plaintiff and the Goodmans saw the danger, knew they had a young colt not accustomed to the place, and that there was a safe way out. Instead of adopting a safe course, they took their chances that they could hold the colt, and let the train pass.

They miscalculated the chances, and must suffer the consequences. We see nothing in the case warranting a new trial. The verdict and judgment below must be reversed. No new trial will be ordered. The other justices concurred.

GRIMM v. TAYLOR'S ESTATE.

(Supreme Court of Michigan. June 1, 1893.)

CLAIM AGAINST DECEDENT'S ESTATE—INSTRUCTIONS.

1. An allegation, in a claim filed against a decedent's estate, for "services in the care and aiding and supporting" decedent's sister and minor children, is broad enough to include aid and support by the contribution of money.

2. Services rendered and money spent by a son in taking care of his mother and her minor children at the special request of his uncle, on his promise to pay therefor, constitute a valid claim against the uncle's estate, after his decease.

3. In a suit for services, where the mother of claimant testifies that claimant was to be paid by deceased "when he was done with the property. He always told me he would leave me a thousand dollars, too, as well as him,"—and another witness testifies that deceased said he would pay claimant \$1,000, but the other testimony is that claimant was to be well paid for his services, it is error to submit the question as to whether there was a distinct contract to pay claimant \$1,000 for his services rendered.

Error to circuit court, Macomb county; Arthur L. Canfield, Judge.

Proceedings by David Grimm to establish a claim against the estate of Thomas Taylor, deceased. There was a judgment for claimant, and the executor brings error. Judgment reversed.

Dwight N. Lowell, (Eldredge & Spier, of counsel,) for appellant. F. P. Monfort, for appellee.

MONTGOMERY, J. The deceased, Thomas Taylor, and claimant's mother were brother and sister. In 1875 the sister, Mrs. Grimm, was divorced from her husband, and at this time the claimant was 16 years of age. The claimant introduced evidence tending to show that at this time, and at various times thereafter, Mr. Taylor requested David to remain at home with his mother, and to care for her and his minor brothers and sisters, contributing from his wages and earnings, and promised him that he would pay him well for it when he was through with his money. The claimant offered further testimony to show that he did remain at home with his mother, and did contribute to her support, and to that of the minor children, and that Mr. Taylor at various times acknowledged himself satisfied with the manner in which he was complying with his request. The claimant recovered a verdict of \$1,000. The executor appeals. The assignments of error are numerous. We do not deem it necessary to discuss all the questions raised, as many of them are not likely to arise upon another trial. The questions which we deem im-

portant are whether the claim filed before the commissioners was broad enough to admit the evidence offered; whether the testimony offered tended to show a valid agreement; and whether the proofs were such as to admit of submitting the question to the jury as to whether there was an express agreement to leave to plaintiff \$1,000 by will.

1. The claim filed before the commissioners was not a formal document. It had not the elements of a declaration, but this is not required. It was in the form of an account, and read as follows: "Estate of Thomas Taylor, deceased, in account with David Grimm, Dr. To services in the care and aiding and supporting Ann Grimm, sister of deceased, and minor children of said Ann Grimm, from 1873 up to the time of the death of the deceased, February, 1889, at the special instance and request made by said deceased in his lifetime, at \$150 a year,—15 years and 3 months,—\$2,287.50." It is claimed that this account did not admit of proof that the claimant contributed money to the support of the family, but we think the language, "aiding and supporting Ann Grimm and children," is broad enough to include aid and support by the contribution of money.

2. Did the contract, as proven, create a valid obligation? It is said that the claimant did no more than he was legally and morally bound to do, but this is not so. The father was the one legally entitled to the claimant's services, and it is fairly inferable from the testimony that he was emancipated by the father. He might have left home, but the testimony offered on behalf of the claimant tended to show that he remained at the special request of the deceased, and upon his promise to pay him for his services. This furnished a sufficient consideration. *Waldron v. Alexander*, 133 Ill. 30, 24 N. E. Rep. 557; *Id.*, 136 Ill. 550, 27 N. E. Rep. 41; *Hamer v. Sidway*, 124 N. Y. 544, 27 N. E. Rep. 256. It was strenuously insisted upon the argument that the evidence offered amounted to no more than an assurance by the deceased that he would remember the claimant in his will, and that claimant did not rely upon such assurance as in the nature of an express contract or promise. We agree, fully, that the danger attendant upon the assertion of claims of this character is such that the trial court should see to it that the jury is not misled into assuming an express promise from mere loose expressions of commendation or assurances; but there is sufficient evidence in this record to justify submitting the question to the jury as to whether the services were in fact rendered in reliance upon the uncle's promise.

3. The circuit judge instructed the jury, among other things, as follows: "If you find from the evidence that David Grimm was induced to perform the services in question

for the family of his mother upon the promise of his uncle Thomas Taylor to give him one thousand dollars on his death, by and through a will, and you also find that no compensation was made in and by the will,—and about that there is no dispute, that the compensation was not so made,—then you will find for the plaintiff in the sum of \$1,000." It is contended by the counsel for the estate that there was no evidence to justify submitting this question to the jury. The testimony offered on behalf of claimant was that of his mother, who testified, in answer to the question, "Did he say when or how he would pay him?" "Well, it was when he was done with the property. He always told me he would leave me a thousand dollars, too, as well as him." Referring again to the same conversation: "I heard him tell Dave to stay, and be a good boy, and work, and turn all he could get, and get things, what he could, for the benefit of the children and myself. Question. Was that all that was said? Answer. That is all I heard,—all but that he would pay him well if he would stay, and do what he could." Again, on redirect examination she testified, in answer to the question, "What did he say about how he would pay him?" "A. Well, when he was through with his property, after his death,—that was the time. He was to give me one thousand dollars, too." Charlotte Grimm, a sister of claimant, testified that, in 1883, claimant told her uncle that he wanted to go away, because he thought he could do better. The uncle said, "No, he did not want him to go; to stay here; to help all he could; give all the services he could to help mother, and bring up the rest of us,—and he would pay him, and would pay him well, if he would." In answer to the question, "Did he in either of these conversations say how he would pay him?" she testified: "He spoke several times about his death. He was speaking several times about willing so much at his death." Martha Chamberlain testified to a statement made by the deceased that on one occasion the deceased said to her "that he had helped them [referring to Mrs. Grimm's family] some, and intended to help them more. He said, 'I must have that boy David stay with his mother;' and, said he: 'I shall give him a thousand dollars, or more, if necessary. I shall stand by him just as long as I live.' I didn't hear him speak of any arrangement with David." On cross-examination she testified: "He said he would stand by him as long as he had anything, and give him a thousand dollars, and even more. He said he had no children, and he thought it was a charity for him to do this." Hiram Eldred testified for the claimant to a conversation with the deceased, in which he said: "He had hired him to stay home; said he wanted to go off with the other boys,—Al, I think,—and David wanted to go, but he had hired him to stay. Don't remember of his saying when or how he was

to pay him." Margaret Hovey testified to a statement of the deceased, in which he said: "David had done well; he was a good boy. Said he had hired him, and he intended, when he died, to leave him a thousand dollars. Had no other talk with him on that subject after that." Ann Wood testified to a statement of the deceased, as follows: "I promised to pay him well for his work, and I am going to do it." He said David had done just what he had hired him to do, and he had been a faithful boy." George Wood testified to a conversation with the deceased: "He said he hired him to take care of his mother, and to look after the family; that he had no fault to find, and he intended to pay him. Didn't say how he calculated to pay him." This comprises the testimony offered on behalf of claimant upon the subject-matter of how he was to receive his pay. The only testimony tending, in the slightest degree, to support an agreement to pay a thousand dollars at his death, is that of Mrs. Hovey, who couples the statement of the deceased that he had hired the claimant with the statement that he intended to leave him a thousand dollars. This, however, is not inconsistent with the alleged contract which the other testimony tended to show,—that he was to pay him well for his services,—and does not tend to show that the agreement between the deceased and claimant was that he was to receive \$1,000. This might not have been damaging error, but for the fact that the claimant's mother was permitted to testify to an understanding that the deceased was to leave her a thousand dollars, as well as the claimant, and the jury might have confounded the two statements. We think that in a case of this nature, where loose statements of the deceased are so liable to misconstruction, extreme care should be exercised that the jury be not permitted to determine the case upon their own ideas of justice, without regard to whether a distinct contract was made, and that it was error to submit to the jury the question of whether there was a distinct contract to pay the claimant \$1,000 for his services rendered. For this error the judgment will be reversed and a new trial ordered. The other justices concurred.

LUDEMAN et al. v. HIRTH.

(Supreme Court of Michigan. June 1, 1898.)

EJECTMENT—AMENDMENT OF PLEADINGS—EXEMPTION SALE—LIMITATIONS.

1. Where a declaration in ejectment is defective because it does not set forth plaintiff's estate in the land, he should be permitted, on the trial, to amend it.

2. Upon the refusal of the court to permit plaintiff in ejectment to amend his declaration on the trial so as to set forth his estate in the land, he should be permitted to submit to a nonsuit.

3. Prior to Act 1889, (3 How. St. § 6173a,) providing that all levies of executions theretofore made should cease to be liens at the ex-

piration of five years from the time the law took effect, there was no limitation on the existence of a lien by execution levy. How. St. § 8736, provides that actions upon judgments must be brought within 10 years after the entry of judgment. *Held*, that where judgment was rendered and execution issued and levy made in April, 1878, and the land advertised for sale in March, 1888, a sale made in May, 1888, was valid; it being immaterial that the sale took place after the expiration of the time within which suit could be brought on the judgment, the proceedings for sale having been commenced within such time.

Error to circuit court, Wayne county; Henry N. Brevoort, Judge.

Ejectment by Fredericka Ludeman and others against Paul Hirth. From a judgment for defendant, plaintiffs appeal. Reversed.

The other facts fully appear in the following statement by GRANT, J.:

The declaration in this case was defective, in that it did not set forth the estate which the plaintiffs claimed. How. St. § 7797. No demurrer was interposed, but the defendant pleaded the general issue, with notice of the statute of limitations, and a claim for improvements. Upon the trial, plaintiffs asked leave to amend their declaration, setting forth the estate claimed. The court refused to permit the amendment. Thereupon, plaintiffs asked leave to submit to a nonsuit, which was also denied, and the court directed a verdict for the defendant. The plaintiffs claimed title under an execution sale. The judgment was rendered April 2, 1878, and execution issued and levy made on the same day. On March 29, 1888, the land was advertised for sale, was sold May, 16, 1888, and deed executed August 28, 1889.

George W. Radford and Edward A. Barnes, for appellants. William Look and H. F. Chipman, for appellee.

GRANT, J., (after stating the facts.) The court erred in not permitting the plaintiffs to amend their declaration, and also, after refusing the amendment, in not permitting them to submit to a nonsuit.

The question raised upon the statute of limitations is not without difficulty. In this state a judgment creates no lien upon the property of the judgment debtor. No lien is created until the levy has been made, and notice thereof filed in the office of the register of deeds. Until 1889 no limitation was placed upon the existence of the lien by execution levy. A statute was then passed, enacting that all levies theretofore made should cease to be a lien at the expiration of five years from the time the act became a law, and that all levies thereafter made should become and be void after the expiration of five years from the making thereof. 3 How. St. § 6173a. Actions upon judgments must be brought within 10 years after the entry of the judgment. How. St. § 8736. In the present case, proceedings for sale were commenced before the right to bring

suit upon the judgment had expired by limitation, but the sale took place after it had expired. Execution cannot be issued, and levies made, after the right of action is barred. *Jerome v. Williams*, 13 Mich. 526; *Parsons v. Wayne Circuit Judge*, 37 Mich. 287. The manifest reason on which these decisions are based is that when the judgment is dead no action can be taken to revive it. But they do not hold that during the life of the judgment any action authorized by law may not be taken to enforce it, although the sale cannot take place till after the right of action upon the judgment is gone. They therefore throw no light upon the present controversy. A lien upon real estate by virtue of a levy under execution is not lost by delay in proceeding to sale, where no fraudulent purpose is shown on the part of the execution creditor. *Ward v. Bank*, 46 Mich. 332, 9 N. W. Rep. 437. It follows that the lien remains in force until the statute of limitations has barred any right to proceed to foreclose it. The record of the levy is notice to every one of its existence, and is equivalent to actual possession of personal property taken under execution. Publication of the notice of sale before the right of action is barred is an open assertion of the nonpayment of the judgment. The debtor is presumed to know that the lien is being enforced. If the judgment has been paid, or if he has lost any right by the failure to proceed earlier to a sale, for which the judgment creditor is responsible, the courts are open to him to restrain the sale. We think that, when any proceedings authorized by law to enforce the lien are instituted before the right of action upon the judgment is barred, they are valid, and the sale in pursuance thereof legal. Plaintiffs' deed, therefore, was not void because the sale took place more than 10 years after the rendition of the judgment. Judgment reversed, and new trial ordered, with costs, and leave to plaintiffs to amend their declaration. The other justices concurred.

**HOLMES v. MALCOLM McDONALD
LUMBER CO. et al.**

(Supreme Court of Michigan. June 1, 1893.)

ACCOUNTING—WHEN ALLOWED.

An action for an accounting will lie, where several parties are interested in a fund held by a trustee, where the facts are complicated, and where fraud is alleged in the procurement of a draft, the surrender of which is asked.

Appeal from circuit court, Manistee county, in chancery; J. Byron Judkins, Judge.

Bill by John A. Holmes against the Malcolm McDonald Lumber Company and others for an accounting of a fund held as trustee by defendant Seymour. There was judgment for complainant on a demurrer to the bill, and the lumber company appeals. Affirmed.

Fletcher & Wanty, for appellant, Malcolm McDonald Lumber Co. E. E. Benedict, for appellee.

LONG, J. The bill in this cause alleges substantially that on March 15, 1889, Herbert A. Tiffany, Richard A. Seymour, and Norman R. Smith contracted to sell certain lands situate in Michigan to J. E. Potts. Mr. Potts gave his four promissory notes of \$9,166.66 each, payable to the parties jointly. Seymour held the notes as trustee for the benefit of the payees. The lands were subsequently conveyed to Potts. Tiffany held a three-eighths interest in them, but the rights of all the parties were subject to the claim of E. N. Snelling, which was paid out of the proceeds of the notes in August, 1890, amounting to \$18,087.27. It is alleged that Tiffany's interest in the notes, after the payment of the Snelling claim, amounted to upwards of \$7,000, and that on June 26, 1889, Tiffany assigned and transferred all his rights and interest in said notes to James Frazer, and gave notice to Seymour of the transfer. James Frazer had indorsed for Tiffany a note for \$3,107.82, and also a note of \$2,012.20, to the complainant in this case, and the assignment by Tiffany of his interest in the four notes was to secure Frazer on these indorsements, and to enable him, with the proceeds of the Potts notes, to pay the notes of Tiffany to Frazer. It is alleged that Seymour gave Frazer to understand that he would account to him when he should discount or collect the notes. July 27, 1889, Frazer drew a draft on Seymour for \$3,250, conditioned to be paid to complainant out of the interest previously held in the notes by Tiffany, which had been assigned to Frazer, when collected. The draft was sent to the First National Bank of Manistee for presentation to Seymour for acceptance. Seymour declined to accept the draft, giving as a reason that he had not yet settled with Tiffany. Frazer then applied to Tiffany to obtain from him an acceptance to cover complainant's claim, which Tiffany undertook to do. Tiffany went to Manistee bearing a draft drawn by James Frazer on Richard Seymour for the \$3,250, to be paid out of the three-eighths interest formerly held by Tiffany in the proceeds of the Potts notes. The draft was drawn payable to James Frazer, who indorsed it to Tiffany, and intrusted it to him to obtain the acceptance of Seymour, and indorse it over to complainant. Tiffany applied for and obtained such acceptance from Seymour; and afterwards, on the same or next day, falsely told Seymour that he had settled with Frazer, and paid up the Holmes and Union Trust Company claims, and that Frazer had executed an assignment of his interest to Richard A. Seymour; and he requested Seymour to take back the accepted draft, and accept in its place a draft drawn by Tiffany to his own order

for the same amount. This Seymour did by a special acceptance, as follows: "Accepted; payable out of the proceeds of the J. E. Potts notes when discounted by me." Tiffany concealed from Frazer that he had exchanged the draft given by him, after its acceptance, for another, but he wrote to him that he had obtained the acceptance, and had concluded to keep it. Frazer immediately notified Seymour not to pay the draft, as it was obtained by fraud. He demanded it of Tiffany, who refused to return it. Tiffany transferred this draft to the Malcolm McDonald Lumber Company, who are not bona fide holders thereof, for a valuable consideration, and who claim to own the draft, and to be entitled to collect it, and refuse to deliver it up on demand of complainant. Richard A. Seymour declines to pay the complainant's demand, alleging as one of his reasons that the Malcolm McDonald Company holds his accepted draft, and he fears that in law he is liable to pay them the same. Seymour also claims that, before the assignment by Tiffany to Frazer, Tiffany assigned the same interest, to the amount of \$4,000, to Seymour, as security for an indebtedness of Tiffany to August A. Cartier, of Ludington, and that he (Seymour) has paid the same to Cartier. October 1, 1889, James Frazer assigned this claim of \$3,250 to complainant, and December 28, 1889, assigned the balance to the Union Trust Company, who are made co-complainants by a supplemental petition attached to original bill of complaint. The bill seeks to obtain from Seymour an accounting of the proceeds of the Potts notes, and of the three-eighths interest originally belonging to Herbert A. Tiffany. It seeks to quash the claim which the McDonald Lumber Company is making to the \$3,250 draft, which belongs to complainant, and to have the same surrendered to him. The court is asked to investigate the fraud practiced by Tiffany in obtaining the exchange of drafts, and the complicity of the Malcolm McDonald Lumber Company in seeking to obtain the benefits of this fraud. The Union Trust Company asks for an accounting, and to be paid out of the residue.

The jurisdiction of equity is claimed on several grounds: (1) That the facts are complicated, several persons being interested in a fund which is held by a trustee; that justice can best be served, and a multiplicity of actions saved, if all interested are joined in one action, which can only be done in equity. (2) That fraud is a distinctive branch of equity jurisdiction, and the remedy in equity is often concurrent with courts of common law, and always so when, owing to conflicting claims, it appears desirable to unite in an action all the features of the case and all persons implicated; that the remedy in equity is more flexible and complete; that the

Malcolm McDonald Company has obtained, through the fraud of Tiffany, a draft which belongs to complainant, and only a court of equity can compel the surrender of the instrument. (3) That an accounting is required of a trustee respecting a fund which is to be distributed to several parties. Such an accounting is also a special branch of equity jurisdiction. (4) That the defendant Seymour has in his possession \$3,250, which is claimed by two parties. He might ask for an interpleader, but that it is equally competent for the complainant to bring his action against the trustee and the contesting claimant to quash the latter's claim, thus consolidating the two actions in one. A general demurrer to the bill was interposed by the defendant the Malcolm McDonald Lumber Company on the ground that the complainant had an adequate remedy at law. The court below overruled the demurrer, and defendant McDonald Lumber Company appeals.

It is insisted that the complainant, Holmes, has a cause of action at law against Seymour, under the statements made in the bill, and to which Seymour could make no possible defense, as the draft held by the McDonald Lumber Company, as shown by the bill, was accepted without consideration, and is therefore invalid in its hands. It is apparent that the demurrer cannot be sustained. The rights of the parties cannot well be settled in a court of law. Seymour has the right to have ascertained to whom the fund belongs before being compelled to pay it over. If the defense of Seymour rested upon the sole question of the draft made to Tiffany, and assigned to the McDonald Lumber Company, there might be force in the contention made that the complainant had made a case by his allegations in the bill which should be tried at law. But the question does not rest upon that allegation alone. It is claimed by Seymour, as shown by the bill, that, before the assignment by Tiffany to Frazer, Tiffany had assigned to him (Seymour) the identical claim assigned to Frazer to secure an indebtedness to Cartier, and that Seymour had paid such indebtedness. Seymour claims, also, as alleged in the bill, a settlement of the matters of difference between himself and Tiffany, and asserts that, on such settlement of the account between them, less than \$3,250 would be due from him to Tiffany. While it is true that Seymour might be estopped under the circumstances from asserting such a claim, yet we think the case made by the bill is one in which the equities between the parties cannot be properly settled in a court of law. The decree of the court below must be affirmed, overruling the demurrer. Defendant will have 20 days in which to answer the bill.

GRANT, J., did not sit. The other justices concurred.

**CITIZENS' ELECTRIC LIGHT & POWER
CO. v. SANDS et al.**

(Supreme Court of Michigan. June 1, 1893.)

**ELECTRIC LIGHT COMPANIES — USE OF POLES —
COMPENSATION—CONTRACTS OF CITY.**

1. How. St. c. 127, § 10, provides that companies incorporated to furnish electricity and electric lights may lay, construct, and maintain conductors for conducting electricity through the streets "with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe." A Manistee city ordinance provides that all poles erected in such city for electric lighting shall be under control of the council so far as to permit their use by other persons for electric lighting on payment of the reasonable portion of their cost. *Held*, that a resolution passed by the council of such city, empowering an electric light company to use the poles of another company without fixing the limits of such use, or regulating the manner in which each is to string its wires, is unreasonable and void.

2. Under How. St. c. 127, § 10, as above set forth, and Manistee City Charter, c. 20, § 3, giving the council authority to light the public grounds within the city, and chapter 22, § 15, giving the council control over the placing of poles in or over the streets, such city may make contracts for electric lighting with individuals as well as with corporations organized for such purposes.

Appeal from circuit court, Manistee county, in chancery; J. Byron Judkins, Judge.

Bill by the Citizens' Electric Light & Power Company restraining Louis Sands from using complainant's poles for defendant's electric light wires under a resolution of the council of defendant the city of Manistee. From a decree dismissing the bill, complainant appeals. Reversed.

Smurthwaite & Higgins, for appellant.
Dovel & Smith, for appellee Louis Sands.
Geo. L. Hilliker, City Atty., for appellee city of Manistee.

LONG, J. Complainant was incorporated under chapter 127, How. St., entitled "Electric Light Companies." Section 10 of that chapter provides: "Every such corporation shall have power to acquire and hold all such real and personal property as shall be necessary for carrying on the business of such corporation; and shall have full power to produce, generate, furnish, and sell such electricity and electrical light as may be desired in any city, town, or village where such corporation carries on its business, for lighting public or private buildings, streets, or grounds, and for any other purpose; and such corporation shall have power to lay, construct, and maintain conductors for conducting electricity through the streets, lands, and squares of such city, town, or village with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe; and such corporation may make all such contracts and by-laws as may be deemed necessary and proper to carry into effect the foregoing powers." Under this section, complainant made application November 25, 1890, to the

common council of the city of Manistee for permission to erect poles, wires, etc., in the streets of that city, and filed a bond as required by the city ordinance in relation thereto. At this time the city ordinance provided: "No person shall erect or maintain within the limits of the city of Manistee any poles, wires, or lamps for the purpose of electric lighting, without first making application therefor to the council in writing, and filing in the office of the city clerk a good and sufficient bond, in an amount and with sureties to be approved by the council, conditioned that the person will comply in all respects with the provisions of this ordinance. At the time of filing said bond such person shall also file with said city clerk a complete diagram, showing precisely the number and location of all poles, which diagram shall be approved by the council before poles can be erected. Persons erecting poles under the provisions of this ordinance shall furnish the council a sworn statement of the accurate cost of poles and erecting the same. All poles to be straight, and of uniform size and length above ground, and to be and remain under the control of the council so far as to permit their use by other parties for lighting purposes, upon payment of the reasonable portion of the cost of poles and the putting up the same, and by the city free of charge, for purposes of maintaining fire-alarm and telephone wires for public use; any and all poles to be removed whenever ordered by the council." The petition of the complainant was referred by the common council to a committee, who reported thereon December 11, 1890, as follows: "Your committee to whom was referred the petition," etc., "beg leave to report that they have examined the diagram of such company, showing the location of poles, and recommend that such diagram be approved, except that on streets where electric poles are already erected the petitioner be required to use said poles as far as practicable. We also recommend that the bond filed by such petitioner be approved, and that a permit as above conditioned be granted the petitioner under the ordinance as this day amended." The amendment to the ordinance referred to provided that wires were to be no less than 20 feet above ground at any point, and the poles not less than 4 feet high. Two new sections were also added, which provided that: "No person, corporation, or company erecting or maintaining within the limits of the city of Manistee any poles, wires, or lamps for the purpose of electric lighting or power, shall at any time enter into a combination with any other person, corporation, or company engaged in the business of supplying electric light or power within such city concerning rates to be charged for electric lighting or power either to the city or to private consumers; nor shall such person or corporation make any consolidation, transfer, or division of the ter-

ritory, streets, or avenues of such city with any other person, corporation, or company engaged in said business. Any violation of the provisions of this section shall work a forfeiture on the part of such person, corporation, or company to the said city of Manistee of all privileges or franchises granted under this ordinance." The report of the committee was adopted and approved by the council. Complainant erected its poles according to the diagram recommended by the committee, said poles being of the height of about 40 feet above ground. It also strung its wires thereon, and in all respects complied with the requirements of the council under the provisions of the statute and ordinances of the city, except as hereafter stated. It was proposed by certain individuals in said city to organize an electric street-railway company, and procure a franchise from the common council for that purpose; and, as alleged by complainant, said company intended to construct such street railway. The complainant obligated itself to transfer to this company when organized, a one-half interest in all its poles along the line of said street-railway company, or to lease to it the use of complainant's poles for the purpose of stretching and extending the wires necessary for the operation of the streets crossed by electricity. No company, however, ever organized.

Prior to the organization and incorporation of the complainant, the defendant Louis Sands had erected in the city of Manistee an electric light plant for furnishing to private consumers an incandescent light, and for that purpose had erected poles in the streets of the city. Though not incorporated, defendant Sands was doing business under the name of Sands Electric Light Company. The complainant charges in its bill that soon after its organization, finding that in many instances the poles of defendant Sands were located convenient for its use, it asked the common council that Sands be requested to file a statement of the cost of his poles as a preliminary step to having the common council investigate the matter, and, if found practicable, and for the public good, and advantageous to the complainant, and not an unwarranted interference with the property rights of defendant Sands, to make reasonable regulations for the use of Sands' poles by the complainant; but that defendant Sands refused to comply with such request, and gave notice that he should resist any attempt on the part of the city or complainant to use any of his poles by complainant or any other person; and, upon inquiry of its electrician, complainant ascertained that the joint use of any pole by two lighting companies was impracticable or impossible, and the complainant thereupon erected its own poles in all places. At and prior to the organization of the complainant, defendant Sands had entered into a contract with the city to light the streets with

gas. After complainant was organized, Sands made a proposition to light the streets with electric light for the unexpired portion of the gas-lighting contract. Complainant and Sands each entered a bid for this contract, complainant's being much lower than that of Sands; but under the advice of the city attorney, the contract was let to Sands, as it was considered that the gas-lighting contract was valid. Under the contract made with Sands for lighting the streets with electricity no mention was made of the poles of complainant or of any other person, and the city, by the contract, was in no manner bound to supply poles to Sands for his use under the contract, and no reservation was made by the city of the Sands poles for fire-alarm or telephone purposes. The complainant's poles were erected under contract. Before settlement was had with the contractors, the common council passed a resolution requiring the complainant to file a statement of the cost of its poles. The complainant thereafter filed a writing explaining its inability to furnish the required information for the reason that it had not yet made a settlement with its contractors, but that it would furnish the same within a period of two weeks. At the same time it notified the common council that a one-half interest in the poles had been transferred to the electric railway company, to be used by it when organized. Within a week thereafter the complainant stated the cost of its poles approximately at \$12.60 each, and filed this statement with the city clerk. On the same evening that this statement was filed a regular meeting of the common council was held, and complainant, by its attorney, appeared before the council, and stated orally the reason why the complainant could not furnish a more particular statement, and promised to furnish the same within a short time. The council thereupon, and on the same evening, passed the following resolution: "Resolved, that Louis Sands be granted permission to use such of the poles erected by the Citizens' Electric Light & Power Company in the streets of the city of Manistee, pursuant to the provisions of the ordinance of said city approved November 11, 1896, and the amendments thereto, as may be necessary for placing the lights under his contract of June 8, 1891; and that he pay such part of the cost of any and all such poles used by him belonging to said company as this council may hereafter determine." No notice had been given the complainant that such resolution would be offered, but complainant's attorney, being present at that time, requested the council to let the matter lay over for one meeting, until it could be looked up, and, if the council had a right to pass such resolution, notice could be given, to all parties interested, and such rules and regulations made by the council as would protect the interests of all concerned. The resolution was passed, notwithstanding this

objection. The next day the defendant Sands, with a force of men, commenced putting up cross-arms upon complainant's poles. It is contended that no question was asked complainant as to the manner in which or places where the different wires could be stretched upon poles without damage or loss to them. The complainant had no opportunity to be heard, and had no voice in determining how its poles should be used. No rule or regulation was made by the common council as to when the electric currents should be let on or shut off of the wires used there by the complainant or Sands; and the complainant was not consulted by Sands as to the length of the cross-arms, or how Sands should string his wires thereon. When Sands commenced putting up the cross-arms for the purpose of stringing his wires the complainant filed its bill, claiming that, if the common council had power to pass such resolution, it could only be done under full hearing as to the practicability of using the poles by two rival parties, and that such power could not be granted Sands as was attempted by the resolution, unless done by ordinance, or something having the authority of law, prescribing fully and expressly such rules and regulations as would fully protect the property of the parties and others and the lives of the employees. On the filing of this bill an injunction was issued against Sands, and restraining his use of the poles. The city, thereupon, conceiving that it was interested in the subject-matter of the litigation, procured a stipulation from the parties, admitting the city as a party defendant to the action. The testimony was taken in open court, and upon the hearing complainant's bill was dismissed, without costs. Complainant appeals.

It is contended by complainant: (1) That the resolution permitting Mr. Sands to use its poles without its consent, and without fixing the limits of the use, or regulating the manner in which each party is to string its wires and turn on its current, is unreasonable; (2) that the common council of the city had no power to grant to Mr. Sands the right to the use of complainant's poles for the purposes declared, for the reason that an individual could not contract with the city to erect poles or string wires for electric lighting. It is conceded that under the charter the council had the power to pass the ordinance providing for the joint use of the poles; but it is contended that the resolution passed by the council authorizing and empowering Mr. Sands to use them is too general in its terms, and, not limiting and fixing the manner or extent of the use, it is unreasonable and void. It is contended that it is universally known that electric currents sufficient for lighting purposes constantly endanger life and property, and must be conducted with the greatest care; that employees must know when the currents are let on and shut off. It is further contended

that the unreasonableness of the resolution is shown from the fact that it does not provide the number of arms on each pole, the number of wires on each arm, or whether arms should be used at all. It does not specify what space or that any space shall be kept between the wires and poles so that the complainant's employees may pass through them to its wires above. It has no provision against crossing wires, and no provision when the currents shall be let on or shut off to enable the employees to handle the wires when necessary, and makes no provision whatever for the safety of the employees. It does not specify what poles shall be used, or leave complainant any voice in the premises as to whether it has any spare room upon any particular pole or poles. It does not specify whose duty it shall be to repair poles, or, in case of decay or destruction, erect new ones. And, finally, it is contended that the resolution simply sells absolutely to Sands an undivided interest in the poles at such price as the council may thereafter fix, with the absolute right to use such as he may need, just as he pleases, and leaves the complainant helpless in his hands.

Defendant Sands claims that there was a committee of the council empowered to act in the matter after this resolution was passed, and that such committee could fix the manner of the use. This committee was known as the "street-lighting committee," but nothing appeared of record in the proceedings of the common council empowering this committee to act or make any regulations for the use of the poles. It is contended, further, by defendant Sands that after the resolution was passed he called upon the president of the complainant company, and was told by him to designate any poles he wished to use for public lighting, and he could use them, and that he would be charged in proportion to the number of wires used; and that, acting under this, and the direction of the committee, he attempted to put up the cross-arms, when he was stopped by the injunction. There is no claim, however, on the part of the defendant that any arrangement was consummated with Mr. Hart, president of the company, as to the manner of the defendant's use of the poles, or the manner of stringing the wires. The committee of the council who directed Sands to go on with the work and use the complainant's poles do not pretend that any regulations were adopted or the manner of their use fixed by the committee, or how many wires were to be placed on the poles, or where located. There can be no doubt that under the charter provisions the common council had the power to pass the ordinances above set out, and to grant the franchise to the complainant, with the resolutions therein contained. After this was done, however, and the complainant had erected the poles, the council could not, by

this resolution, do what was attempted to be done there, without first fixing in a definite way the use which it was attempted to confer upon defendant Sands. The power to make such reasonable regulations for the use of the poles is lodged by the statute in the council, and cannot be delegated to a committee. *Chilson v. Wilson*, 33 Mich. 267; *Vincent v. Mecosta Co. Sup'rs*, 52 Mich. 340, 17 N. W. Rep. 938. The language of the statute is that such corporation shall have power to lay, construct, and maintain conductors for conducting electricity through the streets, etc., "with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe." This language means that the municipality itself shall make the regulations, and such regulations shall be reasonable. The municipality acts through the common council, and it is for that body to make the regulations. No regulations were ever made by it in this matter, and whatever regulations were attempted to be made were ordered by the committee. An ordinance or regulation, to be void for unreasonableness, must be plainly and clearly unreasonable. *White v. Kent*, 11 Ohio St. 550; *Neier v. Railway Co.*, 12 Mo. App. 25. It is apparent from what has been stated, however, that the regulations claimed to have been made by the committee for the use of complainant's poles by Sands were unreasonable, and the complainant cannot be held by their terms. By the power given to Sands under them he became possessed of absolute dominion over the poles, to the utter exclusion of the complainant, and in entire disregard of its rights.

The court below, we think, was in error in dismissing complainant's bill and dissolving the injunction. The injunction should have been continued until the city, by its council, had fully investigated the matter, and made such regulations for the use of the poles by Sands as the circumstances of the case demanded. The city had granted this franchise to the complainant, and the complainant, acting under the powers conferred, had expended large sums of money in erecting poles and stringing its wires. The power granted to Sands by the committee in effect transferred the property rights of complainant in the poles to Sands, and left the complainant at his mercy. The common council also owed a duty to the employees of both complainant and Sands to make such regulations for the joint use of the poles that the lives of such persons should not be endangered. Public policy requires this. Electricity is a dangerous current, unless confined in proper channels; and the lives of employees are not safe unless they are advised what are live and what are dead wires at all times. If two opposing companies can with safety use the same poles, then such regulations must be made that lives and property shall not be endangered; if regulations cannot be made, so that lives and property can be

protected by the use of the same poles by opposing companies, then any provision for such joint use would be most unreasonable. We are not able to say from this record that a joint use cannot be made of the poles by the Sands Company and the complainant. If such joint use appeared conclusively to us to be dangerous, we should unhesitatingly set the ordinances and resolution aside, granting to Sands any use of complainant's poles. We are not, however, satisfied upon that point, and shall in the present case only decide the resolution unreasonable, as not providing proper regulations for a joint use.

The second point raised by complainant's solicitors is not well taken. It is apparent that under the charter of Manistee the common council may permit parties the use of the streets for gas or water pipes, or for the purpose of erecting and maintaining poles for the purpose of telegraph and telephone service or electric lighting. Section 34, c. 2, of the charter provides: "The council shall have authority to enact all ordinances and to make all such regulations consistent with the laws and constitution of the state as they may deem necessary for the safety and good government of the city and the general welfare of the inhabitants thereof; but no exclusive rights, privileges, or permits shall be granted by the council to any person or persons, or to any corporation, for any purpose whatever." Chapter 22 gives the council control of all public highways, bridges, streets, avenues, alleys, and public grounds within the city, and provides that they shall cause the same to be kept in repair, and free from nuisance. Section 13 of said chapter gives the city the right to light the streets and public places and regulate the setting of lamps and lamp-posts therein, and protect the same. Section 3 of chapter 20 confers authority upon the council to lay out, establish, improve, and light the public grounds and parks within the city; and section 15, c. 22, gives the council control over the placing of telegraph and other poles in or over the streets. It is contended, however, that the act under which the complainant is organized limits the right of the council to permit electric light poles to be placed upon any of the public streets to the use of a corporation to be organized under that statute. Section 10 of the act has been quoted above. It provides that such corporation "shall have power to lay, construct, and maintain conductors for conducting electricity throughout the streets, etc., with the consent of the municipal authorities thereof." This was not intended by the legislature to limit the right of the municipal authorities to grant the privilege to any other than such a corporation. The legislature has authorized the formation of such corporations, and empowers the municipal authorities to deal with them; but it has not intended to compel the municipal authorities to deal with

such corporations against their will. It is true that the highways of the state, including streets in cities, are under the paramount control of the legislature, and all municipal control over them is derived from it. 2 Dill. Mun. Corp. § 658. The legislature has the exclusive right to say to whom any rights in the said streets shall be granted, and the municipality can only grant such rights under the powers conferred upon it by the legislative department of the government. The cases cited by counsel for complainant go to the extent that, in the absence of power granted by the legislature to a municipality, such municipality cannot confer upon either an individual or a corporation power to use the same. Domestic Tel. Co. v. Newark, 49 N. J. Law, 344, 8 Atl. Rep. 128. It is said that great evils would result if these privileges were granted individuals, instead of corporations organized for such purposes. This is a matter of legislative concern, and not a question for the courts; but we do not see how such evils can result if such privileges are permitted to individuals. It is the concern of the municipality to light its streets by the cheapest and best attainable means, and the municipal authorities must have some discretion in determining the merits and reliability of the means of reaching that result. City of Detroit v. Circuit Judge of Wayne County, 79 Mich. 384, 44 N. W. Rep. 622. The power granted the city of Manistee, by its charter, over the streets for lighting purposes and the erection of poles, carries with it the right to make contracts for such purposes with individuals as well as with corporations organized for such purposes. For the reasons pointed out, however, the decree of the court below must be reversed, and decree entered here in favor of complainant, restraining defendant Sands from using its poles until the city, by its council, shall, after notice to the parties interested, adopt suitable rules and regulations for such joint use. The complainant will recover against defendant Sands the costs of both courts.

The other justices concurred.

SEABURY et al. v. BOARD OF AUDITORS OF WAYNE COUNTY.

(Supreme Court of Michigan. June 8, 1893.)

JUSTICES' COURTS—DEPUTY CLERKS—APPOINTMENT.

3 How. St. § 7091g, as amended March 6, 1893, provides that the clerk of the justices' courts of Detroit "shall have power to appoint one or more deputies, when the necessity therefor shall be certified by the justices, and said clerk may revoke said appointment at pleasure." *Held*, that where the justices certified that seven deputy clerks were necessary, and that number were appointed by the clerk, who afterwards revoked the appointment of two of them, the fact that the justices then certified that it was unnecessary to fill the vacancies, as five were enough to do the work, did not render

invalid appointments by the clerk to fill the vacancies, as it was for the clerk to name those who should remain, on the reduction of the force.

Mandamus, on the relation of Robert J. Seabury and William F. Stellberger, to compel the board of auditors of Wayne county to pay relators' salaries, as deputy clerks of the justices' courts of Detroit. Writ granted.

George F. Robison, for relators. Allan H. Frazer, for respondent.

McGRATH, J. Section 7091g, 3 How. St., as amended March 6, 1893, provides that the clerk of the justices' courts of Detroit shall have power to appoint one or more deputies when the necessity therefor shall be certified by the justices, and that said clerk may revoke said appointment at pleasure, which appointment and revocation shall be operative from the time of filing the certificate thereof with the county auditors. In August, 1892, said justices had certified to the board of auditors that seven deputy clerks were necessary, and seven were duly appointed. On March 16, 1893, the clerk of the justice's court, whose term of office under the law as it existed prior to March 6, 1893, did not expire until July 1, 1893, and, under the amendment of 1893, until February 1, 1894, revoked the appointment of two of said deputies, and appointed two others (relators) in their stead. On March 21, 1893, a majority of said justices certified to the board of auditors that the clerk of the justice's court had discharged A. and B., and offered to appoint relators, and that "at this time no necessity exists for the filling of vacancies thus occasioned, as the business of these courts has fallen off to such an extent as to justify the undersigned to protest at this time at the placing upon the pay roll any names to succeed those removed. We further certify that no necessity exists for the appointment by said clerk of any deputy clerks of said court." The board of auditors refused to pay the salaries of relators, basing their refusal on said certificate of said justices, and this is an application for a mandamus to enforce such payment.

Under the act, all costs, fines, and dues, of every description, in all proceedings in said justices' courts, are received by the clerk, and he is required to give a bond to the county, conditioned to pay over all moneys received by him as clerk for the use of the county, and otherwise fully and faithfully discharge the duties of his office. The act authorizes the deputies to perform generally the duties of clerk, and empowers the clerk to require of each a bond, with such conditions as he may deem proper. It is the evident intent of the act to place these deputies under the absolute control of the clerk. The act should receive a construction consistent with such purpose. It

was certainly not contemplated that each certificate of appointment should be accompanied by a certificate of necessity. Such a construction of the act would put it in the power of the justices to dictate the appointment, and would prevent the clerk from revoking an appointment, and making another not approved of, except at the expense of assistance. When these appointments were made by the clerk, the certificate of a majority of the justices was on file with the board of auditors, declaring that seven deputies were necessary. The appointments were valid under that certificate. If, however, a majority of the justices should, in the ordinary course, afterwards file a certificate declaring that the necessity no longer existed for so many deputies, it would be the duty of the clerk to reduce the number to that fixed by the certificate of the justices; but the certificate in the present case is aimed at the two new appointees, and the choice, in any event, as to who should remain, is with the clerk, and not with the justices or board of auditors; and the remedy is by a proceeding to set the clerk in motion, and not by a refusal to pay any two of the deputies whom the board of auditors, at the instance of the justices, may choose to select. The mandamus must therefore issue as prayed. The other justices concurred.

KIRKWOOD v. FINEGAN.

(Supreme Court of Michigan. May 31, 1898.)

INJUNCTION—AGAINST ERECTION OF FENCE.

An injunction will issue to restrain the erection of an unsightly fence, six to seven feet high, on the boundary between complainant's and defendant's lots, in the residence portion of a city, depreciating the value of complainant's property, and constructed maliciously, as the outcome of a quarrel between the parties.

Appeal from circuit court, Kent county, in chancery; William E. Grove, Judge.

Action by Frank P. Kirkwood against Mary E. Finegan to restrain the erection of a fence between complainant's and defendant's property on Terrace avenue, in the city of Grand Rapids. Decree for complainant, and defendant appeals. Affirmed.

Terrace avenue ends at and intersects Fifth avenue at right angles about 100 feet north of complainant's lot, and extends north and south. Fifth avenue runs east and west. Complainant's lot is the third lot south of Fifth avenue on the south side of Terrace, and defendant's lot is next north of complainant's. The parties hereto have each a house upon his or her lot, costing about \$2,000 or \$2,500, and both are occupied by their respective owners. The front of complainant's lot is on a level with the street in front, but declines gradually to the west. Defendant filled her lot so as to have a terrace in front, and raised it up from 18 to 24 inches higher than complain-

ant's. Complainant built his house about 3 years ago, and with his family has occupied it since. Defendant built her house about 2½ years ago, and with her husband and children has since occupied it. Until this fence was built, complainant had a nice view from his front porch up Terrace avenue to the city beyond, and from the rear of his house, across the rear end of defendant's lot, to Fifth avenue, and up Lafayette street. This fence consists of posts set in the ground about seven feet apart, the whole distance between the lots of the parties hereto, and spiked to them are stringers on the top and towards the bottom. These posts were formerly railroad ties, and for a long time used for that purpose, containing large spike holes, in some cases decayed by their former use. Defendant placed between these posts certain other railroad ties, with pieces of brick between them and up as high as the terrace, leaving these old ties as support to the bank uncovered on complainant's side, and began nailing on boards close together at the front of these lots, and within six or eight inches of the sidewalk, and had built back about 45 feet north when she was restrained from going further. The boards were nailed to the fence on defendant's side, leaving the fence posts and stringers uncovered on complainant's side. The first 21 feet of this fence was built 6 feet 4 inches high, and the balance, as far as built, was 7 feet 8 inches high. The 21 feet mentioned extends back and opposite complainant's sitting-room window. The higher portion of the fence is opposite complainant's dining-room and kitchen windows. This fence not only cuts off complainant's view to the north, but darkens his sitting room, hall, and dining room. The boards with which this fence is built are old boards, and the cull boards seem to have been selected from them, and used to build the front of the fence,—that portion which is immediately opposite complainant's sitting room.

Defendant attempts to justify the building of this fence upon several grounds: (1) That she did it that she might live without being harassed and molested by complainant's wife. (2) For the reason that the quarrelling of her children, and the chastisement of them by words of complainant's wife, tormented, harassed, and disturbed her to such an extent that the building of such fence is necessary. (3) That said fence is necessary to keep complainant's wife from quarrelling with defendant's husband, and because of unneighborly, malicious, and cruel treatment of defendant's family by complainant and his family.

Thompson, Temple & McCormick, for appellant. Dunham & Preston, for appellee.

McGRATH, J. This is a bill to enjoin the erection and maintenance of a fence between premises occupied by the parties. We

think the case is ruled by *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. Rep. 381. It is clear that the fence is the outcome of a quarrel between neighbors. Its character and style indicate the motive which prompted its construction, and the decree below must be affirmed, with costs. The other justices concurred.

HOFFMAN v. BUSCHMAN et al.

(Supreme Court of Michigan. May 31, 1893.)

HOMESTEAD—ABANDONMENT—EXECUTION—LEVY AND SALE.

1. One who, with his family, removes from his farm, and lives continuously in a city for five years thereafter, where he votes and claims his residence, abandons the farm as a homestead, though he may have left some of his household effects there.

2. A description of land in an execution levy was "the undivided $\frac{1}{2}$ of the following described land, to wit: The S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$," while in subsequent proceedings the description was: "The undivided $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$." *Held*, that the latter description meant the undivided $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, as well as the undivided $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and that both descriptions were therefore identical, and could not mislead any one.

3. Even if two contiguous 40-acre parcels, occupied as one farm, can be considered within How. St. § 6116, which requires each lot, tract, or parcel of land to be sold separately on execution sale, the failure to do so is a mere irregularity, which cannot be questioned in ejectment for the premises by the purchaser against the judgment debtor.

Error to circuit court, St. Clair county; William T. Mitchell, Judge.

Ejectment by John M. Hoffman against Bernard Buschman, Carsten Buschman, and Henry Ahrens. There was a judgment in plaintiff's favor, and defendants bring error. Affirmed.

James L. Coe, for appellants. Charles K. Dodge, for appellee.

HOOKER, C. J. Plaintiff brought ejectment to obtain possession of the undivided half of certain lands, described as follows, viz.: "The southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter, of section thirty-four, town seven north, range sixteen east." The case was tried without a jury, and a written finding of fact and law was filed. The brief of counsel for the appellants relies upon two points to reverse the judgment, viz.: First. The wife of Bernard Buschman was not made a party. Second. The sale under the execution, upon which plaintiff claims title, was void. Exceptions upon each of the findings of fact and law were filed. The findings of fact cannot be disturbed, for the reason that the record does not show that all of the testimony taken upon the trial was included.

The court found that the premises were owned in common by Bernard Buschman

and Carsten Buschman; "that, at the time of the commencement of the action, defendant Ahrens was in possession of the whole of said premises, under and as the tenant of said Bernard and Carsten Buschman; * * * that, for some time previous, and up to the year 1884, said Bernard, with his wife and family, lived upon said lands, but in that year he removed therefrom to the city of Port Huron, where he, with his wife and family, have since lived, and where he votes and claims his residence; but that he left some of his household effects on the lands claimed, and has, with said Carsten, occupied as a tenant." Under this finding it is claimed that the defendant Bernard and his wife should be found to have homestead rights in the west 40 acres. That these parties lived somewhere upon the premises, and had homestead rights in some part thereof, up to April, 1884, is clear; but, at the time of this levy and sale, they had lived in Port Huron for upward of five years. When ejectment was brought, Bernard asserted homestead rights in himself and wife. The burden of proving this right is upon the defendant. *Amphlet v. Hibbard*, 29 Mich. 298. The retention of homestead rights, though the party live elsewhere temporarily, is possible. It is largely a matter of continuing intent, and is a fact to be proved like any other fact. There is nothing in the finding that shows the existence of such intent, but, on the contrary, all facts found are inconsistent with such design, and, in the absence of any other facts, justify the finding of law that the homestead was abandoned.

Plaintiff derived title through an execution sale upon a transcript judgment. The proceedings are conceded to have been regular, with two exceptions. The description in the levy was as follows, viz.: "The undivided one-half of the following described land, to wit: The southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter." In the subsequent proceedings the description was as follows, viz.: "The undivided one-half of the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter;" these proceedings showing that the interest of Bernard Buschman was involved. We think there is no room for question over these descriptions, which are identical, and could not mislead any one.

A further point is made over the sale, the land having been sold as one parcel, which counsel for defendants claim was in violation of How. St. §§ 6116, 6117.¹ If two contig-

¹How. St. § 6116, provides: "When any real estate offered for sale by virtue of any execution shall consist of any known lots, tracts, or parcels, such lots, tracts, or parcels shall be separately exposed for sale; and the defendant may direct which piece or parcel shall be first exposed for sale; and no more of such tracts or parcels shall be exposed for sale than shall appear necessary to satisfy the execution, with the costs and expenses of such sale."

uous 40-acre parcels, separated by a quarter line, and occupied as one farm, can be considered within the prohibition of the statute, such sale was an irregularity, and cannot be questioned in an action of ejectment. *Cavanaugh v. Jakeway*, Walk. (Mich.) 344, and cases cited; *Blair v. Compton*, 33 Mich. 423; *Campau v. Godfrey*, 18 Mich. 45. The judgment must be affirmed. The other justices concurred.

SNOOK v. PEARSALL et al.

(Supreme Court of Michigan. May 31, 1893.)

EQUITY PLEADING—MULTIFARIOUSNESS—PARTIES.

1. An objection that a bill is multifarious should be raised by demurrer, and comes too late when made for the first time after complainant has succeeded on the merits.

2. After distributing his property among his children, a father, for 20 years, respected the right of a daughter to certain mortgages assigned to her in her own right, and to certain other mortgages assigned to her in trust for her children; the father, by agreement, retaining possession of the mortgages, reinvesting the proceeds, and applying a part of the interest to his own support, but paying the balance to his daughter. The daughter filed her bill praying for a receiver to take charge of the mortgages, alleging that her father was denying her rights therein; that, by reason of his age and enfeebled condition, he was not properly managing the property; and that his son now claimed a joint interest in the mortgages so assigned. Held that, after complainant had succeeded on the merits, it was too late for defendants to object that her children had not been made parties, since the bill did not seek to reduce the property to complainant's possession, but only to place it in the hands of a receiver under the direction of the court.

Appeal from circuit court, Macomb county, in chancery; Arthur L. Canfield, Judge.

Bill by Adelia W. Snook against Ira S. Pearsall and Dwight E. Pearsall, praying for the appointment of a receiver of certain notes and mortgages in possession of defendant Ira S. From a decree in complainant's favor, defendants appeal. Affirmed.

Eldredge & Spier and Dwight N. Lowell, for appellants. Crocker & Crocker, for appellee.

McGRATH, J. Defendant Ira S. Pearsall, in 1871, made a distribution of, practically, all of his property. He assigned certain notes and mortgages to the complainant, his daughter, in her own right, and certain other bonds and mortgages to her in trust for her two daughters. At the same time he deeded a farm valued at \$10,000, and assigned certain other notes and mortgages, to the defendant Dwight E. Pearsall, his son. It was agreed between the parties that the father should retain all of the bonds and mortgages so assigned, in his possession, collect both interest and principal, reinvest the principal, apply so much of the interest as was necessary to his own support, and pay over the balance to the respective parties. The as-

ignment to complainant in trust provided that "so much of the increase or proceeds of said mortgages as may be necessary are to be applied to the support, maintenance, and education of my said grandchildren, and the remainder is from time to time to be invested by the said party of the second part in interest-bearing securities; and on said grandchildren, respectively, attaining their majority, said party of the second part is authorized to pay over to them the money to which they are entitled under the terms of this instrument, or she may, in her discretion, retain control of the whole or any part of the moneys unexpended; my intention being to give to her full power in the premises to use the moneys coming into her hands in such manner as she may deem for the best interest of the said children, without any restriction being imposed on her action either during their minority or afterwards." From the date of said assignment until some time in 1890, Ira S. Pearsall continued to respect the assignments so made to complainant. He accounted to her from time to time, sent her moneys, releases to be executed and returned, deeds for execution upon the sale of property acquired by foreclosure, and in various other ways recognized the transfers so made as aforesaid. In May, 1891, complainant filed the present bill, setting forth that, since some time in 1890, defendant Ira S. Pearsall has denied complainant's ownership in said property, refuses to inform her concerning its condition, denies her right to any information, and asserts his right to control such property as owner; that he, by reason of his age, enfeebled condition, and impaired memory, does not properly care for and manage the property; that said Dwight E. Pearsall now makes claim to a joint interest in and right to all of the property so assigned to complainant, and prays for a statement of the notes and mortgages in the hands of defendant Ira S. Pearsall, owned by her individually, a like statement of notes and mortgages in his hands owned by her in trust, an accounting by him, and the appointment of a receiver, in order that the said property should be under the control of the court, and the rights of all parties fully protected.

The court below gave complainant a decree, denied the right of Dwight E. Pearsall to a joint interest with complainant, appointed a receiver, and directed an accounting, and that said property be turned over to such receiver. After a very full examination of the record and testimony, we are satisfied that the decree, upon the merits, should be affirmed. Two questions are raised by defendants: First, that the bill is multifarious, in that it asks for relief respecting property held by complainant in trust, as well as her individual property; and, second, that the bill is defective for want of parties in that the beneficiaries should have been joined.

The objection for multifariousness, if it has

any force, should have been raised by demurrer. *Jenn. Ch. Pr. 26.*

We think, too, that the objection for want of parties, under the circumstances of this case, should have been raised by demurrer before answer. Complainant holds the legal title. The rights of the beneficiaries are not prejudiced by this decree. The bill does not seek to reduce the property to the possession of complainant, but only to place it in the hands of a receiver under the direction of the court. The only object to be attained by making the beneficiaries parties is the protection of defendant *Ira S. Pearsall* against further possible litigation at the instance of the beneficiaries. If defendant desired protection against that possibility he should have made timely objection, in order that the expense of these proceedings might have been avoided. It would be inequitable now, after complainant has made her case upon the merits, to burden her with the cost and expense of these proceedings in order to relieve the defendant from possible further litigation. It is well settled that in a suit by a trustee to reduce the trust fund to his possession the beneficiaries need not be brought in. *Sill v. Ketchum, Har. (Mich.) 423; Morey v. Forsyth, Walk. (Mich.) 465; Adams v. Bradley, 12 Mich. 346.* It is true that in the present case the funds sought to be reached are not all trust funds, and that an accounting is sought to determine which are trust funds, and what are not; but the decree here does not reduce either fund to the possession of complainant, but places both in the hands of the receiver, under the protection of the court, before which the beneficiaries may be heard, so that, as between complainant and the beneficiaries, the latter are fully protected. The decree is therefore affirmed, with costs to complainant.

ELDER et al. v. GARNER, Sheriff.

(Supreme Court of Michigan. June 8, 1893.)

MANDAMUS TO SHERIFF—BAIL—BRINGING ACCUSED BEFORE COMMISSIONER.

Mandamus will not issue, on the relation of persons accused of murder, to compel the sheriff to bring them before a certain circuit court commissioner, in order that they be admitted to bail, when the answer shows that the sheriff had good reason to believe such commissioner disqualified, and no issue was asked to try the question, and there appears to be another commissioner as well as the circuit judge, by either of whom presumably relators may be admitted to bail.

Mandamus, on the relation of John Elder and Robert Nixon, against William A. Garner, sheriff of Genesee county, respondent. Writ denied.

Statement by the court:

Relators, who were committed for trial upon a charge of murder, applied for the writ of mandamus to compel the respondent sheriff to bring them before a certain circuit

court commissioner, to the end that they might be admitted to bail.

Durand & Carton, Gold & Johnson, and J. M. Russell, for relators. George F. Brown, Pros. Atty., for respondent.

PER CURIAM. A circuit court commissioner has power to admit to bail a defendant committed for trial upon a charge of murder in the first degree, except in cases where the proof is evident or the presumption great. *How. St. § 9479.* In this case the answer shows that the commissioner is by the respondent believed to be disqualified from acting in the premises, and that respondent has reasonable grounds for such belief; and inasmuch as no issue was asked to try the question, and there appearing to be another commissioner and the circuit judge, both residents of said county, by either of whom it will be presumed that said relators may be admitted to bail, this court will leave relators to such remedy, and will not interfere in this case by the discretionary writ of mandamus.

In re REINHHEIMER.

(Supreme Court of Michigan. June 8, 1893.)

DISCHARGE ON HABEAS CORPUS—SUBSEQUENT ARREST.

Under *How. St. § 8594, subd. 1*, one committed on failure to comply with an order to give security to keep the peace, and discharged on habeas corpus for a defect in the commitment, may be subsequently arrested and imprisoned on a second commitment, in due form, issued on said order.

Petition by Edward Reinheimer for habeas corpus. Writ refused.

T. P. Zander and L. E. Bradt, (L. O. Holden, of counsel,) for petitioner. A. A. Ellis, Atty. Gen., and E. A. Snow, Pros. Atty., for respondent.

PER CURIAM. One committed upon a failure to comply with an order to give security to keep the peace, discharged upon habeas corpus for a defect in the commitment, and subsequently arrested and imprisoned upon a second commitment, in due form, issued upon said order, is lawfully imprisoned, and will not be discharged upon habeas corpus. *How. St. § 8594, subd. 1.* Petitioner remanded.

¹*How. St. § 8594*, provides that "no person who has been discharged, by the order of any court or officer, upon a habeas corpus or certiorari issued pursuant to the provisions of this chapter, shall be again imprisoned, restrained, or kept in custody for the same cause; but it shall not be deemed the same cause (1) if he shall have been discharged from a commitment on a criminal charge, and be afterwards committed for the same offense by the legal order or process of the court wherein he shall be bound by recognizance to appear, or in which he shall be indicted or convicted for the same offense."

**TINKER v. BOARD OF PUBLIC WORKS
OF CITY OF JACKSON.**

(Supreme Court of Michigan. June 8, 1898.)

**MUNICIPAL CORPORATIONS — CONSTRUCTION OF
CHARTER—MANDAMUS BY COUNCILMAN.**

Under the charter of the city of Jackson, a member of the common council cannot, by mandamus, compel his recognition as a member of the board of public works, unless his petition shows his election by a majority of the common council, exclusive of his own vote.

Mandamus, on the relation of Almerin M. Tinker, against the board of public works of the city of Jackson. Writ denied.

Relator applied for a writ of mandamus to compel respondent to recognize him as a member of such board, alleging his nomination thereto by the mayor pursuant to chapter 25, § 1, of the charter of the city of Jackson, (Act 414, Local Acts 1889,) and the confirmation of such nomination by the common council, by an affirmative vote of 9 of the 16 members elect.

Wilson & Cobb, for relator. J. A. Parkinson, for respondent.

PER CURIAM. Under the charter of the city of Jackson a member of the common council cannot, by mandamus, compel his recognition as a member of the board of public works, when his petition fails to show his election by a vote of a majority of the common council, exclusive of his own vote.

PEOPLE v. ADAMS.

(Supreme Court of Michigan. May 31, 1898.)

**LOCAL OPTION LAW—INFORMATION — EVIDENCE—
PUNISHMENT.**

1. An information under the local option law, (Laws 1889, No. 207,) which alleges that defendant sold fermented cider, contrary to the provisions of the resolution adopted by the board of supervisors pursuant to such law, sufficiently alleges that the law has been made and is operative in the county.

2. Since section 17 of the act makes a certified transcript of the record of the preamble and resolution of the board of supervisors evidence that the provisions of the act are in full force in the county, it is unnecessary, on a prosecution under the act, to prove a promulgation of the adoption of such preamble and resolution.

3. Since the statute prohibits the sale of fermented cider, the stage of fermentation or its intoxicating qualities are immaterial.

4. A confession of guilt on a prosecution for violation of the local option law is a "conviction," within the meaning of the statute, which imposes a heavier penalty on a conviction for a second offense; and such penalty is properly imposed for the second offense, though the judgment and sentence for the first offense may have been void for noncompliance with the statute.

Appeal from circuit court, Van Buren county; George M. Buck, Judge.

Irving Adams was convicted for selling fermented cider, in violation of the local option law, (Laws 1889, No. 207,) and appeals. Affirmed.

Mills, Osborn & Cavanaugh, for appellant. A. A. Ellis, Atty. Gen., and Lincoln H. Titus, Pros. Atty., for the People.

MCGRATH, J. Respondent was convicted for selling fermented cider, contrary to the provisions of a resolution adopted by the board of supervisors of the county of Van Buren in pursuance of the provisions of Act No. 207 of the Laws of 1889, and contrary to the provisions of said act. The information is good. The allegation that the sale was contrary to the provisions of the resolution adopted by the board of supervisors pursuant to the provisions of the act is a sufficient allegation that the act had been made, and is operative. It is not usually necessary in an information, in referring to a statute, to allege that the statute has taken effect, or has become or still is operative, and the reference in the present case is of the same nature. It is unnecessary to prove the promulgation of the adoption of the preamble and resolution. Section 17 of the act makes a certified transcript of the record of the preamble and resolution evidence that the provisions of the act are in full force. The jury were properly instructed that, if the cider sold was fermented, the deponent should be convicted. The statute prohibits the sale of fermented cider, and forecloses inquiry as to whether cider which is fermented is intoxicating, whatever the stage of fermentation. The sale was in December, and the proofs tended to show that the cider was fermented. To prove the former conviction, the judgment was introduced, which showed that, upon a plea of guilty, respondent had been ordered to pay a fine of \$100, and costs in the sum of \$25, and, in default of payment of said sums, to be confined in the common jail until such fine and costs were paid. It is insisted that the sentence is void, under *Brownbridge v. People*, 38 Mich. 751, and *People v. Carroll*, 44 Mich. 371, 6 N. W. Rep. 871. Act No. 207 provides that, "for the second and every subsequent offense so committed, he shall, upon conviction thereof," etc. Conceding the invalidity of the sentence, and that under this statute a conviction of the first offense must be shown, the former conviction stands unreversed. The conviction is the finding of guilt. 1 Bish. Crim. Law, § 963; *Stevens v. People*, 1 Hill, (N. Y.) 261; *State v. Volmer*, 6 Kan. 379; *Nason v. Staples*, 48 Me. 123; *Com. v. Lockwood*, 109 Mass. 323. As is said by Gray, J., in *Com. v. Lockwood*, "the ordinary legal meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt, while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the con-

vict of the fact thus ascertained." It is the declaration of consequences, only, that is bad; but there is no reversal, the conviction stands as evidence of the fact, and the statute is satisfied. The present case is here on appeal from a judgment of conviction. That judgment is affirmed, and the court below is directed to proceed to sentence. The other justices concurred.

CHICAGO & N. W. RY. CO. v. CITY OF CLINTON et al.

(Supreme Court of Iowa. May 17, 1893.)

BOUNDARY BETWEEN STATES—CHANNEL OF RIVER—TAXATION.

A railroad bridge across the Mississippi river between Iowa and Illinois was constructed across a channel of the river to an island, and thence across another channel to the other shore. The island was permanent, and not a shifting sandbar. The channel on the west side of the island, between it and the Iowa shore, was the main channel, having greater depth of water, and being the one generally used for navigation. *Held*, that such channel was the boundary line between the states for the purposes of taxation. *State of Iowa v. State of Illinois*, 13 Sup. Ct. Rep. 239, followed.

Appeal from district court, Clinton county; A. Howat, Judge.

This is an appeal by the plaintiff from an order of the district court affirming an assessment for taxation upon the plaintiff's railroad bridge across the Mississippi river at the city of Clinton.

E. S. Bailey and A. P. Barker, for appellant. C. W. Chase and Geo. B. Phelps, for appellees.

ROTHEROCK, J. It is conceded by the appellant that the part of the said bridge which is situated in this state is subject to taxation by the city of Clinton. But it is claimed that the board of equalization assessed not only that part of the bridge situated in this state, but also part of the structure located in the adjoining state of Illinois. The cause was submitted to the court below upon the following stipulation: "It is hereby stipulated and agreed that the only question to be tried and determined on this appeal is at which point in the Mississippi river where the plaintiff's railway bridge crosses the same is the middle or main channel of said river, and, if it is determined that said middle of the main channel of said river is the middle of the channel between the Iowa shore and the west bank of Little Rock island, then the order or resolution passed by said defendant changing the assessment of said plaintiff's railway bridge from \$15,000 to \$20,000 shall be set aside, and the assessment shall stand as it was before said change was made, to wit, at \$15,000; but if, on the contrary, it shall be held and decided that said middle of the main channel of said river lies east of the middle of the channel of said river between said Iowa shore and the said Little Rock

island, then said assessment shall stand at \$20,000. The bridge in question is located opposite to the city of Clinton. It is constructed across a channel of the river to Little Rock island, and across the island to another channel, and across that to the main land in the state of Illinois. Little Rock island is a permanent island, and not shifting and variable, like sandbars in the river. It is well defined, and contains about 40 acres of land. It is shown by the evidence beyond all question that the channel on the west side of the island is the main channel. It has a greater depth of water than the east channel, and is the one generally used for the purposes of navigation. The rules adopted by this court and the supreme court of Illinois in reference to the boundary lines of the respective states are not in accord. See *Dunleith & D. Bridge Co. v. County of Dubuque*, 55 Iowa, 558, 8 N. W. Rep. 443, and *Buttenuth v. Bridge Co.*, 123 Ill. 535, 17 N. E. Rep. 430. By reason of this conflict of views an action was brought by the state of Iowa against the state of Illinois to determine the boundary line between the two states along the course of the Mississippi river. That case has recently been determined by the supreme court of the United States, and it is held by that court that the boundary line is the middle of the main navigable channel, or channel most used, and not the middle of the great bed of the stream, as defined by the banks of the river. See *State of Iowa v. State of Illinois*, 13 Sup. Ct. Rep. 239. This determination of the question is authoritative, and must be followed, and the result is that the middle of the channel between the Iowa shore and the west bank of Little Rock island is the true boundary line for the purposes of taxation and other governmental purposes. As the district court found the line to be east of that point, the judgment is reversed.

PEREGOY et al. v. WHEELER et al.

(Supreme Court of Iowa. May 22, 1893.)

REVIEW ON APPEAL—OBJECTIONS NOT RAISED BELOW—INSTRUCTIONS—HARMLESS ERROR—QUESTION FOR JURY—CONVERSION—WHAT CONSTITUTES.

1. An objection to a petition for alleged insufficiency, not presented by any pleading nor by motion in arrest of judgment, will not be considered on appeal.

2. Under Code, § 2646, providing that one prayer for judgment may include a sum based on all accounts looking to a money remedy, it is not necessary that each count in a petition in a suit on account contain a prayer for judgment.

3. An instruction imposing on the successful party to an action the burden of proving more than he should have been required, though erroneous, is error without prejudice to appellant, and furnishes no ground for reversal.

4. Where there is any evidence to support an issue of fact it must be submitted to the jury.

5. In an action by junior mortgagees to recover of senior mortgagees of the same chattels

the value thereof in excess of the senior mortgage debt, it appeared that defendants were permitted to remove the property from the state to sell it to satisfy the mortgages; that they removed it, and used it in opening and running a saloon for themselves; that they intended to open the saloon when they removed the property, and concealed their purpose from the other parties interested in such property. *Held* to show a conversion.

Appeal from district court, Pottawattamie county; N. W. Macy, Judge.

Action to recover the value of certain personal property in excess of the amount of a mortgage thereon owned by defendants. There was a trial by jury, and a verdict and judgment for plaintiffs. The defendants appeal.

Sims & Bainbridge, for appellants. Flickinger Bros., for appellees.

ROBINSON, C. J. During the latter part of the year 1886, Jacob Ernstsdorf, and Kate, his wife, were engaged in keeping a chop-house and saloon in the city of Council Bluffs. The business was carried on in the name of the wife. In July of that year she gave to defendants a mortgage on all the chattel property, including fixtures, used in the business, to secure two notes for the aggregate amount of \$887. On the 10th day of January, 1887, Ernstsdorf and his wife gave to plaintiffs a chattel mortgage on the same property to secure a note to them for \$273.52, and on the next day the mortgagors gave to Schneider & Beck a third mortgage on the property to secure a note for \$212.36. The business was closed at about the time the last two mortgages were given, and defendants took possession of the mortgaged property, retained and disposed of a portion of it in Council Bluffs, and took the remainder to Lincoln, Neb. The plaintiffs own the note and mortgage originally given to them, and claim to own, as assignees, the note and mortgage to Schneider & Beck, and the interest held by Ernstsdorf, subject to the three mortgages described. They allege in the first count of their petition that defendants, in consideration of being permitted to take possession of the mortgaged property and remove it to Lincoln, assumed and agreed to pay the indebtedness secured by the second and third mortgages, and to account to Ernstsdorf for all money received in excess of the mortgage liens, and that they sold the property for the sum of \$2,000. In the second count plaintiffs allege that defendants, without authority so to do, wrongfully converted the mortgaged property to their own use. The defendants admit that a verbal agreement was made by them, the holders of the junior mortgages, and the mortgagors for the removal of the property from Council Bluffs, and aver that they were to dispose of it, and, if they should realize more than sufficient to pay their claim, after deducting the necessary ex-

penses of removing and disposing of it, they were to pay the surplus to plaintiffs and Schneider & Beck, to be by them divided as they should agree. They further aver that they disposed of the property, but did not realize enough therefrom to pay the amount of the mortgage indebtedness due them. The verdict in favor of plaintiffs was returned on the 8th day of October, 1891, for \$715.95, and judgment was rendered in their favor for that amount.

1. The appellants contend that the first count of the petition was insufficient, because it contains no allegation of indebtedness nor prayer for judgment. The objection thus made was not presented by any pleading, nor by a motion in arrest of judgment, and we do not think it is well founded. The first count sufficiently alleges an indebtedness in the sum of \$1,800, and at the close of the second count judgment is demanded for that amount. Subdivision 5, § 2046, of the Code provides that "one prayer for judgment may include a sum based on all counts looking to a money remedy." The demand for judgment was sufficient to sustain an allowance on either count.

2. The third paragraph of the charge to the jury is as follows: "If you find, from a fair preponderance of the testimony, that the defendants undertook and agreed with the plaintiffs, Schneider & Beck, and Ernstsdorf and wife to pay and discharge the indebtedness to plaintiffs and said Schneider & Beck, without condition or reservation, in consideration for the right and privilege granted to said defendants to take possession and dispose of the property covered by said mortgages, divested of the liens thereon, and freed from the rights of said Ernstsdorf and wife therein, and, in addition thereto, to pay to said Ernstsdorf and wife any surplus they should receive over and above the lien thereon, then, and in that event, that would constitute an enforceable contract, and the defendants would be bound thereby; *and if you further find that the defendants took possession of said property under and by virtue of such contract, and sold and converted the same to their own use and benefit, then the defendants would be liable for the amount of the indebtedness to the plaintiffs and said Schneider & Beck, and for any surplus of the price received or value of the property, if any, converted, over and above the liens on said property; and the plaintiffs will be entitled to recover the amount they have shown a right to recover by a fair preponderance of the evidence, as hereinafter explained and set forth.*" The appellants complain of the portion of the paragraph which we have italicized. It is undoubtedly true that it is erroneous, in requiring proof of a conversion of the property by defendants, in addition to proof of an unconditional agreement on their part to pay plaintiffs and Schneider & Beck the indebtedness due them and to Ernstsdorf and

wife, the surplus, if any, remaining after the payment of the three mortgages, to entitle plaintiffs to recover, but defendants cannot have been prejudiced by the error. It imposed upon plaintiffs the burden of proving more than should have been required of them, and of that defendants have no reason to complain.

3. The court charged the jury that, if defendants converted the property to their own use, they would be liable for its reasonable market value at the time and place of its conversion, with 6 per cent. interest thereon from that time. It also charged them that "defendants should be allowed all the costs and expenses incurred by them in good faith in disposing of the property, and in getting returns therefrom." Appellants contend that there is a conflict between these portions of the charge. The thought of the charge seems to be that defendants should be allowed for the costs and expenses incurred by them in good faith in carrying out their agreement, even though they did convert the property, or a portion of it, to their own use. That is made manifest by a portion of the charge following that last quoted, which is as follows: "If the contract is as claimed by defendants, so long as they acted in good faith, and within the terms and conditions of the contract, they are protected, but if they acted in bad faith, and went beyond the terms and conditions of the contract, then they are to be held to account, as I have stated." But conceding, for the purposes of this case, that there was error as claimed, it tended to the benefit of defendants by increasing their allowance for costs and expenses, and was not in any manner prejudicial to them.

4. It is contended that the court erred in submitting to the jury any question in regard to the agreement pleaded in the first count, for the alleged reason that there was no evidence of such an agreement. Although much of the evidence offered by plaintiffs tended to show a conversion of the property, yet some of it tended to prove the agreement pleaded, and the court properly submitted to the jury the question whether it was made.

5. The appellants insist that there was no evidence of the conversion of the property in question; hence that the court erroneously charged the jury in regard to a conversion, and that the verdict is not supported by the evidence. Their theory is that the second and third mortgages were released before the property was removed from Council Bluffs; hence that there could not have been a conversion of it. In our opinion the jury would not only have been justified in finding that the mortgages were not released, but any other finding would have been contrary to the preponderance of the evidence. Permission was given to the defendants to remove the property to Lincoln, but such removal was to be for the purpose of selling the property to

procure the means with which to satisfy the mortgages. A sale made for that purpose, under the agreement of the parties in interest, would have had the effect to release the mortgages; but the evidence shows no intent on the part of plaintiffs or Schneider & Beck to release their respective mortgages until such a sale should be made. Only a part of the mortgaged property was removed to Lincoln. That portion used in the chophouse department of the business carried on by Ernstdorf and wife, amounting to about \$420 in value, was sold in Council Bluffs. There is testimony to the effect that liquors, cigars, potatoes, eggs, and canned goods, to the value of about \$250 were taken by defendants, and kept in Council Bluffs, and also a small sum of money, and that the property used in the saloon part of the business, of the value of about \$1,500, was taken to Lincoln. There is conflict in the evidence in regard to the purpose of defendants in removing the saloon property from Council Bluffs. The fact is they used it to open a saloon in Lincoln, which they ran for seven months, and which was continued to be run in their name for five months longer. They claim that they opened it for the purpose of selling the property, and that they sold it at the end of seven months. They seek to have allowed, as expenses incurred in selling the property, the cost of fitting up the saloon and a license to run it. The evidence shows that they intended to open the saloon when they removed the property from Council Bluffs, but that they concealed their purpose from the other persons interested, notwithstanding their claim that the saloon was opened to effect a sale of the property. They sold the property, including some additions they had made, for \$1,800, received \$600 in money, and a chattel mortgage on the property, and a real-estate mortgage on property in this state to secure the remainder. They claim that a part of the price received was for the unexpired part of the license, which cost \$1,000 for one year, and that they did not realize the full amount secured by the mortgages which were given to them. But we are satisfied that, whether the jury found in favor of plaintiffs on the first or second count of the petition, the amount of their recovery is not excessive. The jury might have found that the agreement pleaded in the first count was made, or that defendants converted the property to their own use, as charged in second count. It is shown that plaintiffs are entitled to recover for the interests conferred upon Schneider & Beck and that retained by the mortgagors, as well as the amount of the claim secured by the mortgage to them. In our opinion the verdict was fully sustained by the evidence. The conclusions announced dispose of all material questions in the case. The judgment of the district court is affirmed.

LOTHIAN v. LOTHIAN et al.

(Supreme Court of Iowa. May 20, 1893.)

TRIAL BY JURY—WAIVER OF RIGHT TO—PAYMENT
—EVIDENCE.

1. Where a party states in open court that it is immaterial to him whether the case is tried as a proceeding at law, or in equity, merely directing a trial as in equity is not a denial of a trial by jury, as it was his duty to demand such trial, if he wished it.

2. As attorneys for plaintiff, defendants recovered a judgment, which was paid in drafts, and at their request plaintiff indorsed the drafts at a bank, defendants receiving therefor a certificate of deposit of \$2,000, which they claimed as for services. In proceedings to recover the amount so deposited, it appeared that plaintiff was a woman 75 years of age; and she testified that she thought the \$2,000 was deposited for her, and that she indorsed whatever checks were presented to her by defendants because she "had nobody else to trust." *Held* that, though there was some evidence that the certificate was given to defendants as payment, it failed to show that plaintiff, understandingly, consented to it.

Appeal from district court, Linn county; J. H. Preston, Judge.

The plaintiff and the defendant Daniel Lothian were husband and wife. On the 7th day of January, 1890, they were divorced by a decree of the Linn district court, on the petition of the plaintiff. Permanent alimony was allowed, consisting of certain real estate, and a money judgment was rendered for \$7,000. The defendants Davis & Voris were attorneys for the plaintiff in the action. The judgment of \$7,000 was paid by the defendant Lothian. This is a summary proceeding in that action against said Davis & Voris, in which the plaintiff sought, by motion, to have an order on her said attorneys, requiring them to pay to her, or into court for her use, a balance of \$2,000 which she alleged they collected, and which they neglect and refuse to pay over to her. The motion was heard by the court, and it was found that Davis & Voris had in their possession, as the proceeds of the collection of the judgment and decree for alimony in the cause, the sum of \$2,000, and that they are entitled to retain \$1,000 as their fees. An order was made that said attorneys pay to the plaintiff the sum of \$1,000 within 30 days. From this order the defendants Davis & Voris appeal.

J. W. Jamison and Rickel & Crocker, for appellants. M. P. Smith and Wm. G. Thompson, for appellee.

ROTHROCK, J. The question of fact involved on the hearing of the motion was whether the defendants were entitled to retain the \$2,000 in controversy as compensation for legal services in connection with the separation of the plaintiff and her husband, and the procuring of a decree of divorce and judgment for alimony. The court heard the motion as a proceeding in equity. Counsel for defendants insist that it should have been

tried as an issue at law, and that to deny a trial by jury, as in a law action, is contrary to the constitution of this state. Our examination of the record leads us to the conclusion that no such question was made in the district court. The following is a copy of part of the bill of exceptions: "When the cause was called for trial, the plaintiff insisted the case should be tried and the evidence taken as a proceeding and trial in equity, and the defendants Davis & Voris insisted it should be tried as a special proceeding at law; but said Davis & Voris stated in open court it was immaterial to them which way the court ordered it tried, but did not consent to its being tried as an equity case. Thereupon it was ordered by the court that it should be tried as an equity proceeding, to which order and ruling of the court the defendants Davis & Voris duly excepted." The defendants did not at any time demand that a jury be impaneled to try the issue, and, after expressing themselves as indifferent whether the trial should be at law or in equity, the mere general exception to the ruling of the court can give them no standing on that question in this court. If it were desirable that the question of the constitutionality of the mode of trial should be tested, there should have been no equivocation about it. There should have been a demand that the issue be tried as at law, and a jury should have been demanded. It is provided by section 2910 of the Code that "the motion shall be heard and determined without written pleadings, and judgment given according to law and the rules of equity." Whether this is to be understood as meaning that the proceeding or form of the hearing shall be as in a case in equity, we need not determine. If we were to pass upon that question our holding would be vulnerable to the objection that it was a ruling on a question not presented by the record.

2. It is not disputed that the defendants received \$2,000 of the \$7,000 money judgment awarded to the plaintiff as alimony. It is claimed that this was no more than reasonable compensation for the services rendered. Evidence was taken upon this question, and the testimony of the witnesses is in conflict. It is not our purpose to set out the evidence. A careful examination of the whole record leads us to the conclusion that the \$1,000 allowed by the district court is ample compensation for all the professional services rendered by the defendants for the plaintiff.

3. It is further claimed that the sum of \$2,000 was specially agreed upon by the plaintiff and the defendants as the proper compensation, and that the plaintiff actually paid the defendants that amount. There is evidence to that effect. But, when all the facts and circumstances disclosed in evidence are taken into consideration, we do not think any binding contract was made. Our conclusion is that the minds of the parties never met on that proposition. The judg-

ment was paid into court in the form of bank drafts payable to the order of Mrs. Lothian. The defendants went to the clerk's office, and receipted for the amount of the drafts in the judgment docket, and took the drafts into their possession. The whole judgment was not paid at one time. The first payment consisted of two drafts,—one for \$3,000, and the other for \$2,500. When Mrs. Lothian called at the office of the defendants, one of the defendants produced the drafts, and went with the plaintiff to a bank. The plaintiff indorsed the drafts. They were passed in to the banker, and a certificate of deposit was issued to the defendants for the \$2,000 in controversy. It is true there is evidence that the plaintiff consented to this arrangement. But there is evidence that she did not consent. She testified that she thought that the \$2,000 was deposited "to her call;" that she indorsed whatever checks were presented to her by the defendants, because she "had nobody else to trust." The plaintiff is now about 75 years of age. It appears from the petition for divorce and alimony filed by the defendants that she was married to Daniel Lothian in the year 1836, and that they lived and cohabited together until 1889, when the husband abandoned her, and lived in adultery with another woman. It further appears in the evidence that all of the children of the marriage are dead. In this time of her trial the plaintiff did not want a divorce. She wanted to compel the husband to pay alimony, which she thought would induce him to return to her, and be faithful to his marriage vows. It is no doubt true that she was ready and willing to do anything that she was advised to do by her attorneys. There was no defense to the action. The charge of adultery was confessed by a default. In view of all these, and many other considerations that might be named, not the least important of which is the trust and confidence reposed in an attorney by a person in the situation of this aged woman, we think that it should be held that the evidence fairly shows that she never consented that the defendants should have \$2,000 for their services. If she used language implying such consent, she did not understand its import, and should not be bound by it. The order of the district court is affirmed.

STANBROUGH v. DANIELS.

(Supreme Court of Iowa. May 19, 1893.)

MORTGAGES—PRIORITIES.

After plaintiff had taken a mortgage on land to secure a loan, other mortgages were given to H., C., and Y. on said land and other land. Thereafter plaintiff's loan was taken up by an increased loan, and secured by a mortgage on all the lands, a release of the first mortgage being executed and recorded. Plaintiff then foreclosed his second mortgage by action, recognizing the superiority of the liens of the

mortgages to H., C., and Y. Thereafter lienholders redeemed from the sale, and their interest was purchased as an investment by defendant, to whom a sheriff's deed was issued. Subsequently the H., C., and Y. mortgages were foreclosed, plaintiff becoming the purchaser of the premises under the decree foreclosing the C. mortgage, and also becoming the owner of the decree foreclosing the H. mortgage. Held, in an action to foreclose the lien under the last sale, and to determine the right of redemption of defendant, who claimed that the first mortgage to plaintiff was not released, and that, by reason thereof, she acquired under the foreclosure of the second mortgage a lien superior to the H., C., and Y. mortgages, that, though plaintiff's agent, in all the transactions, was the same person who acted for C. and Y. in taking the mortgages to them, still, it not appearing that it was against plaintiff's interest to discharge in full the first mortgage in consideration of the new note and mortgage, and plaintiff never having complained, and defendant being chargeable with notice that plaintiff, in foreclosing his second mortgage, claimed nothing under his first mortgage, defendant did not acquire any interest by reason of the first mortgage, but an interest junior to those acquired under the foreclosure of the C. and H. mortgages.

Appeal from district court, Delaware county; J. J. Ney, Judge.

Action in equity to foreclose a lien on real estate, and to fix and limit the time within which redemption therefrom may be made. From a decree in favor of plaintiff, the defendant, Susan E. Daniels, appeals.

Blair, Dunham & Norris and Henderson, Hurd, Daniels & Kiesel, for appellant. Yoran & Arnold and Powers, Lacy & Brown, for appellee.

ROBINSON, C. J. In the year 1871 the plaintiff loaned to H. P. Chapman \$1,225, and, to secure its payment, was given a mortgage executed by Chapman on 120 acres of land in Delaware county. In the year 1876, Chapman gave to Andrew Huntress a second mortgage on the same land, to secure a loan of \$1,000. That mortgage was assigned to Mary E. Kent in the year 1878. On the 22d day of March, 1882, Chapman gave to Emma Chase a mortgage on the 120 acres of land specified, and on 90 acres in addition, to secure a loan of \$900, and on the same day gave to Enos Yoran a mortgage on the 210 acres mortgaged to Emma Chase, to secure a loan of \$700. In the year 1884 the loan made by plaintiff in the year 1871 was taken up by a new loan of \$1,300, to secure which Chapman gave to plaintiff a mortgage on the land included in the Chase and Yoran mortgages. In the year 1886 the second mortgage to plaintiff was foreclosed by an action in his name. His petition in that case recognized the liens created by the mortgages to Huntress, Chase, and Yoran to be superior to his own lien, although the decree did not in terms decide the question of superiority. The action was dismissed as to Emma Chase and Enos Yoran. In March, 1886, a sale of the 210 acres was made to plaintiff, under the decree in his favor. In December, 1886, West

phal, Hinds & Co., junior lienholders, redeemed the premises from that sale, and afterwards assigned the sheriff's certificate to Lucy Daniels. A sheriff's deed for the premises was executed to her under the sale in April, 1887, and in October of that year she conveyed them to defendant, Susan E. Daniels. In the year 1887 the Huntress, Chase, and Yoran mortgages were foreclosed, the premises in controversy were sold to plaintiff under the decree rendered on the Chase mortgage, and a sheriff's deed therefor was issued to him in September, 1888. He has also become the owner of the decree foreclosing the Huntress mortgage in favor of Mary E. Kent. The only parties defendant in those foreclosure proceedings were Chapman and his wife. This action was brought to foreclose the lien acquired under the last sale, and to determine the right of redemption conferred by the first sale and the sheriff's deed to Lucy Daniels. Both Lucy and Susan E. Daniels were made parties defendant, but the latter was served with the original notice by publication only, and entered no appearance until after there had been a hearing in the district court, resulting in a decree in favor of plaintiff, which was affirmed by this court on the appeal of Lucy Daniels. See 77 Iowa, 562, 42 N. W. Rep. 443. In January, 1890, Susan E. Daniels appeared in the cause, and asked for a retrial so far as her rights were involved. A new trial was granted, and resulted, on the 5th day of December, 1890, in the confirming of the decree rendered on the first trial, excepting that appellant was given until the 1st day of March, 1891, in which to make redemption from the sale in controversy, and from the decree, as thus confirmed, she appeals. Questions growing out of her claims to the land were determined in *Stanbrough v. Cook*, 49 N. W. Rep. 1011, and in a case between the same parties reported in 53 N. W. Rep. 131.

The appellant contends that in making the new loan by plaintiff to Chapman, in the year 1884, the mortgage executed in the year 1871 was not discharged, but that plaintiff had a right to rely upon it as giving a lien paramount to those created by the Huntress, Chase, and Yoran mortgages; that such right passed by virtue of the sheriff's sale, and was acquired by Westphal, Hinds & Co. by means of the redemption they made, and was transferred by them to Lucy Daniels, and by her to appellant; and that it confers upon her a lien paramount to that under which plaintiff now claims. It appears that plaintiff is, and has been for many years, a resident of the state of New York. In all his transactions with Chapman he acted through Calvin Yoran, who was his agent in making the loans and his attorney in foreclosing his second mortgage. Calvin Yoran also acted for Emma Chase and Enos Yoran in taking the mortgages which were given to them by Chapman, and in foreclosing those mortgages. When the second mortgage to plaintiff was

taken, he executed a release of the first mortgage, which was duly recorded. It is claimed by appellant that, when the release was executed, plaintiff had no actual knowledge of the three mortgages which preceded the second mortgage to him, and that the same was true when his action was brought for the foreclosure of that mortgage, and when the decree in that case was rendered; that Calvin Yoran was at the same time the agent of Emma Chase and Enos Yoran; that their interests were adverse to the interests of plaintiff; therefore, that Calvin Yoran was disqualified to act for him in electing to release his first mortgage. The record does not show that these claims are well founded. It is true that the indebtedness secured by the first mortgage was substantially all the consideration for the second one, and that the taking of a new note and mortgage for an old debt secured by a mortgage will not operate to discharge the first mortgage, even though it be canceled, unless such was the intent of the parties to the transaction. *Port v. Robbins*, 35 Iowa, 210. It is also true that the duty of an agent to be loyal to his principal is of the first importance, and that the agent will not be permitted to serve at the same time and in the same transaction two principals whose interests are antagonistic, unless, with full knowledge of the facts, they consent that he may do so. *Mechem*, Ag. §§ 454, 455; *Whart.* Ag. §§ 244, 245, 573. But it is not shown that it was contrary to the interest of the plaintiff to discharge in full the first mortgage in consideration of receiving the new note and mortgage. The debt secured by the first mortgage was then nearly 10 years past due. It does not appear that plaintiff desired to have the money paid. He had been lending money in Iowa, through Calvin Yoran, since the year 1870, and the latter was fully empowered to negotiate and make loans according to his own judgment. Had the old loan been extended, questions in regard to priority and the rights of the respective parties might have arisen between the plaintiff and the holders of the other mortgages. The first mortgage included but 120 acres of land, and the new one was given upon 210 acres. There is no evidence that the premises last mortgaged were not ample security for the note the mortgage was given to secure, in addition to the debts secured by the prior mortgages. On the contrary, the fact that Westphal, Hinds & Co., as junior lienholders, redeemed from the sale made under the decree foreclosing that mortgage, and the further fact, which is shown, that appellant's grantor purchased the interest of Westphal, Hinds & Co. as an investment, and that appellant purchased that interest for the same purpose, indicate that the security was ample. Calvin Yoran decided that it was for the advantage of plaintiff to make a new loan, and discharge fully the first mortgage, and that was done. Plaintiff has never complained of his action in that respect, and we must conclude

from the record that it was within the power conferred upon him, and justified by the condition of affairs as they then existed. The petition of plaintiff filed in the action to foreclose his second mortgage made no claim to any interest derived from the first mortgage, and showed clearly that he did not claim any right paramount to the liens created by the Huntress, Chase, and Yoran mortgages. Therefore, in purchasing the title conveyed by the sheriff's deed, appellant was not only not led to believe from anything which plaintiff had done that she was acquiring a right under the first mortgage, but she was chargeable with notice that such was not the case. We find that the interest she acquired is junior to the decree of foreclosure in favor of Mary E. Kent, now owned by plaintiff, and that it is also junior to the title he acquired by virtue of the sale and sheriff's deed made under the decree which foreclosed the Chase mortgage. The conclusions we have announced make the determination of several questions discussed by counsel unnecessary.

The decree of the district court is affirmed.

DASHNER v. MILLS COUNTY.

(Supreme Court of Iowa. May 20, 1893.)

DITCHES—NEGLIGENT CONSTRUCTION AND ABANDONMENT—LIABILITY OF COUNTY.

A county is not liable for negligently constructing or failing to keep open a ditch constructed under Code, § 1207, which is paid for, not out of the general fund, but by assessments upon the property of persons benefited.

Appeal from district court, Mills county; N. W. Macy, Judge.

Action to recover damages to crops by being overflowed in consequence of the negligent construction and abandonment of a certain ditch by the defendant county. Defendant demurred to the petition, and the demurrer being sustained, and plaintiff electing to stand upon his petition, judgment was entered against him, from which he appeals.

Smith McPherson and Shirley Gilliland, for appellant. E. B. Woodruff and L. T. Genung, for appellee.

GIVEN, J. Plaintiff, for his cause of action, alleges that he is the owner of certain lands situated in Mills county; that some years ago the defendant county constructed a ditch across or adjoining said lands; that said ditch was negligently constructed, has been abandoned, and is a nuisance; that in two actions in the district court wherein the defendant county was a party said ditch was adjudged to be a nuisance, and the defendant ordered to abate the same by repairing and reconstructing, which the defendant has wholly failed to do; that by reason of such neglect and refusal said ditch, in the spring of 1890, overflowed plaintiff's land, and damaged and destroyed his growing crops thereon, to the

value of \$1,945; that plaintiff could not replace said crops for that year, nor repair said ditch so as to prevent the damage, without the expenditure of a sum of money greater than the damage; that he filed his claim with the auditor, and demanded payment, which was refused by the defendant's board of supervisors. He attaches, as exhibits, transcripts of the records in the two cases mentioned. The defendant county demurred upon the following grounds: "(1) A county is not liable for a negligent construction of a public ditch. (2) A county is not liable for damages caused by the overflow of a ditch constructed under its direction. (3) The petition does not allege that the county has now, or has had at any prior date, any funds realized from the special assessments provided for by law for the repair of said ditch." This ditch was constructed under authority given in section 1207 of the Code, which authorizes the construction of ditches "whenever the same will be conducive to the public health, convenience, or welfare."

The discussion may be reduced to the single question: Is a county liable in damages for negligently constructing or failing to keep open a ditch constructed under authority of said section? The cost of constructing and reopening such ditches is paid for by an equitable apportionment thereof among the owners of the land benefited by the ditch, as provided in section 1214 of the Code. It is not payable out of the general fund of the county, nor by assessment upon all the taxable property in the county. In *Mills Co. Nat. Bank v. Mills Co.*, 67 Iowa, 697, 25 N. W. Rep. 884, it was held that one holding warrants against the ditch fund was entitled to judgment thereon, and to the enforcement of payment by the levy of a tax in obedience to the provisions of the statute. Clearly, such a judgment could not be paid out of any other than the ditch fund. In *Green v. Harrison Co.*, 61 Iowa, 311, 16 N. W. Rep. 136, the precise question under consideration was passed upon. In distinguishing between that case and those wherein damages have been allowed against counties for negligence in the construction and maintenance of bridges, the court says: "Bridges are constructed for the benefit of the general public. The ditch in question was constructed more particularly for the benefit of abutting owners. The benefit to them was direct, while the general public is only remotely and incidentally affected. We are not disposed to extend to ditches the rule that has been held to apply to bridges. There is a clear distinction between the two." See, also, *Nutt v. Mills Co.*, 61 Iowa, 754, 16 N. W. Rep. 536, where the same rule was applied. Appellant cites and relies upon *Kincaid v. Hardin Co.*, 53 Iowa, 430, 5 N. W. Rep. 589, wherein the plaintiff sought to recover for alleged negligence in the construction of defendant's courthouse, and in fail-

ing to keep it properly lighted. In that case this court refused to extend the rule applied in the case of bridges, and held that the defendant county was not liable. A noticeable distinction between that case and this is that the courthouse was for the use of the entire county, was an improvement which the county was required to have, and which was paid for by general taxation, while in this case the ditch was not for the benefit of the whole county, nor was it to be paid for or maintained by assessment upon all the property of the county. At first it seems to be a harsh rule that denies to a person who has suffered damages, as alleged in this petition, the right to recover, but parties so situated are not without remedy. Had the party proceeded, as he might have done, upon the judgment set out in his petition, to compel the levy of a tax, as authorized by the statute, for the reopening of the ditch and putting it in proper condition, he would have saved himself from the damages which he claims to have suffered. Following what is so well expressed in *Kincaid v. Hardin Co.*, supra, as to extending the rule applied to bridges, we must hold that the demurrer was properly sustained, and affirm the judgment of the district court.

Affirmed.

MARSH v. McNIDER et al.

(Supreme Court of Iowa. May 20, 1893.)

LEASES—RIGHT TO ICE.

A lease of a tract of land including half the bed of a stream gives the lessee whatever rights the lessor has to cut and remove the ice.

Appeal from district court, Cerro Gordo county; John C. Sherwin, Judge.

Action in equity to restrain defendants from cutting or otherwise interfering with ice, and to recover the value of ice which they have cut, which is claimed by plaintiff. There was a hearing on the merits, and a judgment in favor of defendants. The plaintiff appeals.

Cliggitt & Rule, for appellant. Richard Wilber, for appellees.

ROBINSON, C. J. Clara E. Doud is the owner of that part of a certain tract of land which is west of the center of a stream of water which flows across it. That stream is about eight rods in width, is not navigable, and is known as "Lime Creek." Mrs. Doud made to plaintiff a bill of sale of the ice which should be formed in her part of the stream during the winter which commenced in the year 1890. When Mrs. Doud purchased the land, in June of that year, it was occupied by S. M. Fulghurn, as subtenant, under a lease which gave him the right to the free and uninterrupted occupation thereof until April, 1891, and the title acquired by the purchase was subject to his rights under the lease. He sold to de-

fendants the ice which was included in the bill of sale to the plaintiff, and, after the ice was formed, they cut and removed portions of it for their own uses. The plaintiff contends that the ice was real estate,—a part of the land owned by Mrs. Doud; therefore, that the lease gave to the tenant no right to remove it; and that the bill of sale transferred the ownership of it to plaintiff. It is well settled that, under some conditions, water and ice are to be regarded as real estate, belonging to the owner of the land which is beneath it. See *State v. Pottmeyer*, 33 Ind. 402, and cases therein cited; 9 Amer. & Eng. Enc. Law, 853. And, when that is the case, the landowner or his assign has the exclusive right to gather and dispose of the ice for his own benefit, subject to the rights of other riparian owners. See *Bigelow v. Shaw*, 65 Mich. 341, 32 N. W. Rep. 800, and cases therein cited. In this state the owner of land has the right to use so much of the water of a stream flowing over it as is necessary to supply what are termed his "natural wants." *Spence v. McDonough*, 77 Iowa, 461, 42 N. W. Rep. 371; *Ferguson v. Manufacturing Co.*, 77 Iowa, 576, 42 N. W. Rep. 448. Where he does not own the soil under the stream, as where it is meandered, and his ownership does not include its bed, he has no exclusive right to the ice which forms in it. *Serrin v. Grefe*, 67 Iowa, 197, 25 N. W. Rep. 227. In such cases, whoever has lawful access to the stream may use the water and the ice which forms therein in such manner as does not interfere with the rights of the riparian owners. *Brown v. Cunningham*, 82 Iowa, 515, 48 N. W. Rep. 1042. Whether the ice which forms in a running stream is to be regarded technically as a part of the land over which it is formed or to which it is attached is a question we do not find it necessary to determine. It is water congealed, and, although more readily secured and controlled for many purposes than water, it is in most respects subject to the rules which govern the rights of the riparian proprietor to the water. Ice may be attached to his land, but it was not produced by the land, drew nothing from it, and will give nothing to it. It is transient by nature, and will soon disappear, unless prevented by the labor of man. It is a product of the changing seasons, which the occupier of the soil may use as he might have used the water from which it was formed. If he own the land under it, he may use the ice as he might have used the water, to supply his natural wants, and for other purposes, so far as he can do so without affecting the rights of others, as of lower owners on the same stream. Such use appertains to the land, and belongs to him who has the right to possess and use it. In this case that right was conferred upon Fulghurn, by virtue of the lease. It is said that his lease was for ordinary farm-

ing purposes only, but, if that were true, he would have had the right to use so much of the water and ice as he required for such purposes. The lease, however, does not restrict the tenant to the use of the premises for agricultural purposes only, but gives him the right to the "free and uninterrupted occupation thereof," and necessarily the right to use them and their appurtenances. Nothing was reserved, excepting timber not required for repairing fences. The leased premises included one-half of the bed of the stream, and such rights as the owner had in the stream itself. He retained no right to enter upon the premises to gather ice, and his grantee acquired none as against the tenant. We are of the opinion that the lease gave to the tenant the right to cut and remove the ice in question, and find that such right was assigned to the defendants. The judgment of the district court is affirmed.

HUGHES v. CHICAGO, ST. P. & K. C. RY. CO.

(Supreme Court of Iowa. May 20, 1893.)

RAILROAD COMPANIES — ACCIDENT AT CROSSING — FAILURE TO GIVE SIGNALS — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

1. In an action for injuries received at a railroad crossing it appeared that the road approached the track at an angle of 25 degrees, over a hill about 25 feet higher than the crossing, and 300 feet from it, and that just before reaching the crossing the road passed through a cut. The track approached the crossing on a descending grade, and, when near it, passed through a cut, the bank of which was 9 feet higher than the crossing at a point 108 feet away. From the top of the hill the track could be seen for quite a distance, but, according to plaintiff's evidence, there were several points between that and the crossing from which the track could not be seen. The engineer, fireman, and brakemen on the train which caused the accident corroborated plaintiff in this by testifying that they could not see plaintiff from the time when he was on the hill till he was within 10 or 15 feet of the crossing. *Held*, that a finding that plaintiff could not see the train while between 20 and 40 feet from the crossing was justified by the evidence.

2. In an action for injuries received at a railroad crossing, the train hands and W., living in the vicinity, testified that the signal for the crossing was given at a whistling post 1,000 feet away, and all but the conductor and W. testified that the bell was sounded from that time until the crossing was reached. Two witnesses who were near the crossing testified that they did not hear the bell, and five others testified that they heard the danger signal at the crossing, which signal was admitted to have been given, but no other. Two witnesses testified as to contradictory statements made by W. as to the time the signals were given. *Held*, that a verdict for plaintiff was justified by the evidence.

Appeal from district court, Marshall county; D. R. Hindman, Judge.

Action to recover for injuries alleged to have been caused by negligence on the part of defendant. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Cummins & Wright and J. L. Carney, for appellant. Caswell & Meeker, for appellee.

ROBINSON, C. J. On the 25th day of September, 1890, defendant owned and operated a railway which extended through Marshall county. In the morning of that day the plaintiff was driving a team of horses, attached to a wagon, northward on a highway in the county named, and when on a crossing of defendant's railway the wagon in which he was sitting was struck by the locomotive engine of a freight train which approached from the south, and he was thrown out and injured. For the injuries thus received, and for injuries alleged to have been caused to the horses, harness, and wagon, he seeks to recover. He claims that the injuries in question resulted from the negligence of defendant in not sounding the whistle and ringing the bell of its engine, as required by law. The defendant denies negligence on its part, and alleges that the accident was caused by the negligence of plaintiff.

1. The highway approaches the place of the accident from the south, over a hill the top of which is about 25 feet higher than the crossing, and about 300 feet from it. From the top of the hill the highway descends towards the crossing, and, just before reaching it, passes through a cut. The highway is 16 inches higher than the crossing at a point 40 feet south of it. The railway approaches the crossing from the southwest on a grade descending at the rate of 53 feet per mile, at an angle of about 25 degrees, and when near the crossing it passes through a cut. At a point 108 feet south of the crossing the east bank of that cut is 9 feet 2 inches higher than the crossing, and at a point about 150 feet further south it is 13 feet 8½ inches higher than the crossing. The center of the highway at the top of the hill is less than 150 feet from the railway, and a person sitting in a wagon at that point can see the track from the crossing southward a distance of more than 1,600 feet. The plaintiff claims that on the morning of the accident, while sitting in his wagon as it was drawn northward from the top of the hill, there were places before the crossing was reached from which he could not see a train as it approached from the south; that as he was going down the hill out of sight of the track he looked for a train, but none was in sight; that his horses were walking at the rate of about 3 miles an hour; that when they were within about 20 feet of the track he checked them, listened and looked both ways for a train, but, not hearing or seeing any, he started over the crossing, and the accident occurred. To sustain his claim that there were places in the highway from which he could not see the train he introduced several witnesses, and photographs and a plat of the locality. The evidence thus presented is clear and direct,

and tends strongly to sustain his claim. To disprove it the defendant introduced witnesses, photographs, and plats which show that a train south of the crossing can be seen by a person sitting in a wagon in the highway 40 feet south of the crossing a distance of 627 feet, and from a point 30 feet south of the crossing, and also from the crossing, a distance of 744 feet. If certain of the photographs offered by defendant were taken when the obstructions to sight were as great as when the accident occurred, and from the points at which plaintiff says he looked for the train, and the highway was unchanged, the conclusion would be irresistible that he must have seen the train had he looked for it, and that he was negligent in attempting to cross as he did; but, when the accident occurred, portions of the point of land or bank between the highway and railway were covered with a dense growth of weeds and timothy grass, which made a screen from two to three feet in height, through which the plaintiff could not have seen. That screen had so nearly disappeared six months later, when the photographs of defendant were taken, that it had ceased to hide an approaching train from the view of a person in the highway. It is shown that the highway has been raised somewhat, near the crossing, since the accident occurred, and there is evidence to the effect that one side of it is, in places, lower than the other. It is not, therefore, certain that the camera used to take the photographs of defendant was on the same level as were the eyes of the plaintiff when he looked for the train. The testimony of plaintiff that he was not in sight of the train when he was about 30 feet from the crossing is corroborated by that of the engineer, fireman, and brakemen of the train. The engineer states that he was looking ahead constantly, and did not see the plaintiff until a moment or two before the collision occurred. The fireman states that he was looking out of the cab window, but did not see plaintiff until his horses had nearly reached the crossing. The rear brakeman was on the top of a car near the rear end of the train, and saw plaintiff's team when it was on the hill, but it disappeared from his sight, and he did not see plaintiff again until the latter was within 10 or 15 feet of the crossing. The front brakeman was on the second or third car from the engine. He saw plaintiff disappear in the cut near the crossing, and did not see him again until he was within 10 or 15 feet of it. We conclude that the evidence to show that plaintiff could not see the train when from 20 to 40 feet from the crossing is ample to sustain the verdict as to that issue.

2. The conductor, engineer, fireman, and brakemen of the train, and a man named Wright, who lived in the vicinity, testify that the signal for a crossing was given by the engine whistle when the engine was near the whistling post, and about 1,000 feet

from the crossing, and all of them but the conductor and Wright testify that the bell was sounded from that time until the crossing was reached. It is shown without dispute that the danger signal was given by the whistle just before the crossing was reached, but plaintiff contends that before the danger signal was given no sound was made by the bell or whistle, and testifies to that effect. When he was about halfway down the hill he met two men who were driving southward. After they had passed him a short distance they saw the train, but neither of them heard the bell, although the train passed but a few rods from them, nor the whistle, until it gave the danger signal at the crossing. Five other witnesses, of whom two were within 60, and two within 90, rods of the crossing, heard the danger signal, but no other, although all could have heard the crossing signal had it been given at the whistling post. Two witnesses heard Wright say that the whistle was not sounded until the danger signal was blown; hence the jury were authorized to disregard his testimony on that point. The greater number of witnesses support the claim of plaintiff that no signal was given until the engine had nearly reached the crossing, and that the whistle could have been blown at the whistling post without being heard by some of them is improbable. The conflict in the evidence on that branch of the case is too great to permit us to say that the verdict is not supported by the evidence. That it was the duty of defendant to sound the whistle and ring the bell before the crossing was reached is not questioned. See Acts 20th Gen. Assm. § 1, c. 104; *Reed v. Railway Co.*, 74 Iowa, 190, 37 N. W. Rep. 149. The train was moving rapidly on a descending grade, with brakes set, and without using steam, making comparatively little noise, and the testimony of plaintiff that he listened for it when near the crossing, but did not hear it, is not unreasonable. We conclude that the judgment of the district court is right. It is therefore affirmed.

LOMBARD v. GREGORY et al.

(Supreme Court of Iowa. May 22, 1893.)

APPEAL—DECISION—PROCEEDINGS BELOW—CORRECTION.

The district court cannot, where a cause is remanded by the supreme court for decree merely in accordance with opinion, entertain a motion to correct a computation by the supreme court of the amount due.

Appeal from district court, Montgomery county; A. B. Thornell, Judge.

This is an appeal from an order of the district court overruling a motion to correct a computation made by this court in the trial of an appeal from a decree foreclosing a mortgage upon real estate. The defendants filed the motion, and they appeal.

Carrie Gregory and H. R. Gregory, in pro. per. D. H. Ettien, for appellee.

ROTHROCK, J. The original action was in equity for the foreclosure of a mortgage. The defense was that the note and mortgage were tainted with usury. The defendants failed to satisfy the district court that the contract was usurious, and appealed to this court. The cause was tried anew in this court, and it was found that the defense of usury was established by the evidence. A computation was made of the amount due, after taking into account the usury and certain payments which had been made upon the debt. The amount for which the decree of foreclosure should be entered was found to be \$556.09, and the cause was remanded to the district court for a decree in accord with the opinion of this court. Thereupon the defendants filed a motion to correct the computation made by this court, claiming that the payments amounted to more than the estimate made thereof by this court. It is only necessary to refer to the opinion on the former appeal to show that the present appeal cannot be entertained. It is expressly found that the balance due the plaintiff was \$556.09, and that he was entitled to judgment and decree for that amount. See *Lombard v. Gregory*, 47 N. W. Rep. 298. The district court had no jurisdiction to determine the correctness of the decision of this court. It could do no more than enter a decree in accord with the opinion of this court. The ruling of the district court on the motion is affirmed.

J. P. KETCHAM & BRO. v. LARKIN.

(Supreme Court of Iowa. May 17, 1893.)

JUDGMENT ON EXCESSIVE VERDICT — HARMLESS ERROR — COUNTERCLAIM — PARTNERSHIP.

1. Where a person in whose favor an excessive verdict was rendered files a remitter of the excess, the court, on appeal, will not reverse a judgment entered for the full amount of the verdict, unless it appears that the lower court, with knowledge of the remitter, has refused to reduce the judgment.

2. In an action on two promissory notes it appeared that plaintiffs and one A., being partners, sold to defendant a cornsheller under an agreement that a firm, into which A. was about to go as a partner, would give defendant sufficient work shelling corn to pay the notes given for the price of the sheller. Defendant gave three notes, to the order of plaintiffs. The partnership between plaintiffs and A. shortly afterwards dissolved. At the proper time, defendant applied for the work of shelling corn, but the same was refused him, and, at the request of A., he returned the sheller to him. *Held*, that the sale of the sheller and the agreement to furnish corn to shell constituted an entire contract, and that the fact that a firm other than the sellers was to provide the work would not preclude defendant from setting up, as a defense to the notes, the failure to furnish such work.

3. As a member of the firm which sold the sheller, A. had a right to order it returned after the dissolution of the partnership, for the rea-

son that, while the firm was dissolved, it still existed for the purpose of closing up its business.

Appeal from district court, Iowa county; S. H. Fairall, Judge.

Action on two promissory notes. Verdict and judgment for defendant. Plaintiff appeals.

Hedges & Rumble, for appellant. Ranck & Wade, for appellee.

KINNE, J. 1. Plaintiff sues on two promissory notes. Defendant admits the execution of the notes, and denies that there is anything due thereon; avers that said notes, with another, were given for a cornsheller purchased by the defendant; that the sum represented by all three of said notes was agreed upon as the purchase price of said sheller, and upon the further consideration that the firm of Harris & Anderson should furnish the defendant corn to shell, sufficient each year to pay the amount due upon each note. Defendant, as a part of said contract, was to receive the sum of two cents per bushel for shelling said corn, and that all of same was a part of the contract of purchase, and part of the consideration for said notes, and that plaintiff, as a party to such contract, consented thereto, and accepted the notes upon said condition. It was further agreed that said firm of Harris & Anderson should deduct from the amount of shelling done by the defendant the amount due plaintiff on the notes. Under said contract, defendant, about December 18, 1889, as ordered by Harris & Anderson, went to Parnell to shell, and was then instructed to wait until after the holidays, which he did. Defendant, at all times until February 6, 1889, offered to comply with his contract, but was refused an opportunity of shelling at the price agreed upon. Plaintiff failed to comply with its contract, and on February 4th, by its agent, ordered defendant to return the sheller, which he did, and rescinded the sale, and demanded his notes. Defendant also pleads three counterclaims,—the first based upon the facts above stated; the second being a claim on the attachment bond for damages for the wrongful suing out of the attachment; and the third demanding that the third note be delivered up and canceled. Plaintiffs, replying, admit that the three notes constituted the consideration for the sheller, and deny all other allegations in the answer not expressly admitted. They deny all the allegations of the defendant's first counterclaim, and all the allegations of the second counterclaim, except as to the bringing suit by attachment, filing the bond, and the issuing and levy of the writ; and, as to the third counterclaim, they admit that they have possession of the third note, and deny all other allegations.

2. It is said that the amount of damages awarded by the jury is excessive. The jury

were instructed by the court that, if they found that the writ of attachment was wrongfully sued out, defendant would be entitled to recover nominal damages, such as one dollar or one cent, and in such case any actual damages which he had suffered by the wrongful suing out of the writ, which should be confined to the reasonable value of the time and money necessarily expended in procuring a bond for the release of the attached property. The court returned a verdict for \$70, though the actual damages shown were but \$12. After the coming in of the verdict, defendant filed a remitter of all of it, except \$12. The court, through oversight no doubt, failed to reduce the verdict, and rendered judgment for the full amount. While the court's attention was called, in the motion for a new trial, to the claim that the damages were excessive, and contrary to the instruction of the court, still it does not appear that the fact that a remitter had been filed was brought to the notice of the court. It seems certain, if it had been, there would have been no such error committed. We do not feel called upon to reverse the case upon a ground not called more particularly to the attention of the trial court. Code, § 8168.

3. It is urged that the verdict and findings of the jury are not sufficiently supported by the evidence. Plaintiff's contention, in this respect, is, in part, based upon the claim that the sale of the sheller, and the agreement to furnish corn to shell, were separate transactions, had with different firms, and that defendant's remedy for the failure of Harris & Anderson to furnish the corn to shell was to bring an action against them for the recovery of damages. It is insisted that the latter firm had no authority to order the sheller returned, and that the defendant could not rescind the contract. We cannot enter into a detailed discussion of the evidence, but a careful reading of it establishes the claim of the defendant. The contract was an entirety. It was made, as claimed, between plaintiffs, Harris & Anderson, and defendant. The sheller was the property of Anderson & Co., a firm composed of J. P. Ketcham & Bro. and Anderson, and, while this firm was in existence, the trade with defendant was consummated. At this time it was understood that the firm of Anderson & Co. would soon dissolve, and Anderson and one Harris would at once form a new firm, which they did. There is no question of Anderson's right to order the sheller returned. He was a member of the firm who sold it. Though that firm was dissolved, it still existed for the purpose of closing up its business. It might well be said that defendant could not rescind this contract, after using and keeping the machine as he did, were it not for the fact that one of the partners directed him to return the machine.

4. Complaint is made that the court erred in giving certain instructions, and that the instructions are conflicting, and that the jury were not sufficiently instructed as to all the issues in the case. The third instruction asked by defendant, and given, was erroneous; but in view of other instructions given and the findings of the jury, the plaintiff was not prejudiced. While it would have been better if the court had more fully instructed the jury touching the relation of the parties to the contract in so far as it provided for shelling the corn, and the effect of acts of the parties thereunder, still, in view of all the instructions given, we are satisfied that no prejudice resulted to the plaintiffs.

5. As the verdict and judgment were excessive to the extent of \$58, it is ordered that the judgment below be reduced to the sum of \$12, and, as thus modified, it be affirmed.

WAGNER v. HOLMES, Judge.

(Supreme Court of Iowa. May 18, 1893.)

INJUNCTION AGAINST SALE OF LIQUORS—VIOLATION—CONTEMPT.

On the hearing of an order to show cause why petitioner should not be punished for contempt, for violating an injunction from selling liquors on certain premises, a witness testified to drinking what he believed to be beer, there, after the injunction. An officer testified that on searching the premises, nearly a month after the injunction, he found two kegs of beer. Petitioner testified that after the injunction he sold the premises, and had no connection therewith until he repurchased the same, some time after the acts constituting the alleged violation; but his evidence tended to show an effort to evade the law, rather than a bona fide sale. *Held*, that the court was justified in finding petitioner guilty of contempt.

Proceeding by certiorari to review the action of the district court in and for Polk county, adjudging the plaintiff guilty of contempt.

H. G. Carpenter and J. F. Conrad, for plaintiff. Spurrier, Dowell & Parrish, for defendant.

GIVEN, J. On July 14, 1892, the plaintiff was, by decree of said district court, enjoined from using a certain building and premises for the selling and keeping for illegal sale intoxicating liquors, and from selling and keeping for illegal sale intoxicating liquors, in Polk county, Iowa. On October 1, 1892, this plaintiff appeared before said court, in obedience to a former order thereof, to show cause why he should not be punished for a contempt of court, for having violated said injunction. Upon full hearing he was adjudged guilty, and judgment entered as authorized in such cases. Plaintiff's claim is that the court proceeded illegally, for the reason that there was no evidence that he had kept or sold any intoxicating liquor after said injunction was

granted against him. Witness Kelly testified to drinking what he believed to be beer, in the place described, about seven weeks before the hearing for contempt. An officer testified that on making a search of said premises, August 8, 1892, he found two eight-gallon kegs of beer. There is no pretense that the beer drank by the witness, or contained in the two kegs, was other than intoxicating liquor; but the plaintiff claims and testifies that soon after the injunction was granted he sold the restaurant where these liquors were, and had no connection with it until September 12, 1892, when he repurchased it. His evidence as to the sale of the restaurant is not satisfactory. The transaction savors largely of an effort to evade the law, rather than a bona fide sale. It is unnecessary that we here discuss the evidence at length. It is sufficient to say that in view of what is shown concerning this alleged sale of the restaurant, and plaintiff's subsequent connection with it, the district court was fully warranted in finding him guilty of contempt. Counsel have discussed at length whether a liquor which plaintiff admits he sold was within the meaning of the statute. Having reached the conclusion just announced, it is unnecessary that we consider this question. The plaintiff's petition is dismissed, and the judgment of the district court affirmed.

FLETCHER v. KELLY et al.

(Supreme Court of Iowa. May 23, 1893.)

FIXTURES—MORTGAGES—PRIORITY—MECHANIC'S LIEN—ATTORNEY'S FEE—ALLOWANCE.

1. On the foreclosure of a mortgage of a leasehold it appeared that, when the mortgagor commenced the erection of the building thereon, he expected to obtain a conveyance of the premises, but only received a lease for 20 years, and then erected the building, as first planned. The lease required the lessee to maintain on the premises an hotel and eating house, to be operated in connection with the lessor's railroad station, and provided for a renewal of the lease on its termination, or a disposition of the building under certain circumstances, but in no event could the lessee remove the same without the lessor's consent. *Held*, that the building was not a mere fixture, but a part of the realty, so that the lien thereon of a mortgage on the leasehold, taken without notice, was superior to that of a prior chattel mortgage on the building only.

2. Where materials and labor are furnished for an addition to a building on which an incumbrance exists, the lien therefor is subordinate to the incumbrance.

3. Acts 18th Gen. Assem. c. 185, § 3, provides that before any allowance of attorney's fee shall be made the attorney shall make affidavit to certain facts, "which affidavit shall be filed with the original papers." *Held* that, where a proper affidavit was filed on the commencement of the case, and afterwards a substituted attorney filed a second or amended affidavit, an allowance of the fee is proper.

4. The holder of a mechanic's lien is not a "subsequent purchaser for a valuable consideration," within the meaning of Code, § 1941, providing that no instrument affecting real estate is valid, as against such purchaser, unless

recorded. Hence, in the absence of statutory provisions therefor, a mechanic's lien on a house is subordinate to that of a chattel mortgage thereon, though the mortgage was not recorded.

Appeal from district court, O'Brien county; Scott M. Ladd, Judge.

J. A. Stocum and J. L. E. Peck, for appellants Mary M. Kelly, Mary M. K. Judd, and Mary M. Kelly, executrix. Allen & Wilcox, for appellants Wheeler & Flint. Cliggett & Rule and J. L. Lee, for appellee, Fletcher.

KINNE, J. 1. The defendant Mary M. Kelly and Mary M. K. Judd is the same person. The pleadings and stipulations of the parties cover about 100 printed pages. We shall endeavor to state the facts touching the matters in controversy between the parties, in so far as they are material to the questions raised by these appeals: Prior to November 1, 1882, the defendant S. R. Kelly had been negotiating with the officers of the defendant the Chicago, Milwaukee & St Paul Railway Company for the purchase of them of a tract of ground lying at the side of, and adjacent to, the right of way of said company at Sanborn, Iowa. Pending these negotiations, Kelly had entered into possession of the premises, and begun the erection thereon of a large brick-veneered hotel building. When he went into possession, and began to improve the property, it was with the understanding had with officials of the railway company that the company would make him a deed to the land. After he had his material on the ground, and the building partly erected, he learned that the company would not give him a deed, but would lease it to him for a term of 20 years. He then entered into a contract with the railway company, leasing the ground for 20 years. The lease provided, among other things, that Kelly should pay one dollar per year as rent for the ground; that he should keep and operate a hotel and railway eating house upon the premises. Under certain circumstances the lease might be forfeited, in which case, as well as at the expiration of the term, the lessor was to take the buildings at an appraised value; or, if the term expired, and the lease was not renewed, and the company should not wish to take the buildings, then Kelly might remove the buildings within 60 days after receiving notice to do so. The lease was dated November 1, 1882, but was not recorded until May 16, 1883. May 9, 1883, Kelly borrowed of plaintiff \$2,500, giving his note therefor, due May 9, 1888, and drawing 8 per cent. interest, and secured by a mortgage in the form of real-estate mortgage on the land on which the buildings were situated. This mortgage was filed for record, and recorded as a real-estate mortgage, on May 16, 1883. The mortgage recited that the premises were free from incumbrance. June 1, 1888, plaintiff began his action to foreclose this mortgage, making all the par-

ties heretofore mentioned parties defendant, and claiming a first lien on said property. September 19, 1888, the railway company filed an answer setting up their lease with Kelly, and claiming that he had no right to mortgage the property. Plaintiff demurred to this answer, but the demurrer was withdrawn, and no further steps taken in the case, so far as the railway company was concerned. December 14, 1888, defendants Wheeler & Flint answered, denying generally, and claiming that on January 7, 1888, they contracted with Kelly to furnish him materials for an addition to said hotel building; that they furnished same, to the value of \$529.99, prior to May 26, 1888, according to contract, which were used in said building; that they filed a statement for a lien; and that an action was pending to enforce their lien,—and asking that their lien be decreed prior to plaintiff's mortgage. September 11, 1889, defendant Mary K. Judd, Mary M. Kelly, and Mary M. Kelly, executrix, (who will hereafter be referred to as Judd,) filed her answer, alleging that on March 21, 1883, she loaned to S. R. Kelly \$6,900, for which he executed his note due April 1, 1888, with interest at 8 per cent., and on the same day secured the same by a chattel mortgage on the hotel building before mentioned. This mortgage was filed for record July 20, 1883, and recorded as a chattel mortgage. She avers that plaintiff, at the time he took his mortgage, had actual and constructive notice of her mortgage. She claims priority, as to the buildings, over the lien of plaintiff's mortgage. September 11, 1889, judgment was rendered against the defendant S. R. Kelly, on default, in favor of plaintiff, on his claim, and a decree of foreclosure entered against him. Plaintiff replied to the pleading of Judd, denying knowledge or notice of her mortgage at the time he made his loan. May 10, 1890, Wheeler & Flint filed a cross petition setting out that they had secured a judgment on their lien claim, had sold the property, and bid in the same at the sale, and claimed the premises as against all the parties to this suit. Fletcher was not a party to the lien foreclosure. May 27, 1890, plaintiff filed a demurrer to the said cross petition of Wheeler & Flint, which was sustained. June 3, 1890, Judd filed an amendment to her answer, claiming that the property was personal, and that plaintiff's mortgage was no lien thereon, and that she had no notice of plaintiff's mortgage. A decree was entered in the case on June 19, 1891, wherein plaintiff's mortgage was decreed to be a first lien upon the property, including all the buildings, the defendant Judd's chattel mortgage a second lien on the buildings only, and Wheeler & Flint's mechanic's lien a third lien on the premises.

2. It is claimed that, at the time plaintiff loaned his money and took his mortgage, he had actual notice of the Judd mortgage. There is some testimony, which is not of a

satisfactory character, which tends to support the contention. But the great weight of the evidence, in our judgment, clearly shows that he made the loan, and took his security, in absolute ignorance of the Judd loan and mortgage. In view of the testimony of Cliggett, Lee, and Rule as to the admissions of S. R. Kelly, it seems certain that Kelly, in order to effect the loan of plaintiff, concealed from him the fact that a prior loan had been made, which was secured by a mortgage on the buildings. The circumstances surrounding the transaction all indicate that plaintiff would never have made the loan, had he known of the Judd mortgage. Prior to making the loan the plaintiff took steps to ascertain if there were any liens upon the property, and the proper records of the county disclosed none. We conclude that it satisfactorily appears that the plaintiff had no knowledge of the Judd mortgage until about a year after his loan was made, and security taken.

3. It is urged that when plaintiff took his mortgage he was bound to take notice of the terms and conditions of the lease from the railway company to Kelly. Counsel for Mrs. Judd seem to have overlooked the fact that plaintiff's mortgage was taken and filed for record before the lease was filed for record, and there is nothing to show that, prior to the recording of the lease, plaintiff had any knowledge of its existence. We do not deem this a matter that need be discussed, as, in our view of the case, the provisions of the lease show that it was the intention that the buildings should be treated as a part of the real estate. What constitutes a fixture, in a given case, is a question upon which the authorities are not agreed, and we shall not undertake the unprofitable task of attempting to reconcile or classify them. The trend of modern decisions is that, subject to the manner of annexation to the realty, and to the use and purposes of the realty, with which a thing in controversy is connected, its character, as a fixture or not, is to be determined by the intention of the party making the annexation. *Ewell, Fixt. 21; Tyler, Fixt. 114; 1 Jones, Mortg. § 429; Cobbey, Chat. Mortg. §§ 204, 205; Teaff v. Hewitt, 1 Ohio St. 530; Potter v. Cromwell, 40 N. Y. 296; McRea v. Bank, 66 N. Y. 489; Binkley v. Forkner, 117 Ind. 176, 19 N. E. Rep. 753; Mill Co. v. Hawley, 44 Iowa, 57.* It is said in the case last above cited that the intention is the controlling consideration in determining the whole question. This court has held that "fixtures are personal chattels annexed to the freehold, and which may be severed and removed by the party who has annexed them, against the will of the owner of the freehold." *Pickered v. Carson, 8 Iowa, 551.* Now it is clear that, by virtue of his lease, S. R. Kelly owned an estate in land, and on this land the buildings in controversy were situated. We have held that a home-

stead may exist in a leasehold interest in real estate. *Pelan v. De Bevard*, 13 Iowa, 53. And a sale of a leasehold under execution, having more than two years of an unexpired term, may be redeemed from. Code, § 3098. And under our law any conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used. Code, § 1930. *Frederick v. Callahan*, 40 Iowa, 313. That such a leasehold estate as that at bar constitutes an interest in lands is clear; and it follows that a conveyance of it by mortgage carries with it the buildings or improvements thereon, unless a contrary intent appears. In view of the principles of law above stated, was this property, including the buildings and improvements thereon, real estate, as between S. R. Kelly and the plaintiff, so as to make plaintiff's mortgage a first lien thereon? Let us examine the character of the annexation of this building to the realty on which it stood. The original building was a brick-veneered structure, three stories and an attic in height, with slate gables and iron shingle roof, and cost \$17,000. An attempt was made to excavate, and put the foundation in the ground, but the ground was so wet that it had to be abandoned, and the foundation was laid on the top of the ground, on large footing stone. In 1888 an addition was built to the hotel, of frame sheathed for brick veneering. It was part two, and part three, stories in height. There was a water pipe running from the company's waterworks to and under the building. Sewer pipes also ran under the building. There were three platforms on the south side of the building,—one 65x40, one 25x16, and one 8 feet square. There was an excavation under the building 8 feet wide and 40 feet long. There was a large cistern at the north end of the building. The land on which this building is erected adjoins the track and depot grounds of the Chicago, Milwaukee & St. Paul Railway Company at Sanborn, which it appears is a town situated at the end of a division on said line of road. The building was to be erected upon the company's grounds, to be used as an hotel and railroad eating house for the accommodation of the patrons of the railroad company. Trains stopped there for meals. Now, what was the intent of Kelly as to making these improvements fixtures? It appears that, without conflict, at the outset, he expected to obtain a deed from the railway company for the land, and, while having this understanding with the superintendent of the company, Kelly got his material upon the ground, and had the building in the course of erection, when he learned that they would not give him a deed for the land, but would give him a 20-year lease. It is certain, then, that the original intention of Kelly was to make these improvements a part of the realty. Was that in-

tention changed afterwards? It does not appear that his plan as to the building was in any respect changed by reason of his failure to obtain a deed. On the contrary, he proceeded with the erection of the building as originally planned, as he had before he knew he could not obtain a deed. But the lease itself clearly shows Kelly's intention. By its terms he was required to maintain upon the demised premises a good, substantial building, with all the customary out-houses, and other improvements and appurtenances, to be used and occupied as an hotel and eating house; and said buildings were to be so located as to be convenient for the purposes for which they were designed. They were to be kept in a clean and healthy condition. He bound himself, during the term of said lease, to carry on and conduct an eating house and hotel to the satisfaction of certain officers of the railway company. He was to keep the buildings and contents insured, and, if the hotel was damaged by fire, was to rebuild it. He was required to keep the buildings in good repair, and to pay all taxes on the property. If the lease was determined by lapse of time, and the company should refuse to renew it, they were to pay the appraised value for the improvements. If it was determined by forfeiture, they were to pay two-thirds of the appraised value. If, at the end of the term, Kelly refused to renew the lease, the company had the option of taking all the improvements at the appraised value, or of requiring Kelly to move them off within 60 days after notice. Under the terms of this lease, Kelly could not, in any event, remove any of the buildings, unless permitted to do so by the company. Under the definition given by this court in *Pickerell v. Carson*, *supra*, these buildings and improvements were not fixtures, because they could never be removed except at the will of the lessor. The obligation to erect and maintain these buildings was one, if not the main, consideration on the part of the railway company for the lease. The company were, by the provisions of the lease, providing for an eating house and hotel, which at that point was a necessary and valuable adjunct to their business as carriers of passengers. Had it been intended that the buildings should be considered as chattels, merely, it is reasonable to suppose that Kelly would have had incorporated in the lease apt language, which would have given him the right to remove them of his own accord. Under the circumstances disclosed in the evidence, the building, as to the character of its annexation to the land, is as permanent as if Kelly had the fee title to the land on which it stood. All the acts of the parties to the lease tend strongly to show that the improvements were intended to become a part of the realty. The character of their use in connection with the land, and their relation to the business of

the railway company, all support our conclusion. Every step taken by Kelly in connection with the execution of plaintiff's mortgage indicates that at that time he considered and treated the buildings as a part of the realty. His testimony touching the negotiations with plaintiff for the loan shows that the improvements were considered as the valuable part of his leasehold interest. This mortgage, then, must be held to cover Kelly's entire interest in the real estate, including all the improvements thereon. It follows that, plaintiff having taken his mortgage for value, and without notice of Mrs. Judd's mortgage, it is a prior lien on the property.

4. Defendants Wheeler & Flint filed a cross bill setting up certain matters by reason of which they claimed a lien on the building superior to plaintiff's mortgage. A demurrer of plaintiff's to this cross bill was sustained, and the record does not show that Wheeler & Flint stood upon this ruling, and hence we cannot consider questions arising thereon. In another part of their answer they claim that their mechanic's lien is superior to plaintiff's mortgage. The material for which the lien was claimed was furnished for an addition to the hotel in 1888, about five years after plaintiff's mortgage was executed and recorded, and six years after the original building was erected. Under our holding, this addition became a part of the real estate, and of the original building, and Wheeler & Flint are only entitled to a lien, as against plaintiff, for any balance that may remain after a sale of the property on plaintiff's claim, and the satisfaction of their debt, with interest and costs. *Bank v. Schloth*, 59 Iowa, 316, 13 N. W. Rep. 314; *Curtis v. Broadwell*, 66 Iowa, 662, 24 N. W. Rep. 285; *Miller v. Seal*, 71 Iowa, 392, 32 N. W. Rep. 391.

5. Defendants Wheeler & Flint and Judd complain of the action of the court in taxing an attorney's fee in favor of plaintiff's attorneys. They insist that the affidavit required by law to be filed as the basis for the allowance of the fee was not filed until over a year after the filing of the petition in the action, and hence no fee could be taxed. The record shows that an affidavit was filed by plaintiff's then attorney, Mr. Lee, when he filed the petition. Afterwards, Mr. Lee removed from the state, and the present counsel were employed. They filed another affidavit. Both affidavits were in the form prescribed by the statute. By chapter 185, § 3, Acts 18th Gen. Assem., it is provided: "Before any allowance of attorney's fee shall be made by the court the court shall be fully satisfied, by affidavit of the attorney engaged in the cause,—which affidavit shall be filed with the original papers,—that there has been, and is, no agreement, express or implied, between the attorney and any other person, except a practicing attorney engaged with him as attorney in the cause, for any division or sharing of the fee to be taxed; and no fee shall

be taxed except in favor of a regular attorney, and in compensation for services actually rendered in the cause." The filing of this affidavit was a condition precedent to the allowance of an attorney's fee. A proper affidavit having been filed with the petition, and the attorney who commenced the action having severed his connection with the cause, it was necessary that the attorneys who afterwards prosecuted the cause to its conclusion should file an affidavit. This last affidavit may be treated as an amendment to the former one, rendered necessary by the withdrawal of the original attorney in the cause. Such being the case, the fee was properly allowed.

6. Wheeler & Flint complain of the decree entered in this case in many particulars, which, if erroneous, can only affect the railway company, which has not appealed. These alleged errors are not available to Wheeler & Flint.

7. We are required to determine the question of priority of liens, as between the Judd mortgage and the Wheeler & Flint mechanic's lien. Wheeler & Flint had no actual notice of the Judd mortgage. Our statute provides that "no instrument affecting real estate is of any validity, against subsequent purchasers for a valuable consideration, without notice, unless recorded in the office of the recorder of the county in which the land lies, as hereinafter provided." Code, § 1941. Now, if we treat the Judd mortgage as an instrument affecting real estate, was it of any validity as against the mechanic's lien, it not having been indexed or recorded in the proper books pertaining to real-estate mortgages? It will be observed that the statute only protects subsequent purchasers for value, and without notice. We have said that the term "subsequent purchaser" means one who claims under some common grantor, under the same chain of title, (*Rankin v. Miller*, 43 Iowa, 11,) and have held that a judgment creditor is not a subsequent purchaser, within the meaning of this section, (*Norton v. Williams*, 9 Iowa, 528; *Bell v. Evans*, 10 Iowa, 353; *Seever v. Delashmutt*, 11 Iowa, 174; *Hays v. Thode*, 18 Iowa, 51; *Chapman v. Coats*, 26 Iowa, 288.) We think that a mechanic's lien holder does not come within the protection afforded by the statute. He is not a purchaser,—not more so than a judgment creditor,—and hence must, at his peril, take notice of all liens and incumbrances, whether recorded or not. His lien attaches to the real estate, subject to all outstanding equities, whether he had notice of them or not, except in so far as this rule may be modified by the mechanic's lien statutes. See *Miller v. Stoddard*, (Minn.) 52 N. W. Rep. 896. Kelly and Judd then having, as between themselves, elected to treat these buildings as chattels, and mortgaged them as such, Wheeler & Flint were bound to ascertain, at their peril, the facts touching the Judd mortgage, and act accordingly. It does not appear that, when

they purchased the property under their lien judgment, they had no knowledge of the Judd mortgage. If it did, the rule might be different. *Weaver v. Carpenter*, 42 Iowa, 343.

The decree of the court below is affirmed.

HEWITT v. MORGAN.

(Supreme Court of Iowa. May 23, 1893.)

EVIDENCE—ADMISSIONS—PROOF OF FOREIGN LAWS
—DEEDS—ACKNOWLEDGMENT—TAX TITLES—
ESTOPPEL OF FORMER OWNER.

1. In an action to quiet title under a tax deed, where the petition alleges that the deed was recorded in the county records, and the answer, as a basis for affirmative relief, alleges "that the said pretended tax deed, and the record thereof, * * * constitute a cloud" on his title, an objection that the "deed is not properly acknowledged, indexed, and recorded as required by statute," cannot be raised when the deed is offered in evidence.

2. Code, § 259, provides that a notary's seal shall have engraved on it the words "Notarial Seal," the name "Iowa," and the surname and at least the initials of the notary's Christian name. *Held* that, in the absence of proof to the contrary, it will be presumed that the requirements of another state in which an acknowledgment is taken are the same as those of Iowa.

3. Where a deed is insufficient for want of a proper acknowledgment, it is not reversible error to receive it in evidence, where the deed is pleaded in the complaint, and not denied in the answer, and defendant acquired the interest in the land which he claimed before the deed was executed, and was not affected by any want of notice of the deed, nor by any defect in its acknowledgment.

4. Where persons purchase land from one holding tax deeds therefor, regular on their face, in good faith, and without notice of any illegalities in the tax sales, and go into possession, the former owner of the land, who has discontinued paying the taxes and has remained quiet for more than 20 years, is estopped to assert his title in equity against them, where no excuse is offered for the delay. *Mathews v. Culbertson*, (Iowa,) 50 N. W. Rep. 201, followed.

Appeal from district court, Sioux county; George W. Wakefield, Judge.

Action in equity to quiet the title to 80 acres of land in Sioux county, claimed by plaintiff through a tax deed. There was a hearing on the merits, and a decree in favor of plaintiff. The defendant appeals.

Struble, Rishel & Hart and Pitts & Kessey, for appellant. Geo. W. Hewitt, for appellee.

ROBINSON, C. J. In the year 1859 a patent for the land in question was issued by the United States to the defendant, Morgan. On the 26th day of August, 1871, the treasurer of Sioux county executed and delivered to William H. Gurley a tax deed for the land, which purports to be based upon a sale for delinquent taxes of the years 1864, 1865, and 1866, held on the 3d day of August, 1868. Subsequently conveyances of the land were made as follows: By Gurley to Laura Chamberlain; by Laura Chamberlain to Gurley; by Gurley to John Koster; by John Koster to Jacob Koster; by Jacob Koster to

plaintiff; by plaintiff, of an undivided one-half of the land, to A. Van der Meide, and by him of an undivided one-half to plaintiff. The defendant alleges that the tax deed conveyed no title, and is void for various reasons set out in the answer. In a pleading styled a "cross bill" he avers that he is the owner of the land in question; that plaintiff claims some interest in it by virtue of the tax deed, and that Gurley makes some claim as the holder of a mortgage thereon, executed to him by J. Koster, based upon the tax deed, but that the tax deed is void for reasons stated in the answer. The defendant asks that the petition of plaintiff be dismissed; that the tax deed be declared null and void; that the record thereof be held for naught; that the mortgage be declared null and void; that plaintiff and Gurley be estopped to claim any right in the land adverse to defendant; and that the title thereto be established and confirmed in him. The plaintiff, in his reply to the answer, and answer to the cross bill, and Gurley, in his answer to the cross bill, plead various matters in support of their title. In addition to the conveyance described, both plaintiff and Gurley claim under a deed alleged to have been executed by defendant to one Marcus T. Sacia, and under a deed from him to Gurley, but the defendant pleaded, and the district court adjudged, that the pretended deed to Sacia was forged. As plaintiff does not appeal, he can claim nothing in this court under the deed to Sacia, but must rely upon the tax title. The other issues were found by the district court in favor of plaintiff, and a decree was rendered quieting his title, and dismissing the cross bill. Defendant served his notice of appeal only on plaintiff and the clerk. Gurley does not appeal, and is not a party to the proceedings in this court.

1. The appellant contends that appellee must fail because there is no evidence that the tax deed was ever recorded. When it was offered in evidence, defendant interposed to it nine objections, which cover nearly all of a printed page of the abstract. The eighth objection is stated as follows: "Because tax deed is not properly acknowledged, indexed, and recorded as required by statute." The appellant now insists that this objection was well founded. We find no competent evidence to show that the tax deed has been recorded, but we find that such evidence was not necessary. The petition alleges that the deed was "recorded in Record No. 1, at page 23, of Sioux county records." That statement is not denied in any pleading filed by defendant, and must therefore be taken as admitted. Moreover, in his answer the defendant, as a basis for affirmative relief, alleges "that the said pretended tax deed, and the record thereof, * * * constitute a cloud" upon his title. Among the numerous defects in plaintiff's title alleged by defendant in his answer

and cross bill, a failure to record the deed is not charged. No issue in regard to the recording of it was presented by the pleadings, and none could be raised by objection when the deed was offered in evidence. We are satisfied that a failure to record the deed was not urged as an objection in the district court, and it cannot be insisted upon for the first time in this court. The condition of the record requires us to presume that the deed was not only recorded, but that it was recorded properly.

2. It is next urged that the deed from Gurley to Laura Chamberlain is not so acknowledged that it can be received in evidence. The objection is founded upon the fact that the seal of the notary public who certified the acknowledgment in the state of Ohio is defective. On it are engraved only the words "Notarial Seal," the name of the county in which the certificate was made, and the letter "O" for the name of the state. The law of the state of Ohio in regard to such seals is not shown. In this state the seal of a notary public is required to have engraved on it the words "Notarial Seal," the name "Iowa," and the surname, and at least the initials of the Christian name, of the notary. Code, § 259, (1.) In the absence of proof to the contrary, it will be presumed that the requirements of another state in which an acknowledgment is taken are the same as those of this state. *Stephens v. Williams*, 46 Iowa, 540. If the admissibility of the deed in evidence depends upon the sufficiency of the seal, the deed must be rejected as not having been shown to be acknowledged as required by the laws of this state. But the rejection of the deed as evidence cannot affect the decision of the case for several reasons, which may be stated as follows: The petition alleges that Gurley conveyed the land to Laura Chamberlain, and that averment is not denied in the pleadings of defendant. If a conveyance to Laura Chamberlain is not shown, it does not appear that Gurley parted with his interest in the land until he conveyed it to John Koster. Gurley testified, without objection on the part of defendant, that he at one time owned the land, and sold it to John Koster. The deed in controversy was good between the parties to it without an acknowledgment. As defendant acquired the interest in the land which he claims before the deed was executed, he has not been affected by any want of notice of the deed, nor by any defect in its acknowledgment. We think the conveyance to plaintiff of the rights created by the tax deed is both admitted and proven. There was no real controversy in the district court in regard to it.

3. The appellant insists with much earnestness that the tax deed is absolutely void for reasons stated as follows: "(1) There was no tax sale in substance or in fact. (2) No taxes were levied in Sioux county for either

of the years in question. (3) Said sale purports to have been made on August 3, 1868, and before that date the treasurer, by an adjournment of more than two months, had been divested of any authority to proceed with such sale. (4) The tax-sale certificates upon which the tax deed in question was based had been settled for and canceled by Sioux county long before the execution of the tax deed." The sale in question was in all material respects like that considered in *Mathews v. Culbertson*, (Iowa,) 50 N. W. Rep. 201. The objections now made to the sale and to the tax deed were urged in that case, and the evidence to support them is substantially the same in both cases. The sale involved in this case was made for the delinquent taxes of the same years as the one questioned in that, and also for the delinquent taxes of 1864, but the same rules govern both sales and both deeds. The land in question was taxable in the year 1860 and subsequent years. Defendant did not pay them for any year after that of 1863. The land was sold for the delinquent taxes of the years 1864, 1865, and 1866. The plaintiff and his grantors paid the taxes for the year 1867, and for all subsequent years, to and including the year 1888. The plaintiff has possession of the land, and he and his grantors have had such possession since the year 1885. Prior to that time it had been unimproved and unoccupied. The defendant states that he has paid taxes on the land within less than 25 years, but is unable to state when he made the last payment. He says that prior to the year 1872 he sent money to the treasurer of Sioux county, but that no receipt for it was given. In that year one of his nephews visited Iowa, and by request of the defendant made an examination in regard to the land, and reported that it had been sold for taxes, and that the time in which redemption could have been made had expired. About the first of the year 1884 he spoke to another nephew in regard to the land, and in the spring of 1886 that nephew caused an action to be brought in a district court of this state which was transferred to the United States circuit court. Very little is shown in regard to that action excepting that plaintiff, Jacob Koster, Van der Meide, and Gurley were made parties defendant, and the questions raised by the pleadings were the same as those in issue in this action. The action was dismissed, apparently without a hearing, and without an adjudication on the merits. Nothing whatever which in any manner tends to excuse the delay of defendant in protecting and asserting his title is shown. The evidence does not justify us in concluding that he paid, or attempted to pay, taxes for any year since the year 1864. When he stopped paying taxes, the land was of but little value, and there does not appear to have been any demand for it. In its immediate vicinity there was an abun-

dance of land owned by the United States, and it may be that defendant discontinued the payment of taxes for that reason. At least that is the most probable one suggested by the record. The plaintiff acquired title with constructive notice of the condition of the Sioux county records and the facts which they disclosed, and had knowledge of the claims of defendant as made in the action which he instituted in the year 1886. It is not shown, however, that the Kosters had any knowledge of the claim of plaintiff when the conveyances to them were made, and plaintiff is entitled to the rights which they acquired as purchasers in good faith. It was said of the appellants in the Mathews Case that they had failed to make that showing of merit and diligence which is required to justify the interference of a court of equity in their behalf. The reasons upon which that conclusion is based are applicable to this case, and we must hold, not that the tax sale in question is valid, but that the negligence of defendant has been so great that he is not entitled to the assistance of a court of equity to ascertain whether his claim in regard to the sale and deed are well founded. The appellant contends that laches is available only as a defense, and that, if plaintiff wishes to rely upon it, he should have remained quietly in possession of the land until suit was brought to recover it, when he might have based his defense upon such laches. The answer to that is that the tax deed appears on its face to be regular, and to have conveyed a good title to the land. The plaintiff is in possession under the deed and is entitled to maintain and protect his possession as against adverse claims, which are not so grounded that a court will enforce them. The defendant makes adverse claims, but they can be enforced only by setting aside the tax deed. As he is not entitled to have that done, he has no claim which a court will recognize, and therefore the title of plaintiff should be quieted as against the claim he makes. We conclude that the decree of the district court is correct, and it is affirmed.

PITTS v. SEAVEY.

(Supreme Court of Iowa. May 19, 1893.)

QUIETING TITLE—EVIDENCE—PROOF OF TITLE—ACKNOWLEDGMENT—ESTOPPEL—PLEADING—TAX TITLES—RECOVERY.

1. In an action to quiet title, where it appears that the land was patented to one John F. in 1860; that one Margaret F., widow, and her daughter, Nellie, conveyed the land to plaintiff in 1886; that the husband of Margaret was named John, who died intestate in 1884, leaving, surviving, his widow and a daughter, Nellie; and that he had possession of papers relating to the land,—and where no evidence is offered to show that the patentee was not the same person who had been Margaret's husband, it is sufficiently established that Margaret was the widow of the patentee, and her daugh-

ter the only heir, and that plaintiff has title, within Code, § 897, providing that no person shall be permitted to question a tax title without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale.

2. A certified copy of a deed executed after the passage of the curative act is not admissible as evidence where the certificate of acknowledgment, purported to be made by a notary public, was not attested by a seal.

3. Where plaintiff claims, first, under his patent title, second, that defendant's tax title is void, and, third, that, if the tax title should be held good, he has acquired the interest through another deed, he does not thereby recognize the validity of the tax title, and is not estopped from questioning the validity of any of the subsequent conveyances thereunder.

4. Where a person purchases land from those holding the patent title, who, during the 26 years they held the title, did not concern themselves about it, and paid no taxes, he takes the title charged with all the defects thereto in the hands of his grantors, and their abandonment of the land cannot be cured by his subsequent activity in asserting his rights; but he is barred from recovery as against the purchaser from one holding tax deeds therefor regular on their face, and who in good faith, and without notice of an adverse claim or of any illegalities in the tax sales, goes into possession of the land. *Mathews v. Culbertson*, (Iowa,) 50 N. W. Rep. 201, followed.

Appeal from district court, Sioux county; George W. Wakefield, Judge.

Action to quiet title. Decree for plaintiff. Defendant appeals.

Geo. W. Hewitt, for appellant. Pitts & Kessey, for appellee.

KINNE, J. 1. Plaintiff's claim to the land in controversy is based upon two chains of title,—one by patent from the United States to John Fleming in 1860, and by deed from Fleming's widow and heirs in 1886. The other chain is through a series of mesne conveyances from one Alex. Johnson, who derived his title by virtue of a tax deed issued to him by the treasurer of Sioux county, Iowa, in pursuance of a sale had August 3, 1868, for the delinquent taxes due on the land for the years 1861 to 1866. One of these mesne owners of the tax title was Preston C. Hudson, who, by warranty deed dated March 18, 1876, conveyed an undivided one-half interest in the land to the defendant herein. November 14, 1882, the same Hudson quitclaimed his interest in the land to R. M. Wright, which deed was recorded eight days thereafter. Hudson also gave to Wright a warranty deed to the land of the same date as the quitclaim, but it was not recorded until December 11, 1885. Afterwards, Wright, by quitclaim deed dated September 23, 1886, and which was recorded two days thereafter, conveyed his interest in the land to the plaintiff herein. Defendant's warranty deed from Hudson was not filed until some two months after the filing of the deed from Wright to the plaintiff. Plaintiff claims that, at the time he received his deed from Wright, he had no notice or knowledge of defendant's equities in and to the land. Plaintiff, while expressly claiming the in-

validity of the tax title by virtue of which the defendant claims one half of the land, and by virtue of which plaintiff's grantor, Wright, conveyed all of it to plaintiff, still insists that his purchase from Wright gave him whatever interest Wright's grantor, Hudson, may have had in the land. So that the present situation of the parties is this: Plaintiff relies for title absolutely on his chain from the government through the Flemings, with a further claim that he acquired through the Wright purchase the interest of his grantor, Hudson, if he had any. Defendant claims only through his tax title through Johnson. The tax title of defendant is assailed as void because the land was not assessed for the years 1861 to 1866; that no taxes were levied for either of these years; that there were no officers in Sioux county charged with the duty of assessing property and levying taxes in said years; that the delinquent taxes were not carried forward; that no notice of the tax sale was given; that the pretended sale was invalid by reason of its having been adjourned for over two months; that there was no sale had on August 3, 1868; that the amount paid by the tax-sale purchaser was less than one-third of the amount of the sale; that the county paid a large sum of money to redeem the land from the sale, on the ground that it was erroneous. Still other reasons are given against the validity of the tax sale. Defendant contends that the fee-title owners have been guilty of such laches as should prevent their recovery; that defendant is an innocent purchaser for value, and without notice of fraud, if any, in the sale; that the plaintiff is barred by the statute of limitations; and that plaintiff has not shown title in himself. It is admitted that prior to May, 1887, the land in controversy was wild and unoccupied; that about that time plaintiff entered into the actual possession thereof, and has ever since retained such possession. The district court entered a decree for plaintiff, quieting his title to the land.

2. Section 807 of the Code provides that no person shall be permitted to question a tax title without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale. Defendant insists that such title has not been established by plaintiff. In 1860, one John Fleming entered the land in controversy. There was introduced in evidence a certified copy of the patent from the United States to John Fleming of the premises in suit. In 1886, one Margaret Fleming, a widow, and Nellie F. Vanderwyst and her husband, executed their deed of said land to plaintiff. It is said that the evidence does not sufficiently identify these parties as being the widow and all the heirs of John Fleming, the patentee of said land. The evidence shows that the name of the husband of Margaret Fleming was John Fleming; that

he died March 9, 1884, leaving no will; that said Nellie Vanderwyst was the daughter of John and Margaret Fleming, and their only heir; that the John Fleming who was in fact the husband of Margaret Fleming claimed, prior to his death, to be the John Fleming who was the patentee of the land in suit. There is also evidence showing that the Fleming who was the husband of Margaret had possession of certain papers relating to the land. No evidence was offered to show that the patentee, John Fleming, was not the same John Fleming who had been Margaret Fleming's husband. Under the circumstances, we think it was sufficiently established that Margaret Fleming was the widow of the patentee of the land, and that her daughter, Nellie, was the only heir of said deceased patentee. Plaintiff, then, must be held to have acquired all the interest that the widow and heir of the patentee had in the land at the time they deeded to him.

3. One of the conveyances in the defendant's chain of title was a deed from Byam Hudson. Defendant offered in evidence certified copy of said deed. Plaintiff objected to it because the certificate of acknowledgment purported to be made by notary public, and the same was not attested by any seal. Defendant's claim to the one-half interest in the land was bottomed solely on the Johnson tax title and various mesne conveyances to defendant. If defendant failed to thus show title in himself, he had no defense to plaintiff's action. Hence it becomes material to determine whether the certified copy of the Byam deed was competent to go in evidence without a seal of the notary who purported to have taken the acknowledgment. It was held in *Tunis v. Withrow*, 10 Iowa, 308, "that the official acts of a notary public should be authenticated by seal and signature, and that an affidavit is not proved to have been made unless the jurat is authenticated by both seal and signature." In *Rindskoff v. Malone*, 9 Iowa, 542, it was held a protest by a notary public which lacked a seal was not admissible in evidence. And it has been held a deposition will be suppressed when it is taken by a notary public, and there is no impression of his seal. *Stephens v. Williams*, 46 Iowa, 540. See *Neese v. Insurance Co.*, 55 Iowa, 604, 8 N. W. Rep. 450. If it is necessary that a notary's signature and certificate be authenticated by a seal in such cases, surely it is essential that his certificate of acknowledgment to a deed should be thus authenticated. Nor is this defect in the acknowledgment made good by the curative acts. The deed in question was executed after the passage of the curative act of the 13th general assembly, which related to acknowledgments defective for want of a seal, and the act of 1884 does not have reference to seals. We conclude, then, that the Byam deed was not admissible in evidence. It is said that plaintiff, by his pleadings and claim

of title, is estopped from questioning defendant's title, except as to the validity of the tax deed; that he cannot now be heard to complain that, if the tax title was good, the chain of title based thereon is not complete. We are satisfied that the defect in the acknowledgment of the Byam deed for want of a seal of the notary was not in contemplation of plaintiff when he drew his pleadings. In them he claimed—First, under his patent title through the Flemings; second, he claimed the tax title was void; third, he claimed, in effect, that, if the tax title should be held good, he was the owner of the land in controversy under it by virtue of his deed from Wright. In other words, while relying upon his patent title, he proposed, if that should fail him, and the tax title be held good, to avail himself of whatever rights he might have obtained by the Wright purchase. This, as it occurs to us, he had a right to do, and in so doing he did not recognize the validity of the tax title, nor necessarily the validity of the subsequent conveyances thereunder. He cannot set out the pleadings to show why we reach the conclusion that the plaintiff is not estopped by them or by his claim under them, as they are voluminous. We are satisfied, however, that plaintiff is not thus estopped from questioning the validity of any of the several conveyances in the tax-title chain. It does not appear to us, however, that the proof was sufficient, as to defendant's title, to entitle him to contest plaintiff's claim to the land. Defendant testified, without objection, that Hudson was the owner of the land. True, this evidence would not have been competent if objected to. Plaintiff had a right to insist upon proper evidence of the ownership of Hudson, who received the deed with the defective acknowledgment from Byam, but he did not do so. We have held that the holder of the patent title who testifies, without objection, that he is the owner of the land, makes a sufficient showing of title in himself to be permitted to question a tax deed under the provisions of the statute heretofore quoted. *Hintmager v. Klene*, 62 Iowa, 608, 15 N. W. Rep. 568, and 17 N. W. Rep. 910; *Brandriff v. Harrison County*, 50 Iowa, 169. There would seem to be no good reason why one holding under the tax title should not be placed upon the same footing. There was sufficient evidence, then, of defendant's title to a one-half interest in the land to entitle him to contest plaintiff's claim and title. Incidentally it may be said that Hudson, and those claiming under him, have redeemed the land from tax sales, and have paid the taxes thereon for about 15 years.

4. In the statement of this case we referred somewhat in detail to several of the grounds on which plaintiff bases the claim that the tax title under which defendant claims was void. We need not, in view of our disposition of the case, discuss the validity of the tax title. One of the grounds urged by the

defendant against the plaintiff's recovery is that the patent-title owners have been guilty of such laches as should estop them from recovering. If this claim is well founded, it disposes of the case. Aside from the taking possession and improvement of the land in controversy, the facts in this case are substantially like those in the case of *Mathews v. Culbertson*, (Iowa,) 50 N. W. Rep. 202. See, also, *Hewitt v. Morgan*, 55 N. W. Rep. 478, (decided at this term.) Plaintiff in the case at bar testifies that when he purchased the land he had no notice or knowledge that defendant made any claim thereto. It may be conceded that he personally had no such notice or knowledge. But the evidence shows, without conflict, that plaintiff was a member of the firm of Pitts & Kessey; that said firm was engaged in banking and real-estate business; that the title to land purchased by the firm was for convenience taken in the individual names of the members of the firm, sometimes in the name of Mr. Pitts, and at other times in the name of Mr. Kessey. It appears, also, that the correspondence touching the purchase of the land from Mrs. Fleming and her daughter was signed in the firm name, and some of the correspondence relating to the purchase of the Wright title was conducted in the firm name. The evidence tends to show that the purchase of this land was made by the firm of Pitts & Kessey, and the title taken in plaintiff's name for convenience. Mr. Kessey, the other member of the firm, did not testify in the case. It is nowhere shown that at and prior to the purchase of this land he was not fully acquainted with the claims of the defendant and his equities. Under these circumstances it cannot be said that the plaintiff has shown himself to be an innocent purchaser. July 4, 1860, John Fleming received a patent for this land, and, though he lived for 20 years thereafter, he appears to have paid little attention to the land. It was not until 1886 that plaintiff obtained his deed from Mrs. Fleming and her daughter, and in October, 1887, almost 20 years after the land was sold at tax sale, this action was commenced. It does not appear that the fee-title holders, either before or after John Fleming's death, and prior to plaintiff's purchase in 1886, ever concerned themselves about the land. The Flemings, during the 26 years they held the title, paid no taxes, so far as we can discover; certainly not for over 1 or 2 years. Mrs. Fleming testifies: "No one came to see me about the sale of this land at or prior to the sale [to Pitts] except Mr. Pitts." No excuse is made for this seeming abandonment of the land by the Flemings. If the tax deed was void, it was a fact as apparent from the records 15 or 18 years ago as now. For almost 20 years the public records of Sioux county had indicated that the land in question was held by a title adverse to the Flemings, and proper inquiry on their part would have disclosed the condition of the tax title, so far as the rec-

ords of the county were concerned. They were negligent in not asserting their rights. They left the burdens of the government to be discharged by others, and after almost 20 years had elapsed, and after those holding under the tax title had expended much money in the payment of taxes, the patent-title holders, through the agency of plaintiff, first assert a claim to the land as against the tax-title holders. It is said that plaintiff, since his purchase of the land, has been diligent in asserting his rights. That may be conceded, but the laches of his grantors furnish ample reason why plaintiff should not recover. He took the title charged with all the defects pertaining thereto in the hands of his grantors. Their neglect and abandonment of the land for almost 20 years cannot be cured by his subsequent activity for 1 or 2 years in asserting his rights. When the defendant purchased the land he had no knowledge that any one was asserting a claim to it. He was not cognizant of any fraud connected with the tax-sale proceedings, or in the execution of the deed based thereon. The tax deed to Gurley, through whom defendant's title comes, was regular on its face. There was nothing in connection with defendant's purchase which should have caused him to doubt his title. He had no knowledge of the claimed illegalities until after this suit was commenced. He procured an abstract of title before taking a deed for the land, which showed title in his grantor. He was advised by counsel that the title was good. Defendant was an innocent purchaser for value. We need not enter into a discussion of the law and its application to the acts of the fee-title holder. That is fully considered in *Mathews v. Culbertson*, supra. We hold that the holders of the patent title have been guilty of such laches that they should be held barred from recovering. They are not entitled to relief in a court of equity and conscience. The questions considered are decisive of the case, and the judgment below must be reversed.

PAYNE v. DICUS, (IOWA CENT. R. CO.,
Garnishee; GRIFFITH, Intervener.)

(Supreme Court of Iowa. May 22, 1893.)

ATTACHMENT—PRIORITIES—VENUE—APPEAL.

1. After testimony has been taken, objection thereto should be made by motion to strike it out.

2. Where no exception is taken to the failure of the court to rule on a motion to dismiss the case and strike out testimony, and it does not appear that the matters were called to the attention of the court afterwards, and before the decision of the case, it will be presumed that the motions were waived.

3. Defendant, residing in J. county, gave plaintiff two notes. One was payable in H. county, where plaintiff resided. The other note did not state the place of payment. Plaintiff commenced an action on the notes, aided by attachment, in H. county. *Held*, that under Code, § 2580, providing that, if defendant is a resi-

dent of the state, an action, aided by attachment, must be brought in the county of his residence, or that in which the contract was to be performed, and section 2580, providing that, if a suit be brought in the wrong county, "it may there be prosecuted to a determination, unless the defendant, before answer, demand a change of place of trial," as to the action on the note not stating the place of payment, defendant not having objected to the jurisdiction, a subsequent attaching creditor had no right to do so, and plaintiff's attachment created the superior lien.

Appeal from district court, Henry county;
E. L. Burton, Judge.

Jones & Fullen, for appellant. T. A. Bereman, for appellee.

KINNE, J. 1. Plaintiff, on June 30, 1889, filed a petition in the district court of Henry county, Iowa, against the defendant, claiming judgment therein on two notes,—one for \$600, and the other for \$250; both being then due and payable to plaintiff. The \$250 note was, by its express terms, made payable at the residence of plaintiff, which was in Henry county. No place of payment was stated in the \$600 note, but it is shown that, some time after its execution, defendant verbally agreed with plaintiff to pay it at plaintiff's residence, in Henry county. The notes were in separate counts, the petition prayed for an attachment, and on the same day a writ issued, on which, on July 1, 1889, the Iowa Central Railroad Company was garnished. Notice was served on the principal defendant. July 17, 1889, an original notice in the case was served on defendant, and on August 30, 1889, defendant entered a voluntary appearance in said cause. The next day the garnishee filed its answer, admitting an indebtedness to defendant of \$1,063.73, less its fees, and in January, 1890, paid said sum to the clerk of the district court of Henry county, in accordance with an order of court. September 20, 1889, judgment was rendered in plaintiff's favor for the full amount of his claim. July 3, 1889, the intervener filed his petition with the clerk of the district court of Jefferson county, Iowa, against defendant, praying for a writ of attachment, and claiming that defendant was indebted to him in the sum of \$4,332.96 for lumber taken from plaintiff's premises in Washington county, Iowa. On July 3, 1889, a writ of attachment issued in said case, directed to the sheriff of Washington county, which was served upon the Iowa Central Railroad Company, as garnishee, the same day. October 16, 1889, said garnishee filed its answer in said cause in Jefferson county district court, averring that, prior to the attachment of said company as garnishee in said cause, it had been attached as garnishee in the case of *Payne vs. Dicus*, pending in the district court of Henry county. August 27, 1889, Griffith filed his petition of intervention in the last above mentioned suit, pleading that defendant was, at the time of the commence-

nent of the suit of Payne vs. Dicus, a resident of Jefferson county; that, the \$600 note not being in terms payable at any particular place, plaintiff's action was improperly begun thereon, and to that extent his attachment was void; also claiming that the indebtedness from the garnishee was to a partnership of Dicus & Price, not to Dicus alone; that his suit in Jefferson county was against Dicus for an indebtedness owing Dicus & Price,—and praying that the firm money be appropriated to pay his debt as a firm debt. Plaintiff denied the partnership. The case of Griffith vs. Dicus is still pending in Jefferson district court. This cause was tried to the court, and a judgment entered for plaintiff, ordering the money paid to the clerk by the garnishee applied on plaintiff's judgment, and taxing the costs of the trial on the intervention to intervenor. Intervenor excepts and appeals.

2. One claim of intervenor is that the debt due from the railway company was not due Dicus individually, but to the firm of Dicus & Price; also that the claim upon which intervenor brings suit is a claim against said firm of Dicus & Price, of which George Dicus is a partner; and so he insists that his claim should be first satisfied out of the firm property, instead of the claim of plaintiff, which is a personal one against Dicus. Without discussing the evidence in detail, it appears to us that the partnership claimed has not been established. That there were some preliminary steps taken towards forming a partnership we have no doubt, but it appears never to have been fully consummated. It will be observed that the garnishee in its answer shows the indebtedness is due to the defendant Dicus; the contract was made in his name. In his petition of intervention Griffith makes no claim that it is Dicus & Price that owe him, but Dicus alone. While there is some evidence of acts which would tend to show a partnership, still a careful consideration of the entire record leads us to the conviction that no partnership existed.

3. Intervenor moved to dismiss plaintiff's proceedings because his action was not prosecuted by the real party in interest. Intervenor also objected to certain testimony. He also moved to strike out certain testimony. In case of each of said motions and objections the ruling was reserved. No exception was taken to the action of the court. In the cases where the testimony was objected to, the objection appears not to have been made until after the testimony had been taken. In such case the proper course would have been a motion to strike out the objectionable evidence. If no such motion was made, intervenor has no ground of complaint. As to the motion to dismiss case and strike out testimony, no exceptions having been taken to the failure of the court to rule thereon, and it not appearing that the matters were called to the attention of the court

afterwards, and before the decision of the case, and a ruling insisted upon, refused, and an exception taken, it will be presumed that the motions were waived. *Gable v. Hainer*, (Iowa,) 49 N. W. Rep. 1024; *Rosenthal v. Bilger*, (Iowa,) 53 N. W. Rep. 255.

4. This is a contest between plaintiff and intervenor, both being attaching creditors of defendant, as to priority of liens, as against the money owing by garnishee to defendant, and now in court. It is conceded that defendant was an actual resident of Jefferson county, Iowa, at the time the suits of plaintiff and intervenor were commenced. It is also conceded that as to the \$250 note, it being payable to plaintiff, a resident of Henry county, Iowa, the action was properly commenced by plaintiff in that county, and his attachment is a first lien on the fund to the extent of the amount due thereon. It is also agreed that the plaintiff's attachment was sued out, and the railroad company garnished thereon, prior to the time the intervenor's garnishment was served upon the company. The only remaining question is, should plaintiff's lien by garnishment, for far as the \$600 note is concerned, be held void, or postponed to intervenor's lien by reason of the fact that defendant was a resident of Jefferson county when plaintiff's suit was begun, and for the further reason that said note was not made payable in Henry county? In other words, will a creditor who holds two notes, one of which is payable to him at his residence, and one of which is not payable at any particular place, and who begins suit on both in one action in the county of his (the creditor's) residence, and obtains a lien by garnishment, have a superior claim or lien to another creditor, who obtains a lien by a garnishment subsequently served, but on a writ issued in a suit begun in the county where the principal defendant resided when both suits were commenced? The determination of this question involves a construction of sections 2580 and 2589 of the Code. That part of section 2580 material to this inquiry, and which relates to the bringing of suits aided by attachment, provides: "If such defendant is a resident of this state, such action must be brought in the county of his residence, or that in which the contract was to be performed." Section 2589 reads: "If a suit be brought in the wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demand a change of place of trial to the proper county." Intervenor contends that, the defendant being a resident of Jefferson county, the attachment in this case is void as to the \$600 note. We think, at most, it was only voidable. The opinion of the learned trial judge touching this question was as follows: "In the first place, the action was properly brought in Henry county, as one of the notes was payable in that county; hence, under the strict construc-

tion of section 2580 of the Code, this action was properly aided by attachment, and the writ was not void, but was a valid writ, and was legally served upon the garnishee herein. Now, the writ being valid, and not void, it seems to me that no one but the defendant could take advantage of the fact that the action was also brought upon the \$600, as well as the \$250, note. The defendant has made no motion to have any part of the action transferred to Jefferson county, but upon personal service he has permitted judgment to be rendered against him upon the two notes sued upon. He has made no motion to have any portion of the money secured by said attachment released from the levy. He has not attacked the writ or its service in any manner. The intervener cites the case of *Wasson v. Millsap*, 70 Iowa, 348, 30 N. W. Rep. 612. But that case is not like the one at bar. The defendant in that case appeared and satisfied the court that he was sued in the wrong county, and moved the court to transfer the case to the county of his residence. This motion was sustained, and the cause sent to Jasper county for trial. In the last-named court the defendant moved to dissolve the writ on the ground that it was issued without jurisdiction, and the supreme court say this motion should have been sustained. It is true the writer of the opinion uses the word "invalid," but he evidently uses it in the sense of "voidable." To illustrate, the district court of Polk county, where the action was brought, had jurisdiction over the subject-matter of the suit, and over the defendant. The clerk of the court had the legal power to issue a writ of attachment in that case, as well as in any other case, for aught that appeared upon the petition itself. The district court of Polk county was a court of general jurisdiction, and had the power to hear, try, and determine that case, unless the defendant moved to transfer it to the proper county. The court, unless the transfer was made, had the power not only to try the cause upon its merits, but it had the power to make all proper orders relating to the attachment, and the attachment could not be attacked collaterally upon the ground that the writ was void. The writ was not void, but was voidable only, upon the motion of the defendant. It seems to me that section 2589 of the Code can have no other construction. It says: "If a suit be brought in the wrong county, it may there be prosecuted to a termination, unless the defendant, before answering, demand a change of place of trial to the proper county." Now, in the suit at bar, the court had jurisdiction over the subject-matter and over the person. The clerk had the right to issue the writ of attachment, and the sheriff to serve it. The entire suit was before the court, without objection by the defendant; hence, under the statute, it may be prosecuted to a termination. I am of the opinion that, the defendant

not having made any objection to the form in which this suit is brought, the intervener has no right to do so, and the attachment, to the extent of the judgment, must be regarded as valid. Referring to the case of *Haller v. Parrott*, 82 Iowa, 42, 47 N. W. Rep. 996, after stating the facts, and quoting from the opinion of this court, he says: "It seems to me the better way is to hold that the writ is voidable only, and not absolutely void. If the defendant does not see fit to ask that the writ be quashed, no one else ought to have the right. But the case of *Haller v. Parrott*, like the case of *Wasson v. Millsap*, is not in point. In the case at bar the action was brought in the proper county; the writ was valid; the action as to the \$600 note was not transferred to any other county. The district court of Henry county had jurisdiction to render judgment upon each note, no objections having been made." We approve the views expressed by the trial judge, and they are so clear and persuasive as to need no further elaboration. It will be noticed that section 2589 of the Code, which provides for a change of place of trial when suits are brought in the wrong county, does not by its terms exclude cases of suits begun by attachment. The language used is general, and there appears to be no reason why it should not be held applicable to the case at bar. The result reached here is not in conflict with the holding in *Orcutt v. Hanson*, 71 Iowa, 514, 32 N. W. Rep. 482.

The judgment below is affirmed.

HORNE et al. v. PUDIL.

(Supreme Court of Iowa. May 24, 1893.)

LIABILITY OF JUSTICES—ACTION FOR DAMAGES.

A petition stated that on presentation of an appeal bond by plaintiff to defendant, a justice of the peace, defendant approved same, and agreed to send up proper transcript, expressly waiving any right to payment of fees in advance; that in making up the docket defendant omitted any mention of the appeal, wrote plaintiff he must pay, or the transcript would not be sent, and afterwards entered in the docket that plaintiff was to pay before the appeal was taken, and, not having done so, the appeal was not taken; which entry, it was alleged, was false, and made with intent to injure plaintiff, and prevent his appeal. *Held*, in an action for damages on account of such acts, to show not merely a mistake in judgment, but that the acts were malicious and corrupt; and a demurrer, therefore, should have been overruled.

Appeal from district court, Johnson county; S. H. Fairall, Judge.

This is an action at law to recover damages for certain alleged wrongful, corrupt, and malicious acts of the defendant, done while he was acting as justice of the peace, by reason of which acts the plaintiffs were prevented from taking an appeal to the district court from a judgment rendered by the defendant against the plaintiffs and in

favor of one Nesmith. There was a demurrer to the petition, which was sustained, and judgment was rendered against plaintiffs for costs, from which judgment they appeal.

Rickel & Crocker, for appellants. Ranck & Wade, for appellee.

ROTHROCK, J. It appears from the averments of the petition that the defendant is a justice of the peace in Johnson county. In July, 1890, one Nesmith commenced an action before the defendant to recover of the plaintiffs for one month's work and labor performed for them. The plaintiffs herein filed an answer and counterclaim, by which they claimed damages of Nesmith, because he had agreed to work and labor for five months, and quit the employ of plaintiffs without cause, to their damage. The cause was tried before the defendant herein on its merits on the 5th day of July, 1890, and the defendant, as justice of the peace, rendered a judgment against the plaintiffs herein for \$14, and the costs of the action. The plaintiffs herein gave notice of appeal, and immediately prepared an appeal bond in due form, and presented the same to the defendant for filing and approval, and the same was filed and approved by the defendant as justice of the peace. At the same time said bond was filed and approved the said defendant, Pudil, expressly agreed and promised that he would send to the clerk of the district court the proper transcript, and expressly waived his right to demand his fees for a transcript in advance. In making up his docket the defendant maliciously and corruptly omitted to note therein the fact that an appeal bond had been filed and approved, and notice of appeal given and allowed. On the 15th day of July, 1890, the defendant wrote a letter to the plaintiffs, in which he stated that he would allow the appeal, but that they must pay him \$1 in advance, and that he would not send up the papers before payment, and that the cost was 50 cents for the transcript and 50 cents for approving the bond. Afterwards the defendant orally notified the plaintiffs that he would not allow the appeal, nor send up the transcript, unless said sum was paid him in advance. Afterwards, and on the 25th day of July, 1890, the defendant made the following entry in his docket: "And defendants filed bond, the appeal was allowed, and the defendants to pay for the transcript and bond before the appeal was taken, but the defendants refused to pay for the transcript and bond, and the appeal was not taken." It is averred in the petition that this was false, and that it was corruptly made with intent to injure the plaintiffs, and prevent an appeal. On the 25th day of September, 1890, the defendant issued an execution on said

judgment, and the same was levied on plaintiffs' property, which was sold to pay the judgment and costs, and that defendant still fails and neglects to prepare a transcript and file it with the clerk of the district court, and allow an appeal. It is also averred that the plaintiffs had a good defense to the action in which said appeal was taken by them. It is stated in the petition that all of the acts and doings of the defendant as a justice of the peace after the taking of the appeal bond were done wrongfully, willfully, and corruptly, by reason of which plaintiffs have been damaged in the sum of \$200, for which they ask judgment. The demurrer is to the effect that the petition does not state a cause of action. The specific grounds of the demurrer have reference to the right of the justice of the peace to demand his fees in advance for the approval of the bond and the making of the transcript. And counsel for the respective parties have argued these questions at considerable length. We do not think it necessary to determine them. The question of waiver of the right to advance payment is also presented, and we think it must be held that, conceding the averments of the petition to be true, there was an express waiver of the right to demand the fees in advance. We know of no reason why the plaintiffs had not the right to stand on the waiver. It is averred in the petition in the most explicit terms. When the defendant received the bond, and accepted it as sufficient, he should then have demanded his fee for approving it. Instead of doing so, he received the bond, and expressly waived payment in advance for the transcript, by promising to prepare and forward the transcript to the clerk of the court. It is not necessary to examine and determine the question whether the plaintiffs should have made a tender of any part of the fees. No tender was necessary, as there was a waiver of payment in advance. Our conclusion is that it was the right of the plaintiffs under this petition to show that the acts of the defendant were wrongful, malicious, and corrupt, and not merely the result of the mistaken judgment of a judicial officer, and that there was a good defense to the action of Nesmith, which could have been maintained upon appeal. The judgment of the district court is reversed.

VAN HOESSEN v. TEACHOUT et al.

(Supreme Court of Iowa. May 23, 1893.)

FRAUDULENT CONVEYANCES—GIFT TO WIFE.

Plaintiff's husband, after consulting with defendant with reference to investing in a company with which defendant was connected, made an agreement for stock therein to the amount of \$1,500. Thereafter, to enable the husband to make a further purchase, defendant indorsed his note for \$3,500, the money from which, with the \$1,500, entitled him to 100 shares, which he agreed to deposit with de-

defendant to secure him for his indorsement. At the husband's request only 1 share was issued in his name and 99 in his wife's name. The stock was then handed to defendant in an envelope. The husband afterwards obtained it, on an agreement that he would bring it back, or the proceeds of a trade which he proposed to make with it. He obtained in exchange certain land, which was deeded to plaintiff, and \$3,500 in notes. He returned the envelope to defendant, who supposed that it contained the shares or their proceeds. He afterwards again obtained the envelope on a like promise, but never returned it. He had no property except the stock and the proceeds thereof. There was nothing to show that the \$1,500 was furnished by plaintiff. Held that, defendant having been obliged to pay the \$3,500, plaintiff could not hold the land against him.

Appeal from district court, Polk county; C. P. Holmes, Judge.

Action in equity to restrain the sale on an execution issued against P. E. Van Hoesen of certain real estate alleged to belong to plaintiff. Decree and judgment for defendants. Plaintiff appeals.

Earle & Prouty and Mitchell & Dudley, for appellant. Read & Read and Kauffman & Guernsey, for appellees.

KINNE, J. 1. The facts touching this controversy are as follows: In 1883 defendant Teachout was interested in the Des Moines Ice Company. P. E. Van Hoesen, the husband of plaintiff, had been consulting with Teachout with reference to investing \$1,500. On Teachout's recommendation, P. E. Van Hoesen agreed to take stock in the ice company to the amount of \$1,500. He paid this money in, as it was needed for use in the business. The stock was not issued until March 25, 1885. Meantime P. E. Van Hoesen expressed a desire to own a one-third interest in the company, and induced Teachout to indorse his note for \$3,500, to enable him to purchase the additional stock. P. E. Van Hoesen received the \$3,500, which, with the money he had already paid in, entitled him to 100 shares of stock in the company. It was agreed that Teachout should take and hold the Van Hoesen stock as collateral to protect him as against his indorsement of the \$3,500 note with Van Hoesen. The stock was not issued for about a year after the money on the \$3,500 note was obtained. Van Hoesen was entitled to 100 shares of stock. When the stock was issued, P. E. Van Hoesen wanted 1 share issued in his own name and 99 shares issued in his wife's, the plaintiff, for special reasons not disclosed by him. It was so issued. Teachout supposed that he was to receive the entire 100 shares as collateral as aforesaid, and testifies that such was the arrangement. The stock was handed to him in an envelope. He retained the envelope, with its inclosures, until August, 1885. Van Hoesen sold his interest in the ice company in 1885 to Jones & Towne, at which time Van Hoesen called upon Teachout for the stock. The latter handed him the envelope un-

opened, under an agreement that Van Hoesen would bring back to Teachout the collaterals or the proceeds of the trade, that he might still hold them as a protection against liability for his indorsement aforesaid. It is not disputed that Teachout would not have turned over the collaterals to Van Hoesen in the absence of the agreement to return them or their proceeds, or to give him a lien on property received from them. Van Hoesen, after completing his trade with Jones & Towne, returned to Teachout the envelope, with inclosures, which the latter put away without examining, believing that it contained either the same securities or their proceeds, according to agreement. Afterwards Van Hoesen called for the envelope, stating that he had a trade on hand with one Wishard, and promised he would return the collaterals or their proceeds to Teachout. Relying on his promise, Teachout gave him the envelope with its inclosures. Van Hoesen thus obtained possession of the collaterals, and never returned them or their proceeds to Teachout. It seems that Van Hoesen sold to Jones & Towne the entire 100 shares of stock, which was paid for by the conveyance to plaintiff of the real estate in controversy in this suit. Jones & Towne also executed their seven notes for \$500 each to P. E. Van Hoesen. It is by virtue of the title obtained in this trade by a conveyance made to plaintiff that she claims the real estate in question as her property, free from the indebtedness of Teachout. Teachout was compelled to and did pay the \$3,500 note, with interest. He then brought suit against P. E. Van Hoesen, obtained a judgment, and caused an execution to issue, which was levied upon the real estate conveyed by Jones & Towne to plaintiff in consideration of the 100 shares of stock. Plaintiff then brought this action to enjoin the sale of the real estate levied upon. The court below found that the real estate was in fact the property of P. E. Van Hoesen; that plaintiff was entitled to no relief, and dismissed her bill. It appears that P. E. Van Hoesen had no other property than the money he put into this stock.

2. The only question we are called upon to determine is: Was the real estate levied upon, and the title to which was in plaintiff, in fact the property of P. E. Van Hoesen, and hence subject to the execution of Teachout? It is not our custom to enter into an extended discussion of the evidence in equity cases. We can only state in a general way our conclusions, and the reasons on which they rest. It may be conceded that the plaintiff by introducing her deeds in evidence established a prima facie case. To our minds, there is nothing to show that the funds put into the ice company's stock by P. E. Van Hoesen were ever the property of plaintiff. Clearly the \$3,500 which was borrowed by the husband on the

strength of Teachout's indorsement was not hers. Nothing appears in this record which would justify appellant's contention that the money paid in by P. E. Van Hoesen, outside of the \$3,500, belonged to plaintiff. It clearly appears that the husband treated it as his own, and that no claim thereto was ever made to it by plaintiff until she instituted this suit claiming the property which was the proceeds of stock purchased with all the money. We do not consider the fact that nearly all the stock was issued in plaintiff's name as of controlling importance. Under the circumstances surrounding the issuance of the stock, it cannot be said that the mere fact that it was issued in plaintiff's name showed that she had ever furnished any of the money that was paid for the stock. It does not appear that plaintiff was the party negotiated with in making the trade with Jones & Towne. It appears also that P. E. Van Hoesen and Jones & Towne entered into a written contract touching the deal which resulted in the purchase of the Van Hoesen stock. We think it sufficiently appears that P. E. Van Hoesen had no property other than this stock, and the property obtained for it by plaintiff. It is said that Teachout ought not to recover, as he surrendered collateral which was ample to indemnify him for his liability as indorser. We think he never surrendered it, but it was obtained from him by reason of the representations of P. E. Van Hoesen that he would return it or its proceeds, which he never did. It was claimed that Teachout was entitled to hold only 64 shares of the stock as security in any event. True there was a paper signed by plaintiff pledging 64 shares to Teachout, to secure him as indorser; but it appears that Teachout did not know of the existence of that paper. He had never examined the contents of the envelope which he supposed contained the collaterals, and, in view of his testimony that the arrangement was that he was to have the entire 100 shares as collateral, we conclude that such was the agreement. Neither plaintiff nor her husband testified. We may fairly presume that what Teachout says about it is true, else they would have testified to the contrary. Now, it occurs to us it would be most inequitable and unjust to hold that because plaintiff's husband practiced a fraud on Teachout, whereby he secured the collaterals, and then traded them to Jones & Towne in part for the land in controversy, plaintiff should hold the same free from the claims of Teachout. Plaintiff never parted with anything of value as a consideration for the stock, or any of it, so far as appears from the record. For some reason, known only to her husband and herself, the stock was issued in her name. It was bought with the husband's money, and there is no reason why it or the property purchased with it should not be charged with the indebtedness due to

Teachout from the husband. We have not deemed it necessary to discuss the legal propositions stated by counsel. The controversy depends largely upon the facts, and we think they are against plaintiff. The judgment of the district court is affirmed.

THATCHER v. STICKNEY et al.

(Supreme Court of Iowa. May 23, 1893.)

TRANSFER FROM LAW TO EQUITY DOCKET—OPENING CASE FOR RECEPTION OF ADDITIONAL EVIDENCE—APPEAL.

1. Plaintiff, in a single count, alleged that defendant contracted to assign to him certain stock; that defendant failed to pay certain assessments on said stock; and that the corporation refused to transfer it on its books, to plaintiff's damage. The answer admitted the allegations of the petition, and alleged that the contract was for the assignment of stock on which a certain per cent. had been paid, and prayed for the reformation of the contract. Plaintiff thereupon filed an amendment averring false representations by defendant as to the value of the stock. *Held* that, the parties having mingled legal and equitable issues, it was not error to transfer the cause to the equity docket.

2. Under Code, § 2799, authorizing the court at any time before a cause is finally submitted to permit the introduction of further testimony to correct an evident mistake, where there is an affidavit showing newly-discovered evidence and diligence, there will be no interference on appeal with the court's exercise of discretion in permitting further evidence, though the record shows an entry, "Cause submitted."

3. An abstract must show that it contains all the evidence, a certificate of the judge and reporter as to the contents of the transcript being insufficient.

Appeal from district court, Benton county; L. G. Kinne, Judge.

The plaintiff sold to the defendant firm certain lands, and as a part consideration therefor the firm agreed "to make a good and sufficient transfer and assignment of one hundred and twenty shares in the capital stock of the Iowa Falls Mineral Springs Improvement Company," valued by the parties at \$1,200. The certificate of stock held by Stickney Bros. shows the shares to be of \$10 each, "on which 55 per cent. has been paid." The contract of sale was made on the 23d day of April, 1887, and on the 2d day of July, 1887, the defendant assigned the certificate for the one hundred and twenty shares of stock to the plaintiff by an indorsement thereon, but no entry has been made on the books of the corporation, which is essential to a valid transfer of the stock. The plaintiff alleges that there are certain assessments on said stock which the defendant company neglects and refuses to pay, in consequence of which the corporation will not make the transfer upon its books, and without such transfer the stock is valueless to him, because of which plaintiff asks judgment for the amount of stock, with interest. The answer admits the allegations of the petition, except such as charge fraud and misrepresentation by the defendant, or pertain to its obligation to

pay further assessments on the stock, and charges that it was agreed that it should assign to plaintiff 120 shares of said stock, "on which 55 per cent. has been paid," and that such part of the contract was omitted from the writing by mistake, and asks by way of affirmative relief that the contract be reformed to conform to such agreement. The plaintiff filed a reply in denial, and the cause was, on motion of defendant, set down for trial as an equitable action; and upon final submission the court found the issues with the defendant firm, and gave it judgment for costs. The plaintiff appealed.

W. C. Connell, for appellant. J. D. Nichols and C. Nichols, for appellees.

GRANGER, J. 1. The questions we are to determine are presented by an assignment of errors. The first is that the court erred in setting down the cause for trial as an equitable proceeding. The assignment leads us to consider the state of the pleadings in the case. The original petition is in paragraphs numbered from "1st" to "6th." It contains but a single count, and is for damages because of the failure to pay the assessments, resulting in a refusal by the corporation to make the transfer on the books. The answer, because of its admissions, makes the issue one upon its allegations for affirmative relief in the reformation of the contract, and the denial by the plaintiff. With the issue thus presented, if the contract should be reformed, it would show that the plaintiff should pay the assessments, and he would have no cause of action. If not so reformed, the admissions by defendant would show its liability, and the result would be determined in either case without further proceedings. The issue as to reformation is purely an equitable one. *Carey v. Gunnison*, 65 Iowa, 702, 22 N. W. Rep. 934. With this condition of the pleadings there could be no issue for a jury. But the plaintiff files an amendment to the petition, averring false and fraudulent representations by defendant as to the value of the stock. The amendment is not a separate count, but is numbered "1st." To the petition thus amended there is filed an "amended and substituted answer" in paragraphs 1 to 13, in which are admissions, denials, and matters for affirmative relief, as in the former answer, with a like prayer. It is because of the transfer of the issue thus made to the equity docket for trial that complaint is made. The petition should have been made in two counts; one for a breach of the contract to assign the stock, and the other for fraud. So pleaded, the answer must necessarily have been in two divisions, and the legal and equitable issues have been entirely separate, and susceptible to assignment for trial in the proper forum. Without objection by either party the issues

have been mingled, and trial had thereon. The objection to the transfer was not as to the issue of fraud, but as to the whole action. It was not error to transfer it. It was the defendant's right to have the equitable issues so tried. In *Van Orman v. Merrill*, 27 Iowa, 476, it is held that, where the answer in an action at law sets up defenses, some of which are legal and some equitable, and the case is tried without any steps being taken by either party to separate the issues thus made, and have them tried separately, it will, on appeal, be considered one case only, and will be regarded as an equity case. It seems to us that such a rule should obtain in this case. The parties have treated this as but a single cause of action, without even intimating, in the court below, so far as we discover, that but a single trial was desired.

2. On the 2d of April, 1891, the record shows an entry, "Cause submitted." On the 4th of April defendant filed a motion and affidavit to set aside the submission and permit additional evidence to be offered. The affidavit is a showing of newly-discovered evidence and of diligence, and the court, against plaintiff's objection, granted the motion, of which complaint is now made. It is urged that there had been a final submission of the cause, and that the court had no authority to grant the motion, relying upon Code, § 2799. That section was construed in *Sickles v. Bank*, 81 Iowa, 408, 46 N. W. Rep. 1069, and is authority for the action of the court. It is said that the showing is not based on an evident oversight or mistake as contemplated by the section, but upon newly-discovered evidence. We think the showing, taken altogether, was such that the district court might have found that there was an oversight or mistake, and with its discretion in such a matter we should not interfere.

3. The third assignment involves the merits of the case on the evidence, and the abstract contains no showing that it is one of all the evidence. It has the certificates of the judge and reporter as to the contents of the transcript. The transcript is not the abstract. Before we can determine the case upon the evidence, we must have an abstract, showing that it is one of all the evidence. The judgment is affirmed.

KINNE, J., took no part in this case.

STATE v. CHAPMAN.

(Supreme Court of Iowa. May 18, 1893.)

ASSAULT WITH INTENT TO RAPE—EVIDENCE—CORROBORATION.

1. Testimony that defendant and prosecutrix were seen walking together along a railroad track is not sufficient corroboration in prosecution for assault to commit rape.

2. Prosecutrix testified that she was walking along a railroad track with defendant to

her home; that, when about halfway, at his solicitation they cut across the fields; that he then made improper proposals to her; that she walked away; that on his calling to her to come back, that he had something to say to her, she finally came; that he renewed his proposals, which she rejected, and finally, in a bantering way, gave him to understand that he was not strong enough; that he then seized her, and had improper relations with her against her wishes, she at the time endeavoring to free herself. It appeared that he had made such proposals to her before. She did not make known the occurrence until her delicate condition made it necessary. *Held*, that the evidence would not support a conviction of assault with intent to rape.

Appeal from district court, Black Hawk county; John J. Ney, Judge.

Indictment for rape. Verdict for an assault with intent to commit a rape. The defendant appealed.

Hemenway & Grundy, for appellant. John Y. Stone, Atty. Gen., and Thos. A. Cheshire, for the State.

GRANGER, J. The prosecuting witness is one Bina Mork, who was at the time of the alleged offense about 19 years of age. The following statement of facts, as disclosed by her testimony, we take from the argument of appellee: "It appears therefrom that Bina Mork, a girl nineteen years old, who had known the defendant about three years, was going with him on foot from Cedar Falls to her home, about six miles distant. That the two walked on the Illinois Central Railway track a portion of the way home. About three miles from Cedar Falls, at the solicitation of the defendant, they 'cut across the fields,' that they might reach home by a shorter and quicker route. She consented to go by the nearer route without much dissent, and after they had started across the fields, and on coming to low ground covered with short grass, the defendant made improper proposals to her. The testimony shows that she first walked away, and that he asked her to come back, and to stop,—that he wanted to speak to her. She at first refused, saying that she wanted to go home. He called her again, and, after some parleying, she came back to where he was standing. He then renewed his proposals, which she rejected, and finally, in a bantering way, gave him to understand that he was not strong enough. The testimony shows that he seized her, there was a struggle, and he threw her down, and against her wishes and desires had improper relations with her; she at the time endeavoring to free herself from his grasp and make her escape." The only corroboration relied upon, as stated by the district court in its instructions, is that of two witnesses who testified that they saw defendant and the prosecuting witness together on the track of the Illinois Central Railway at the time

of which she testified. They saw nothing more. They did not see them leave the track, nor give a word of testimony corroborating the complainant, except that defendant was with her on the track. There is nothing in such testimony tending to connect him with the offense. Nothing in their testimony shows the parties out of the sight of others, so that there was really an opportunity to commit such an offense. This court has said that it is not enough, as corroboration, to show an opportunity in seduction cases, and surely no less will suffice in a case of this kind. *State v. Painter*, 50 Iowa, 317; *State v. Aranh*, 55 Iowa, 258, 7 N. W. Rep. 601. For the crime of which defendant stands convicted—an assault with intent to commit a rape—corroboration is not essential, if the testimony of the prosecutrix is otherwise sufficient. It may be conceded that there was sexual intercourse between the prosecuting witness and the defendant at the time of the alleged offense. The statement above quoted, which is that of appellee, is a comparatively strong showing that there was no assault with intent to commit a rape. The statement might be made much broader from her testimony on the trial. The statement shows that, without any suggestion of or attempt at force on his part, but in response to his "proposals" for intercourse, which she declined, she, "in a bantering way, gave him to understand that he was not strong enough" to have intercourse with her, and that what he did was in pursuance of her bantering statement. This was not the first time he had made such proposals to her, and while she claims, in parts of her testimony, that she tried to avoid being in his company alone, the reverse of it appears quite unmistakably certain. With full knowledge of his desires, and his disposition to urge them when opportunity offered, she gave him such opportunities when they could and should have been avoided. Her own statements show that on the day of the alleged offense, after his proposals, she walked away, and then came back, upon his invitation, to talk with him, when it was manifest that the talk would be to further press his solicitations for intercourse; and it was after she came back, and he renewed his proposals, that she made the "bantering" statement. Her failure afterwards to make known the occurrence until her delicate situation made it necessary to tell her mother, her going directly to the home of defendant, where she worked, with him, or nearly there, and her entire conduct after the affair, taken in connection with that previous, presents a state of facts so inconsistent with her forcible defilement, which must have been under her statements, that we think the verdict without sufficient support, because of which the judgment is reversed.

DEXTER v. HAYES et al.

(Supreme Court of Iowa. May 23, 1893.)

EXECUTORS AND ADMINISTRATORS—RENT OF LAND—RIGHTS OF HEIRS.

Code, § 2402, provides that an administrator may take the rents of land accruing after the death of the owner, "if there be no heir or devisee present and competent to take possession." Section 2403 provides that under the order of the court the administrator may apply the profits of the real estate to the payment of the taxes and claims against the estate, in case the personal assets are insufficient. *Held*, where a mortgage on land was foreclosed after the death of the owner, that the administrator cannot maintain an action against the heirs for the rents and profits received by them during the time for redemption, though there are no other assets to pay debts.

Appeal from district court, Tama county; L. G. Kinne, Judge.

Action by the administrator of the estate of C. E. Hayes, deceased, to recover of the defendants, the widow and heirs of said deceased, the "rents, profits, and avails" of the farm lands of which deceased died seised. Judgment was entered dismissing plaintiff's petition, from which he appeals.

W. H. Stivers and F. J. M. Wonser, for appellant. Struble & Stiger, for appellees.

GIVEN, J. 1. The following statement of the facts made by appellant is correct, and sufficiently presents the questions discussed: "That appellant, since June 12, 1888, has been the administrator of the estate of C. E. Hayes, who died intestate, domiciled at Tama county, in this state, April 28, 1888, the owner of the east half of section 28, and the north half of the southeast quarter, and the southeast quarter of the southeast quarter, of section 21, all in Twp. 83, R. 14 W., in said county; that the last-described forty was the homestead of the decedent, and the widow continues to occupy it as such; that the defendant Annette P. is the widow of said decedent, and the other defendants are their adult children; that the real estate owned by the said decedent at his death, except the said homestead forty, was mortgaged, and, after such death, the said mortgages were foreclosed, and the land sold thereby, subject to redemption, and during this right of redemption the said defendants took possession of said land, worked a part of it on their own account, and rented a portion to others, receiving rents therefor, and have said rents in their possession; that there is an unpaid claim allowed against said estate aggregating over fifteen hundred dollars, and there is no property or avails of the said estate, except the said rents and profits, to pay the same; that defendants enjoyed the possession of the land to the value of one or two hundred dollars, and that said defendant Annette P. has in her possession about seven or eight hundred bushels of corn, the crop of said premises, and that they refuse to account to

the appellant for the use of said premises or said rent, or turn over to him any of such rent. The testimony fully establishes the fact the reasonable value of the use of the land, during the said time it was held and occupied by defendant, to be from two dollars to three dollars per acre, and the amount of crops detained by defendants as rent to be of the value of at least six hundred dollars. There is no controversy as to the facts, except a slight difference as to the value of the use of the land, and of the value of the rents and profits realized therefrom by defendants."

2. Under our statute one-third in value of all the legal or equitable estate in real property possessed by her husband at any time during the marriage, which had not been sold on execution or other judicial sale, and to which she had not made relinquishment of her right, passed to the defendant Annette Hayes, widow, in fee simple, upon the death of her husband. Code, § 2440. She had the right to elect whether her share should include the homestead, and to take the homestead in lieu of her distributive share in the real estate. Code, §§ 2441, 1998. Upon the death of her husband Mrs. Hayes had a right to continue to possess and occupy the whole homestead until it was otherwise disposed of according to law. Code, § 2007. Subject to the rights of the widow and creditors of the estate, and in the absence of other arrangements by will, the estate of which the decedent dies seised descended in equal shares to his children. Code, § 2453. Appellant cites section 3102 of the Code, giving the right to the defendant in execution one year to redeem, and the right of possession during that time. He also cites *Barnes v. Cavanagh*, 53 Iowa, 27, 3 N. W. Rep. 801, holding that the interest of a judgment defendant is subject to levy and sale, and contends that the use of the land during the period for redemption did not pass to the widow and heirs, but was subject to the debts of the estate. This right of redemption was an equitable estate in real property, and, in the absence of will or statute to the contrary, vested in the defendants immediately upon the death of Mr. Hayes. *Lepage v. McNamara*, 5 Iowa, 125; *Foteaux v. Lepage*, 6 Iowa, 126; *Beezley v. Burgett*, 15 Iowa, 192; *Laverty v. Woodward*, 16 Iowa, 2; *Kinsell v. Billings*, 35 Iowa, 156. The relinquishment of the widow was to the mortgages only, and she might assert her rights as against all other creditors. It is clear that, in the absence of will or statute providing otherwise, the defendants were entitled to the use and rents of this land.

3. The only statutes under which executors and administrators are entitled to rents of real estate accruing after the death of the owner are sections 2402 and 2403 of the Code. Under the first he may take possession, receive rents, etc., "if there be no heir or devisee present and competent to

take possession," and, under the second, "under the order and direction of the court, may apply the profits of such real estate to the payment of taxes, and of debts and claims against the estate of the deceased, in case the personal assets are insufficient." In *Toerring v. Lamp*, 77 Iowa, 488, 42 N. W. Rep. 378, it is held that section 2403 is not limited to real estate of which the executor may take possession under section 2402, but applied to all the real estate of the decedent. It is entirely clear that appellant was not entitled to possession, and is not entitled to rents or profits, under either of these sections, as the defendants were present and competent to take possession, and appellant had no order or direction of the court, as provided in section 2403. *Toerring v. Lamp*, supra, is distinguishable from this case in several important particulars. This is an action by the administrator to recover rent from the widow and heirs, whose liability to any one is at least questionable. That case was against the tenant under a lease for 20 years, executed by the deceased, and there was no question of the defendant's liability to some one. In that case the administrator had an order of court, made with the consent of the widow and heirs, to collect that rent. In this there is no such authority. It is said in that case: "It may be that such consent was given with the understanding that no right to them was thereby waived; but, under the admitted facts of the case, the rents are not exempt, and will have to be retained by plaintiff to discharge the debts of the estate." Rents and profits, like the real estate itself, may be subjected to the payment of debts when the personal assets are insufficient, in the manner provided, but not otherwise. *Madison v. Shockley*, 41 Iowa, 451, is cited. In that case the widow and heirs were each held liable as an administrator de son tort. They claim, in mitigation of judgment, their right to support, and in fixing the amount the court considered what they had received, including the use of the real and personal property. It is not there decided that an administrator is entitled to rents and profits of real estate. In *re Gable's Estate*, 79 Iowa, 178, 44 N. W. Rep. 352, is relied upon. In that case the administration was granted in Pennsylvania, and, at the request of the administrators, auxiliary administration was granted in Iowa, for the purpose of selling lands in Iowa to pay debts. The lands were sold for that purpose, as provided by our statute, and all claims allowed in Iowa paid. There was a surplus in the hands of the Iowa administrator, and this court held that that surplus should go to the administrators in Pennsylvania, to pay debts there proven and unpaid, and not to the heirs. It was not land, but money derived from an authorized sale of land to pay debts, that was the subject of dispute. The question of the right of an administrator to rents and

profits of real estate as against the widow and heirs was not in the case. Our conclusion is that the judgment of the district court should be affirmed.

KINNE, J., took no part.

ROBERTSON v. CRAVER.

(Supreme Court of Iowa. May 20, 1893.)

WITNESS—LEADING QUESTIONS—BREACH OF MARRIAGE PROMISE — ACTION FOR DAMAGES — EVIDENCE—INSTRUCTIONS.

1. The question, "Do you know whether or not he [defendant] bought his father's homestead?" is not leading, and does not call for a conclusion.

2. In an action for breach of a promise of marriage it was proper to show plaintiff's condition after she heard of defendant's marriage with another woman.

3. The court properly excluded declarations of plaintiff's feelings towards defendant, made after the marriage contract was broken, where it was not shown that the declarations related to plaintiff's feelings towards defendant before the breach.

4. The questions as to "what the plaintiff was doing in the way of getting ready to be married," and "Do you know anything about Rosa making preparations for marriage?" are not objectionable on the ground that they assume the existence of a contract.

5. Where a brother of plaintiff testified on direct examination that, while defendant was courting his sister, no one else was going with her, it was error not to permit the witness, on cross-examination, to answer whether he told defendant that witness' sister had made a "maah" on another man.

6. The court properly excluded evidence that plaintiff had kept company with another man a short time before she began going with defendant, when there was no evidence that the intercourse between them was other than that which exists in case of friendship between persons of the opposite sex who do not contemplate marriage.

7. It was error to exclude evidence of declarations by plaintiff, made after the breach, that she had never cared for defendant, and only wanted his money.

8. An instruction that, if the parties had entered into a marriage contract, the admission by defendant of his marriage to another woman would constitute a breach, is not open to the objection that there was evidence that the engagement had been broken, and that the instruction assumed that the evidence failed to establish that fact, when defendant rested his whole case upon the fact that no contract ever existed, and the case was tried on that theory.

9. An instruction that the jury, in assessing damages, might consider the "personal pain" suffered by plaintiff, is not open to the objection that "personal pain" means physical suffering, and was not in issue.

Appeal from district court, Poweshiek county; A. R. Dewey, Judge.

Action for breach of promise of marriage. Jury trial. Verdict and judgment for plaintiff. Defendant appeals.

John T. Scott and H. S. Winslow, for appellant. Haines & Lyman, for appellee.

KINNE, J. 1. It is averred that plaintiff and defendant, in January, 1891, entered into a marriage engagement; that the marriage

was to take place about December 25, 1891; that in April, 1891, the defendant married another woman, and thus put it out of his power to perform his contract with the plaintiff. The answer admits the marriage of the defendant, and denies the other allegations of the petition.

2. Plaintiff was asked, "Do you know whether or not he [the defendant] bought his father's homestead?" The question was objected to as leading, suggestive, incompetent, and calling for a conclusion. She answered: "Yes, sir; he told me he had bought his father's place the first time I saw him after he was married." Defendant moved to strike out the answer as incompetent and immaterial; the statement having been made since the defendant's marriage, and referring to matters occurring after his marriage. The motion was overruled. Questions so framed are not necessarily leading. *Woolheather v. Risley*, 38 Iowa, 486; *State v. Watson*, 81 Iowa, 383, 46 N. W. Rep. 868. It is sometimes permissible to direct the attention of the witness to the particular fact about which information is sought. *Graves v. Insurance Co.*, 82 Iowa, 637, 49 N. W. Rep. 65. The purchase of a homestead was a fact. The question did not call for a conclusion. The ruling was without prejudice, as the same fact was testified to by another witness, and was not disputed.

3. Plaintiff was also asked, on direct examination, this question: "When you heard that he was married, how did it affect you?" It was objected to as incompetent and immaterial, and the objection overruled. She answered, "I hated it awful bad." The question, we think, was proper. It called for facts touching her condition, mental and physical, as a result of the marriage. The answer, though not in good form, was but one way of expressing the mental condition of the witness. Besides, in the course of the trial, the answer was withdrawn from the jury. Other witnesses were asked questions relating to plaintiff's condition after she had heard of defendant's marriage, thus: "You may state to the jury how it affected her, or how it seemed to affect her." The court held the question was not incompetent, and the witness answered, "She didn't talk about the matter, only she was downhearted." It was competent to show how, if at all, the defendant's marriage affected the plaintiff. Her wounded feelings, mortification, and pain, if any, resulting from defendant's breach of the contract, were all proper to be shown as elements of damage.

4. Error is assigned on the ruling of the court excluding evidence as to plaintiff's declarations made after the marriage contract was broken. We think there was no error in these rulings. The questions asked did not indicate that they related to expressions of plaintiff as to her feelings towards defendant before the breach of the contract. How she felt towards the defendant after he had

deceived her, and put it out of his power to fulfill his contract with her, could in no way tend to show what her feelings towards him were while the engagement lasted. It was not proposed to show that these declarations, though made after defendant's marriage, related to her feelings towards or affection for him during the time the engagement subsisted. Moreover, the objection that the matter inquired about was not proper cross-examination was well grounded.

5. A witness was asked what the plaintiff was doing in the way of getting ready to be married." "Do you know anything about Rosa making preparations for marriage?" These questions were objected to as assuming a fact not proven, and the objection was overruled, and the witness answered: "Yes, sir; piecing quilts, and doing fancy work." Prior to the examination of this witness, testimony had been introduced, without objection, which showed these and other preparations for marriage. Indeed, there appears to be no conflict in the evidence touching preparations on part of plaintiff for a marriage. In that respect, and in view of the undisputed evidence in the case, the ruling was correct. But defendant urges that the questions assumed the existence of the contract of marriage, and cites *Jones v. Layman*, (Ind. Sup.) 24 N. E. Rep. 363. The question in that case was: "What declaration, if any, did she make in regard to her disappointment, and refusal of defendant to marry, at the time she showed you the letter?" It will be observed that the entire inquiry was based upon the thought expressed in the question, that defendant had refused to marry the plaintiff. Again, the question related to a declaration made by plaintiff in the absence of defendant, after the engagement had been broken. The court held the question objectionable for the latter reason, as well as because it assumed a breach of the contract. In the case at bar the evidence called for and elicited related to preparations which plaintiff was making for a marriage during the continuance of the engagement. Evidence of the conduct of the plaintiff, if it relates to the time covered by the engagement, or to a time when first informed of the fact that her intended husband has married another, is admissible to prove her consent to the alleged marriage and contract. We do not think the questions, as asked, were objectionable.

6. A brother of plaintiff who had testified on direct examination that, while the defendant was keeping company with his sister, no one else was going with her, was asked: "Did you not, then, at that house on your father's farm, tell Mr. Craver, the defendant in this case, that your sister (plaintiff) had made a mash on Shadley there, at John Stilwell's?" An objection to the question was sustained on the ground that it was incompetent, immaterial, and irrelevant. The evident drift of this question was to show that the witness had made statements to defendant inconsistent

ent with his testimony on direct examination. The question was clearly proper. What the answer would have been, of course, we cannot say; but it was proper for defendant to show if he could, on the cross-examination, that he was mistaken in his statements made in his examination in chief. The ruling of the court placed an undue restriction on the right of cross-examination.

7. On cross-examination a witness testified that plaintiff had kept company with one Mackey a short time before she began going with defendant. The court, on motion of plaintiff, struck out this evidence as immaterial and irrelevant. This action is assigned as error. We think the ruling was right. Defendant's claim seems to be that the conduct of plaintiff in receiving the attention of young men prior to the time the defendant began keeping company with her is material to the question of damages. Counsel say: "The ease with which the affections became enlisted, the readiness with which she laid down the old to take up the new, and like matters, were proper subjects to be considered, if the amount of damages to be allowed ever becomes important." If such evidence, relating to a time anterior to that when defendant began to seek plaintiff's society, is ever admissible, surely it is not under the circumstances developed in this examination. There was no evidence that the relations existing between plaintiff and Mackey were other than those usually incident to mere friendly association. It does not appear that it was a case of love at first sight, or otherwise. Their intercourse, so far as appears, was not different from that which exists in all cases of friendship between persons of the opposite sex who do not contemplate marriage. To show such friendly association between plaintiff and other men at a time prior to defendant's seeking her society is not material to any question involved in the case.

8. On cross-examination, defendant was asked several questions in relation to his property. All of them were objected to as not being proper cross-examination. The objections should have been sustained. Nothing was asked him on direct examination relating to his property. The questions were foreign to the examination in chief.

9. Complaint is made that the court admitted certain evidence in rebuttal which was a part of plaintiff's case in chief. As there was no ruling, we must presume that the objection was waived.

10. Witness Linn Craver testified with reference to having had a conversation with plaintiff after defendant's marriage. He was asked: "Now you may state whether or not, in that conversation, she said anything in regard to whether she had cared for your brother; that all she wanted was his money." Ollie Craver also testified to a similar conversation. She was asked the following questions: "You may state whether or not, in

that conversation, she did or did not say she had never cared anything for the defendant, but all she was after was his money?" "I will ask you whether or not Rosa Robinson did or did not say, in this conversation, that she did not care if he was married?" "What did she say was her feeling towards the defendant?" These questions were all objected to as incompetent and immaterial, and one of them was also objected to as leading. The objections were sustained. The ruling was proper as to the last two questions. Evidence of the plaintiff's statements or declarations, made soon after hearing of the defendant's marriage, and relating thereto, and expressive of her feelings towards the defendant, as they existed during the term of the engagement and before it is terminated, is admissible when it tends to show such feelings as are "inconsistent with any purpose to fulfill the engagement in a spirit befitting the relation contemplated by it." One possessed of such feelings would suffer little or no injury by reason of the breach of the contract. But evidence tending to show the feeling of the plaintiff towards the defendant after the breach of the contract, and relating only to that time, is never admissible. *Miller v. Hayes*, 34 Iowa, 496; *Miller v. Rosier*, 31 Mich. 475. A declaration of a woman who claims to have had an engagement of marriage, whether made during the existence of the engagement, or after she learns of its breach, that she had not cared for affianced; that all she wanted was his money,—certainly has a tendency to show that her object in seeking the engagement was of a mercenary character; that that love and affection so necessary to the enjoyment of the married state were wholly wanting; and that an engagement consummated under such circumstances would be unprofitable, unendurable, and full of contention and sorrow. The first two questions clearly refer to the feeling plaintiff had for the defendant before his marriage. Whether she "had cared" or "had never cared" for the defendant calls for the condition of her feelings towards him as they existed when she had reason to believe that the marriage would in due time be consummated. The last two questions may be said to relate to her feelings as they were at the time she made the statements, if any, and hence were properly excluded.

11. Error is assigned on the giving of an instruction to the effect that, if the jury found that the parties had entered into a marriage contract, the admission by the defendant of his marriage to another woman would constitute a breach of it, and plaintiff would be entitled to recover. It is said that there was evidence tending to show that the engagement had been broken, and that the instruction assumed that the evidence failed to establish that fact. There was no issue under which it would have been proper to submit to the jury the question of the

abandonment of the contract. It was averred by plaintiff that a marriage contract was made, and it was denied by the defendant. Defendant rested his whole case upon the fact that no contract of marriage ever existed. The case was tried by the defendant upon that theory. Furthermore, the letter which is claimed shows the abandonment did not reach defendant until after his marriage. The instruction, under the issues, was correct.

12. Exception is also taken to an instruction of the court wherein he told the jury that in assessing damages they might consider, among other things, "personal pain" suffered by plaintiff by reason of the breach of the contract. It is insisted that "personal pain" means physical suffering, instead of mental distress or mental suffering, and it is said the question of "personal pain" was not in issue. The petition avers "that the plaintiff has been, by the defendant, made to suffer great grief, shame, and mortification, and her affections have been greatly wounded," etc. This court has said that in this class of cases "the distinction between injury to the feelings and affections and personal pain and mortification for disappointment is too shadowy to receive practical recognition." *Royal v. Smith*, 40 Iowa, 618. Webster defines pain as "mental distress; anxiety; grief; anguish." It may well be said that the pain would be "personal," as much so as if it was purely physical. The instruction is unobjectionable.

The many other errors assigned we find to be without merit. For the reasons given, the judgment of the district court is reversed.

ROBERTSON v. MOLINE, MILBURN & STODDARD WAGON CO.

(Supreme Court of Iowa. May 23, 1893.)

EXECUTION SALE—REDEMPTION OF REAL PROPERTY—RIGHTS OF PURCHASER.

1. Code, §§ 3102-3105, provide that the right to redeem from an execution sale shall be exclusively in the execution defendant for the first six months; then in his creditors having liens in common with defendant, and as between each other, for the next three months; and to defendant exclusively for the last three months. Section 3123 provides that defendant's rights to redeem are transferable, and the assignee has the like power to redeem. *Held*, that where an execution defendant conveyed his real estate by a deed absolute on its face, but which was in fact a mortgage, and the mortgagee quitclaimed to a third person, such person took no greater rights than the mortgagee had, and had the right to redeem as a creditor only.

2. A purchaser at execution sale was entitled to question the right of one attempting to redeem, and to ask that an attempted redemption be set aside as a cloud on his title, where those entitled to redeem had failed to do so.

Appeal from district court, Cherokee county; George W. Wakefield, Judge.

This appeal comes up on the ruling of the court below, sustaining a demurrer to

plaintiff's petition. The petition, in substance, states that in February, 1890, plaintiff obtained a judgment against Addie J. and W. W. Meredith, husband and wife, for about \$900, and also a decree of foreclosure against certain real property in Washta, belonging to said Addie J. Meredith. That J. D. F. Smith and the Moline, Milburn & Stoddard Wagon Company were made defendants, and their rights in said premises foreclosed, as shown in the decree, which is set out. That a special execution issued, and said premises were sold to plaintiff April 8, 1890, and a certificate of sale made by the sheriff. That in 1899 said defendant company had a claim against said W. W. Meredith for a large amount, and commenced an action by attachment thereon, and thereunder levied on certain property of said Meredith, and garnished certain persons as supposed debtors of said Meredith. That the legal title of lot 7, in block 4, in Washta, was in said Addie J. Meredith; the same being a part of the real property covered by said decree of foreclosure. That said Addie J. Meredith and W. W. Meredith conveyed said lot to J. D. F. Smith, by deed, for the sole purpose of securing the said claim on which said attachment suit had been commenced, "and for no other purpose whatever." That at the time said deed was made it was orally understood and agreed that on payment of said debt, or the balance after deducting the amount realized from the sale of the personal property, and from garnishments above referred to, said Smith should reconvey said premises to said Addie J. Meredith; that rents were to be collected by said Smith, and applied on said claim, and accounted for. That said title was in fact held by Smith in trust for the defendant company. That said conveyance to Smith was not an absolute conveyance, but only a security for said claim, and that Smith never became the owner of the property under said deed. That January 10, 1891, said Smith and wife conveyed said property by quitclaim to the defendant wagon company. That February 28, 1891, said Addie J. and her husband conveyed said property by quitclaim to one J. H. Allen. That said defendant made no attempt to redeem from said sale until April 8, 1891, when it paid to the clerk of said court the amount necessary to redeem from said sale, and said clerk receipted for the same, and still holds said money. That on account of said attempted redemption the sheriff refuses to execute to plaintiff a deed for the premises, notwithstanding there has been no other redemption than as set out above. That said pretended redemption prevents plaintiff from securing his deed. And the petition prays that the said redemption be set aside, and plaintiff be decreed to be entitled to a sheriff's deed, and also judgment for the rental value of the property since plaintiff was entitled to his deed. To this petition defend-

ant demurred on the ground that the facts stated do not entitle plaintiff to the relief demanded. This demurrer was sustained, and plaintiff appeals, assigning error on said ruling.

David H. Bloom and E. C. Herrick, for appellant. J. D. F. Smith, for appellee.

GIVEN, J. 1. Under the Code, one year from the day of sale is given in which to redeem real estate sold upon execution. The right to redeem is given exclusively to the defendant for the first six months; then to his creditors having liens in common with the defendant, and as between each other, for the next three months; and to the defendant exclusively for the last three months. See sections 3102-3105. Section 3123 is as follows: "The rights of a defendant in relation to redemption are transferable, and the assignee has the like power to redeem." This court has held that the vendee of an execution defendant is considered as within the meaning of the term "defendant," as used in said sections, and that he may redeem as such. *Thayer v. Coldren*, 57 Iowa, 110, 10 N. W. Rep. 300. The redemption in question was not made until after the three months allowed to creditors. It was not made until the last day of the year. Appellee claims the right to redeem at that time, not as a creditor, but as assignee and vendee of the execution defendant under the deeds mentioned. Appellant contends that, said deeds being given solely as security, they have no other effect than a mortgage, and therefore appellee is a mere creditor, and only entitled to redeem as such. There is no question but that if those deeds were in fact absolute, as they purported to be, they would convey to appellee the same rights to redeem that the execution defendant had, namely, to redeem at any time within one year from the day of sale. According to the petition, they are not absolute, but were given for the sole purpose of securing the indebtedness owing by Mr. Meredith to appellee, "and for no other purpose." This court and the courts of this country have very generally held that a conveyance of real estate, absolute on its face, may, by proper evidence, be shown to have been intended to operate as a security, and when so shown it is regarded as a mortgage, and the rights of the parties enforced accordingly. *Trucks v. Lindsey*, 18 Iowa, 504; *Key v. McCleary*, 25 Iowa, 191; *Green v. Turner*, 38 Iowa, 112; 6 Amer. & Eng. Enc. Law, 675. Appellee does not question the rule just stated, but contends that the conveyance to Smith is shown in the petition to have been in trust; that his conveyance to appellee was a transfer of the trust; that it was the privilege and duty of appellee, as trustee and holder of the legal title, to protect the trust estate by redeeming; and that it might do so as trustee at any time within the year.

Concede that the conveyance to Smith was as trustee, yet, according to the petition, it was as security, and therefore, under the law, but a mortgage. A mortgage is not an estate in the land, but simply a specific lien or charge thereon. *Newman v. De Lorimer*, 19 Iowa, 246. Smith did not have an absolute assignment, and therefore he was not a vendee of defendant, within the meaning of the statutes we have referred to. If Smith was a trustee, the trust was terminated by his conveyance to appellee. Appellee took no greater rights than Smith had, which were the rights of a mortgagee. Taking, as we do, for the purposes of the demurrer, the allegations of the petition to be true, we think they show that appellee is but a mortgagee. If the Merediths had executed a mortgage to Smith as trustee, or directly to appellee as a security, it would hardly be claimed that appellee could redeem otherwise than as a creditor, and yet, under the allegations of the petition and the law, these conveyances were but a mortgage. We are of opinion that, under the facts as alleged, appellee had the right to redeem as creditor only.

2. Appellee contends that appellant is not entitled to question the character of the conveyances from the Merediths to Smith, and from Smith to appellee; that he is a stranger to said conveyances, and had no estate in the lot, but a mere lien thereon, which he has exhausted, and of which he gets the full benefit by the redemption. When appellant purchased said lot at the sale on execution, he took it subject only to redemption from the sale by the persons and in the manner authorized by statute. If those entitled to redeem failed to do so within the time and in the manner provided, the lot became his absolutely. He might surely question the right of one not authorized to redeem to do so, and ask that an attempted redemption be set aside as a cloud upon his title. For the same reasons he may question a redemption by one authorized to redeem, who does not do so within the time allowed. Our conclusion is that the demurrer should have been overruled. Reversed.

HAMILTON BUGGY CO. v. IOWA BUGGY CO. et al., (WESTERN MIN. & INV. CO. Intervener.)

(Supreme Court of Iowa. May 20, 1893.)

GARNISHMENT — INTERVENTION — EVIDENCE — INSTRUCTIONS — NOTICE — ASSIGNMENT OF ERROR.

1. An assignment of error that "the court errs in overruling intervenor's motion to direct a verdict for intervenor," the motion referred to containing 12 distinct grounds, is insufficient in not pointing out the particular grounds of error complained of.

2. Assignments of error that "the verdict is contrary to law," and that "the court erred in rendering judgment upon the verdict," are too general.

3. After intervenor, who claimed the ac-

counts garnished by plaintiff, had introduced in evidence that part of defendant corporation's minute book showing the action of defendant's board of directors ordering the assignment of accounts to intervenor, plaintiff, on cross-examination, read the remainder of the minutes of the meeting of defendant, relating to the assignment of notes and accounts to other creditors, and to the fixing and payment of the salaries of defendant's officers. Held that, though it was not admissible under Code, § 3650, as relating to the same subject, it was proper, in connection with other evidence, as tending to show fraud in the disposition of defendant's property.

4. Where fraud was claimed in the assignment of claims by defendant to intervenor, it was proper to show that the same persons were officers in both companies.

5. It appearing that intervenor company owned defendant company, and did business under its name, and it not being shown when such relation ceased, it cannot be said that intervenor was a stranger to the entries in defendant's books, so as to make the admission of them against it error.

6. Such being the relation of the companies, statements of defendant's president, made to plaintiff as a basis for obtaining credit, would be admissible against intervenor.

7. The contradiction between an instruction that it was incumbent on intervenor to establish the material averments of its petition, and another, that it was admitted intervenor was incorporated, and as to that fact no evidence was necessary, but it should be accepted as established, is not misleading.

8. An instruction submitting to the jury the reasonableness of the compensation voted by defendant to its officers, and charging the jury that, if they found that the sum voted when defendant was insolvent was unreasonable, such fact should be considered in determining the intent and purpose of the assignment of the claim to intervenor, is not given, in the absence of evidence as to the reasonableness of the compensation, where it appears that the compensation voted covered a period of several months prior to defendant's incorporation.

9. Refusal of intervenor's request to introduce notes in evidence several days after the closing of the evidence, and after it had made its argument and plaintiff had begun his, will not be considered an abuse of discretion, where no reason is given why it was not offered sooner, and no offer to connect the notes with the case is made, except as that fact might be presumed from their dates and the indorsements thereon.

10. The notice required by Code, § 2975, to be served on defendant before trial of issues raised by the garnishment, is waived by appearance of defendant.

Appeal from district court, Polk county; S. F. Balliet, Judge.

Earle & Prouty, for intervenor, appellant. Park & Odell, for appellee. W. S. Sickmon, for garnishee.

KINNE, J. 1. Plaintiff commenced an action by attachment against the defendant, claiming about \$2,800, and on October 25, 1890, caused one Cook to be garnished therein. December 20, 1890, Cook answered as garnishee, denying any indebtedness to the defendant, and averring that he had been indebted to the defendant in October, 1890, about \$1,800; that on October 10, 1890, he received from the defendant a written notice of the assignment of said debt to the intervenor. January 7, 1891, the Western Mining & Investment Company filed a petition of in-

tervention, claiming the account or property in the garnishee's hands. On January 10, 1891, plaintiff filed its answer to the petition of intervention, denying the intervenor's ownership of the indebtedness, and averring that the transfer of it to intervenor was without consideration, fraudulent, and void. June 6, 1891, judgment was rendered in the main action against the defendant. The cause, as to the issues joined between plaintiff and intervenor was tried to a jury, and a verdict and judgment rendered for plaintiff, from which intervenor appeals.

2. Plaintiff insists that the 1st, 2d, 3d, 4th, and 6th assignments of error are not sufficiently specific. Each and all of these assignments relate to the admission of evidence against the objection of intervenor, and each assignment sufficiently points out the error, naming the witness, and specifying the evidence and rulings objected to. To require more would entail an unnecessary burden upon appellants. While the law contemplates that such assignments shall clearly point out the error complained of, it is not necessary to incumber the record by setting out the whole examination in which the error is claimed to have occurred. *Union Bldg. Ass'n v. Rockford Ins. Co.*, (Iowa,) 49 N. W. Rep. 1032. It is urged that the thirteenth assignment of error is insufficient. It reads: "The court erred in overruling intervenor's motion to direct a verdict for intervenor." The motion referred to contains 12 distinct grounds for a new trial. The assignment of error is insufficient in not pointing out the particular ground, or grounds, of error complained of. *Betts v. City of Glenwood*, 52 Iowa, 126, 2 N. W. Rep. 1012. The same objection is made to the sixteenth and seventeenth assignments, which are substantially in the same form, and for the reason last stated cannot be considered. The following assignments of error are assailed as being too indefinite: "(26) The verdict is contrary to law." "(23) The court erred in rendering judgment upon the verdict." These assignments are too general. They do not point out or suggest wherein the verdict is contrary to law, or wherein the entry of judgment was error. *Brigham v. Ketelsdorf*, 73 Iowa, 714, 38 N. W. Rep. 715; *Vanderberg v. Camp*, 68 Iowa, 212, 26 N. W. Rep. 80; *Betts v. City of Glenwood*, 52 Iowa, 126, 2 N. W. Rep. 1012; *Tomblin v. Ball*, 46 Iowa, 190.

3. H. B. Cunningham, a witness for intervenor, identified the minute book of defendant company, whereupon intervenor introduced in evidence that part of page 11 of said book which showed the action of the board of directors of defendant ordering the assignment of accounts to the intervenor, to pay notes held by it against the defendant. On cross-examination plaintiff, against intervenor's objection, was permitted to read in evidence the remainder of the minutes of said meeting of defendant. They related to

the assignment of certain notes and accounts to other creditors of the company; also to the fixing and payment of the salaries of defendant's officers. Plaintiff contends this, being a part of the same record, was admissible, under section 3650 of the Code. Clearly, this evidence was not admissible under the provisions of the section quoted. It did not relate to the same subject, but it did relate to acts of defendant which took place at the same time the transfer of the accounts was made. It was proper to show that, at the time intervenor claimed defendant assigned the account to it, defendant was engaged in disposing of its other property. True, the facts shown might not, of themselves, show fraud, but were proper to be taken into consideration with all other facts and circumstances in determining the intent with which defendant acted in its transfer of the accounts of intervenor. Of course, to bind intervenor by such transactions, even if fraudulent on part of defendant, it must be made to appear that intervenor was a party to the fraud. Again, the manner in which these two corporations had conducted their business, as hereinafter referred to, warranted great latitude in the admission of such testimony.

4. Plaintiff called as a witness J. T. James, president of defendant, and examined him as to who constituted the stockholders of said company, who were officers of intervenor, their residence, and relationship to the stockholders and officers of defendant. It is urged that this was error. Some of the facts touching the stock of defendant were also testified to by witness Leiser, and, while error is assigned on the admission of his evidence, it is not argued. Other facts sworn to by James were established by the books of defendant, which we, for reasons hereafter stated, hold were properly admitted. Again, much latitude is allowed in the examination of witnesses in cases where fraud is the subject of the inquiry. The relationship of the officers of defendant and intervenor was clearly within the reasonable limits of the investigation in such a case, and was a proper matter to be shown. The fact that the witness was president of the defendant company, and at the same time secretary of the intervenor, might be material, in connection with other facts and circumstances, in tending to show that the transaction in controversy was fraudulent.

5. It is urged that the court erred in admitting in evidence the books of defendant, and also of the accounts of James and Cunningham therein, who were officers of the defendant. It is claimed that intervenor is a stranger to the transactions of defendant, and hence cannot be bound by any entries that may be found in its books. The law undoubtedly is that the entries in the books of a company are not evidence as against strangers. The evidence shows that the defendant and intervenor used the same

books. Witness Leiser testifies: "I think the Western Mining & Investment Company owned the Iowa Buggy Company. Mr. James was then manager. It was doing business at that time under the name of the Iowa Buggy Company. I do not know how long the Western Mining & Investment Company did business as the Iowa Buggy Company. These books do not show. There are no books that I know of that would show. I kept these books for the Iowa Buggy Company while they were doing business under that name. They are the only books I kept for the company." From the evidence before us it is impossible to say when the career of one corporation ended, and the other began its operations. It cannot, with any degree of certainty, be said that intervenor was a stranger to the entries in these books, and hence we cannot say that the court erred in admitting them.

6. Counsel urge that the court erred in admitting in evidence the letter of James to plaintiff, his statement therein, as well as other statements made by him. Counsel say: "These were matters occurring long prior to the transfer to the intervenor, and even before the debt to intervenor was created." True, they occurred prior to the transfer of the account, but counsel are mistaken in saying that at that time the indebtedness to them did not exist. The letter was written February 10, 1890, and, so far as appears, the statements were made about the same time. The notes given by defendant to intervenor are dated in October and November, 1889. Ordinarily, it may be true, as intervenor contends, that the statement made by James, as president of the defendant, in February, 1890, to plaintiff, as a basis for obtaining credit of plaintiff,—that, of the \$6,100 of defendant's indebtedness, \$5,400 of it was owing to stockholders of the defendant company,—would be inadmissible as against intervenor. But the evidence in this case as disclosed by this record, if it is to be believed, tends to show that intervenor company was operating defendant company under the name of the Iowa Buggy Company during the year 1889, until after the notes were given to intervenors, and, as we have said, it is impossible to say from the evidence when one corporation ceased to do business and the other began. This being the case, it would seem that the evidence objected to was properly admitted. Whether, in the absence of evidence tending to show that intervenor was running the business in the name of defendant, the evidence would be admissible, we need not determine.

7. It is insisted that the court erred in refusing to give certain instructions asked by intervenor. The thirteenth instruction no doubt stated the law correctly; yet, in view of the evidence in this case, we think it was not error to refuse it in the form it was presented. Other instructions, and which were

proper, were sufficiently covered by the charge of the court.

8. It is said that the first and twelfth instructions given by the court are contradictory. In the first the court tells the jury that it is incumbent on intervenor to establish the material averments of its petition, and in the twelfth that it is admitted that intervenor was a duly-incorporated company, and as to that fact no evidence was necessary, and they should accept it as an established fact. We do not think that the jury could have been misled. The effect of the two instructions was to direct the jury that, except as to allegations in intervenor's petition which were admitted, it was incumbent on it to establish them.

9. The sixth instruction is assailed as being inconsistent in announcing contradictory rules as to when fraud may be deemed to have been established. This objection is in part based upon what appears to be a typographical error in the omission of the word "not." Reading the whole instruction, we are justified in assuming that the word "not" was in the instruction as given by the court, but was by oversight omitted by the printer. While the instruction is not in the best form, yet as a whole it is quite favorable to intervenor; certainly as much so as the law would permit. It ought not to complain, and plaintiff cannot.

10. It is said that the thirteenth paragraph of the court's charge is erroneous. It submitted to the jury the question of the reasonableness of the compensation voted by the defendant to its officers, and told them, if they found such sum so voted unreasonable, and voted when the defendant was insolvent, such facts should be considered in determining with what intent and purpose the assignment of the Cook claim was made. It is contended that there was no evidence as to the reasonableness of the compensation so voted. There was evidence that the compensation so voted covered a period of several months prior to the incorporation of the defendant. Under the evidence we think there was no error in this paragraph of the charge.

11. June 8, 1891, five days after the taking of evidence had been concluded, and after intervenor's counsel had made their argument and the argument in behalf of the plaintiff had begun, the intervenor asked leave to introduce certain notes given to it by the defendant, and which were shown to have been paid October 9, 1890. The court refused to admit the evidence, and its action is assigned as error. The admission of evidence under such circumstances is a matter of discretion, and we should not be justified in interfering unless it clearly appeared that the district court had abused the discretion with which it is vested. There was no offer to show that the notes sought to be introduced were in fact the identical notes for which the account in controversy

was transferred, except as that fact might be presumed from their dates and the indorsement of payment thereon. There was no reason given why the offer was not sooner made, or that it was impossible to do so. It was simply a naked request to be permitted to offer the notes in evidence five days after the taking of testimony had closed, and when the closing argument was being made, without arguing any reason therefor. Under such circumstances the court did not err in refusing intervenor's request.

12. It is urged that the verdict is against the evidence. The evidence was conflicting. There was much evidence of facts and circumstances from which the jury might properly have found as they did. It will serve no useful purpose to consider it in detail. Fraud is rarely susceptible of direct proof. The evidence is ample to justify the verdict, and we cannot interfere.

13. Lastly, it is contended that the court had no jurisdiction to try the case as to the issues presented by the garnishment, because no notice had been served on the principal defendant, as required by section 2975 of the Code. It appears that the principal defendant appeared in court, and thus rendered the service of the notice unnecessary. As the statute requiring notice to be served on the principal defendant is for his benefit and protection, it is clear it could waive its provisions by voluntarily appearing to the proceedings, as -- did in this case. We have examined all the errors assigned, and discover no reversible error. Affirmed.

THOMAS v. McDANELD.

(Supreme Court of Iowa. May 20, 1898.)

RES JUDICATA—WITNESS—OPPOSITE PARTY.

1. A husband exchanged land owned by him for land owned by the wife, giving the wife, as security for the difference, a note and mortgage for \$550 and a chattel mortgage for \$1,600. Having sold most of the chattels, the husband executed a note and mortgage for \$1,000 on real estate, which was credited on the \$1,600 note and mortgage. Afterwards the wife brought suit on the \$550 and \$1,000 notes, and recovered judgment. *Held*, in an action by a creditor who had been made party in such suit, that the judgment was not an adjudication preventing inquiry by plaintiff as to the \$1,600 note and mortgage, but was an adjudication merely as to the other notes.

2. An instruction that, if the judgment was collusively obtained, it was no adjudication as against plaintiff, and the jury should inquire whether the wife took any of the mortgaged chattels, the value thereof, and the amounts of payments made to her by the husband, and, if the property and payments so received exceeded in value the indebtedness, they should find for plaintiff, otherwise for defendant, was erroneous in limiting the inquiry, instead of submitting the entire transaction.

3. A party is not precluded from proving material statements made by the opposite party at other times by calling him as a witness, nor because such party is present in court.

Appeal from district court, Linn county; J. H. Preston, Judge.

Plaintiff, a judgment creditor of T. J. McDanel, brings this action to charge the defendant, H. O. McDanel, garnishee, as an alleged debtor of said T. J. McDanel. Issues were joined upon the answer of the garnishee, and the case submitted to a jury. Verdict was returned for the defendant, and judgment entered thereon, from which the plaintiff appeals.

Rickel & Crocker, for appellant. Davis & Voris, for appellee.

GIVEN, J. 1. The pleadings are somewhat lengthy, the facts numerous, and the evidence conflicting and contradictory. The following will be sufficient for an understanding of the issues and questions presented on this appeal: In 1884 the plaintiff obtained a judgment against T. J. McDanel upon an account that accrued in 1877 and 1878, and which judgment remains unpaid and unsatisfied. T. J. and H. O. McDanel are and were husband and wife during all the time of the transactions under consideration. Mrs. McDanel owned a house and lot in Marion, Iowa, occupied by her and her husband as a homestead, valued at \$3,500. Mr. McDanel owned another house and lot, valued at \$1,350. In December, 1877, they exchanged these properties, each conveying to the other at the values stated, and for the difference in values T. J. McDanel executed to his wife one note for \$550, secured by mortgage on lot 3, block 4, and part of lot 8, block 12, Marion; also one note for \$1,600, secured by chattel mortgage, which included all the chattel property owned by McDanel. These mortgages were duly recorded. On May 6, 1878, T. J. McDanel executed his other promissory note to his wife for the sum of \$1,000, secured by mortgage on said lot 3, block 4, the amount of which note was credited on said note for \$1,600, but not upon the record of the chattel mortgage securing the same. T. J. McDanel retained the use and possession of the property covered by the chattel mortgage, and sold and disposed of the same as his own, with the knowledge and consent of his wife. He frequently made payments to and for his wife, of which no account was kept, and the exact amounts of which are not shown. They kept their money together; she, as they expressed it, holding the purse. In May, 1888, this defendant commenced her action for judgment against T. J. McDanel on said notes for \$550 and for \$1,000, and for the foreclosure of the mortgages securing the same. This plaintiff was made defendant in that action, and filed his answer and cross petition, denying that T. J. McDanel was owing the amount claimed, or any part thereof, and charging that said notes and mortgages had been paid in full; that they were without consideration, and fraudulent. The case was heard July 5, 1888, this plaintiff appearing

by his attorneys. T. J. McDanel not appearing, and default having been entered against him, judgment was entered in favor of this defendant against him for \$2,570.52, and the case continued. On June 22, 1889, this plaintiff withdrew his answer and cross petition, and default was entered against him for want of answer, and decree establishing said mortgages as superior to his judgment.

2. Appellant's first complaint is of certain instructions given. To understand this complaint we must have in mind the issues and claims of the parties. The controlling issue is whether appellee was indebted to her husband at the time the notice of garnishment was served upon her. Appellant contends that said exchange of properties, and said notes and mortgages, were all executed to hinder, delay, and defraud the creditors of T. J. McDanel, and are therefore void as to them, and, being so void, appellee is chargeable with the value of the property she received. This claim is not without support in the evidence. At the time of the exchange, T. J. McDanel was insolvent, and most of his property subject to execution. He exchanged his house and lot for the homestead, and mortgaged all his other property to secure the difference, thereby placing it beyond the reach of his creditors unless the conveyances are set aside. Having sold most, if not all, the personal property covered by the mortgage, he gave a second note and mortgage on lot 3, block 4, thereby covering it to its full value, and credited the amount on the chattel mortgage note, but failed to inform his creditors thereof by crediting it on the record. Thus they left the record to show a mortgage indebtedness of \$1,000 more than is claimed to have existed. Against this claim of appellant, appellee contends that her judgment against her husband was a full and final adjudication of the question of indebtedness, and, being in her favor, is conclusive that she was not indebted to her husband. Appellant answers this plea by alleging that said judgment was obtained by collusion and fraud, for the purpose of furthering the intent to hinder, delay, and defraud the creditors of T. J. McDanel. Appellant further contends that the question of indebtedness was not fully adjudicated in that action; that the adjudication was only as to the two notes and mortgages sued upon; and that the validity of the chattel mortgage, and the state of indebtedness resting thereon, and upon the personal property and money received by appellee from her husband, was not involved nor adjudicated in that case; and that, upon an accounting thereof, it appears that appellee is indebted as claimed. Upon these issues the court instructed, in substance, as follows: That, if the jury failed to find that appellee's judgment was collusively and fraudulently obtained by appellee, their duties were at an

end, and they should return their verdict for the garnishee defendant. By this instruction appellee's judgment is made conclusive upon the question of her indebtedness, unless it was found that it was collusively and fraudulently obtained. That it was so conclusive as to all matters of indebtedness that were or should have been pleaded therein there can be no question; but it will be observed that the matter of the chattel mortgage, the \$1,600 note, and the amount of personal property and money received by appellee from her husband, were not pleaded in that action. It was alone upon the \$500 and \$1,000 notes, and mortgages securing them. In *Donahue v. McCosh*, 81 Iowa, 296, 46 N. W. Rep. 1008, this court held as follows: "One having two independent causes of action against the same party, by suing upon one, would not thereby be barred from afterwards bringing his action upon the other, though both might have been embraced in the first action." Appellee certainly has a cause of action upon the \$1,600 note and chattel mortgage, independent of her causes of action upon the two notes and mortgages upon which she did sue. T. J. McDaneld and his creditors have a right in such an action to question the validity of said note and chattel mortgage, and whether or not anything is due thereon. This cause of action being independent of, and not joined with, the cause of action upon which said judgment was rendered, that judgment was not an adjudication thereon. In the absence of collusion or fraud in obtaining it, that judgment is conclusive that T. J. McDaneld was indebted to appellee in the amount found on the two notes sued upon, but it is not conclusive as to the general state of indebtedness between them. We think the instruction was erroneous.

3. The court further instructed that, if said judgment was collusively obtained to defraud the creditors of T. J. McDaneld, it would be no adjudication as against the plaintiff; that, if they so found, they should inquire whether or not appellee took any of the mortgaged chattels, the value thereof, and the amount of payments made to her by T. J. McDaneld, and, if the value of the property and the payments so received exceeded the amount of the indebtedness due to appellee, they should find in favor of the plaintiff to that amount; otherwise they should find for the defendant. If appellee's judgment was not an adjudication as against appellant because of collusion and fraud, he had the right to have the question of the validity of the notes and mortgages upon which said judgment was rendered submitted to the jury. If they were void as alleged, then appellee was chargeable with the property she received under them. Under

the instructions the inquiry was limited to the personal property and payments received by appellee, while the amount of the judgment was left to stand in her favor. If appellee's judgment was collusively and fraudulently obtained, it was, under the instructions, no adjudication as to appellant, and the question of the validity of all these notes and mortgages should have been submitted to the jury, and they instructed to determine whether or not, upon all the transactions, appellee was indebted to her husband at the time the notice of garnishment was served upon her. Appellant answered in that action that the notes and mortgages sued upon had been fully paid, and were without consideration and fraudulent. If the judgment was not obtained by collusion and fraud, as alleged, then it was an adjudication of these pleas, notwithstanding the withdrawal of the answer and cross petition, but, if the judgment was obtained as alleged, it adjudicated nothing.

4. Appellant, after having examined appellee as his own witness, offered to read in evidence her testimony formerly given, and taken in writing, signed by her, in a proceeding supplemental to execution on appellant's judgment against T. J. McDaneld. Appellee objected, "as being an attempt to contradict or corroborate his own witness," and for the reason that the witness was present. "Defendant's counsel also state that to any part of the examination in said Exhibit A which is additional to the testimony given by the witness on the witness stand no objection is made." Appellant was not precluded from proving material statements of appellee made at other times, by calling her as his witness, or by reason of her presence. Such evidence was against her as a party to the action, and admissible, whether she was examined or not. The court excluded the entire document, thereby excluding that which was not objected to, as well as that which was. While the exhibit is largely the same as her testimony on the trial, it contains different and additional statements, that should not have been excluded under the objection. T. J. McDaneld having been examined on part of the defendant, the plaintiff in rebuttal offered his evidence, taken in writing and signed, given in said proceeding supplemental to execution. Appellee objected as incompetent, immaterial, and not rebuttal, which objection was sustained. The evidence offered is in several particulars different and contradictory of that given on the trial, and, in view of T. J. McDaneld's relation to this action, should have been admitted. It was in direct rebuttal of his testimony on the stand. Other questions discussed will not arise on a retrial, and are therefore not considered. Reversed.

BARBER v. SCOTT.

(Supreme Court of Iowa. May 22, 1893.)

BILL OF EXCEPTIONS—FILING—ABSTRACT OF EVIDENCE—AMENDMENT.

1. A bill of exceptions not filed within the time allowed cannot be considered.

2. Where appellee, in his amendment to appellant's abstract, says that appellant's abstract is misleading, and does not contain all the testimony, or a fair substance thereof, and that by reason of appellant's unfair abstract the two abstracts, taken together, do not contain a truthful and fair account of all the testimony, the two together will not be held to contain all the evidence, so as to dispense with a bill of exceptions.

Appeal from district court, Story county; J. L. Stevens, Judge.

Action for the recovery of damages for an alleged malicious prosecution. Defendant answers, admitting that he filed the information, that he was subpoenaed, and testified before the grand jury; that plaintiff was finally discharged on a trial by the district court; and denying that said prosecution was without probable cause, or with malice or ill will. The case was tried to a jury, and verdict for plaintiff in the sum of \$3,000. Defendant's motion for a new trial being overruled, judgment was entered upon the verdict, from which the defendant appeals.

Funson & Gifford, G. W. Dyer, and Gatch, Connor & Weaver, for appellant. E. L. Green and J. T. Martin, for appellee.

GIVEN, J. Appellee "moves this court that the judgment of the court below be affirmed, the appeal dismissed, and that the bill of exceptions be stricken out." He states as grounds for said motion that the bill of exceptions was not filed until after the time allowed, that no exceptions were taken by appellant; and that there is no evidence made a matter of record. Appellant's abstract shows that on the trial he objected to two material items of evidence offered by appellee; that his objections were overruled, to which rulings he at the time excepted; that these rulings were stated as grounds for a new trial; and that he excepted to the overruling of his motion for a new trial. Before filing the motion under consideration appellee filed an amended abstract of record, in which he denies the correctness of appellant's abstract, and alleges that the two abstracts, taken together, "do not contain a truthful and fair account of all the testimony." Following this, appellant filed his denial of this allegation, and alleged that the two abstracts contain all the evidence. He also filed a transcript showing the judgment to have been entered on the 10th day of March, 1891, with leave to defendant to file bill of exceptions in 30 days, and a bill of exceptions filed April 10, 1891. The errors assigned are in admitting testimony over appellant's objections; that

the verdict and special findings are contrary to certain instructions; that the verdict is excessive; and that the court erred in overruling the motion for new trial.

The bill of exceptions was filed on the 31st day following the rendition of the judgment. Several affidavits are filed by appellant in explanation of this delay, none of which tend to show that the delay was caused by any fault or action of appellee or his counsel. It is not required that we notice what is presented by these affidavits, and in argument in explanation of or excuse for the delay in filing the bill of exceptions. This court has uniformly held that a bill of exceptions not filed within the time prescribed will not be considered on appeal. *Cobb v. Chase*, 54 Iowa, 196, 6 N. W. Rep. 264; *McFarland v. Folsom*, 61 Iowa, 117, 15 N. W. Rep. 863; *Coal Co. v. Smith*, 68 Iowa, 561, 27 N. W. Rep. 746; *Templin v. Bank*, 69 Iowa, 149, 28 N. W. Rep. 484; *McCarthy v. Watrous*, 69 Iowa, 260, 28 N. W. Rep. 596. The fact being undisputed that the bill of exceptions before us was not filed until after the 30 days allowed, it follows from these decisions that the bill of exceptions cannot be considered. Appellant contends that, if appellee deemed his abstract imperfect or unfair, and he elected to file a further or additional abstract, he was required to set out all of the evidence that he deemed necessary "to a full understanding of the questions presented," and that, having filed an additional abstract, we must assume that he has supplied all the omissions and imperfections of the appellant's abstract, and that by the two abstracts we have before us all parts of the record necessary to a full understanding of the questions presented, and that in such case it is immaterial whether or not there was any bill of exceptions. *Starr v. City of Burlington*, 45 Iowa, 87, is referred to. In that case an amended abstract to supply the omissions made by plaintiff was filed without claiming that, with the parts of the record so supplied, the case was not fully presented, and the evidence all before this court. In *Richardson v. Blinkiron*, 76 Iowa, 256, 41 N. W. Rep. 10, appellee filed an additional abstract, setting out evidence alleged to have been omitted from appellant's abstract, and, it not being denied that all the evidence introduced on the trial was before this court in the two abstracts, appellee's motion to strike the bill of exceptions because not filed in time was overruled. See *Connors v. Railway Co.*, 74 Iowa, 384, 37 N. W. Rep. 996. It will be observed that in neither of these cases was there a denial that the two abstracts did not contain all the evidence. In this case appellee, in his amendment to appellant's abstract, "says that the appellant's abstract is misleading and unfair; that the same does not contain all the testimony offered and introduced at the trial, nor does the same contain a fair substance thereof,

and the same is unfairly made, and is untruthful and misleading in all its parts; that by reason of the unfair abstract of appellant's submitted to this court the two abstracts, taken together, do not contain a truthful and fair account of all the testimony introduced or admitted at the trial of this case." The bill of exceptions not having been filed in time, and the parties thus disagreeing in their abstracts, appellee's motion to strike the bill of exceptions and to affirm the judgment must be sustained.

FALKER et al. v. LINEHAN et al.

(Supreme Court of Iowa. May 27, 1893.)

CHATTEL MORTGAGES—VALIDITY—FAILURE TO RECORD—BILL OF SALE—VALIDITY—ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF CREDITORS.

1. The complaint, in an action to declare void a chattel mortgage and bill of sale, alleged that the mortgage was withheld from record in pursuance of an agreement between the parties thereto. It appeared that defendant K., a merchant, executed to defendant L., to secure a certain indebtedness, a mortgage covering his present stock, and all that might thereafter be added. The mortgage was not recorded for a year. Between the execution and filing thereof, plaintiffs, having no knowledge of the mortgage, sold K. goods on credit, and, about the time the mortgage was filed, recovered judgments for the unpaid balance. K. testified that, when the mortgage was executed, L. said he would have to record it, to which K. objected on the ground that such action would injure his credit. L. thereupon agreed to keep the mortgage in his safe. L. denied any agreement to withhold the mortgage, but failed to satisfactorily explain why the same was not recorded. *Held*, that the mortgage was void as to plaintiffs.

2. On the day after the mortgage was filed, K. and some of his creditors, including L., met, and it was decided that K. should make a general assignment. On the following day, K. executed to L., who knew of K.'s insolvency, a bill of sale covering the goods embraced in the mortgage, and on the same day executed a general assignment. *Held*, that the two instruments constituted one transaction,—an assignment for creditors, with a preference,—and therefore the bill of sale was void.

§ Code, § 3150, provides that after judgment an action in equity may be brought to subject any property, money, etc., belonging to the defendant to the satisfaction of such judgment, and that persons indebted to the judgment debtor, or holding any property in which such debtor has any interest, or the evidence of sureties for the same, may be made defendants. Section 3152 provides that in such a case a lien shall be created on the property of the judgment debtor, or his interest therein, in the hands of any defendant, or under his control, which is sufficiently described in the petition, from the time of the service of notice and copy of the petition on the defendant holding or controlling such property. *Held*, that the action might be commenced though plaintiffs therein had no lien or interest in the property in question at the time, and that by the commencement thereof they acquired a lien on the same.

Appeal from district court, Dubuque county; J. L. Husted, Judge.

Plaintiffs, judgment creditors of the defend-

ant H. D. Kelley, who is insolvent, bring this action in equity to declare a certain chattel mortgage and bill of sale executed by the defendant Kelley to the defendant Linehan void, and to subject money in the hands of defendant J. J. Dunn, derived from the sale of part of the mortgaged property, to the payment of their judgments. Judgment was entered, dismissing plaintiffs' bill, and for costs, from which the plaintiffs appeal. The issues and facts appear in the opinion.

Henderson, Hurd, Daniels & Kiesel, for appellants. Longueville & McCarthy, for appellees.

GIVEN, J. 1. There is no dispute as to the following facts: For some years next preceding June 10, 1889, the defendant Kelley was engaged in the retail grocery business in the city of Dubuque, having three stores,—one at No. 737 Main street, one at No. 1,179 Iowa street, and one at No. 5 South Locust street. On May 16, 1888, defendant Kelley executed a chattel mortgage to defendant Linehan on all of the goods and fixtures in said stores, "and all additions that may be hereafter made to said stocks," and on a delivery horse and wagons, to secure an existing indebtedness of \$1,400, for borrowed money. This mortgage was not filed for record until June 8, 1889, and the plaintiffs had no knowledge thereof until the same was so filed. Between the time said mortgage was executed and the day it was filed for record, the plaintiffs, wholesale dealers in other states, sold goods on credit to the defendant Kelley, and on June 8 and 12, 1889, obtained judgments for the balances due them, respectively. On June 12 and 14, 1889, notices of garnishment were served on the defendant Linehan, on each of said judgments, and his answers afterwards taken. It does not appear that any further proceedings were had under the garnishment. On Sunday, June 9, 1889,—the day following the filing of said mortgage for record,—there was a conference between Kelley and some of his creditors, including one W. J. Brown, general manager for Mr. Linehan, who was acting for him. Mr. Linehan was at the place of meeting, but there is a dispute as to how long he remained, and what took place in his presence. There is no dispute, however, but that the opinion was generally expressed that Kelley should make a general assignment for the benefit of all his creditors. At the request of Mr. Linehan, made to Kelley at the place of the conference, Kelley went to Linehan's house that Sunday evening, between 9 and 10 o'clock, where he met Mr. Linehan, Philip Ryder, W. J. Brown, and J. C. Longueville, attorney for Mr. Linehan. Soon after 12 o'clock, defendant Kelley executed and delivered a bill of sale, prepared by Mr. Longueville, to the defendant Linehan, of the goods and fixtures at No. 1,179 Iowa street, and certain other property not included in the

mortgage, and Linehan took possession of the property that same night. Soon after executing the bill of sale, Mr. Kelley went to Mr. Longueville's office, where he executed a general assignment to Philip Ryder for the benefit of all his creditors, which Mr. Longueville also prepared. A receiver was afterwards appointed, and he sold part of the property covered by the mortgage and bill of sale, realizing therefrom the \$800 now in the hands of the defendant Dunn, as clerk of the court, and which plaintiffs ask to have applied upon their judgments.

2. Appellants allege and maintain that said chattel mortgage was withheld from record, in pursuance of an agreement between Kelley and Linehan, for the purpose of enabling Kelley to buy goods on credit, and that it is therefore void as to the plaintiffs. Appellee Linehan denies that there was such an agreement or purpose. Kelley testifies in his deposition as follows: "At the time I gave the mortgage, Mr. Linehan said he would be obliged to record it. I objected, saying that such action would injure my credit. He then said he would keep it in his safe. He said to record it would tend to injure my credit." On cross-examination he states: "I had a conversation with defendant Linehan, about not recording the mortgage, a day or two after it was given, and again had a conversation with him about it a few months later, at his store, when he said he thought he would have to record it, and raise money on it. I said, if he should do so, it would injure my credit, and I could not buy goods to advantage. Our talks were always private, no one else being present." Defendant Linehan was asked upon his examination, in substance, if these conversations had occurred, and he answered: "Not of that kind. Nothing was said between us about keeping it from record." He says: "I didn't record the mortgage because he came to me, and wanted to borrow money. He was crying, and I was going away. I think I got the mortgage at my store, and left it there. I may have got the mortgage at Mr. Deery's office. I don't remember. It was long since." This is the only explanation Mr. Linehan attempts to make, why he did the very unusual thing of keeping that mortgage from record for more than a year. He knew that Kelley was carrying on business in the usual way of merchants; that, on the strength of his business and goods on hand, he was buying on credit; and he knew, as every business man knows, that the recording of that mortgage would at once close the doors of Kelley's stores. But one conclusion can be reached from the evidence before us, and that is that Kelley desired, and Linehan consented, to hold the mortgage from record, that Kelley might obtain credit, and continue in business. A number of authorities are cited to show the effect of such a state of facts, but as this case is identical in its facts, so far as the points in dispute are concerned, with the re-

cent case of *Goll & Frank Co. v. Miller*, (Iowa,) 54 N. W. Rep. 443, we do not refer to any other. In that case it was found, as we find in this, that the mortgage was withheld from record in pursuance of an arrangement between the parties which "could have but one object, and that was to maintain the credit of Miller, and lead parties with whom he dealt to give credit to him in the belief that he was not a chattel-mortgage merchant." It is further said in that case: "In such a case it is well settled that the mortgagee cannot be permitted to insist on the validity of his mortgage, as against those who have given credit to the mortgagor under such circumstances. Such a transaction is fraudulent as to the other creditors." Following this case, and those cited therein, we hold that appellee Linehan is not entitled to the money in question, as against these plaintiffs, by virtue of said chattel mortgage.

3. In the case of *Goll & Frank Co. v. Miller*, a bill of sale and possession of the property were given, as in this case, and it was claimed, as these appellees now claim, that taking the bill of sale was an independent transaction, and that the relation of the parties is the same as if no mortgage had ever been taken. It was held in that case that the mischief was done by withholding the mortgages from record, and that the bill of sale could not purge the mortgages of their fraudulent character. For the reason given in that case we hold that the bill of sale is void as against these plaintiffs. Appellants contend that the bill of sale and assignments should be considered as one instrument, and held to be void because of the preference given to appellee Linehan. We are entirely satisfied from the evidence that it was the intention of H. D. Kelley, at and at all times after the conference on Sunday, to make a general assignment for the benefit of all his creditors alike, and that the creditors present, including Mr. Brown and Mr. Linehan, so understood. These creditors other than Linehan acted and relied upon that understanding, while he induced Kelley to give the bill of sale. We are in no doubt but that Linehan knew at the time he took the bill of sale that Kelley was insolvent, and that it was his intention to at once make a general assignment of all his property for the benefit of his creditors. Here we have, not only an intention upon the part of the debtor to make a general assignment, but a knowledge of that fact on the part of the creditor at the time he took the bill of sale. The execution of the two instruments was so connected in time, intention, and circumstances as to constitute one transaction, namely, a general assignment of all the debtor's property for the benefit of creditors, with preference to appellee Linehan, and is therefore void. Code, § 2115; *Burrows v. Lehnndorff*, 8 Iowa, 96; *Bank v. Crittenden*, 68 Iowa, 237, 23 N. W. Rep.

646; Moore v. Church, 70 Iowa, 208, 80 N. W. Rep. 855; Van Patten v. Burr, 52 Iowa, 518, 3 N. W. Rep. 524; Perry v. Vezina, 63 Iowa, 25, 18 N. W. Rep. 657; Farwell v. Jones, 63 Iowa, 316, 19 N. W. Rep. 241; Clement v. Johnson, (Iowa,) 52 N. W. Rep. 502.

4. Appellee Linehan contends that the plaintiffs are not entitled to any relief in this action for the reason that they have no lien on or interest in the property described in the mortgage and bill of sale, and because their remedy is adequate at law. We have seen that prior to the commencement of this action each of these plaintiffs obtained judgment against H. D. Kelley, and that executions were issued thereon, and appellee Linehan garnished; also, that a receiver was appointed, and that he sold part of the property, realizing therefrom the \$600 now in the hands of the defendant Dunn, as clerk of the district court, which plaintiffs ask to have applied to their judgment. While it is true the plaintiffs had no lien upon this property, or the proceeds thereof, prior to the commencement of this action, they are certainly entitled to have it subjected to the payment of their judgments, if the mortgage and bill of sale were fraudulent, as alleged. This proceeding is under sections 3150 to 3153 of the Code, inclusive. Sections 3150 and 3152 are as follows: "Sec. 3150. At any time after the rendition of a judgment an action, by equitable proceedings, may be brought, to subject any property, money, rights, credits, or interest therein, belonging to the defendant, to the satisfaction of such judgment. In such action, persons indebted to the judgment debtor, or holding any property or money in which such debtor has any interest, or the evidences of sureties for the same, may be made defendants." "Sec. 3152. In the case contemplated in the two preceding sections a lien shall be created on the property of the judgment debtor, or his interest therein, in the hands of any defendant, or under his control, which is sufficiently described in the petition, from the time of the service of notice and copy of the petition on the defendant holding or controlling such property, or any interest therein." It is clear, from these statutes and facts, that plaintiffs were entitled to commence this action, though they had no lien or interest in the property in question at that time, and that under said section 3152 they acquired a lien thereon by the commencement of the action and service of notice. It is said in argument that this kind of action must be against the judgment debtor, and those who are endeavoring to aid him in covering up or concealing his property may be brought into the action secondarily, and that no relief is asked against Kelley, and therefore relief cannot be granted against his mortgage. Plaintiffs have their judgments against Kelley, and

desire no further relief as to him. Their action is properly against those charged with concealing or covering up his property. We think the case is strictly within the provisions of the sections of the Code quoted, and that the district court erred in dismissing the plaintiff's petition. The judgment and decree of the district court are reversed, and the case will be remanded for judgment and decree in conformity with this opinion.

LAWRENCE et al. v. MCKENZIE, (AMERICAN HAND-SEWED SHOE CO., Intervener.)

(Supreme Court of Iowa. May 22, 1893.)

FRAUDULENT CONVEYANCES — CONSTRUCTION OF STATUTE — ACCOUNTS — NOTICE — WHAT CONSTITUTES.

1. Code, § 1923, providing that no sale or mortgage of personal property, where the mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is recorded in the county where the holder of the property resides, does not apply to "accounts."

2. Where plaintiff had left certain accounts assigned to him by defendant with defendant as his agent, to collect and account therefor until his indebtedness was satisfied, the possession of such agent was the possession of plaintiff, and, by garnishing property of defendant's creditors for the same debt, plaintiff waived all rights under the assignment.

3. Accounts may be mortgaged.

4. A description of accounts in a mortgage thereof which fails to schedule them, or to give the names of the parties owing them, is insufficient to impart constructive notice of such mortgage to a person to whom such accounts have previously been assigned.

5. Though such person knew that the mortgagees were in possession of the books of account and claiming such books, such facts would not be notice that they were claiming the accounts themselves.

Appeal from district court, Cass county; N. W. Macy, Judge.

Action by attachment against the defendant, in which certain creditors of defendant were attached as garnishees. The American Hand-Sewed Shoe Company intervened, claiming to be the owners of the indebtedness due from the garnishees to the defendant. Trial to the court. Judgment against intervener, dismissing its petition, and for costs, from which it appeals.

Willard & Willard and C. S. Patterson, for appellant. De Lano & Meredith, for appellee.

KINNE, J. 1. The case, as between the plaintiff and intervener, was submitted to the court below upon an agreed statement of facts, from which we condense the following as being material to the determination of this controversy: The defendant, J. S. McKenzie, was engaged in the boot and shoe business in Cass county, Iowa, from August 14, 1888, to February 15, 1889. On the first-named date he executed to plaintiff an assignment of "all accounts due me, as shown

by my ledger and day books" which he had used, and was using, in his business; also "all accounts I hereafter make in my said business." This assignment was made to secure notes given to the plaintiff. By the terms of the writing, when the indebtedness to secure which the assignment was made was paid, the assignment was "to be surrendered to him, and all the uncollected accounts turned back to him." It also provided that he should collect the accounts, and pay over the money to plaintiffs, as called for, until his indebtedness to them was paid. This assignment was pasted on the inside cover of defendant's ledger, and remained there until after the book was seized by the mortgagees, hereinafter referred to. Thereafter defendant executed chattel mortgages upon his stock of goods, including accounts, as follows: January 15, 1889, to H. S. Albright & Co., to secure \$527.96; February 4, 1889, to D. M. Wells & Co., to secure \$889.24; January 4, 1889, to R. G. Dun & Co., as trustees, \$800; February 5, 1889, to Hathaway, Soule & Harrington, \$283.85; February 5, 1889, to American Hand-Sewed Shoe Company, to secure \$2,034; February 23, 1889, to Little & Co., to secure an amount not shown by the record. All these mortgages were duly recorded on the same or the day following their execution. All of them were in the usual form, and the accounts in controversy were described in the several mortgages as follows: In the Wells mortgage and in intervenor's mortgage, after describing other property, occur the words "and book accounts." In the other mortgages the description is, "and book accounts for goods sold." The several mortgagees, at the time they took their mortgages, had no notice or knowledge of the assignment to plaintiff. February 13, 1889, the mortgagees took possession of the property, and foreclosed said mortgages by notice and sale. February 22, 1889, plaintiff brought an action by attachment against defendant on the notes secured by said assignment of accounts, and, after the foreclosure sale, caused the parties owing said accounts to be garnished therein. At the time of the service of said garnishments, plaintiff had no actual notice that said mortgagees had or made any claim to the several sums of money owing by the garnishees to the defendant, and no constructive notice of such claims except what the record of said mortgages afforded, and an examination of the mortgages afforded, together with actual notice that the books of account kept by defendant were in the hands of the agent of the mortgagees, and that they were claiming them under said mortgages. February 23, 1889, the property described in the mortgages was offered for sale under the foreclosure proceedings, when one of the plaintiff's firm, being present, gave notice, prior to the sale, of plaintiff's claim to the accounts. At his request the

tiffs made a bid thereon, which they afterwards withdrew, and the accounts and notes were purchased by the intervenor for \$3,350. The proceeds of the sale paid all the mortgages upon the stock of goods and book accounts prior to intervenor's mortgage, but nothing was left to apply, thereon, and same is unpaid. None of the property was advertised or sold under intervenor's mortgage. June 10, 1889, plaintiff recovered a judgment against the defendant for \$314.10 debt, and \$25.75 attorneys' fees, and \$85.30 costs, no part of which is paid.

2. This is a controversy between plaintiff and intervenor as to which of them has the better right to the money which was due defendant on said accounts, and is now in the hands of the several garnishees. Plaintiff claims under both the assignment and garnishment. Intervenor claims by purchase at the sale under the mortgages. We will first consider plaintiff's claim. Our statute provides: "No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors, or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides." Code, § 1923. It will be remembered that no such instrument was made and filed in the case at bar; hence plaintiff's rights, so far as the assignment is concerned, depend upon the construction of the statute above quoted. At the time the mortgages were taken, and even at the time the mortgagees took possession of the books of account, they had no knowledge that the assignment had been made. The question then is, were these accounts "personal property," within the meaning of the statute? If they were, then the assignment of them to the plaintiff was void, as against the mortgagees, and also against intervenor, who claims under them, if they were sufficiently described in said mortgages. Whether this section of our recording act applies to accounts was suggested, but not decided, in *Manufacturing Co. v. Robinson*, 49 N. W. Rep. 1031. The statute of New Jersey uses the words "goods and chattels," and under it it has been held that corporation stock was not included. The court said: "The act has reference to pledges of personal property of a kind which is capable of visible possession." *Williamson v. Railroad Co.*, 26 N. J. Eq. 403. The same court held that a legacy was not covered by the act; that it did not apply to "mortgages of choses in action." *Bacon v. Bouham*, 27 N. J. Eq. 212. So it has been held that a policy of insurance is not "property," in such a sense that a transfer of it is required to be recorded under our statute. *Aultman v. McConnell*, 34 Fed. Rep. 724. In Massachusetts the statute uses the words "personal property," and it was held, per Shaw, C. J.,

that an assignment of a legacy was not a case covered by the act, as it "applied only to goods and chattels capable of delivery, and not to the defeasible or conditional assignment of a chose in action." *Marsh v. Woodbury*, 1 Metc. (Mass.) 436. In New York the act is held not to apply to the case of the assignment of a lease as security; that the statute relates "to goods and chattels which can be removed from one place to another, and the possession thereof changed, and not to chattels real, or to a chose in action." *Booth v. Kehoe*, 71 N. Y. 341. In Ohio the statute is held not applicable to legacies. *Kilbourne v. Fay*, 29 Ohio St. 264. The supreme court of Virginia holds that such statutes only include personal property which is visible, tangible, or movable, and that an assignment of a mere chose in action is valid without recording, as against a subsequent attachment of the same debt or claim. *Kirkland v. Brune*, 31 Grat. 126. In West Virginia the holding is the same. *Tingle v. Fisher*, 20 W. Va. 497; *Bank v. Gettlinger*, 3 W. Va. 317. In Michigan the statute reads "goods and chattels," and it is held: "It applies only to goods and chattels which are capable of delivery. * * * There is no way in which an account can be delivered. It has no tangible entity, and exists only as an incorporeal right. Neither the thing itself, nor any evidence of it, is capable of delivery." *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, (Iowa,) 47 N. W. Rep. 502. A leading text writer says: "Statutes respecting the recording of mortgages of personal property apply only to goods and chattels capable of delivery, and not to defeasible or conditional assignments of choses in action." *Jones, Mortg.* § 278. The following cases support the same doctrine: *Monroe v. Hamilton*, 60 Ala. 226; *Bank v. Huth*, 4 B. Mon. 423; *Newby v. Hill*, 2 Metc. (Ky.) 532; *Brady v. State*, 26 Md. 311. See, also, *Howe v. Jones*, 57 Iowa, 138, 8 N. W. Rep. 451, and 10 N. W. Rep. 299. While the language used in the recording acts of the several states differs, yet its legal effect, as applied to the matter under consideration, is the same, and the almost uniform holding has been that such acts have no application to accounts. There appears to be no good reason why, in the construction of our statute, we should depart from the rule established in nearly all the cases. As the transfer of accounts was not a sale or mortgage of such property as is contemplated by the section of the Code under consideration, it was not necessary that the instrument evidencing the same should be recorded. It was valid, as against the mortgagees and those claiming under them, though they had no notice of it, and the assignor continued to remain in possession of the property. There is no claim that the transfer of the accounts was without consideration, or fraudulent. In fact, it appears that, at the time the assignment was

made, the defendant was indebted to the plaintiff in a large sum of money. From what we have said it follows that plaintiff has the right to the sums due from the parties owing said accounts, unless he has (as is claimed by the intervener) waived it by causing the parties who owe said accounts to be garnished in his attachment proceeding.

3. Intervener claims that, by causing the debtors of defendant to be garnished, the plaintiff has waived all his rights under the assignment. We think the claim is well founded. Plaintiff was, by his agent, in the possession of the accounts. His claim under his garnishment was clearly inconsistent with his claim by virtue of the assignment. The law is well settled that one in possession of personal property, and claiming a lien thereon or title thereto, cannot attach the property for the same debt, and still maintain his prior lien or claim. *Bank v. Dows*, 68 Iowa, 460, 27 N. W. Rep. 459; *Crawford v. Nolan*, 70 Iowa, 97, 30 N. W. Rep. 32; *Munson v. Porter*, 63 Iowa, 453, 19 N. W. Rep. 290; 2 Pars. Cont. 244, 245; *Story, Ag.* § 367; *Drake, Attachm.* § 540; *Evans v. Warren*, 122 Mass. 303. Plaintiff claims that he was not in the actual possession of the accounts under his assignment, and hence he is not within the rule. The evidence shows that he left the accounts with the defendant as his agent; that the agent was to collect and account for the same as he might be called upon, until the full sum of his indebtedness to the plaintiff was satisfied. The agent's possession was the principal's possession. Plaintiff, it occurs to us, ought not to be permitted to say that he is in possession of the accounts for the purpose of claiming that by his assignment he held a right therein superior to all others, and at the same time be justified in his contention that he was not in possession, if it was likely to interfere with his claim to the same property by virtue of the garnishments. Plaintiff, then, if successful, must be so under his garnishment proceedings. He has waived his right to claim the property under the assignment.

4. Prior to plaintiff's garnishment of the debtors of the defendant, the mortgages in question were executed upon the goods of the defendant, including the accounts in controversy. Plaintiff insists that accounts are not the subject of mortgage. The general rule is that, in the absence of statutory provisions to the contrary, any personal property which is capable of being sold, and which has an actual or prospective existence, may be mortgaged. 1 *Cobbey, Chat. Mortg.* § 189; *Jones, Chat. Mortg.* § 114; 6 *Lawson, Rights, Rem. & Pr.* § 3079. This court has recently held that accounts are the subject of a mortgage, and, whatever the rule may be elsewhere, the question is no longer an open one in this state. *Manufacturing Co. v. Robinson*, 49 N. W. Rep. 1031.

5. Was the description of the accounts in the mortgages under which intervenor purchased sufficient to impart constructive notice to plaintiff? A description reading, "our books of account, and accounts due and to become due," has been held not sufficiently definite to impart notice to third persons. *Sperry v. Clarke*, 76 Iowa, 505, 41 N. W. Rep. 203. The description in the case at bar is not more certain than that in the case cited. So, a description reading, "all the threshing-machine accounts which we shall earn, or shall become due us, by the work of the above machine, from now till this debt is paid in full," was held not good as constructive notice, though the name and number of the machine was also given. *Manufacturing Co. v. Robinson*, (Iowa,) 49 N. W. Rep. 1031. See, also, *Hayes v. Wilcox*, 61 Iowa, 732, 17 N. W. Rep. 110; *Everett v. Brown*, 64 Iowa, 420, 20 N. W. Rep. 743; *Ormsby v. Nolan*, 69 Iowa, 130, 28 N. W. Rep. 569; *Warner v. Wilson*, 73 Iowa, 719, 38 N. W. Rep. 719. Under the holding in these and other cases which might be cited, it is clear that mortgages containing such descriptions as those in the case at bar are of no validity whatever as against plaintiffs. No attempt is made to schedule the accounts. The names of the several parties owing the debts are not stated. There is nothing to show where they reside. The character of the property sought to be mortgaged is such, and it is so peculiarly, and we might say exclusively, within the knowledge of the parties to the transaction alone, that it should be as fully described as possible. It is certainly reasonable to expect that in case of such property the names of the debtors, and the amounts they severally owe, should be set out.

6. Intervenor claims that the plaintiff had actual notice, prior to its garnishments, of the mortgages on the accounts. It is true it appears that plaintiff knew that the mortgages were in possession of the books of account, and were claiming them by virtue of the mortgages. The mortgages did not pretend to cover the books of account, and the fact that plaintiff knew that the mortgages were claiming the books would not be notice that they were claiming the accounts which plaintiff afterwards sought to hold by virtue of its garnishment of the several debtors. These mortgages do not, in terms, claim to cover accounts which might be the fruit of the defendant's business after they were given. Some of them do not show whether they were intended to cover all of defendant's accounts, or only a part of them. We do not think, under all the circumstances, as it does not appear that the plaintiff knew, prior to its garnishment, that the mortgagees were making any claim to the accounts themselves, that it can be said that they had actual notice.

Some other questions are argued which

we do not deem it important to consider, as they do not affect the result we have reached. We think the holding of the court below was right, and its judgment will be affirmed.

PEET v. CHICAGO, M. & ST. P. RY. CO.
(Supreme Court of Iowa. May 24, 1893.)

RAILROAD COMPANIES—KILLING LIVE STOCK—DESTRUCTION OF FENCE BY STORM—FAILURE TO REPAIR.

1. In an action against a railroad company for cattle killed by a train it appeared that a storm had, the night before, washed out part of the fence between the field where the cattle were and defendant's track, and that the cattle, having escaped, were driven back by defendant's section men, who left without repairing the fence. Between 5 and 6 o'clock on the same day the cattle were again found on the track by the section men and foreman, who drove them into an adjoining field, not belonging to plaintiff. The fence of this field had also been washed out by the storm, and plaintiff's cattle escaped therefrom, and were struck by a train. The storm had seriously damaged defendant's track, roadbed, and bridges for 50 miles; had broken the telegraph line, and destroyed 12 miles of fence. But the fence at that particular point could have been repaired by the section men in an hour. *Held*, that a finding that defendant did not exert ordinary diligence in repairing the fence was justified by the evidence.

2. Where no exceptions are taken to instructions, they must stand as the correct law of the case.

Appeal from district court, Jones county; J. H. Preston, Judge.

Action to recover for cattle killed by the defendant's train. Judgment for plaintiff, and the defendant appealed.

A. L. Bartholomew and H. M. Remley, for appellant. Sheean & McCarn, for appellee.

GRANGER, J. The plaintiff and one Murfield owned farms adjoining, and abutting on the defendant's right of way, along the line of which the defendant had constructed a fence. June 14, 1890, a storm washed out a part of the fence between the right of way and plaintiff's field, and also between the right of way and Murfield's field. The storm was in the night of June 14th. On the afternoon of June 15, 1890, about 20 head of plaintiff's cattle went through the gap in the fence from the field onto the right of way, and were driven back into the field by the section men, who left without repairing the fence. Later in the day, and between 5 and 6 o'clock, the cattle were again on the track, and found by the section men and foreman. They were opposite to the field of Murfield, and were, by the men, driven into Murfield's field, and left without repairing the fence. From this field the cattle again went onto the track, and some of them were, during the night of June 15th, killed by defendant's train. The only question in the case is whether or not, under

the evidence, as a matter of law, the defendant was entitled to judgment. The jury returned the following special findings: "(1) How long a time intervened between the time knowledge came to the defendant of the defect in the fence and the time of the injury to said stock? Answer. About eleven hours. (2) Under the circumstances, as shown by the evidence, did defendant exercise ordinary diligence in repairing the fence? A. He did not."

We think the findings of fact have such support in the evidence that we should not interfere. The evidence discloses that the storm, on the night of June 14th, seriously damaged the railway track, roadbed, and bridges of defendant's line for a distance of nearly 50 miles; that the telegraph line was broken, and some 10 or 12 miles of fence destroyed; and it is urged that because of such a situation, requiring so much to be done with the utmost dispatch, in order that trains might be moved in the interest of the company's business, and for the preservation of life and property intrusted to its care, as a matter of law, the time found by the jury is not sufficient for the repair of the fence, by the exercise of reasonable care. The facts as to the condition of the road after the storm are not in dispute, but notwithstanding they do not have the effect of presenting a question of law as to negligence, upon an undisputed state of facts. A difficulty with appellant's contention is that it brings into view so many remote facts, entirely disconnected from the subject of inquiry, as the record discloses. For instance, the record is, rather than otherwise, an affirmative showing that the condition of the line for 50 miles did not interfere with the means for making the repairs to the fence, for, to our minds, it does not appear that there was anything to prevent the section men who turned the cattle into Murfield's field from then so repairing the fence as to have prevented a return of the cattle, and such a course, it seems to us, was indicated by the most ordinary diligence. It is true that it was then nearly or quite 8 o'clock, and it may have been necessary to go a mile or more for one or two posts; but will it be said that such facts are a sufficient excuse for leaving those cattle, that had twice, the same afternoon, been upon the track, to return, as they would be likely to do? The testimony shows that it would have taken about an hour to fix the fence at that point, and the presence of the cattle in that open field indicated a necessity for prompt action. As we gather from the evidence, when the cattle were driven into the lot, one of the men took a wire, and twisted it around a stake, in an attempt to fix the fence, and by direction of the "boss" they "all went home" without repairing it. As we have said, it is not a case where the undisputed facts show a want of negligence, but it is a case, to say the least, where the

question of negligence is to be determined from an undisputed state of facts, as to which ordinary minds might differ, and the question then becomes one for the jury. *Mathews v. City of Cedar Rapids*, 80 Iowa, 459, 45 N. W. Rep. 894, and authorities there cited. The case of *Lemke v. Railway Co.*, 39 Wis. 449, is much relied upon by appellant, but it is not authority for its position. There, certain undisputed facts are held, as a matter of law, to constitute negligence in removing goods, when delivered by a common carrier. The goods reached their destination at 5 o'clock Friday afternoon. The consignee resided at the station, and neglected to remove them before the next Tuesday noon, when they were destroyed by fire. The cases are without any special similarity as to facts. In that case the court places particular stress upon the fact that the goods were in the depot all of Monday, and half of Tuesday, without removal, and without any sufficient reason for it, and held the failure, as a matter of law, to be such negligence as released the defendant from liability as a common carrier, and rightly so. Persons of ordinary intelligence could not reasonably differ as to such a conclusion, guided by the rules of law fixing the liability of carriers. *Goddard v. Railway Co.*, (Wis.) 11 N. W. Rep. 593, is not a parallel case in its facts, though quite like this in many particulars. In this case the cattle had been on the track, and the probability of their returning was quite apparent. In that case the condition of the ground and water was such that the fence could not be repaired sooner, and the court recites the particular facts showing it. In this case there is no reasonable ground to claim that the fence could not be repaired at the time the cattle were driven into the field. The day the cattle were driven into the field was Sunday, and it is urged that Sunday should not be computed in the reasonable time allowed by law for repairing the fence. The court, in its instructions, made no reference to Sunday, and the law, as given, would not exclude it. No exceptions are taken to the instructions, and they must stand as the correct law of the case. The record shows, without mistake, that, in the trial and submission of the case, Sunday was considered in determining whether or not the fence was repaired in a reasonable time. The question seems to be presented here for the first time, and it is too late.

Affirmed.

DURLAM v. STEELE et al.

(Supreme Court of Iowa. May 24, 1893.)

LIEN FOR RENT—ENFORCEMENT BY ADMINISTRATOR—EVIDENCE.

1. In an action by an administrator to enforce a lien for rent against grain grown on the leased land, and purchased by defendants from the lessee, it is no defense that in a re-

plevin suit by defendants against the lessee, on refusal of the latter to deliver the grain in accordance with his contract of sale, plaintiff administrator was a witness, and made no claim to the grain, when it does not appear that such action on his part misled defendants to their detriment.

2. Code, § 2402, provides that, "If there be no heir or devisee present, and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate, and demand and receive the profits thereof." *Held*, that an administrator had power to enforce a lien for rent, where, four years before, there was no heir present, or competent to take possession of the land, and the administrator had had possession of and rented the land since that time, and there was nothing to show that he was not entitled to possession.

Appeal from district court, Carroll county; J. P. Connor, Judge.

Action by plaintiff to recover the value of certain oats, claimed by him by virtue of a landlord's lien for rent due and unpaid. Answer in denial, and plea of estoppel. Jury waived, trial to the court, and judgment for plaintiff, from which the defendants appeal.

F. M. Powers, for appellants. Beach & Hoyt, for appellee.

KINNE, J. 1. Defendants are grain dealers residing at Coon Rapids, Iowa. On July 29, 1890, by written contract they purchased of one A. W. Sexton 1,000 bushels of oats. The oats were grown on land belonging to the estate of one S. D. Belding, deceased, and plaintiff was the administrator of said decedent. Plaintiff claims to have leased the land to Sexton for the year 1890 for \$300 rent, to be paid whenever demanded, and says that, while the rent remained unpaid, defendants purchased the oats of Sexton. Defendants deny generally, and plead by way of estoppel that plaintiff, by his acts and statements to defendants, consented to and acquiesced in the sale and purchase of the oats, with full knowledge of all the facts, and that defendants, relying thereon, made said purchase. They also say "that the plaintiff was a witness for the defendant in the case of Steele & Jenks v. A. W. Sexton, tried in this court at the September term, and as such witness was present at the trial, and at no time since the determination of said trial did the said plaintiff make any claim whatever to said oats; that at the said trial the issue was: Was Steele & Jenks, or A. W. Sexton, entitled to the possession of the oats now in question in this cause."

2. On motion of plaintiff, that part of defendant's answer quoted above was stricken out, as being immaterial, irrelevant, and constituting no defense to the action. Defendants insist that in this the court erred. It appears that, after defendant had purchased the oats, Sexton refused to deliver them, whereupon defendants replevied the oats. On this trial plaintiff was a witness,

and, as is alleged, made no claim to said oats. It is contended the facts alleged in that part of the answer quoted, if true, constitute an estoppel, or, if not, that at least they were material, in connection with the other facts pleaded. The matter stricken out did not constitute an estoppel, nor could it in any event be material to the controversy. It appears that, prior to this suit between defendants and Sexton, they had made their written contract for the oats. They were by the suit seeking to enforce that contract. As between defendants and Sexton, defendants were the owners of the oats prior to their bringing the replevin suit. The contract which had before that time been entered into fixed the liability of defendants as purchasers of the oats, so far as Sexton was concerned. It is not alleged that by virtue of plaintiff's silence at the trial, or afterwards, or by his failure to claim the oats, defendants were led to do, or did, anything not required by their contract with Sexton, whereby their situation with reference to the oats was changed to their detriment. Their liability to Sexton had been created long prior to the time set out in the answer, and could not be changed by plaintiff's failure to act.

3. It is said that the administrator had no authority to bring the suit; that he has not shown that there are no heirs present and competent to take possession of the real estate, and hence he is not the proper party to maintain a suit to collect rents of real estate which have accrued since Belding's death. Our statute provides: "If there be no heir or devisee present and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate, and demand and receive the rents and profits thereof, and do all other acts relating thereto which may be for the benefit of the persons entitled to such real estate." Code, § 2402. Section 2403 makes provision for the application of the profits of such real estate, under the direction of the court, to the payment of taxes, debts, and claims in certain cases. It is true that the administrator could not maintain an action for these rents if there was an heir present and competent to take possession of the real estate; and it may be conceded that it is incumbent on the administrator to establish that fact. *Shawhan v. Long*, 26 Iowa, 488. It is shown without conflict that there are no heirs of deceased living in Carroll county, Iowa; that several of them are nonresidents of Iowa; that in 1886, plaintiff made application to the proper court for authority to lease the land of decedent; that it was averred in said application "that there are no heirs at law present and competent to take charge of said real estate." Plaintiff has been in possession of such real estate, and leased the same, ever since said application was made. True, it does not affirm-

actively appear as to whether the court in 1886 granted the prayer of the petition, and ordered the administrator to lease the land, but no claim is made in argument that an order was not made as prayed. The order was asked in 1886 on the ground that there were no heirs present and competent to take possession of the real estate. If granted, the presumption would be, in the absence of evidence to the contrary, that they continued to be absent, and not competent to take possession of the real estate. Such presumption would prevail until overcome, and the burden was on the defendants to show the contrary. This they have failed to do. While the fact that the administrator had been in possession of the real estate, receiving the rents and profits, would not, in the absence of other proper evidence, show his right to maintain this action, yet where, as in this case, the evidence tends to show, and it is virtually conceded, that there were no such heirs in 1886, his possession of the land, and renting it since that time, especially in the absence of any evidence to the contrary, justifies the conclusion that such possession was rightful. Under the evidence we think the court properly found that the plaintiff had authority to bring the action.

4. It is claimed that the evidence supports defendants' plea of estoppel. The evidence is conflicting, and, as it is sufficient to maintain the finding of the court below, we cannot disturb the judgment.

5. Some other errors are assigned which, in our view of the case, are not prejudicial, and need not be considered. The findings of the court stand as the verdict of a jury, and supported, as they are, by the evidence, the case must be affirmed.

PECK v. HUTCHINSON.

(Supreme Court of Iowa. May 19, 1893.)

ABSTRACT ON APPEAL—MALPRACTICE—EVIDENCE—DEGREE OF SKILL—SPECIAL FINDING.

1. An additional abstract filed by appellee because appellant's abstract omits evidence and other material matters will be stricken from the files, where such additional abstract contains merely the deductions and conclusions of counsel as to what the record is, instead of setting out the omitted portions, as required by rule 19.

2. In an action for malpractice, the reading from an old edition of a medical work to show the proper practice is harmless error, where the evidence fully shows the modern and better practice.

3. In an action for negligently performing a surgical operation on plaintiff's eye, alleged to have caused a loss of plaintiff's sight, evidence that the disease from which plaintiff was suffering generally resulted in a loss of sight is competent.

4. In such action, where it is admitted that plaintiff, a minor female, had a sexual disease, which caused the diseased condition of the eye, evidence that her parents had never been afflicted with such a disease is incompetent, in the absence of any claim by defend-

ant that they had been thus afflicted, or that plaintiff herself had been unchaste.

5. In the absence of an express contract touching compensation for the services of a physician or surgeon, the law implies a promise to compensate, and hence, in such case, the physician or surgeon must exercise ordinary skill in rendering his services.

6. Physicians and surgeons are required to exercise ordinary skill and diligence; that is, the average of that possessed by the profession as a body, and not by the thoroughly educated alone, having regard to the improvements and advanced state of the profession at the time of the treatment.

7. When a special finding of the jury is not supported by the evidence, and the fact so found is material, though not necessarily of a determinative character, a new trial must be granted.

Appeal from district court, Polk county; W. F. Conrad, Judge.

Action for damages arising from alleged malpractice. Trial to a jury. Verdict and judgment for plaintiff. Defendant appeals.

A. B. Cummins, James C. Hume, and George E. McCaughan, for appellant. Henry S. Wilcox, for appellee.

KINNE, J. 1. Plaintiff, as guardian of Anna Peck, a minor, avers that in 1886 the defendant, who held himself out to the public as a physician and surgeon, especially skilled in the treatment of diseases of the eye, was employed and undertook to treat a diseased eye of Anna Peck; that he negligently resorted to a surgical operation, instead of using proper medical treatment, and, in performing said operation, negligently used a large knife, instead of an instrument adapted to that purpose; that he negligently and unskillfully undertook a painful operation on said eye without first giving the proper drug to render the patient insensible to pain, and negligently and unskillfully cut a long gash in and about the sight of the eye, and left said gash without proper treatment. He says that, in consequence of all of said negligent and unskillful acts, said Anna Peck, without fault on her part, suffered great pain, and lost the use of her eye; that, but for the said acts, the eye would have recovered. Damages in the sum of \$5,000 are prayed. In an amendment to the petition, it is said that defendant was employed by Dr. H. R. Paige, with the knowledge and consent of Charles Peck, the father of said Anna Peck; that no arrangement was made fixing defendant's compensation, and he has not been paid anything for his services. It is also averred that the pain now exists and will continue. Defendant admits treating Anna Peck for a diseased eye, and that he performed a surgical operation upon the same, and denies all other allegations in the petition. Defendant also charges that the injury to plaintiff's ward, if any, resulted from her contributory negligence in carelessly moving her head during the operation, and in that her parents forbade the use of general anaesthetics upon

said Anna while she was undergoing said operation.

2. Appellee files what he calls an "additional abstract." After denying the correctness of appellant's abstract, it is said: "Appellee does not undertake to supply the evidence and other matters omitted from the said abstract." Some matters are then referred to as having been omitted from appellant's abstract. Appellant moves to strike the additional abstract, for many reasons, among which that it does not undertake to amend the abstract, but is a statement of counsel's deductions and conclusions from the evidence. Rule 18 requires appellant to serve upon appellee "a printed copy of so much of the abstract of record as may be necessary to a full understanding of the questions presented for decision." By rule 19, if appellee is not satisfied with the appellant's abstract, he may file such "further or additional abstract as he shall deem necessary to a full understanding of the questions presented to this court for decision." The general rule is that the appellee should set out what he claims has been omitted. We have said that, when the appellant claims he has furnished an abstract of all of the evidence, "we will assume that he has, unless the appellee sets out additional evidence." *Miller v. Wolf*, 63 Iowa, 236, 18 N. W. Rep. 889; *Guinn v. Insurance Co.*, 80 Iowa, 350, 45 N. W. Rep. 890. Now, the additional abstract is filled with deductions and conclusions of counsel as to what the record is, which constitute no part of the evidence or record. No sufficient reason is shown for failing to set out the portion of the record which it is claimed was omitted. We have examined appellant's abstract in the light of appellee's so-called "additional abstract," and find that many matters stated therein were in fact in appellant's abstract. The motion is sustained.

Appellee moves to strike out an additional abstract filed by appellant. The ground of the motion is that the paper was filed too late. There is no showing of prejudice by reason thereof to appellee. It does not appear that it has delayed the submission of the cause. The motion is overruled. The cause will then be determined upon appellant's abstract and additional abstract.

3. It seems that in December, 1885, the defendant was called by Dr. Paige to examine the eye of Anna Peck. That at this time there was a perforating ulcer of the left cornea, with protrusion of the iris, a small part of the iris, about the size of a grain of wheat, being outside the cornea, protruding from the eye. The external parts of the eye were watery, irritable, and spongy. That the ulceration spoken of was the result of the infection of conjunctivitis and blennorrhoea. The defendant did not see the eye again until January 17, 1886. At this time there was greater protrusion in a marked degree, and very little sight in the eye. Defendant then advised the parents that without an operation the eye

was absolutely lost; that he could not tell with certainty the result of an operation. It was consented to, and performed the next day. The patient was placed upon a lounge, her hands held, and also her head during the latter part of the operation. Near the end of the operation, and while the final incision was being made, the patient flinched, and the knife made a cut across the cornea in a diagonal direction. It is this cut which plaintiff claims destroyed the eye. Either by reason of the diseased condition of the eye, or by reason of the operation and cut, the sight of the eye was entirely lost. The diseased condition of the eye, as it existed prior to the operation, was caused by infection of the iris, either gonorrheal or blennorrhoeal, transmitted from the vagina to the eye. The operation was successful so far as the excising the prolapsed portion of the iris was concerned, but sight was not restored. There is much conflict in the testimony as to whether the defendant used an anaesthetic. Plaintiff contends he did not. Defendant claims that he was preparing to use chloroform, when the mother of the child forbade its use, whereupon he consulted with his colleague, Dr. Paige, as to the propriety of proceeding with the operation, using cocaine or local anaesthetics, and they decided that they could properly proceed using cocaine, which they did. The testimony tends to show that a patient may flinch or jerk in case of such an operation, even if a general anaesthetic is used. We have stated this much touching the condition of the child, the operation, and surrounding circumstances in order that a better understanding may be had of the points hereafter discussed.

4. Many errors are assigned. Some of them are purely technical, and without merit. In other cases the error, if any, was clearly not prejudicial. We can consider at length only those assignments which seem to raise questions of controlling importance. Against the objection of the defendant, plaintiff was permitted to read to the jury from "Wells' Treatise on the Eye" what that writer says as to the operation of "Iridectomy." This evidence was objected to as incompetent, immaterial, and because the work was an old edition. The book was published in 1880, and states that chloroform should always be administered. It does not recognize local anaesthetic treatment; in fact, says nothing about it. The operation was performed in 1886, and it is claimed that after 1880, and prior to 1886, great changes had occurred in optical surgery; that, during that time, cocaine, a local anaesthetic, was discovered, and came into use, thus superseding the use of general anaesthetics in such cases. This may be conceded. The evidence, we think, preponderates largely in favor of the claim that in such cases the modern and better practice is to use local anaesthetics. Now, that fact was fully shown to the jury, and from the evi-

dence it appeared that the Wells book antedated the time when local anaesthetics first began to be used in such cases in this country. As the evidence clearly showed what the modern practice was, we cannot say that the defendant was prejudiced by the introduction of the book.

5. Defendant asked Dr. Schooler the following question: "What is the general result of perforating ulcer of the cornea produced by gonorrheal blennorrhoea?" An objection was sustained to the question, as being incompetent and immaterial. We think the question was both competent and material. If the general result of operations in such cases was not to restore the sight, it would be proper, as tending to show that the sight of Anna Peck's eye would have been lost by reason of the disease, regardless of any negligence in performing the operation. But the doctor afterwards testified that "operations performed for the disease of gonorrheal blennorrhoea do not usually result in saving the sight of the eye." There was therefore no prejudice to the defendant from the ruling.

6. In rebuttal, plaintiff and his wife were asked: "Did you ever have clap or any sexual disease?" The questions were objected to, as incompetent, irrelevant, and immaterial, and the objection overruled. The witnesses answered, in substance, that they had not had any such disease. The inquiry was foreign to any issue in the case. It was in every respect improper. The plaintiff testified: "Before she contracted this trouble in the eye, Anna had a discharge from her private parts, which was transferred to her eye." Dr. Polasky, a witness for plaintiff, testified that, when he saw Anna, there was an inflammation in the eye, which proved to be blennorrhoea, and that the latter "is contracted from vaginitis or gonorrhoea." There was no attack made on the parents of this girl that called for an inquisition as to whether or not they had been afflicted with the disease mentioned. It was shown, and not disputed, that the disease could have been imparted to the girl without her having had connection with any one. No one had claimed that she was unchaste, and no one had accused her parents of having such a disease. There could have been but one purpose in introducing this evidence,—to repel the idea that the girl had been afflicted with the disease which plaintiff and the witnesses had testified she had. It could in no event have aided the jury in arriving at a proper determination of the matters in issue. It can easily be seen that it might work great prejudice to the defendant.

7. Exception is taken to the refusal of the court to give the following instruction: "Where the services are rendered as a gratuity, gross negligence or willful negligence or want of skill will alone create a liability; and, if you find that the services of the defendant were rendered to the plain-

tiff or to his ward gratuitously, you must further find that the negligence or want of skill of the defendant was gross or willful, and, unless you so find, you must find for the defendant." The same question was raised by a request to submit an interrogatory to the jury, which was refused. The instruction and the request to submit the interrogatory were properly refused. We can discover no good reason why the degree of care to be used by the physician or surgeon should be less in case his services are gratuitously rendered. But we need not discuss the question. The evidence fails to show any contract touching the services. In the absence of an express contract in such cases, the law implies that the defendant should be compensated for his services. *Pettigrew v. Lewis*, (Kan.) 28 Pac. Rep. 458; 14 Amer. & Eng. Enc. Law, p. 78.

8. It is said that the court erred in refusing the sixth instruction asked by defendant. It reads: "Physicians and surgeons are required to use ordinary skill and diligence, only the average of that possessed by the profession as a body, and not by the thoroughly educated only, having regard to the improvements and advanced state of the profession at the time of the treatment." This instruction should have been given. It is a correct statement of law. The eleventh instruction given by the court is objectionable, in that it is liable to be understood by the jury as requiring a greater degree of skill and care than that stated in the instruction asked. The instruction given also fails to state to the jury that, in determining what is ordinary skill and care in such a case, regard must be had to the improvements and advanced state of the profession at the time of the operation. *Smothers v. Hanks*, 34 Iowa, 286; *Almond v. Nugent*, Id., 300; *Gates v. Fleischer*, 67 Wis. 504, 30 N. W. Rep. 674.

9. The following interrogatory was submitted to the jury: "Would the sight of the diseased eye of the said Anna Peck have been saved had the accident complained of not happened?" The jury answered, "Yea." Now, we think it clearly appears that this finding is not sustained by the evidence. We need not set it out in detail. It is sufficient to say that the evidence shows that the child could see very little with this eye prior to the operation. The ulcer in the eye, it appears, had almost destroyed the sight. There was a possibility, merely, of restoring sight by means of the operation; but the evidence, in any view of it, cannot be said to justify the conclusion reached by the jury, as evidenced by the answer to this interrogatory. The inquiry was a material one. Of necessity, it must have been in a large measure influential with the jury in determining the amount of their verdict. If the sight would not have been restored by the operation in the absence of the accident, it must be conceded that the damages allowed—

\$2,500—were excessive. When a special finding is not supported by the evidence, and the fact so found is material, though not "necessarily of a determinative character," a new trial must be granted. *Jeffrey v. Railroad Co.*, 51 Iowa, 439, 1 N. W. Rep. 765; *Heath v. Mining Co.*, 65 Iowa, 737, 23 N. W. Rep. 148; *Baldwin v. Railway Co.*, 63 Iowa, 210, 18 N. W. Rep. 884.

10. Other errors assigned do not merit serious consideration. We have examined them all, and find no prejudice to defendant. For the reasons heretofore given, the judgment of the district court must be reversed.

BARTLETT v. MAHLUM et al.

(Supreme Court of Iowa. May 19, 1893.)

MECHANICS' LIENS—OWNERSHIP OF LAND—SUB-CONTRACTORS—LIEN STATEMENT.

1. A husband holding a lot by contract of purchase in his own name, who, with his wife's knowledge and consent, makes a written contract for the erection of a building on the lot, and conducts the business throughout in his own name and for himself, without disclosing any agency for the wife, must be deemed the owner of the lot as to mechanics and material men furnishing labor and material on the house; and the wife cannot, as against them, assert ownership to the lot.

2. The contractor for the construction of a house agreed to take in payment a stock of goods, offer the same for sale at retail and wholesale as soon as delivered, and apply the proceeds to the bills for the house, and turn over the balance to the owner. *Held*, that the delivery of the stock of goods to the principal contractor was not a payment in full of the contract price of the house, so as to deprive a subcontractor, who subsequently furnished material to the principal contractor, of his right to a lien.

3. A lien statement filed by a subcontractor is not subject to the objection that it is not just and true because he failed to allow a discount, according to his agreement with the principal contractor, where such discount was to be allowed only for cash payments.

Appeal from district court, Emmet county; Lot Thomas, Judge.

Action in equity to establish and foreclose a mechanic's lien on account for materials furnished for the erection of a dwelling house, in lot 5, block 33, town of Estherville. The issues presented on this appeal are between the plaintiff and defendants as above named. The answer may be summed up as presenting a general denial. The issues will sufficiently appear in the opinion. Decree and judgment was entered against the plaintiff, and in favor of these defendants. Plaintiff appeals.

Soper, Allen & Morling, for appellant. J. G. Myerly, for appellees.

GIVEN, J. 1. It clearly appears that in the summer of 1890 Elijah Harrie furnished the materials and erected a dwelling house upon said lot 5 under a contract with one or both the defendants, and that he contracted for and received materials for said house from

the plaintiff. We think it fairly appears that the building contract was with the defendant William Mahlum. He held the lot by contract of purchase in his own name, made the written contract with Harrie in his own name, and conducted the business throughout in his own name and for himself, without disclosing any agency, or that he was acting for his wife. It is contended that a house and lot belonging to Mrs. Mahlum was deeded as consideration for building the new house. Concede this to be true, yet Mrs. Mahlum knew that her husband was acting and contracting in his own name, and as owner of lot 5, and at all times acquiesced therein and consented to what he did. Whatever may be their rights as between themselves, we must hold under the facts that for all the purposes of this case William Mahlum is the owner of said lot, and the person for whom the house was erected. The result must be the same, whether he acted as principal or agent, for Mrs. Mahlum fully authorized and ratified all his acts relating to the transaction.

2. Appellant's first claim is that he is entitled to a lien as principal contractor, because of an alleged agreement on the part of William Mahlum, by which plaintiff was induced to furnish said materials. William Mahlum denies the statements made by plaintiff, but, conceding that they were made as claimed, we think they fall far short of establishing an agreement between plaintiff and defendants for the material in question. Plaintiff's further claim is that said statements and representations were such that the defendants should be estopped thereby from denying his right to a lien. It is a sufficient answer to these claims that the plaintiff did not regard what was said as constituting either an agreement or an estoppel. He did not act or rely thereon; he has never attempted to perfect a lien upon the basis of an agreement with the defendants, but filed a lien based upon an agreement with Harrie, as principal contractor. It was after this alleged agreement with William Mahlum that plaintiff contracted with Harrie, furnished and charged the material to Harrie, and filed his claim for a lien based upon his agreement with Harrie. He is clearly not entitled to a lien as principal contractor, nor are the defendants estopped from denying his right to a lien.

3. We next inquire as to the plaintiff's right to a lien as a subcontractor. That he furnished material for said house in pursuance of an agreement with the contractor Harrie is not questioned. On December 9, 1890, plaintiff filed his claim for a lien, based upon a contract with Harrie, showing the last item to have been furnished November 29, 1890. On December 23, 1890, he filed an amendment touching the ownership of said lot 5 that need not be further stated. On December 24, 1890, notice of this claim for a lien was duly served on the defendants.

It appears from the face of these documents that the plaintiff is entitled to a lien as claimed, but defendants assert as reasons why he is not so entitled that he has failed to show that there was anything due from them to Harrie at the time the material was furnished, that the claim for a lien was not filed and notice served within 30 days from the date on which the last item of material was furnished, and that the plaintiff has not filed a just and true statement of his account. The claim that there was nothing due to Harrie when the materials were furnished is based upon the following facts: One Kirk, having a stock of merchandise at Vinton, Iowa, agreed with one Clark to exchange the goods as per invoice for a certain farm. The defendants agreed with Clark to convey to him a certain house and lot in Estherville, where they resided, for said stock of merchandise and \$200 in money. On August 5, 1890, defendants William Mahlum and Elijah Harrie entered into a written agreement, whereby Mahlum sold to Harrie said \$1,400 worth of dry goods at invoice price, to be delivered at Estherville, and agreed to pay Harrie \$200 in cash. In consideration of said goods and cash, Harrie agreed to build for said Mahlum on any lot designated in Estherville a dwelling house according to certain specifications, and to make to said Mahlum a warranty deed to lot 4, block 24, Estherville. Said agreement contains the following: "Whereas, said first party is to exchange a house and lot for the aforesaid goods and cash, and said goods are to be delivered and the cash paid as soon as they come into the possession of the first party, and the deed for the aforesaid lot 4 to be delivered to the first party at the same time the goods are delivered to the second party; however, it is further understood and agreed that the \$200 cash to be paid by the first party is to be paid to J. G. Myerly, to be by him paid on the bill of lumber for said house to be built by the second party; and it is also further understood and agreed, as a part of this contract, and as one of the essentials hereof, that said dry goods are to be offered for sale by said second party at retail and wholesale as soon as the same are delivered to him, at some suitable place, and as fast as the same are sold, said sales to be for cash only, the money therefor is to be turned over to J. G. Myerly, and by him applied on the payment of bills for the aforesaid house, outhouse, cistern, well, etc., and to be applied until all bills thereon are fully paid, and the balance turned over to said second party." It appears that one J. S. Fletcher acted as agent for Clark and Kirk in these transactions, and that at a date which does not appear, but evidently on or after August 5, 1890, an agreement was entered into by Harrie, Mahlum, and Fletcher reciting that, whereas Mahlum had that day conveyed his house and lot to Clark in consideration of the

\$200 and said goods as per invoice in the hands of Fletcher, the goods to be shipped to Estherville, Harrie agreed to pay the freight, and Mahlum to deposit his deed and abstract in the bank to be delivered to Fletcher when the goods were delivered at the depot in Estherville, and the \$200 tendered. Said agreement recites that Harrie shall have 60 days in which to construct the dwelling house for Mahlum, and, if not finished in that time, he to pay \$10 per month for the house conveyed by Mahlum to Clark until the new house was finished. Said agreement also provides as follows: "If necessary, said J. S. Fletcher shall make a loan on the said new house to the amount of \$300.00, to clear off the last payments for constructing said house." Said lot 5 was designated as the lot upon which Harrie was to build the new house, and upon which he did build it, he having ordered and received lumber and other materials therefor from the plaintiff. The deed from Mahlum to Clark was deposited in the bank August 5th, and the goods arrived at Estherville August 7, 1890, and were put in charge of a salesman to be sold. Defendants contend that by the deposit of their deed to Clark, in the bank, they made full payment to Harrie for the new house, and that, as that was before any material was furnished, plaintiff is not entitled to a lien. While it is possible that a failure to carry out any one of these agreements might have prevented the execution of all of them, it is not true that the deed to Clark was the consideration for which Harrie agreed to build the new house. It is shown by his written agreement with William Mahlum that it was in consideration of the stock of goods and the \$200 that he agreed to convey said lot 4, and to erect the house. Neither the goods nor the \$200 were delivered to Harrie on August 7th, but were held subject to the agreement that the \$200 and the proceeds of the sale of the goods should be held by Mr. Myerly, to be applied in payment of bills incurred in erecting the house. It is manifest to our minds that Harrie was not paid in full before the plaintiff furnished materials for the house. The goods were held for a time as agreed upon, and \$175 paid on the lumber bill. After some time Harrie exchanged the goods for land in Kossuth county, which he deeded to Myerly in trust, as defendant's claim, to secure them against a failure to complete the house, but we think it was to indemnify them against mechanics' liens. The evidence shows that these defendants very properly regarded themselves as having a right to insist that the goods should be held and the proceeds applied as agreed upon in their written agreements.

4. There is a conflict in the evidence as to when the last item of material was furnished by the plaintiff. We think, however, that the decided preponderance is in favor

of the conclusion that it was on the 29th day of November, 1890, less than 30 days before plaintiff's statement and amended statement for a mechanic's lien was filed and notice served. Plaintiff agreed with Harrie to allow a certain discount on part of the materials furnished in his statement for a lien. Defendants contend that for this reason the statement filed is not a just and true statement of his account as required by statute. Whether plaintiff was bound to allow any discount we do not determine. It is clear, however, that he was not bound to do so except upon that part of the account upon which cash was paid as agreed. This he did, and his statement of his account was just and true. Our conclusion is that the decree of the district court dismissing plaintiff's petition must be reversed. It does not appear whether any issues were joined by the defendants other than William and Agnes Mahlum, or what judgment was entered as to them. The case will be remanded for decree in conformity with this opinion, and for such judgments and decrees as may be proper and necessary as to said other defendants. Reversed.

WAMBACH v. GRAND LODGE OF IOWA, LEGION OF HONOR.

(Supreme Court of Iowa. May 19, 1893.)

APPEAL—TIME OF TAKING.

An appeal will be dismissed, as not having been taken within six months from the rendition of the judgment, as required by Code, § 3173, where the only showing in the abstract as to the date of the judgment is that the court, at the conclusion of the trial, sustained a motion to take the case from the jury, and enter judgment for plaintiff, and it appears that the trial took place some 10 months before the appeal was taken.

Appeal from district court, Hamilton county; J. L. Stevens, Judge.

Action on a beneficiary certificate. Judgment for plaintiff, and the defendant appealed.

J. L. Kamrar and A. St. Clair Smith, for appellant. Wesley Martin and Geo. Wambach, for appellee.

GRANGER, J. It is suggested by appellee that the abstract is an affirmative showing that the court is without jurisdiction. An appeal must be taken "within six months from the rendition of the judgment or order appealed from; not afterwards." Code, § 3173. Time, in taking an appeal, is a jurisdictional fact. It must affirmatively appear. Where the jurisdictional facts do not appear, the appeal must be dismissed. *Plummer v. Bank*, 74 Iowa, 731, 33 N. W. Rep. 150. Appearance does not cure the defect. *State v. Clossner*, (Iowa,) 51 N. W. Rep. 16, and authorities there cited. The abstract shows that upon the filing of the answer, February 9, 1891, "this action came on for trial to a

jury," etc. At the conclusion of the evidence the court sustained a motion to take the case from the jury, and enter judgment for the plaintiff. This is the only showing in the abstract as to the date of the judgment. The abstract then shows that "on the 15th day of December, 1891, the defendant appealed to this court, by serving notice," etc. It thus appears from the abstract that the appeal was taken some 10 months after the judgment or order appealed from. We are in such a case entirely without jurisdiction. Of our own motion, we are required, before trial, to "see to it" that a case is one of which we have jurisdiction. *Plummer v. Bank*, supra.

The appeal must be, and is, dismissed.

COOK v. THUMAN et al.

(Supreme Court of Iowa. May 19, 1893.)

APPEAL—DEFECTIVE ABSTRACT—DISMISSAL.

An appeal will be dismissed where appellee files an additional abstract, in which he denies that the trial judge certified the evidence as set out in appellant's abstract, denies that any certificate whatever in reference thereto was filed in the case, and denies that both abstracts contain all the evidence, and appellant fails, not only to meet this denial, but to file any argument.

Appeal from district court, Carroll county; J. H. Macomber, Judge.

Action in equity to subject certain real estate and personal property to the payment of a judgment in favor of the plaintiff against the defendants. Decree was entered for plaintiff. Defendants appealed.

E. L. Green, for appellants. George W. Pain, for appellee.

GIVEN, J. 1. Appellee filed an additional abstract, in which he denies that the trial judge certified the evidence as set out in appellants' abstract, and denies that any certificate whatever in reference thereto was filed in the case, and denies that both abstracts contain all the evidence. Appellants not only fail to meet this denial, but have failed to file any argument. Such being the state of the record, the appeal is dismissed.

STIVERS et al. v. GARDNER.

(Supreme Court of Iowa. May 19, 1893.)

WILLS—DURATION OF ESTATE DEVISED—PRECATORY WORDS—QUIETING TITLE.

1. Testatrix devised her land to her husband, and on his death to her children, but if "he should get married after my death, in that event all of my said property, both real and personal, to revert" to the children. *Held*, that the provisions as to the disposition of the property after the husband's death or marriage were not mere precatory words, and that he took only a life estate in the land, subject to be defeated by his remarriage.

2. Where an action is brought to quiet title in a parcel of land as an entirety, a prayer

for general relief will not authorize a partition of the land on the theory that plaintiffs are the owners of an undivided interest in the land under a different title than that set up in the petition.

Appeal from district court, Tama county; L. G. Kinne, Judge.

Action in equity, by which the plaintiffs seek to quiet their title to 126 acres of land in Tama county. There was a demurrer to the petition, which was sustained, and plaintiffs appeal.

William H. Stivers and James Fowler, in pro. per. Struble & Stiger, for appellee.

ROTHROCK, J. 1. The plaintiffs claim title to the land by a conveyance from one Thomas K. Scotthorn. It appears from the averments of the petition that the land was formerly owned by Caroline Scotthorn, who was the wife of said Thomas K. Scotthorn, and that on the 2d day of August, 1886, the said Caroline Scotthorn made and executed her last will and testament, which is as follows: "I, Caroline Scotthorn, married, being of sound mind, make this my will and testament. After paying my funeral expenses and physician's bills and all my other debts, I give and devise to my husband, Thomas K. Scotthorn, the following described lands, viz.: The east half of the southwest quarter of section ten, and the southwest quarter of the southeast quarter of said section ten, and the north six acres of the northwest quarter of the northeast quarter of section fifteen, all in township eighty-six north, range thirteen west of the 5th P. M. That at the death of my said husband, T. K. Scotthorn, then all of said lands to go to my son, Robert Scotthorn, and that he shall pay to my daughter, Louisa May, the sum of one thousand dollars, the same to bear interest at the rate of six per cent. per annum from the death of my said husband, should he survive me. That my son, Robert, to have five years to pay the said thousand dollars from the death of my husband, or, in the event should I survive him, five years from my death, and that he shall pay to her six per cent. from my death or the death of my husband; and a failure on the part of my son, Robert, to pay said money to my said daughter, Louisa May, within the specified time, that she shall have a lien on all of said land hereinbefore described, and that his title shall not be perfected unless said money be paid; and a failure on his part to pay said money, that my daughter may have her said one thousand dollars' interest in said lands, together with the interest due thereon, set off to her by partition. I give and bequeath to my daughter, Louisa May, my gold watch, and all my jewelry of every kind, together with my wearing apparel. I give and bequeath all my household and kitchen furniture, all my stock and implements, in fact all my personal property of every description that I may own at the time of my death, to my son, Robert, and Louisa May, to

be divided equally between, to share and share alike, except the gold watch, jewelry, and my clothing hereinbefore described. That all my personal property is to be left in the care and control of my husband, T. K. Scotthorn, to have the use of all of said property during his life, free to control and manage all of said property, to use the same as his own; but if my husband should get married after my death, in that event all of said property, both real and personal, to revert to my said son and daughter. Given under my hand this 2nd day of August, A. D. 1886." It is further averred in the petition that the testatrix and her husband resided upon said land from the year 1885 till the year 1888, when said testatrix died, and that she left three children surviving her. The will was duly proved and admitted to probate, and all debts and demands against the testator have been paid. Said Thomas K. Scotthorn remained single until the 6th day of April, 1889, when he intermarried with one Martha J. McCormick, who is still his wife. After said marriage the two children named in the will made quitclaim deeds of said land to the defendant. The said Thomas K. Scotthorn remained in possession of said premises after the death of the testator, and until the 1st day of May, 1889, when said defendant, during a temporary absence of said Scotthorn, forcibly broke open the doors and windows of the dwelling house situated on said premises, and took possession thereof. On the 18th day of April, 1891, the said Scotthorn and his wife sold and conveyed said premises to the plaintiffs. The prayer of the petition is to the effect that the interest of the plaintiffs in said premises may be determined and confirmed as against any adverse claim of the defendant, and that plaintiffs be decreed to be the owners of the premises, and entitled to the possession thereof, and for general relief. The demurrer is to the effect that it does not appear from the petition that the plaintiffs are entitled to the relief demanded, nor to any relief.

The real controversy presented by the record is whether the devise of the land to Thomas K. Scotthorn was a devise in fee simple. It is claimed by the plaintiffs that the estate created by the will was an absolute devise. On the other hand, the defendant claims that the estate created by the will was for life only, and that the life estate was subject to be defeated by the subsequent marriage of Scotthorn. We are united in the opinion that by a proper construction of this will Scotthorn took a life estate, and that said estate terminated upon his marriage. Counsel for plaintiffs state their claim in argument in the following language: "The will devises to the testator's husband in fee simple the real estate, without restriction or limitation, (which is shown by the petition to be all her lands,) and the subsequent directions as to its disposition after the death of the husband are simply precatory in character, and cannot affect the absolute, unconditional

title conveyed by the will." It is a fundamental rule of construction that all of the provisions of a will must be construed, in order to arrive at the intention of the testator. There is no ground, based upon either authority or reason, why this rule should not apply to wills the same as to other writings. If the first clause of this will, which gives and devises the land to Thomas K. Scotthorn, is to be considered alone, there can be no doubt that it would be an absolute devise. But there is the provision immediately following that at the death of Scotthorn all of said lands should go to the testator's son, and the further provision that, if Scotthorn should marry, all of said property, real and personal, should "revert" to the son and daughter. These provisions are not mere recommendatory or precatory words, praying or requesting that the property shall go to the children upon the death or marriage of the husband. They are as absolute provisions of the will as the provision making the devise to the husband. And they are not repugnant because they really all relate to the same subject. They denote the intention of the testator that the husband shall take the estate for life, or so long as he shall remain unmarried, and that at his death or marriage it shall descend to the children. It is said in argument that by use of the word "revert" the testator does not devise property to any one, because the son or daughter never before owned the land. It is very plain that the testator intended the word "revert" in the same sense as "give" or "devise." Counsel cite a number of cases in this court as sustaining the claim that the devise to her husband was absolute. They are as follows: *Alden v. Johnson*, (Iowa,) 18 N. W. Rep. 697; *Case v. Dwire*, (Iowa,) 15 N. W. Rep. 265; *Rona v. Meier*, 47 Iowa, 607; *Williams v. Allison*, 33 Iowa, 278; *Benkert v. Jacoby*, 36 Iowa, 273; *In re Will of Burbank*, 69 Iowa, 378, 28 N. W. Rep. 648; *Bills v. Bills*, 80 Iowa, 269, 45 N. W. Rep. 748. An examination of these cases will show that this court has at no time relaxed the rule above announced that the whole instrument must be considered in arriving at the intention of the testator. The cases where it is held that a devise with a subsequent limitation repugnant to the devise is void are such that the devise is plainly intended to be absolute, as where a devise is to one with a provision that whatever of the devised land may be undisposed of at the death of the devisee shall go to other parties. In such cases it is held that the devise is absolute, because it plainly invests the devisee with the power to sell and dispose of the land. There is no such a provision in the will in controversy in this case, and it seems to us that, if we were to hold this devise to be absolute, it would be as plainly subversive of the intention of the testator as if the wife had used these words in her will: "I give and devise my land to my husband, and at his death, or in the event of his marriage, it

shall go to my children." And when this rule is considered as it should be, the intent is manifest that the devise to the husband should not be absolute.

2. It is claimed by appellants that they are entitled to at least one-third interest in the land, because Scotthorn was entitled to a distributive share in the land under the statute. Although there is a prayer for general relief, yet the petition is not a petition for partition. It is a demand or claim founded upon the will, and not upon any right in the land as the surviving husband, and for aught that appears the claim is made for the first time in this court. In view of the averments of the petition, our conclusion is that, if there is any ground for claiming partition under the statute, the plaintiffs should be required to resort to that remedy by an action for that purpose. The decree of the district court dismissing the plaintiff's petition is affirmed.

KINNE, J., took no part in the decision of this case.

NOVELTY IRON WORKS v. CAPITAL CITY OATMEAL CO.

(Supreme Court of Iowa. May 24, 1903.)

RECORD ON APPEAL — DOCUMENTARY EVIDENCE — MEASURE OF DAMAGES — BREACH OF CONTRACT TO SUPPLY MACHINERY.

1. Documents which have been set out in the petition and admitted in the answer, and which have been properly identified in the stenographer's minutes and offered in evidence, are part of the record on appeal, even though they were not filed and left with the clerk as evidence in the case. *Jamison v. Weaver*, (Iowa,) 53 N. W. Rep. 1076, followed.

2. A statement for a mechanic's lien for materials, charging defendant on a certain day "To bill received" for certain amounts, followed by credits, with the month and day of each, and showing a balance due plaintiff, to which are attached sheets setting out the several items of the bills, is sufficient to show when the material was furnished. *Valentine v. Rawson*, 10 N. W. Rep. 338, 57 Iowa, 179, distinguished.

3. In an action to recover the price of machinery for an oatmeal mill, where the contract provides that, when ready to start, defendant will furnish all needed help and grain for testing the mill, defendant is not entitled to credit for the services of the engineer, nor for the time for which he was paid previous to starting, though the mill was not ready to start until three months from the time set in the contract. *Brownell v. Chapman*, (Iowa,) 51 N. W. Rep. 249, distinguished.

4. Defendant cannot recover for coal consumed in making steam to test the mill.

5. Where plaintiff notified defendant that the mill was about ready to start, defendant was entitled to recover the reasonable wages paid to a servant, whom defendant called from another part of the state, while waiting for plaintiff to complete the work.

6. Where the contract calls for an "adjustable brush, specially for oats," and an adjustable brush such as is used in flour mills is put in, which plaintiff refuses to replace, and which defendant replaces, and notifies plaintiff that the old brush is subject to its order, the measure of damages is not the differ-

ence between the two brushes, but the value of the new brush and the cost of putting it in.

7. Where plaintiff agrees "that the mill, as a whole, shall have a capacity of 100 barrels of good merchantable meal in 24 hours," and it is alleged that the drying kilns did not have the required capacity, the contract is sufficiently complied with where it appears that, at the test, 45 barrels of meal were made in 11 hours.

8. The measure of damages for delay in completing the contract is the reasonable rental value of the mill during such time, though it is proper to consider the cost of the mill, the depreciation of the machinery while in motion, and the profits that could be made, to arrive at such value. *Brownell v. Chapman*, (Iowa,) 51 N. W. Rep. 249, followed.

Appeal from district court, Polk county; C. P. Holmes, Judge.

Action in equity to enforce a mechanic's lien for material, machinery, and labor furnished for the completion of an oatmeal mill. Defendant answered, denying that plaintiff filed with the clerk of the court a statement of its claim, as required by law, and alleging, by way of counterclaim, a failure to complete the mill within the time, and in the manner, required by the contract, and asking damages. Plaintiff, in reply, denied the counterclaim. Decree was entered in favor of the plaintiff. Defendant appeals.

St. John & Stevenson and J. D. Whisenand, for appellant. Cummins & Wright, for appellee.

GIVEN, J. 1. Appellee filed an additional abstract and a denial of appellant's abstract, whereby it appears that the mechanic's lien and contract set out in the petition, and admitted in the answer, were offered in evidence; also a statement from defendant to plaintiff of the damages claimed, and that these documents were not filed and left with the clerk as evidence in the case. For this reason appellee moves to dismiss the appeal, and to affirm the judgment below. Appellant moves to strike this additional abstract because not filed in time. Under the pleadings, and the certificates of the trial judge and reporter, these documents are sufficiently identified. In *Jamison v. Weaver*, (Iowa,) 53 N. W. Rep. 1076, this court held that documentary evidence which has been properly identified in the reporter's notes and offered in evidence is part of the record on appeal, even though they are not on file, or in the actual custody of the clerk, and not attached to or incorporated in the stenographer's report when certified by the judge. As appellee's motion to affirm must be overruled, it is unnecessary that we consider appellant's motion to strike appellee's additional abstract.

2. Appellant's first contention is that the statement filed by appellee for a mechanic's lien is insufficient, for that it does not show when the material was furnished or labor performed, and when completed. The statement consists of four sheets,—the first debit-

ing appellant: "1889, Nov. 16. To bill received, \$7,310.00. 1889, Nov. 16. To bill received, \$295." Following this are several credits, with the month and day of each, and showing a balance due to appellee of \$2,103.48. The second sheet, under date of November 16, 1890, gives the three items composing the bill for \$295. As the statement for a lien was filed April 11, 1890, we conclude that this is a misprint, and that November 16, 1889, instead of 1890, is the date appearing in the second sheet. The third sheet sets out the several items composing the bill for \$7,310, as sold to appellant November 16, 1889; and the fourth is the verification. This statement certainly shows that the several items charged were furnished on November 16, 1889. In *Valentine v. Rawson*, 57 Iowa, 179, 10 N. W. Rep. 338, the statement did not give any time as that at which the material was furnished. This statement is sufficient in this respect.

3. There is no dispute on this appeal but that appellee is entitled to be allowed the contract price, \$7,605, less \$5,566.99, paid in cash by appellant. The contentions are as to certain items of the counterclaim disallowed, in whole or in part, by the district court. The contract provides: "Mill to be started by November 1st, in good running order." Appellee did not complete its work until February 1, 1890. Appellant alleges that it employed and paid one Shadley, as engineer, the reasonable compensation of \$165 from November 1, 1889, to February 1, 1890, and was damaged in that amount by appellee's delay in completing the mill; and that Shadley, under the direction of appellee, was employed from December 6, 1889, in operating the engine for appellee in testing the mill. Under the contract, appellant agreed as follows: "When ready to start, will furnish all needed help (except miller) and grain for operation of mill." The start here referred to was the start for testing the mill, and not the start after completion. The services of the engineer were "needed help" for the purpose of testing the mill, and appellant is not entitled to recover therefor, nor for the time for which the engineer was paid previous to starting. Appellant was bound to furnish that help, and it does not appear that it was necessary to have employed him on wages prior to the time his services were required. The case is unlike *Brownell v. Chapman*, (Iowa,) 51 N. W. Rep. 249, in that appellant was bound to furnish the help for which he charges damages. Appellant charges for coal consumed in making steam to test the mill. While coal is not expressly mentioned in the contract, we think its spirit and meaning is that appellant should furnish the coal. Appellant had employed one Kinney, and, being notified that the mill was about ready to start, notified Mr. Kinney to come from his home, in another part of the state, which he did, and appellant paid him \$17.50,

his reasonable wages while waiting for appellee to complete the work. In view of the notice that the mill was about ready, appellant was warranted in calling Mr. Kinney to come, and is entitled to recover the amount paid him.

4. Under the contract, appellee was to put in "1 No. 2 Victor adjustable brush, specially for oats." A No. 2 Victor adjustable brush, such as is used in flouring mills, was put in. It is not disputed but that this brush was not "specially for oats," and was not suited to the intended use. Appellant continued to use the brush until about July 1, 1890, when it removed the same, and replaced it with one suited to an oatmeal mill, at a cost of \$165, and notified appellee that the brush put in by it was subject to its order, and has ever since so held it. While appellee does not claim that the brush put in was according to contract, it contends that the measure of damages is the difference in the value of the two brushes, and that, as appellant did not prove their values, it cannot recover for this item. Such is not the rule, as applied to these facts. Appellant was entitled to a brush such as the contract called for. Appellee failed and refused to furnish such a brush, but furnished one unsuited to the intended use. Appellant must either continue to use the unsuitable brush, or provide itself with a suitable one, which it did, at a necessary cost of \$165, because of appellee's failure to perform its contract. The value of the brush furnished by appellee may have been equal to or greater than the one purchased by appellant, but that did not make it suitable "specially for oats," nor of value to appellant. By the notice that the brush put in by appellee was subject to its order, appellant made all the return thereof that it was required to make, and the brush thereafter was the property of appellee, and subject to its control. Under the facts the case is not different from what it would have been had appellee failed to put in any brush. We think appellant is entitled to be allowed the reasonable expense of putting in a brush such as appellee agreed to put in, which we find to be \$165. Appellant claims \$20, the cost of correcting defects in the dust reels. It is evident that these reels were insufficient, as originally constructed, when the mill was run near its capacity. The change in the reels was necessary, and the reasonable cost (\$20) should be allowed to appellant.

5. Appellee agreed "that the mill, as a whole, shall have a capacity of 100 barrels of good merchantable meal in 24 hours." It appears that, in the process of manufacturing oatmeal, the oats are dried by being passed over a series of pans heated by steam. Appellant contends that the drying kilns or pans put in by appellee did not have the required capacity; that only grain enough could be dried to produce 80 barrels of meal in 24 hours. Appellee contends that the evidence shows that, properly managed, the kiln

had the required capacity. We will not discuss the evidence relating to this question of fact further than to say that the test made, where 45 barrels of meal were made in 11 hours, satisfies us that, with a sufficient supply of steam, grain enough could be dried in the kiln to produce 100 barrels of meal in 24 hours. Appellee is not responsible for any lack in the supply of steam. Our conclusion is that this item was properly disallowed.

6. Appellee was bound, by the contract, to have the mill ready to be started November 1, 1889, in good running order. This it failed to do, and did not have its work completed, and the mill in good running order, until February 1, 1890. Appellee does not question but that appellant is entitled to be allowed proper damages for this delay, but the contention is as to the measure of damages. The court below allowed appellant \$350 as the rental value of the mill during these months. Appellant contends that it is entitled to recover the profits which it is shown it could have made during that time had the mill been completed as agreed. As showing the profits, evidence was introduced as to the cost of oats, the cost of manufacturing, and the price of oatmeal. It is claimed that, oats being low and meal high, appellant would have made a profit of \$1 per barrel, or \$100 per day. Appellee contends that the measure of damages is the rental value of the mill. Many authorities are cited, but, as the contention is fully answered in *Brownell v. Chapman*, (Iowa,) 51 N. W. Rep. 249. (recently decided by this court,) we do not here notice the other cases referred to. That was a counterclaim for damages for a failure to furnish boilers for a steamboat at the time agreed. This court, after an extended review of the cases, held that the measure of damages was the rental value of the boat. While it is true that the cost of the mill, the depreciation, or otherwise, of its machinery while in operation, and the profits that could be made with the mill, are proper to be considered in arriving at the rental value, neither constitutes the measure of damages. Here, as in *Brownell's Case*, "we must keep in view the rule universally recognized, that the damage for breach of contract must be limited to such as would naturally come within the contemplation of the parties at the time the contract was made." Surely, those parties did not then contemplate that oats would be low and meal high, and therefore the profits large. They must have contemplated that a failure to complete the mill in time would deprive appellee of the use of the mill, and that the damages would be the value of that use, namely, the rental value. The court below allowed appellant, as the rental value for the three months, \$350; being \$116.66% per month. The witnesses differ widely in their estimates of the rental value; some basing their estimates on profits, placing it at \$25 per day, and others, estimating on the investment,

placing as low as 8 per cent. thereon. As we have seen, neither, taken alone, is a correct basis, yet both are proper to be considered in arriving at the rental value. Appellant had about \$8,500 invested in machinery, 8 per cent. on which would be \$680 per year, or \$56.66% per month. Add to this \$65 per month, paid by appellant as rental for the building, and we have, according to the lowest estimate, \$121.66% as the rental value per month, being \$15 more than was allowed. We think the fair conclusion from all the evidence is that the reasonable rental value of the mill, as it was, to be for the months of November and December, 1889, and January, 1890, \$200 per month. Appellee in argument refers to an additional abstract, showing the state of the pleadings, and argues therefrom that appellant is not entitled to this item of damage as claimed under the pleadings. We do not find such additional abstract, and presume that the argument was made in anticipation of an additional abstract that was not filed. Under the pleadings as shown in the abstract, appellant is entitled to be allowed on this item according to the measure of damages in such cases, which is the rental value of the mill as it was to be. Our conclusion is that appellant is entitled to be allowed \$452.50 on the counterclaim, in addition to the amounts allowed by the district court, that this amount be deducted from the \$1,117.51 found in favor of appellee, and that, thus modified, the judgment of the district court is affirmed.

STATE v. LUICK et al.

(Supreme Court of Iowa. May 27, 1893.)

Appeal from district court, Polk county; C. P. Holmes, Judge.

Defendants were indicted for a liquor nuisance; were convicted and sentenced to pay a fine of \$300 each, and costs and attorneys' fees, and to stand committed to the jail of Polk county, Iowa, for \$107 days, unless said fine and costs should be sooner paid. Defendant Luick excepted, and appeals.

John Y. Stone, Atty. Gen., and Thos. A. Cheshire, for the State.

KINNE, J. This cause is submitted on a transcript which contains a copy of the indictment, notice of appeal, appeal bond, and record entry of judgment. Neither the evidence, instructions, nor motion for a new trial is in the record. We have examined the entire record before us, and find no error. Affirmed.

STATE v. MEIER.

(Supreme Court of Iowa. May 27, 1893.)

Appeal from district court, Polk county; C. P. Holmes, Judge.

The defendant was convicted of the crime

of nuisance committed by maintaining a place in which he kept for sale and sold, in violation of law, intoxicating liquors. From the judgment imposing a fine, and providing for his imprisonment in case of a failure to pay the fine and costs, and for the abatement of the nuisance, defendant appeals.

PER CURIAM. This cause is submitted for our determination on a transcript of the indictment, judgment, notice of appeal, and appeal bond. We have read the record so submitted, but without discovering any ground for reversing the judgment of the district court. It is therefore affirmed.

STATE v. HARTY.

(Supreme Court of Iowa. May 27, 1893.)

Appeal from district court, Polk county.

John Y. Stone, Atty. Gen., for the State.

PER CURIAM. This is an appeal by the defendant from a judgment for a fine of \$500, upon a conviction on an indictment for keeping a nuisance. The appeal is presented upon a transcript of the indictment and the judgment entry and a supersedeas bond. The record, thus presented, discloses no error, and the judgment of the district court is affirmed.

STATE v. OSBORN.

(Supreme Court of Iowa. May 27, 1893.)

Appeal from district court, Polk county.

Indictment for nuisance. Judgment of conviction, from which the defendant appealed.

No appearance for the defendant, and the cause was submitted on a partial transcript.

PER CURIAM. The record, aside from a copy of the indictment, and the appeal bond, shows the overruling of a motion for a new trial and the judgment. There is nothing to indicate error in the proceeding, and the judgment is affirmed.

STATE v. KIMES.

(Supreme Court of Iowa. May 27, 1893.)

Appeal from district court, Polk county; C. P. Holmes, Judge.

The defendant was convicted of the crime of keeping a house of ill fame resorted to for the purposes of prostitution and lewdness. From the judgment, which required him to be imprisoned in the penitentiary at Ft. Madison for the period of 18 months, and to pay the costs, defendant appeals.

PER CURIAM. This cause is submitted for our decision on a transcript of the in

dictment, judgment, notice of appeal, and appeal bond. We have examined the record thus submitted with care, but find no ground upon which the judgment of the district court should be disturbed. It is therefore affirmed.

STATE v. WAGNER.

(Supreme Court of Iowa. May 26, 1893.)

Appeal from district court, Polk county; W. F. Conrad, Judge.

J. Y. Stone, Atty. Gen., for the State.

PER CURIAM. It appears from a transcript in this case that the defendant appealed to this court from a judgment imposing a fine upon him of \$300 and attorneys' fees and costs, upon a charge of keeping and maintaining a nuisance by the sale of intoxicating liquors. An examination of the transcript discloses no error in the proceedings in the court below, and the judgment is affirmed.

STATE v. HILLISON.

(Supreme Court of Iowa. May 26, 1893.)

Appeal from district court, Polk county; C. P. Holmes, Judge.

Phillips & Phillips, for appellant. John Y. Stone, Atty. Gen., for appellee.

PER CURIAM. This case was submitted upon a transcript, and without abstract or argument. The transcript shows that the defendant was legally charged, tried, and convicted of the crime of owning and keeping intoxicating liquors, with intent to sell the same, in Polk county, Iowa, in violation of law. Judgment was entered that defendant pay a fine of \$50, and costs taxed at \$69, and that he be imprisoned in the jail of Polk county for 35 days, unless said fine and costs be paid. From this judgment the defendant appealed. We have examined the transcript before us with care, and fail to discover any errors or irregularities in the proceedings. The judgment of the district court is therefore affirmed.

STATE v. WAGNER.

(Supreme Court of Iowa. May 26, 1893.)

Appeal from district court, Polk county; W. F. Conrad, Judge.

Indictment for a nuisance. Judgment of conviction, from which the defendant appealed.

No appearance for appellant, and the cause was submitted on a partial transcript of the record below.

PER CURIAM. The transcript, aside from a copy of the indictment, contains no part of the record of the proceedings before verdict. It shows that a motion in arrest of judgment and for a new trial was overruled, but neither the motion nor the grounds thereof are set out. So far as the record discloses, the proceedings leading to the judgment are valid, and the judgment is affirmed.

STATE v. WAGNER.

(Supreme Court of Iowa. May 26, 1893.)

Appeal from district court, Polk county; C. P. Holmes, Judge.

Indictment for a liquor nuisance. The defendant was convicted, sentenced, and appeals.

John Y. Stone, Atty. Gen., and Thos. A. Cheshire, for the State.

KINNE, J. This cause is submitted on a transcript which contains nothing save a copy of the indictment, notice of appeal, appeal bond, and record entry of judgment. We have carefully examined the entire record before us, and discover no error. The judgment of the district court is affirmed.

STATE v. WYNIA.

(Supreme Court of Iowa. May 25, 1893.)

Appeal from district court, Sioux county; F. R. Gaynor, Judge.

The defendant was indicted, tried, and convicted upon a charge of keeping and maintaining a building with the intent to sell intoxicating liquors therein, and was adjudged to pay a fine of \$400, from which he appeals.

John Y. Stone, Atty. Gen., for the State.

PER CURIAM. The case is presented to this court upon the record entries made in the court below, consisting of the indictment, a motion to quash the same, which was overruled, and a demurrer thereto, which was also overruled. There is also the record of a trial by jury upon a plea of not guilty, a motion for new trial, which was overruled, and a judgment was entered on the verdict. An examination of the record discloses no error in any of the proceedings, and the judgment is affirmed.

STATE v. MOOSE.

(Supreme Court of Iowa. May 25, 1893.)

Appeal from district court, Sioux county; F. R. Gaynor, Judge.

John Y. Stone, Atty. Gen., and Thos. A. Cheshire, for the State.

KINNE, J. This cause is submitted on a transcript which contains a copy of the indictment, plea, entry of judgment, notice of appeal, and appeal bond. No exception was taken to any of the proceedings in the court below, so far as the record before us discloses. We have examined all the record here, and discover no error. The judgment of the district court is affirmed.

STATE v. HARGENS.

(Supreme Court of Iowa. May 25, 1893.)

Appeal from district court, Harrison county.

The defendant was convicted of the crime of keeping a place in which he kept for sale and sold intoxicating liquors in violation of law. From the judgment of the district court requiring him to pay a fine and costs, and committing him to jail in default of payment, he appeals.

ROBINSON, C. J. This cause is submitted for our decision without argument for either party, on a transcript of the indictment, judgment, notice of appeal, and appeal bond. We have read the record thus presented with care, but discover no reason for disturbing the judgment of the district court. It is therefore affirmed.

STATE v. FRAUCKE.

(Supreme Court of Iowa. May 25, 1893.)

Appeal from district court, Clay county; Lot Thomas, Judge.

Indictment for a nuisance. Verdict of guilty, and a judgment from which the defendant appealed.

No appearance in this court for appellant, and the attorney general submitted the cause on a transcript of the record.

PER CURIAM. The transcript is a mere statement of the proceedings in the district court without the evidence or instructions of the court. The proceedings seem to have been regular and legal, and the judgment of the district court is affirmed.

CRISS v. CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa. May 25, 1893.)

RAILROAD COMPANIES—KILLING STOCK—DEFECTIVE CROSSING—FINDINGS.

1. In an action for killing a horse at a public crossing, plaintiff's theory was that the horse's hoof caught in the space between the plank in the crossing and the rail, and he was unable to extricate himself. It was conceded that the horse was carried some distance from the crossing, and that one of his hoofs was pulled off, and wedged between the plank and the rail. The train men testified that the horse

was not caught, but there was other evidence that he stopped when he came upon the track, and "had plenty of time to get across." *Held*, that a finding that the horse was caught would not be disturbed.

2. Some of the witnesses testified that the opening was from 2½ to 3½ inches wide, and others that it was as wide as the breadth of their hands. A civil engineer testified that 3 inches was the limit in width of a properly constructed crossing. *Held*, that a finding that defendant was negligent in permitting the crossing to remain in that condition would not be disturbed.

Appeal from district court, Sac county; C. D. Goldsmith, Judge.

Action at law to recover the value of a horse killed on a public crossing of the defendant's railroad by one of the defendant's engines while in the operation of the road. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

J. O. Cook and W. A. Helsell, for appellant. Elwood & Zane, for appellee.

ROTHROCK, J. 1. There is no dispute as to the killing of the horse. He was struck by an engine on the crossing of a public road over the defendant's railroad. It is claimed by the plaintiff that the collision with the horse was occasioned by reason of a defective crossing. The alleged defect consisted in allowing the opening between the plank in the crossing and the rails of the track to be so wide that the horse, in crossing the track, crowded his foot in the opening, and was unable to remove it, and was pinioned there until struck by the engine. The theory of the defendant is that the animal attempted to cross the track in front of the engine, and at the same time, and that his foot was crowded or pushed into the opening by the collision. It is conceded that the horse was carried some distance from the point of contact with the engine, and that one of his hoofs was pulled off, and found wedged between the plank and the rail. There are only two real questions in the case. The first is, was there sufficient evidence to authorize a finding that the horse was struck by reason of having his foot in the opening? It is true that the train men testified as witnesses that the meeting of the horse and the engine was simultaneous, and that he was not fast in the track; but there is other evidence to the effect that the horse stopped when it came on the track, and "had plenty of time to get across;" that it was standing on the crossing when it was struck. This was a question for the jury to determine, and, in view of the claim that the foot was forced between the plank and the rail by the collision, no court would be justified in disturbing the finding. The next question is, was the opening between the rail and the plank so wide as to authorize a finding that the defendant was negligent in permitting it to be in that condition? Here, again, there is conflict in

the evidence. The testimony of the witnesses as to the width of the opening put it at from $2\frac{1}{2}$ to $3\frac{1}{2}$ inches; others stated that, at the place where the hoof was wedged in, the opening was as wide as the breadth of their hands; others stated that the opening was so wide as to attract their attention when driving over the crossing, and induce them to avoid the widest part of it; and the testimony of a civil engineer gives 3 inches as the limit in width of a properly constructed crossing. Our conclusion is that the verdict finds sufficient support in the evidence.

2. Exceptions were taken to certain paragraphs of the charge to the jury, and to the refusal to give certain instructions at the request of the defendant. We discover no error in the charge. It fairly presented every material question in the case. And some of the instructions asked and refused were in effect given in the charge of the court. Others were rightly refused because they were argumentative, and not proper to be given. It is sufficient to dispose of these questions in this general way. A mere statement of the questions raised would show that there was no error in the matter of rulings on questions of law. Affirmed.

INDEPENDENT DIST. OF EDEN, NO. 2, et al. v. RHODES, President.

(Supreme Court of Iowa. May 25, 1893.)

PARTIES—MANDAMUS — SCHOOL DISTRICTS—EMPLOYMENT OF TEACHER.

1. Under Code, § 2545, which provides that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, an independent school district and a teacher employed by the board may join as plaintiffs in an action to compel the president of the board to approve and file the contract of employment, since both are interested in the subject of the action,—the contract,—and in the relief demanded,—its approval and filing.

2. Where a private person is clearly within Code, § 3377, which permits mandamus proceedings to be instituted on the petition of a private party aggrieved, the fact that the interest of a school district joined with him as plaintiff is a public interest, and should therefore be represented by the state, as further required by said section, is no ground for dismissing the action, if the result, under the issues, would necessarily be the same as if the state had been joined.

3. Code, § 1757, which requires teachers to be employed by the subdirector of the district township, does not apply to independent school districts organized from parts of district townships, and having neither subdistricts nor subdirectors, but such authority rests with the board of directors, which is the only official power in an independent district. *Athearn v. District*, 33 Iowa, 105, explained.

4. After a teacher has been employed by the board of directors of an independent district, and the contract has been signed by himself and the secretary, the president of the board cannot refuse to approve and file the contract because the teacher is not of good moral character, and not personally fit to teach, since these are matters for the board to determine.

Place v. Township, 9 N. W. Rep. 917, 56 Iowa, 573, limited.

5. The illegal and void appointment of a president pro tem., by the board of directors, to approve and file the contract, after the refusal of the regular president to do so, is not a waiver by the teacher of the performance of that duty by the president, and does not bar mandamus proceedings by the teacher and the board to compel him to do so.

6. The trial court does not abuse its discretion in refusing a continuance to obtain witnesses to rebut certain oral evidence introduced by plaintiff, showing the consideration for a written contract, where defendant himself introduced evidence on that question, and the continuance would have taken the case beyond the term.

Appeal from district court, Marshall county; J. L. Stevens, Judge.

Action for mandamus to compel defendant to file and approve a teacher's contract. Judgment for plaintiffs, and the defendant appealed.

J. L. Carney, for appellant. O. Caswell, for appellees.

GRANGER, J. On the 1st day of April, 1891, the board of directors of the plaintiff district, by a majority vote, agreed to employ the plaintiff Gambell as a teacher for the district for the period of nine months from September 14, 1891, in pursuance of which a contract in writing was prepared and signed by Gambell and the secretary of said board, and presented to the defendant, to be by him, as president of the board, approved and filed, which the defendant refused to do, and this action is to compel the performance of that duty. The answer is in four divisions, the first being of admissions and denials. To the other three divisions the district court sustained a demurrer, and the substance of each division can better be stated as we reach the different questions for consideration.

1. In the second division it is averred that there is a misjoinder of parties plaintiff. It will be seen that the district and the teacher—the contracting parties—are the plaintiffs. The argument by appellant is that, while the "causes of action are the same kind," they are not in favor of the same party; and reference is made to Code, § 2630, which is as to joinder of causes of action, and not parties. Section 2545 treats of joinder of parties plaintiff, and is as follows: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in this Code." For the purpose of this question, we, of course, assume the facts to be as pleaded. It then appears that the district and Gambell have made a contract. The law requires that it shall be reduced to writing, approved, and filed, and designates by whom this shall be done. This suit is to compel the performance of that agreement. The "subject of the action" is the contract. The "relief demanded" is the performance of the duty by

the president of the board. Is it to be doubted that both the district and the teacher are interested in the subject of the action,—the contract,—and the relief demanded,—the approving and filing of the same? The question will hardly admit of discussion. Presumably, one party to the contract would be as much interested as the other, at the time of making it. In having the law complied with as to the manner of its making and preservation, and not, as claimed, that the teacher alone would have that interest.

2. It is contended that because the district has only a public interest the action should have been in behalf of the state, and by the public prosecutor, and reference is made to Code, § 3377, as follows: "The order of mandamus is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state, or on the petition of the state by the county attorney, when the public interest is concerned, and is in the name of such private party, or of the state, as the case may be in fact brought." While the case, in a sense, involves a public interest, it is exceedingly doubtful, in view of the law as to the duties of the public prosecutor, and creating school districts, if such a public interest comes within the legislative intent of the section. It is not, however, necessary that we should determine the question. The plaintiff Gambell is a private person seeking relief, and comes clearly within the rule of Code, § 3378, and if it should be held that the interest of the district should be represented by the state, as a party, it would not have the effect to dismiss the suit as to Gambell. Nor would it in any way change the relief to be granted. With Gambell alone as plaintiff, the result would be the same as to defendant, under the issues, and hence there is no prejudice.

3. The third division of the answer, after some admissions, including the presentation to the defendant of the contract, contains the following defensive matter: "That said paper was presented for the approval of defendant as president of said school board, and, acting under and in accordance with law, this defendant refused to file or approve the said paper as a contract with the said Gambell, and that said action was taken after due consideration, and for the reason that the contract did not conform to the provisions of the law, and because the plaintiff V. C. Gambell was not a person of good moral character; that his employment was protested against by a large number of patrons of the school, who had become dissatisfied by the said Gambell's former connection as teacher with the schools of Rhodes, and, because of the inefficiency and failure of the said Gambell to discharge the duties of a teacher, a large number of the people residing in the said independent school district refused to send their children to school. The defendant further shows that during the school year of 1890 the said Gambell failed

to instruct his pupils at Rhodes, in physiology and hygiene, with special reference to the effect of alcoholic drinks and stimulants upon the human system, as required by the law of this state. The defendant further avers that acting, as he believed, in the best interests of the school at Rhodes, Iowa, and to faithfully discharge the duties of his office, as president of the board, in the exercise of his best judgment, and with the discretion vested in him under the law, he had, a long time prior to the beginning of this action, refused to approve or file the said paper as a contract with V. C. Gambell. Defendant further avers that each of the plaintiffs had full notice of the refusal of defendant to approve the contract prior to any services being rendered by said Gambell as a teacher."

The law governing district townships makes express provisions as to the employment of teachers for subdistricts, and devolves that duty upon the subdirector of each subdistrict, under such rules and restrictions as the board of directors may prescribe. Code, § 1753. All contracts with teachers shall be in writing, * * * and shall be signed by the subdirector or secretary and teacher, and be approved by, and filed with, the president. Code, § 1757. The general school laws, in their adaptation, are to the district townships,—they being the original plan of organization,—and the law, in its particular specifications and phraseology, is largely directed to the details of such organizations, and their methods of procedure. Independent districts are of later origin, and but few sections of the law are especially applicable to them. They are organized from parts of district townships, with especial provisions for a board of directors, a president, and secretary, but no subdirectors, nor are there subdistricts. There is no express provision of the law applicable alone to independent districts, as to employing teachers; but it is provided that schools are to be conducted, and the board of directors is the only official power in the district, and by the letter of the law the district is to have as many schools as the board of directors may deem proper. Code, § 1806. And by the same section it is further provided that the district "shall be governed by the laws enacted for the regulation of district townships, so far as the same may be applicable." Appellant contends that the board has no power to employ teachers; that they must be employed by subdirectors; and refers to *Gambrell v. Township*, 54 Iowa, 417, 6 N. W. Rep. 693. The case deals with the authority of the board of directors of a district township, where the schools are in subdistricts, and the law, as we have said, especially provides that the employment shall be by the subdirector. That particular provision is certainly not applicable to independent districts, where there are neither subdistricts nor subdirectors. The conclu-

tion necessarily follows that the authority is, by a necessary implication, with the board of directors, in some form. In *Athearn v. District, 33 Iowa, 105*, it was sought to recover on a contract made with the directors, acting independently,—that is, when not assembled as a board,—and the following language is used: "It very clearly appears that the laws governing the powers and duties of subdirectors are applicable to the directors of independent districts, and that acts which would be lawful if done by the first-named officers must be sustained when done by the second. They are clothed with like powers, and perform like duties." Appellant regards that language as holding that a director of an independent district has the same powers in respect to hiring teachers as a subdirector, and that the board of directors of the independent district cannot employ teachers, because it was held in *Gambrell v. Township, supra*, that the board of directors of such a township had no such authority. The facts giving rise to the language will not warrant such a conclusion. It was certainly never the intention to hold that a director of an independent district possessed the same authority as a subdirector in a district township, for a comparison of their respective duties, in many particulars, would forbid such a conclusion. That was a case in which all the directors acted, each independently, and the language is applied to such a state of facts. The effect of such a holding as that claimed would revolutionize, in a marked degree, the working of the school system of the state. Subdirectors were invested with certain powers and duties in regard to their subdistricts, being a part of the township, but in all matters pertaining to the township at large the board control, and a subdirector is without authority, except as a member of the board. The employment of a teacher in an independent district is for the entire district, alike represented by all the directors, and the provisions of the law as to particular duties of subdirectors are without application. We think it quite important to keep in mind, in construing the law as applicable to independent districts, the distinctive features of its organization from district townships, and the reasons for the enactment of particular provisions. It seems to be both the letter and the spirit of the law that contracts, when made and signed, in the case of district townships by the subdirector and teacher, and, in independent districts, by the secretary and teacher, shall be approved and filed, so as to become, in a sense, a part of the record or files of the school district. Now, as to the facts pleaded as a reason why this contract was not approved, as that the teacher was not a person of good moral character, and other facts going to his personal fitness to teach the school, we think the president possessed no discretionary power. These were discretionary matters for

the board to settle pending the negotiations. When the contract, as to terms, was agreed upon, all that remained to be done was an observance of the law as to preparing and preserving the evidence of the contract as the law directs. Surely the law does not mean that the president possesses a discretionary power to overrule the action of the board of which he is a member. In *Place v. Township, 56 Iowa, 573, 9 N. W. Rep. 917*, which was a district township case, it is said: "It becomes the duty, then, of the president of the board to determine whether the contract conforms to the provisions of the law, and give or withhold his approval according as he shall find the fact to be."

Not desiring to trench upon any state of facts not clearly within this record,—which brings in question only the authority of officers of independent districts,—we must say that we construe the law to invest the president with authority only to inquire whether the contract, as to matters not within the discretionary powers or authority of the board of directors, conforms to the provisions of the law. It does not invest him with authority to overrule the action of the board on a question of fact that is open to question, and necessary for determination. The construction claimed would put the president of the board, in many important particulars, in supreme control of the district,—a result neither intended nor desirable.

4. With a view to comply with the law, after the refusal of the defendant to approve and file the contract, the board of directors appointed one L. W. Thomas "as president pro tem." for that purpose, and it was so filed and approved, and these facts are pleaded in the fourth division of the answer as a waiver on the part of the plaintiffs of the performance of that duty by the defendant. There was no state of facts to warrant the appointment of a president pro tem., and such a proceeding was a nullity. It in no manner affected the duties or obligations of the defendant. It was done after the refusal by the defendant, and was a futile attempt to substitute another to perform the duties of the president without his absence, or any other legal reason for so doing.

5. Some issues of fact are presented by the denials in the first division of the answer. The action is by ordinary proceedings, and the testimony is conflicting, beyond dispute. Appellant expresses a wish that the case should be considered on the merits to avoid further litigation. If by that it is meant that we should consider the evidence, and determine the facts by a preponderance of the evidence, we need only say that we are without jurisdiction for that purpose. The statute defines our duties under the different forms of actions. In this proceeding we can only review errors upon assignment, as in other ordinary actions. The record of the proceedings of the board

was introduced in evidence, and it failed to show the price per month, as agreed upon, for the teacher. The contract, as signed by the secretary and teacher, provided for \$75 per month. The court, against objections, admitted oral evidence as to the agreement on that point. It appears, also, that the copy of the contract attached to the petition was not an exact copy of the one offered in evidence, and the court permitted an amendment to the petition in that respect. After the introduction of the oral testimony by plaintiff, defendant applied for a continuance to obtain witnesses, which application was denied. In view of the testimony actually introduced by defendant on that question, the situation of the trial, and the fact that the application was to take the case beyond the term, we think there was no abuse of the discretion reposed in the trial court. We have examined the entire record, and find no error for which there should be a reversal. Affirmed.

WILLS v. NEILAN.

(Supreme Court of Iowa. May 25, 1893.)

DETINUE—WHEN LIES—APPLICATION OF MONEY TO FINE BY JUSTICE.

Where a police justice imposes a fine of \$10 or three days' imprisonment, and applies out of a certificate of deposit in his possession, taken as bail at the time of the arrest, the amount of the fine, he is not liable in detinue, though the prisoner preferred to serve the jail part of the sentence, since, until the judgment was satisfied, it might be enforced by collection or imprisonment, and the prisoner's election was no bar to its collection.

Appeal from district court, Woodbury county; Scott M. Ladd, Judge.

Action in detinue to recover a certain certificate of deposit for \$35. Judgment was entered for plaintiff. Defendant appeals.

The amount in controversy being less than \$100, the appeal is upon a certificate of the trial judge, as follows: "Wilber F. Wills vs. Martin Nellan, as Police Judge of Sioux City, Iowa. The undersigned, judge of said court, hereby certifies that the above case involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court. On the 17th day of January, 1891, Wilber F. Wills was arrested for frequenting a bawdyhouse within the limits of Sioux City, Iowa. He gave bond for his appearance in the police court before the defendant, as judge, on January 19th, 1891, and delivered, as part of said bond, a certificate of deposit amounting to \$35. That the said Wills appeared in said court on the 19th day of January, 1891, and was adjudged guilty of frequenting a bawdyhouse, and fined \$10, or three days in the city jail, and the said Wills elected to take the jail part of the sentence, and the court orally ordered, at the time of rendering the judgment, that \$10 of the certificate

be applied on the fine, and the balance of said certificate be returned to said Wills, and he be released, said oral order not being entered of record until some five days afterwards, and more than three days thereafter. That said Wills was never imprisoned, but brought an action in detinue against the defendant in justice's court for the whole of said certificate of deposit. The justice held that the said Wills was entitled to the possession of the whole of said certificate of deposit, and rendered judgment against the defendant for \$35 or the return of the certificate. From that decision the defendant appealed to the district court, where the decision of the justice is affirmed. From the above facts an opinion is desired on the following question: Is a police judge liable to a civil action in detinue, in a case where he imposed a fine of \$10 or three days in the city jail, for applying, out of a certificate of deposit in his possession as bail at the time of the trial, the amount of the fine imposed, when the prisoner preferred to serve the jail part of the sentence, and under the circumstances above related? Scott M. Ladd, Judge of the 4th Judicial Dist. of Ia. July 8th, 1891."

Martin Nellan, for appellant. W. H. Farnsworth, for appellee.

GIVEN, J. Our inquiries are limited to the questions of law stated in the certificate, and these we are to decide in the light of the specific facts certified that relate to those questions. The specific facts certified are that appellant, sitting as a police judge, found appellee guilty of an offense over which that court had jurisdiction, and, as authorized by law, entered judgment against appellee that he pay a fine of \$10, or be imprisoned in the city jail for three days. At the same time appellant, as police judge, ordered that \$10 of the certificate of deposit theretofore deposited by appellee in lieu of bail be applied on the fine, and that the balance be returned to him. Appellee then "elected to take the jail part of the sentence," but was not committed. The question certified is whether appellant is liable to a civil action in detinue for so applying the certificate of deposit in his possession, "when the prisoner preferred to serve the jail part of the sentence." Appellant's authority to receive the certificate of deposit in lieu of bail, and to order it applied as he did, is not questioned in the certificate; only his liability in a civil action in detinue for so ordering it to be applied "when the prisoner preferred to serve the jail part of the sentence." The judgment is in the alternative, and would be satisfied by either payment or by imprisonment, but, until satisfied, it might be enforced either by collection or by imprisonment. Appellee had the right to pay the fine, and thereby avoid imprisonment, but he had no right to elect

to go to jail instead of paying the fine. The judgment not being satisfied, it might be enforced either by collecting the fine or by imprisonment. Appellee's election to be imprisoned was no bar to appellant's right to enforce collection. It follows from these conclusions that the question certified must be answered in the negative, and that the judgment of the district court must be reversed.

WAUD v. POLK COUNTY.

(Supreme Court of Iowa. May 26, 1898.)

DEFECTIVE BRIDGE—CONTRIBUTORY NEGLIGENCE— NOTICE OF CONDITION.

1. Where a person, knowing the defective condition of a bridge which is open for public travel, undertakes to cross the same, and is injured by reason of the defect, the question of whether he was guilty of contributory negligence in going on the bridge should be submitted to the jury.

2. Where a bridge in a highway has been openly out of repair for from six months to a year, it will be presumed that those charged with the care thereof had notice of its condition.

Appeal from district court, Polk county; W. F. Conrad, Judge.

Action to recover damages for a personal injury resulting from a defective bridge. Trial to a jury. Verdict and judgment for defendant. Plaintiff appeals.

Park & Odell, for appellant. Spurrier & Dowell, for appellee.

KINNE, J. 1. Plaintiff claims that while passing over a bridge which spans Four Mile creek, in Polk county, Iowa, himself, his wife, and his team and wagon were precipitated to the ground below, a distance of about 12 feet; that his wagon was broken and rendered useless, his harness and horses injured, and that he was severely hurt,—for all of which he claims damages in the sum of \$4,700. It is averred that the injuries complained of were caused by the carelessness of defendant, and that the plaintiff was without negligence on his part which contributed to produce said result. He presented his claim to the board of supervisors of the defendant, and payment was refused. The particular grounds of negligence charged are—First, that defendant had permitted the plank flooring of the bridge to become defective and displaced, so as to leave a large hole or opening in the floor of said bridge at the south end thereof; and, second, that the guard railing over and across said bridge, and on the east side thereof, was defective, and a portion of it gone. Defendant admitted its organization as a county, and denied all other allegations of the petition. At the conclusion of the plaintiff's testimony, defendant made a motion to direct a verdict for it, which was done. Plaintiff's motion for a new trial was overruled,

and judgment entered against him for costs, to which he excepted, and appealed.

2. One of the grounds of the motion to direct a verdict was that plaintiff's negligence had caused the injuries of which he complained. It appears, without conflict, that plaintiff resided about a mile northeast of the bridge in question. That he had been over the bridge frequently prior to the date of the accident, and as late as the day previous thereto. That at these times the bridge, at the point where the hole complained of existed on the day of the accident, was out of repair. The planks were split, and at least one plank was gone, and it appears it had been gone for several months. The guard rail on the east side of the bridge had no support at the south end, at the point where the wagon struck it when it went over. It appears that the defects complained of, as existing at the date of the accident, were of long standing, and well known to the plaintiff before he drove upon the bridge. The only difference was that on the day of the accident two planks were gone instead of one. The place where the planks were gone was at the extreme south end of the bridge, and the joists of the bridge were thus left exposed for a space of about 30 inches in width. Prior to the accident, plaintiff had often been across the bridge when the joists were thus exposed for a width of from 10 to 12 inches. It seems he had often replaced the plank when he found it out of place. He drove on the bridge the morning of the accident from the north end, at which point he could not see the hole in the bridge. When his horses saw the hole they became unmanageable, and suddenly backed up for a distance of about 20 feet until the wagon struck the defective guard rail, and the team, wagon, and occupants went off of the bridge to the ground below. The bridge had been used prior to the accident by the public with safety. The burden was on the plaintiff to show that he did not, by his own negligence or want of care, contribute to the result of which he complains. The court, by its ruling, and as a matter of law, held that plaintiff had contributed to produce the injury, and hence could not recover. It may be conceded that when the whole testimony in a case, and all legitimate inferences that can be drawn therefrom, show that the injury complained of occurred by reason of the want of ordinary care, the question of negligence is one for the court. *Mynning v. Railroad Co.*, (Mich.) 35 N. W. Rep. 811; *Milne v. Walker*, 59 Iowa, 186, 13 N. W. Rep. 101; *Starry v. Railroad Co.*, 51 Iowa, 419, 1 N. W. Rep. 605; *McLaury v. City of McGregor*, 54 Iowa, 717, 7 N. W. Rep. 91. But we have repeatedly held that knowledge of a defect in a bridge, highway, or sidewalk will not, of itself, defeat a recovery by one who sustains damage by reason of such defect. *Kendall v. Albia*, 73 Iowa, 248, 34 N. W. Rep. 833;

Walker v. Decatur Co., 67 Iowa, 308, 25 N. W. Rep. 256; Munger v. City of Marshalltown, 59 Iowa, 763, 13 N. W. Rep. 642; Ross v. City of Davenport, 66 Iowa, 551, 24 N. W. Rep. 47; Rice v. City of Des Moines, 40 Iowa, 642; Kendall v. Lucas Co., 26 Iowa, 397. In most of the above cases it is held that the question of negligence was to be determined by the jury. In Walker v. Decatur Co., supra, the facts were that the plaintiff was injured by stepping into a hole in a bridge. The bridge had been out of repair for some time, which fact was known to the plaintiff. In that case, as in the case at bar, the bridge was not barricaded. It was open to the public, and used by it. The court said: "It is true that it was unsafe, and the time would come, and perhaps it had already come, when it would be imprudent for any person, in the exercise of reasonable discretion and prudence, to make the attempt to pass over it; but this was a question for the jury." The question in the case at bar was whether or not the plaintiff, under all the circumstances, acted as a reasonably prudent and cautious man would, having in mind the proper preservation of himself, his wife, and his property from harm. These circumstances were not confined to plaintiff's knowledge of the condition of the bridge; but, in determining the question of his negligence, regard must be had to the fact that he and others had used the bridge, that it was open for the use of the traveling public, that his team was gentle, that they had never before been frightened while crossing this bridge in its defective condition, and all other facts surrounding his use of the bridge. We think the question of plaintiff's negligence should have been submitted to the jury.

3. There is no claim that the defendant had actual notice of the hole in the bridge. One Lewis testified that from six months to a year prior to the accident he notified the board of supervisors of the defendant of the condition of the bridge; that he notified one Brooks, a member of the board, by letter, and afterwards talked to him, about the condition of the bridge; that the guard rail, or at least a part of it, on the east side, had been off for a year or more. It is said that it does not appear that the letter was ever mailed to Brooks, or that he ever received it. A technical view of the language used by the witness may bear out the theory that all he intended to say was he wrote the letter; but that would hardly avoid the effect of his testimony that he talked with Brooks about the condition of the bridge. Let it be conceded that the defendant had no actual notice, yet the testimony shows, without conflict, that the condition of the bridge, so far as the guard rail was concerned, had been open and notorious for a period of from six months to a year; surely, under such circumstances, notice to defendant may well be pre-

sumed. Ferguson v. Davis Co., 57 Iowa, 610, 10 N. W. Rep. 906; Davis v. Allamakee Co., 40 Iowa, 217.

4. It is contended that no damages were shown. As the case may be tried again, we should refrain from discussing the weight of the evidence. It is proper to say that there was evidence as to damages which should be passed upon by the jury. For the reasons heretofore given, the judgment of the district court is reversed.

STATE v. FITZPATRICK.

(Supreme Court of Iowa. May 26, 1893.)

CRIMINAL LAW—APPEAL—TIME OF HEARING.

Code, § 4532, providing that appeals in criminal cases shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, and decided, if practicable, "unless continued for cause, or by consent of the parties," does not allow a party to postpone the hearing beyond the time fixed by statute by naming a later time in his notice of appeal.

Appeal from district court, Clay county: Lot Thomas, Judge.

Defendant pleaded guilty to an indictment for nuisance, and on February 22, 1893, judgment was entered that he pay a fine of \$300, and costs taxed at \$135.80, including an attorney's fee of \$25, and that he be committed to the jail of Clay county for 90 days unless the fine and costs be sooner paid. Defendant appeals.

G. P. Hartley, for appellant. John Y. Stone, Atty. Gen., for the State.

GIVEN, J. This case is submitted upon a transcript alone, which, in addition to what is already stated, shows the following: On April 4, 1893, appellant filed his notice of appeal to this court, duly served, in which he gave notice "that said appeal will come on for hearing and trial in said court at the January term thereof, to be held at Des Moines, Iowa, commencing on the 3d Tuesday of January, 1894." The notice of appeal, duly served, being filed April 4th, the clerk made out and transmitted to the clerk of this court a duly-certified transcript, as required by section 4525 of the Code, which transcript was received and filed April 19, 1893. By filing this notice, the appeal was taken. Code, § 4524. Section 4532 provides that appeals in criminal cases "shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, unless continued for cause, or by consent of the parties, and shall be decided, if practicable, at the same term." The transcript being filed to this term, and there being no cause or consent for a continuance, the case is properly before us for decision at this term, notwithstanding the time named in appellant's notice of appeal. An appellant cannot postpone the time of hearing beyond that fixed in the statute, by naming

a later time in his notice of appeal. We have examined the transcript with care, and find no errors in the proceedings prejudicial to appellant. The judgment of the district court is affirmed.

PORTER v. GOBLE et al.

(Supreme Court of Iowa. May 25, 1893.)

HUSBAND AND WIFE—ACTIONS—FRAUDULENT CONVEYANCES.

1. A wife let her husband have money received from her father's estate without promise to repay, or any note or other writing. The husband used the money as he saw fit, finally buying a piece of land, which he took in his own name. This land was retained by him until the insolvency of a firm in which he was interested, and then conveyed to the wife. *Held*, that the wife was not entitled thereto as against persons who had given the firm credit believing that the land was that of the husband, and who were unable to find other property of the firm or partners.

2. Code, § 2204, providing that, should either husband or wife obtain control of property belonging to the other before or after marriage, the owner may maintain an action therefor, or for any right growing out of the same, in like manner as if unmarried, does not apply to property voluntarily given by one to the other.

Appeal from district court. Appanoose county; W. I. Babb, Judge.

Action to quiet title to certain lands. Trial to court. Decree against plaintiff, and judgment against her for costs. She appeals.

O. H. Law and Geo. D. Porter, for appellant. T. M. Fee, for appellees.

KINNE, J. 1. Plaintiff brought her action to quiet title to the N. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 14, township 68, range 18, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 22, township 67, range 18. The defendants deny plaintiff's ownership of the land. They aver that they each have judgments against her husband, A. J. Porter, and others, which are liens upon said land; that said judgments were recovered for goods sold to the firm of Williamson & Porter, while Porter was a member of said firm, and while the title to said land was in A. J. Porter, and said credit was extended to said firm under the belief that A. J. Porter was in fact the owner of the land in controversy; that the firm of Williamson & Porter have disposed of all their property with the intent to defraud their creditors, and to hinder and delay them in the collection of their claims; that said firm is insolvent; that on July 28, 1890, said A. J. Porter, the husband of plaintiff, conveyed said land to her, without consideration, and for the purpose of defrauding, hindering, and delaying said creditors in the collection of their claims; that plaintiff participated in said fraud, and fraudulent intent. A decree is asked setting aside the deed from A. J. Porter to plaintiff, and declaring defend-

ants' judgments and liens upon the land. It appears also that writs of attachment had been sued out by all of the defendants except H. L. Spencer & Co., and levied upon the land in controversy. Plaintiff denied all of the allegations of the answer. The court dismissed plaintiff's petition, and decreed the judgments to be liens on the land in the order in which the attachments were levied, and ordered the land sold to satisfy said liens. The deed was also set aside, so far as defendants' liens were concerned.

2. From the agreed statement of facts and the testimony introduced it appears that plaintiff, in 1875, married A. J. Porter. At that time he had no property. His wife received from her father's estate about \$1,300. This money she let her husband have, but did not at any time take any note or other writing therefor; nor did he, at the time he received it, or afterwards, promise to return the money, or repay it to her, or to secure her in any way therefor. He was permitted to and did use it as he saw fit. There is nothing to show that the parties expected it would ever be repaid. It was in no sense treated as a loan to the husband. In 1876 the husband purchased 80 acres of land, and paid this \$1,300 thereon. In February, 1882, he sold the land to one Wells, and during the same month purchased from one Shaffer the land now in controversy. The title to the land in both cases was taken in the name of the husband. Under the Shaffer purchase the husband continued to hold the title to the land until July 28, 1890, when he deeded it to his wife. The husband and wife resided on the land until 1889, when they rented it, and moved to Centerville, where the husband purchased an interest in a grocery, and became the partner of one Matt Williamson. This partnership existed until July 28, 1890, under the firm name of Williamson & Porter. On that day the firm disposed of all its property by sale to one Crawford, except a delivery wagon and horse, which they mortgaged for its full value to one McFarland. Prior to thus disposing of their property, the firm had become insolvent, and were owing over \$3,000, including the indebtedness to the defendants herein. The creditors of the firm had, prior to July 28, 1890, been pressing the firm for settlement of its obligations. Defendants severally obtained judgments against the firm and the individual members for the amounts due them, and all of them, except H. L. Spencer & Co. sued out attachments, and levied them on the land involved in this action. Said judgments are unsatisfied. The firm had no property which it had not disposed of as heretofore stated. Neither of the partners has any property outside of this land. It is conceded that defendants extended credit to the firm on the ground that said land was owned by A. J. Porter. The case needs no extended

discussion. The facts stated show that the \$1,300 was a gift from the wife to her husband, without conditions, promise, or hope of repayment. So far as was in her power, she made this money the husband's, and permitted him at all times to deal with it as his own. He transacted all of the business, bought the land. It does not appear that when the purchase was made she expressed a desire even that the title should be taken in her name. The money absolutely vested in the husband, and the law in such a case does not create or imply an agreement that he shall return it to the wife, when the parties have done nothing to indicate that such was the arrangement. To permit her, under such circumstances, to retain the land as against the claims of his creditors, would be holding out an inducement for fraud. The conveyance to the wife was voluntary and without consideration. *Courtright v. Courtright*, 53 Iowa, 57, 4 N. W. Rep. 824; *Patterson v. Hill*, 61 Iowa, 534, 16 N. W. Rep. 599; *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. Rep. 357; *Romans v. Maddux*, 77 Iowa, 203, 41 N. W. Rep. 763; *Bump, Fraud. Conv.* p. 311.

3. Plaintiff claims that her rights to the land in controversy are controlled by Code, § 2204, which provides: "Should either the husband or wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried." This statute was referred to in *Courtright v. Courtright*, 53 Iowa, 58, 4 N. W. Rep. 824, but the question as to whether it applied to property voluntarily given by a husband or wife to the other, or which had been rightfully obtained, was not decided. In *Patterson v. Hill*, 61 Iowa, 536, 16 N. W. Rep. 599, it was held that, if money or property of the wife in the husband's hands was used by him with her knowledge and consent, for purposes connected with the support of the family, without any arrangement for its repayment, she should not recover therefor. The object of the statute was, no doubt, to afford husband and wife a remedy for the recovery of property wrongfully or improperly withheld by the one from the other. We cannot believe that by its enactment the legislature intended to give a husband or wife the right to recover from the other, as against the claims of creditors of that other, property which the one seeking to recover had given to the other, and on the faith of the ownership of which credit had been extended. The statute should not be given a construction which would work such a radical change in the rights and remedies of creditors of a husband or wife, unless it is clear that the lawmaking power so intended. We see nothing in the phraseology of the statute itself, or in the wrongs sought to be remedied by

it, that would call for such an interpretation.

4. It is insisted that in any event 40 acres of this land were used as a homestead, and is therefore exempt to plaintiff from the liens of the defendants. In view of the condition of this record, we are precluded from determining this question. No such issue was presented by the pleadings, and it is but fair to presume that this claim is made for the first time in this court. We need not cite authorities to show that we cannot consider matters, whether meritorious or not, which were not presented to and passed upon by the trial court. The judgment and decree of the district court will be affirmed.

STATE v. DIMMITT.

(Supreme Court of Iowa. May 25, 1893.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

Evidence of a witness that stolen goods had been sold by some one other than defendant, at a place where witness was employed, and in witness' presence, cannot be regarded as newly-discovered, for the purposes of a new trial, even if a new trial can be granted in criminal cases for newly-discovered evidence, where such witness had testified on the trial, and no diligence is shown in ascertaining what he knew about the matter.

Appeal from district court, Polk county; C. P. Holmes, Judge.

The defendant was convicted of the crime of burglary, and adjudged to be imprisoned in the penitentiary at Ft. Madison for the period of six years, and to pay the costs. From that judgment he appeals.

ROBINSON, C. J. 1. The indictment charged that the defendant feloniously broke and entered a certain store in the city of Des Moines, in which merchandise was kept for sale, use, and deposit, with the intent to commit the crime of larceny. The evidence showed that the store building was broken and entered as charged in the indictment, and that a tub of butter was stolen from it. The state introduced evidence which tended to prove that defendant sold the stolen butter soon after it was taken. The defendant introduced evidence which tended to prove that he was at his boarding place during the night the offense of which he is accused was committed, excepting four hours, ending at midnight, and a witness testified that during those hours he was with the defendant in and about the streets of Des Moines, drinking alcohol, but that he was not near the store from which the butter was taken. Several persons testified that the moral character of that witness was bad. If the witnesses for the state were credible the jury were fully justified in finding the defendant guilty as charged. Whether they were credible was a question for the jury to determine. So far

as we are able to discover from the record, defendant had the benefit of a fair trial, by an impartial jury, which was properly charged by the court, and the verdict is sustained by the evidence.

2. In support of a motion for a new trial, defendant offered the testimony of a witness to the effect that he was present when the butter was sold, after it was stolen, and that it was not sold by defendant. The defendant asked that the testimony so offered be regarded as newly-discovered evidence, and considered as a part of the motion for a new trial. The testimony so offered was given by a person who had testified as a witness on the trial, and no diligence whatever to ascertain, before or during the trial, what he knew about the person who sold the butter, is shown, although it appeared that he was employed at the time by the person who purchased the butter at the place where it was sold. Therefore, defendant would not have been entitled to a new trial, had newly-discovered evidence been a ground for granting it. That a new trial cannot be granted in a criminal case on account of newly-discovered evidence has been repeatedly decided by this court. *State v. Potts*, 49 N. W. Rep. 846.

We have examined the record with care, but without finding any ground upon which the judgment of the district court ought to be disturbed. It is therefore affirmed.

RYCE v. CITY OF OSAGE.

(Supreme Court of Iowa. May 25, 1893.)

MUNICIPAL CORPORATIONS—REPEAL OF ORDINANCE
—CITY ATTORNEY—COMPENSATION.

1. Where a city attorney is elected while an ordinance providing that it is his duty to act for the city in any suit brought by or against it, and generally to attend to its interests as its attorney, is in force, it is part of his duty to conduct the defense to a suit brought to quiet the title to a tract of land therein, known as a "public square."

2. A city ordinance cannot be repealed or superseded by the passage, by the city council, of a resolution which undertakes to fix a different compensation for a city attorney than that prescribed in the ordinance.

3. Code, § 491, providing that the emoluments of an elective city officer shall not be increased or diminished during the term for which he shall have been elected, prohibits the city council, on its own motion, from making a contract with the city attorney for compensation other than that fixed by ordinance.

4. Where a city has had the benefit of its attorney's services, rendered under a verbal contract to pay therefor a sum in excess of his salary fixed by ordinance, the city is not estopped from pleading the ordinance in an action to recover such excess, since such contract is against public policy, and void.

5. Where a person accepts the office of city attorney at a fixed salary, he is bound to perform the duties of the office for the salary; and a promise to pay him an extra fee is not binding, though he renders services, and exercises a degree of diligence greater than could legally be required of him.

Appeal from district court, Mitchell county; G. W. Ruddick, Judge.

Action against the defendant for compensation for services as an attorney. Judgment for defendant. Plaintiff appeals.

L. M. Ryce, pro se. N. L. Rood, for appellee.

KINNE, J. 1. Plaintiff's cause of action is set out in three counts, and may be summarized as follows: In 1889, plaintiff was elected as city attorney for defendant for the term of two years, and afterwards entered upon his duties. At the time of his election, as well as when he performed the services sued for in this action, there was an ordinance in force in said city, section 5 of which provided as follows: "The duties of the city solicitor shall be to give his legal opinion and advice upon any subject or question that may be submitted to him for that purpose by the city council or mayor, to act as attorney for the city in any suit or action brought by or against the city, and generally to attend to the interests of the city, as its attorney; and his compensation therefor shall be the sum of \$100 per year." When he entered upon his office, a suit was pending against the city, which had been brought by one Smith, to quiet the title to a tract of land therein known as a "public square." One Coffin was, prior to plaintiff's taking the office of city attorney, conducting said suit under special contract with the city. When plaintiff entered upon the duties of his office, he claims it was the understanding and agreement between him and the council of the defendant that he should take charge of and defend said suit in the district and supreme courts, and the city would pay him therefor in addition to his salary as city attorney. He did so, and presented his bill to the council, and it was not allowed. That the city paid him \$200, being, as they claimed, his salary for the two years as city attorney. That the services he rendered in the defense of said suit were not included within his official duties as city attorney, and that, as said officer, he was in no event bound to defend said suit in the supreme court. That the city council, in 1886, by a resolution repealed said ordinance by fixing the salary of the city attorney at \$25, and such further compensation as they might deem just and equitable. That the defendant, having treated said ordinance as repealed, is now estopped from claiming it to be in force. That defendant city demurred to the petition on the ground that the labor claimed to have been performed by the plaintiff was a part of the duties which pertained to his office, and, his salary as city attorney being fixed by an ordinance, neither the council nor any of its members had the power to make the alleged contract, and to bind the city thereby. That the facts set up, and claimed to amount to a repeal of said ordinance, were ineffectual to accomplish that end. The demurrer was

sustained, and, plaintiff electing to stand up on his petition, and refusing to plead further, judgment was entered against him for costs, and his action dismissed.

2. The appeal presents the single question of the correctness of the ruling of the trial court in sustaining the demurrer. It is urged that the services rendered were not, even by the terms of the ordinance, included within the plaintiff's duty as city attorney. It seems to us that a mere reaming of that section of the ordinance which prescribes the duties of the city attorney is sufficient to show that under it he was required to act for the city, as its attorney, in any case brought by or against it; and, if that is not broad enough, the further requirement certainly would be that he is "generally to attend to the interests of the city, as its attorney." That the services rendered by the plaintiff, and for which he now seeks to recover, were included within his duties as city attorney, is too plain to admit of argument.

3. It is claimed that this provision of the ordinance was repealed, or rendered inoperative, because the council, several years after its enactment, by a resolution fixed, or rather undertook to fix, the compensation of the city attorney at \$25 per year, and hence it is said that the city is now estopped from relying upon the ordinance. The statute provides the manner in which ordinances shall be passed. When legally passed, if not in conflict with constitutional or statutory provisions, an ordinance will remain in force until repealed or amended in a legal manner. We need not stop to argue the self-evident proposition that an ordinance cannot be repealed, or rendered ineffective or inoperative, by a failure to enforce it. Nor can an ordinance be repealed or superseded by the passage of a resolution which undertakes to fix another and different compensation for a city officer than that prescribed in the ordinance.

4. Furthermore, the passage of the resolution, even if it should be conceded to work a repeal of the ordinance, would not avail plaintiff. Our statute provides, as to officers of cities and incorporated towns, that "the emoluments of no officer whose election or appointment is required by this chapter shall be increased or diminished during the term for which he shall have been elected or appointed." Code, § 491. This statute has been construed to prohibit the city council from, on its own motion, changing the compensation of a city officer, or from accomplishing the same end by making a contract with the officer for compensation other than that fixed by the ordinance. *Purdy v. City of Independence*, 75 Iowa, 359, 39 N. W. Rep. 641. See *City of Council Bluffs v. Waterman*, (Iowa,) 53 N. W. Rep. 289, and cases there cited. The council could not, even by repealing the ordinance and passing a new one, affect the compensation to be paid to plaintiff as city attorney during the term for which he was elected.

5. It is said that the city, having had the benefit of plaintiff's services, which were rendered under a verbal contract made with its council to pay therefor a sum in excess of his salary as city attorney, is now estopped from pleading or relying upon the ordinance which fixed his compensation. In support of this claim a large number of cases are cited. They are either cases which concerned private corporations, and parties contracting with them in good faith, where the corporation has had the full benefit arising from the performance of the contract, and sought to avoid it, or cases where municipal corporations have contracted with strangers for gas, grading, or other proper public improvements, and received all the benefit flowing therefrom. Surely, such cases are not authority for holding that a city, after fixing the salary of its officer in a legal manner, may enter into an arrangement with him whereby he may obtain additional compensation for services embraced within the duties of his office. Such a contract is against public policy, and void. *Vandercook v. Williams*, 106 Ind. 345, 1 N. E. Rep. 619, and 8 N. E. Rep. 113.

6. When plaintiff made the verbal contract with the defendant, under which he seeks to recover in this action, he knew, or was bound to know, that the services he would be called upon to render thereunder were included in his duties as city attorney, and that the salary of said office was fixed by ordinance at \$100 per year. No rule is better established than that "a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary." 1 Dill. Mun. Corp. § 233, and note; *Fawcett v. Woodbury Co.*, 55 Iowa, 154, 7 N. W. Rep. 483; *Purdy v. City of Independence*, 75 Iowa, 358, 39 N. W. Rep. 641; *City of Council Bluffs v. Waterman*, (Iowa,) 53 N. W. Rep. 289; *Bayha v. Webster Co.*, 18 Neb. 131, 24 N. W. Rep. 457; *State v. Silver*, 9 Neb. 88, 2 N. W. Rep. 215; *Evans v. City of Trenton*, 24 N. J. Law, 764; *Com. v. Holmes*, 25 Grat. 771; *Turpen v. Board*, 7 Ind. 172; *Territory v. Carson*, 7 Mont. 417, 16 Pac. Rep. 572; *Hays v. City of Oil City*, (Pa. Sup.) 11 Atl. Rep. 63; 19 Amer. & Eng. Enc. Law, p. 529. And a promise to pay a city attorney "an extra fee or sum beyond that fixed by law is not binding, although he renders services, and exercises a degree of diligence greater than could legally have been required of him." 1 Dill. Mun. Corp. § 234; *Carroll v. City of St. Louis*, 12 Mo. 444; *City of Detroit v. Whittemore*, 27 Mich. 281; 19 Amer. & Eng. Enc. Law, pp. 529, 530; *Hays v. City of Oil City*, (Pa. Sup.) 11 Atl. Rep. 63; *Territory v. Carson*, 7 Mont. 417, 16 Pac. Rep. 572. And it has often been held that a payment to a public officer of a sum in excess of that fixed by law for his compensation is unauthorized and void. *Adams Co. v. Hunter*, 78 Iowa, 323, 43 N. W. Rep. 208; *Fawcett*

v. Woodbury Co., 53 Iowa, 154, 7 N. W. Rep. 483; Fawcett v. Eberly, 58 Iowa, 544, 12 N. W. Rep. 580; Griffin v. County of Clay, 63 Iowa, 413, 19 N. W. Rep. 327; City of Council Bluffs v. Waterman, (Iowa,) 53 N. W. Rep. 289. As is well said by Judge Dillon in his excellent work on Municipal Corporations, (volume 1, § 233): "To allow changes and additions in the duties properly belonging, or which may properly be attached, to an office, to lay the foundation for extra compensation, would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularly the duties annexed to public offices, and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be considered strictly official; and, if these distinctions are much favored by courts of justice, it may lead to great abuse." The demurrer was properly sustained, and the judgment below is affirmed.

STATE v. FERNALD et al.

(Supreme Court of Iowa. May 25, 1893.)

FORCIBLE DEFILEMENT—EVIDENCE.

1. On an indictment under Code § 3862, for compelling a woman to be defiled against her will, it appeared that before the alleged commission of the crime F., one of defendants, had been criminally intimate with the woman, and that he and B., the other defendant, arranged that B. should surprise F. and the woman in flagrante delicto, and, under threats of exposure, compel the woman to allow B. to have sexual intercourse with her, and that, when surprised, the woman refused to consent to B.'s proposal, but did so under fear of B.'s threats of exposure. *Held*, that the evidence was sufficient to warrant a conviction.

2. To constitute a crime under Code, § 3862, providing that any person who by force or duress defiles a woman shall be fined, etc., the woman defiled need not be of previous chaste character.

Appeal from district court, Washington county; A. R. Dewey, Judge.

Defendants were indicted and put on trial for the crime "of compelling a woman to be defiled against her will." After the state rested, defendants moved to take the case from the jury, and that they be discharged, "for the reason that all the testimony on the part of the state does not constitute the crime charged in the indictment." This motion was sustained, and the state appeals.

John Y. Stone, Atty. Gen., C. J. Wilson, Co. Atty., and H. Scofield, for the State. H. M. Elcher, J. F. Henderson, and G. A. Ewing, for appellees.

GIVEN, J. 1. The question presented is whether the court erred in sustaining defendants' motion. To determine this we must first inquire what the charge is, and then whether there is evidence to support it. The

indictment accuses the defendants "of the crime of compelling a woman to be defiled against her will," and charges the crime to have been committed as follows: "The said P. A. Fernald and A. W. Brown, on or about the 24th day of July, in the year of our Lord one thousand eight hundred and ninety, in the county of Washington, and state of Iowa, did unlawfully and feloniously and against her will take one Etta Jones, she being a female woman, and by force, menace, and duress compel her, the said Etta Jones, to be defiled by him, the said A. W. Brown, and said P. A. Fernald; and A. W. Brown did then and there unlawfully and feloniously, by force and menace, threaten her, the said Etta Jones, that unless she would surrender up her person to the said A. W. Brown, and be by him defiled and carnally known, he, the said A. W. Brown, would circulate derogatory and scandalous reports, charges, and stories of and concerning her, the said Etta Jones, and by force, menace, and duress did put Etta Jones in fear, and against her will feloniously and unlawfully did then and there compel her, the said Etta Jones, to be defiled and carnally known." Section 3862 of the Code is as follows: "If any person take any woman unlawfully and against her will, and by force, menace, or duress compel her to marry him or any other person, or to be defiled, he shall be fined," etc. It is suggested on behalf of appellant that this indictment charges the crime of malicious threats to compel the person threatened to do an act against her will, under section 3871 of the Code. It is not charged that the threats were maliciously made, and for this and other reasons we conclude that the charge is not under section 3871, but is based upon section 3862. The evidence consists of admissions made by the defendants and the testimony of Etta Jones. It shows that for some time previous to the time it is alleged this offense was committed the defendant Fernald, an unmarried man, was keeping company with Etta Jones, then a young and inexperienced girl, and that their association led to criminal intimacy. Fernald boasted to Brown, a married man, of this criminal relation with Etta Jones, and, Brown expressing doubts as to the truth of his statements, it was agreed between them that Fernald would take Etta Jones to a certain place on a certain evening; that Brown should come upon them while they were in the act of sexual intercourse; that Fernald would pretend to attempt to buy his silence with money, and that Brown should insist as the only condition upon which he would not tell what he had seen that Etta Jones allow him to have sexual intercourse with her. The subsequent statements of the defendants not only show this agreement between them, but also that it was fully carried out by them. Etta Jones testified that when Brown came upon them he said "Hello;" that Fernald offered him \$10 not to tell; that they two talked together twice, a

short distance from her; that she did not hear what was said; that Fernald came, and told her that if she did not let Brown have sexual intercourse with her he would tell on her; that the second time Brown came with Fernald; that she cried, and said, "Oh, please don't;" that Fernald pushed her down, and pulled up her clothes, and Brown got on her, and had sexual intercourse with her, and that she believed unless she yielded Brown would tell on her. There can be no question but that, if the crime charged was committed, the defendants are alike guilty, as what was done was in pursuance of the agreement between them, and was participated in by both. If they took Etta Jones unlawfully and against her will, and by force, menace, or duress compelled her to be defiled, they are guilty of the crime charged. In *Beyer v. People*, 86 N. Y. 370, the defendant was indicted under a statute substantially the same as our section 3862. The defendant took the prosecutrix to a house of prostitution for the purpose of her defilement, under the pretense to her that he had procured her a situation as a servant in a respectable family. It was held that the woman was taken unlawfully and against her will. In this case, as in that, the prosecutrix was ignorant of the purpose for which she was taken, hence it was against her will; and, the purpose being her defilement, the taking was unlawful. The evidence certainly tends to show that Etta Jones was compelled to submit to the embraces of Brown by his threats to publish her criminal relations with Fernald if not so indulged. In *Pollard v. State*, 2 Iowa, 567, in construing section 2582 of the Code of 1851, which is identical with said section 3862, this court said: "It is true that no particular amount of force is necessary to constitute the offense, and the section 2582 of the Code was probably intended to cover those cases in which there is no force, except that which is constructive, and in which the act is accomplished principally by menace or duress, acting to subdue the will; but it contemplates at least an act against the will. If the will is subdued to submission by menace or duress, the act is still against the will, in every fair sense, and just such a case is provided for in this section of the Code." It was by the threat to disclose her conduct with Fernald that the will of Etta Jones was subdued. It was that menace that caused her to submit to Brown. The act, therefore, was not voluntary, but against her will.

We infer from the record that the defendants' motion was sustained upon the ground that there was no defilement; that "defilement," as used in the statute, means to make impure and unclean that which is pure and clean, to corrupt the chastity of the chaste and virtuous; or, in other words, that previous chaste character is an element in the crime charged, and that, Etta Jones being unchaste, there was no defilement. We think this is an erroneous view of the law. The

statute does not make previous chaste character an element in this offense, as in seduction. The statute is the same in this respect as that defining rape. The two crimes are kindred, for that in both the act must be against the will of the woman. The courts have uniformly held that women, however abandoned, are within the protection of the law punishing rape. Her want of chastity is no license to the vicious to ravish and carnally know her by force and against her will, nor should it be to gain her consent by menace or duress. The reason for the rule is alike applicable to both crimes. To hold otherwise is to encourage just such outrages as that charged in this case. Among the definitions of the word "defile" given by Webster is the following: "To corrupt the chastity of; to debauch; to violate." Surely there is evidence that this girl was debauched and violated in a most debasing manner. Absolute purity or cleanliness is not the basis of defilement in any of the definitions. That which is already impure or unclean may be defiled by making more impure or unclean. Under Rev. St. 1889, § 3487, of the state of Missouri, making it an offense for an employer to defile a girl under 18 years of age while in his employ, it was held that the criminality of the act did not depend upon the character or reputation of the female defiled, as in prosecutions for seduction; that the crime consisted in the act of defilement; and that evidence of other engagements for illicit purposes was no defense or excuse. *State v. Rogers*, (Mo. Sup.) 18 S. W. Rep. 976. In that case, as in this, it was the act of defilement that constituted the crime, and it was held that a want of chastity was no defense. To hold that the protection of section 3862 only extends to the chaste and virtuous would be to leave the unfortunate victims of the seducer without its protection, while their fault or misfortune has placed them where they of all others need just such protection. We think the case should have been submitted to the jury, and that the court erred in sustaining the defendants' motion. Reversed.

STEVENS v. WITTER.

(Supreme Court of Iowa. May 27, 1893.)

CLAIMS AGAINST DECEDENTS—EVIDENCE—APPEAL.

1. In a proceeding to establish a claim against a decedent's estate, an objection that the claim was not filed and proved within the required time (Code, § 2421) cannot be raised for the first time on appeal.

2. Where a claim is for work done for a decedent under a contract, claimant must not only show the contract, and the performance of the work in accordance therewith, but also that he has not been paid for it.

3. In such a proceeding it is proper to allow claimant to testify in regard to the possession of a written contract between him and deceased, which has been lost, but he should not be allowed to testify as to the contents of such contract.

Appeal from district court, Polk county; W. F. Conrad, Judge.

Proceeding to establish a claim against an estate. Claim allowed, and defendant appeals.

Clinton L. Nourse, for appellant. Henry S. Wilcox, for appellee.

KINNE, J. 1. It is contended that this claim was not "filed and proved" within the 12 months, as provided by the statute, and hence it is barred. Code, § 2421. The claim was filed within 12 months of the giving of the notice by the administrator, and proceedings actually begun to prove it up within the time, but not concluded until after the expiration of the 12 months. The claim was for \$372, being a balance said to be due on a contract made with the decedent for the erection of a dwelling house in the city of Des Moines. No question was made in the district court as to the claim being barred, and we cannot now consider it.

2. It is said that the court erred in establishing the claim, inasmuch as plaintiff failed to show that anything was due thereon. Plaintiff insists that if he shows the contract between him and decedent for the erection of the house, wherein the amount to be paid and the times of payment are set forth, and if he establishes the fact that the house was in fact erected in accordance with the contract, plans, and specifications, it is sufficient to establish the liability of defendant, and, if payments were made which have not been credited, it is incumbent upon the defendant to establish such fact. Section 2410 of the Code provides: "All claims filed and not expressly admitted in writing, signed by the executor with the approbation of the court, shall be considered as denied, without any pleading on behalf of the estate." It is said in *Scovil v. Fisher*, 77 Iowa, 97, 41 N. W. Rep. 583: "The resistance of the defendant put in issue all matters upon which a defense to the claim could be based, usually set up by a general denial. It is not to be presumed that defendant admitted plaintiff's right to recover or the validity of his claim." In *Lamm v. Sooy*, 79 Iowa, 597, 44 N. W. Rep. 893, in speaking of this provision of the statute, the court says: "The defendant not having filed any answer to either petition, it follows from this provision that each and every allegation of both of the plaintiff's petitions was denied, and thereby the burden was cast upon him to prove each material allegation." The denial which the law interposes makes it necessary for the plaintiff to show that he had a valid claim against the estate of decedent,—that something was due him. The denial goes to the entire claim. It was the purpose of the law to protect estates against any but legitimate claims, and to that end the burden is cast upon the claimant to establish his claim. This cannot

be done by plaintiff's showing that he has carried out a contract which he had entered into with decedent, by the terms of which decedent was to pay him a certain sum of money. It seems to be conceded in argument that there was no evidence showing the amount due plaintiff. Under such circumstances, the court should not have established plaintiff's claim against the estate. It is said that payment is an affirmative defense, and must be pleaded and proven by the one claiming it has been made. That this is the general order may be conceded, but the provision of the statute above quoted renders such rule inapplicable to this class of cases, and imposes on the claimant the burden of showing the amount due.

3. It appears that the claim of plaintiff is for a balance alleged to be due him in a house built for decedent, McClelland, in the year 1885. It is claimed, and the evidence tends to show, that some time prior to the erection of the house decedent entered into a written contract with plaintiff for its erection. It also appears that the house was to be built in accordance with certain plans and specifications agreed upon between the parties. The record is not clear as to whether the plans and specifications were attached to or embodied in the contract, or whether they were separate, though we think the fair inference is that the entire agreement, including plans and specifications, was a part of the contract. On the trial competent evidence was introduced showing that such a contract had been entered into between plaintiff and the decedent. We are in some doubt as to whether the contract was ever signed by the parties. We do not, however, consider that essential, as it appears that the work was entered upon and prosecuted under the contract, and it was in all respects treated as the contract of the parties. Plaintiff, as a witness, was asked if he had a contract in his possession or under his control between him and decedent relating to the erection of the house, and if he had ever had the contract, or knew when it was placed. These questions were objected to as incompetent, and as calling for a personal transaction between witness and deceased. The court overruled the objection, and permitted the witness to answer. Section 3639 of the Code provides: "No party to any action or proceeding * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, * * * against the executor, administrator, * * * of such deceased person." We have held that testimony that an instrument was in the handwriting of the deceased, and that he signed it, when based upon the knowledge of the handwriting of the deceased, was not a personal transaction. *Sankey v. Cook*, 82 Iowa, 125, 47 N. W. Rep. 1077. In that case it is said:

"The object of the statute is to close the lips of the living party to the transaction; that he cannot give testimony in regard thereto that, because of the decease of the other party, he cannot dispute if untrue." The testimony was not of a personal transaction, but touching an "independent fact," which deceased, if alive, could not dispute. By it it was shown that no such contract had ever been in plaintiff's possession. It was proper for the court to receive and consider the testimony. The plaintiff was also asked what Exhibit B was. The same objection being made and overruled, he testified that it was a part of the specifications he built the house by; that they were the ones he had in his possession. So far as is disclosed by this record, these specifications were a copy of those originally agreed upon by the parties, and, if so, the evidence was inadmissible. The witness also testified as to the provisions and conditions of the contract which had been entered into between him and decedent, and which was shown to have been lost. This evidence was also objected to, and the court reserved its ruling. A motion was made to strike out the testimony because incompetent for the reason before stated, and on this the court reserved its ruling. The question presented is, may the plaintiff, in a proceeding to establish his claim against the estate, testify on his own behalf as to the terms and conditions of a contract entered into between him and decedent, and under which it is sought to hold the estate liable to plaintiffs? We think the testimony was inadmissible. *Robinson v. James*, 29 W. Va. 224, 11 S. E. Rep. 920. Without this evidence plaintiff had not established the terms and conditions of the written contract. The direct effect of the evidence was to fix a liability against the estate and in favor of plaintiff. It was given concerning a matter which decedent, if alive, might have disputed. The contract of the parties had been reduced to writing. It was a personal transaction, within the meaning of the statute. To permit such evidence to be introduced would defeat the object and purpose for the accomplishment of which the statute was executed. Without this evidence the court would not be advised as to the terms of the contract between the parties, and hence no liability to plaintiff was shown. For the errors pointed out the case is reversed.

McCORMICK HARVESTING MACH. CO. v. BROWER.

(Supreme Court of Iowa. May 26, 1893.)

SALE OF MACHINE—WARRANTY—INTERPRETATION—BREACH—RESCISSON—NOTICE OF DEFECTS—WAIVER OF RETURN—AUTHORITY OF AGENT—QUESTION FOR JURY—PLEADING—EVIDENCE.

1. A contract for the sale of a harvesting machine recited that it was "warranted to be well made, of good material, and durable with

proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to" the company, etc. *Held*, that the warranty was not all embraced in the provision that it was "well made, of good material, and durable with proper care," but the contract warranted the machine to "work well."

2. In an action by the sellers for the price of such machine, in which defendant alleges a breach of the contract of warranty in that the machine did not work well, it is not incumbent on him to prove wherein the machine was not well made.

3. Where the warranty of a machine provides that "if, upon one day's trial," it does not work well, "the purchaser shall give immediate notice to" the sellers or their agent, a notice that it did not work well, given by the purchaser to the agent after about one-half day's trial, is premature, and not a compliance with the contract.

4. Where such notice is given to the agent two days after the expiration of the one day's trial, and the latter requested him not to return it, and said he would see the company, and thought it would take it away, it is for the jury to determine whether the purchaser complied with the provision of the contract requiring such notice to be given "immediately."

5. Where such agent, after receiving notice that the machine would not work well, proposed to telegraph for an expert, and have him at the purchaser's house the next morning, to put the machine in order, and the latter would not permit him to do so, the purchaser failed to comply with a provision of the contract to allow the sellers time to put the machine in repair, and cannot rescind the sale.

6. Where such agent sold such machine for plaintiffs in such action, and was their agent for the sale of such machines, he had the power to waive the return of the same by defendant.

7. In such action the answer alleged that defendant gave such notice to plaintiffs' agent, and offered to return the machine, but the latter requested him to retain it where it was, and he would have it boxed and shipped to plaintiffs; and that the agent then agreed to receive the machine on defendant's premises. *Held* that, though the waiver was not clearly pleaded, the facts stated were sufficient to justify the admission of evidence of waiver.

8. Where defendant testifies that such agent gave him certain instructions as to running the machine, without stating what they were, it is error to permit him to further state that "I did just as he said," since such evidence is the statement of a conclusion.

9. It is error to permit defendant to ask a witness how the draught of such machine compared with the draught of other similar machines, and, if it was greater, how much greater, and to permit the witness to answer that he "could not say just how much greater, but it was very hard; it would just kill a team,"—since such evidence did not aid in determining the issue as to whether or not the machine "worked well."

Appeal from district court, Dallas county; J. H. Appelgate, Judge.

Action against defendant for the price of a harvester. Defense, breach of warranty. Jury trial. Verdict and judgment for defendant. Plaintiff appeals.

Kauffman & Guernsey and D. W. Woodin, for appellant. White & Clark, for appellee.

KINNE, J. 1. July 3, 1889, defendant entered into the following written contract: "McCormick Harvesting Machine Company

will ship for the undersigned on or before July 10, 1889, one of their latest improved 5-foot H. binders, including the usual extras, consigned to the care of G. M. Armfield, at Redfield, the undersigned agreeing to pay the McCormick Harvesting Machine Company \$130 cash, with interest thereon at the rate of — per cent. per annum from date until due, and at the rate of — per cent. thereafter until paid. These machines are all warranted to be well made, of good material, and durable with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to said McCormick Harvesting Machine Company, or their agent, and allow time to send a person to put it in order. If it cannot then be made to work well, the purchaser shall return it at once to the agent of whom he received it, and his payment, if any has been made, will be refunded. Continuous use of the machine, or use at intervals through harvest season, shall be deemed an acceptance of the machine by the undersigned. Dated the 3d day of July, 1889. Post office, Adel; county, Dallas; state, Iowa. D. M. Brower." Plaintiff claims that the machine in all respects conformed to the requirements of the contract; that delivery of it was made thereunder; and that it was received and accepted by the defendant, and he refused to pay therefor. Defendant admits the purchase of the machine, the execution of the written contract, and that he has not paid for the machine. He avers that the machine was purchased of plaintiff through George Armfield, its agent at Redfield, Iowa. He sets out the contract, and alleges that when the machine was delivered to him it was set up by plaintiff by its agent, George Armfield, assisted by one Charles Armfield, an employe of George Armfield. That the latter attempted for about 12 hours to make the machine work well, but was unable to do so, and it did not work well, and said agent left defendant, knowing that the machine did not work well. That when he left, defendant notified him that the machine did not work well; that he would not keep it and pay for it if he or plaintiff did not make it work properly, —and requested him to notify said George Armfield, plaintiff's agent, of these facts, and to furnish a suitable person to make the machine work properly. That he then and there asked Charles Armfield to make said machine work well. That the latter told defendant if he would continue to use the machine it would work all right. That he refused to remain and fix the machine so it would work properly, but promised to come back in a day or two, and make the machine work well. That, as requested by plaintiff's agent, he did retain the machine for about four days, and used every effort to make it work well, but was unable so to do. That plaintiff, though notified in accordance with the terms of the contract, that the machine

failed to work well, neglected to fix the same. That defendant notified George Armfield, plaintiff's agent, that the machine was defective in material and construction, and would not work well, and offered to return same, but said agent requested defendant to retain it where it was; that he would have it boxed up, and shipped to plaintiff; and then agreed to receive the machine of defendant on his premises. Avers that it was not well made and of good material, and durable with proper care, and that it did not work well upon one day's trial. Defendant particularly complains that the machine was of excessive draught; that it would not elevate the grain well, would not bind properly, and otherwise would and did not work well.

2. Appellant claims that the warranty was all embraced in the provision that "these machines are all warranted to be well made, of good material, and durable with proper care." This, it occurs to us, is too narrow a view of the contract. It expressly provides for returning the machine after one day's trial, if it does not "work well," and notice is given, and an opportunity afforded plaintiff to send some one to put it in order. That the machine would "work well" was just as much a part of the warranty as that it was made of good material. Nor was it incumbent on defendant to prove wherein it was not well made. He was not a mechanic or a manufacturer. He had a right to rely upon the contract that it "would work well," and if defendant, in operating the machine, exercised reasonable care and skill in an honest effort to make it work properly, and if the condition of his grain and ground was such as not to prevent it from working well, and it would not do so, then there was a breach of the warranty.

3. Appellant complains of the court's refusal to give the following instruction: "The defendant claims a breach of warranty in the contract in suit. The contract in question warrants the machine in question to be well made, of good material, and durable with proper care. The warranty that the machine is well made, of good material, implies a warranty that it will do good work. This, however, does not mean that the machine in question was warranted to do good work under any and all conditions. It means that the machine in question will not, on account of poor material, or on account of being poorly made, fail to do good work, when operated by a person of reasonable skill and intelligence, and under average conditions as to ground and grain. To show a breach of warranty in this cause the defendant must make it appear by a fair preponderance of the evidence that the machine in question failed to do good work when operated by a person of ordinary skill in such matters, under average conditions as to ground and grain; and, further, that this failure was caused by some defect in

the machine growing out of the fact, if such you find the fact to be, that this machine was not well made, of good material." In the form presented, we think this instruction was properly refused. It is objectionable, for the reasons stated in division 2 of this opinion.

4. Did the defendant comply with the terms of the contract as to the trial of the machine, before notifying plaintiff of its failure to work as warranted? He was required to give the machine one day's trial. At the time the notice is claimed to have been given to the expert, Charles Armfield, that the machine did not work well, the time for trial had not expired. As near as can be determined from the evidence, the machine had not been operated over a half day. By the terms of the contract defendant was required to try the machine fairly for one day before he could give the notice, if it did not work. It is possible that there might be such defects in a machine as would absolutely preclude its working, so that further trial would be unnecessary, and the notice might be given; but the evidence in this case fails to show that any such condition existed. So it seems that the notice given to Charles Armfield on July 16, 1880, was premature, and hence ineffectual. The contract required the one day's trial. The parties must abide by their agreement, fairly entered into. *Wendall v. Osborne*, 63 Iowa, 103, 18 N. W. Rep. 709; *Russell v. Murdock*, 79 Iowa, 101, 44 N. W. Rep. 237. After Charles Armfield left the defendant's place on Tuesday, the 16th of July, the defendant continued to work the machine up to the following Friday morning, and failed to make it work well. On the latter day he notified the agent of whom he purchased it of its failure to work, and told him he would return the machine the next day, but the agent requested him not to do so, but to keep it on his place for a while; that he would see the company, and thought they would knock it down, and take it to Kennedy, and ship it to Des Moines. It is claimed that this notice was not given immediately after the one day's trial was had. True it is that two days intervened after the one day's trial, and before notice of the failure of the machine to work well was given to the agent, and appellant claims such notice was too late. The notice was required to be given "immediately" after the one day's trial. That would demand that the defendant act promptly in giving his notice after the time for trial had passed. Whether or not he did so act must be determined by the jury in view of all the facts of the case. *Machine Co. v. Russell*, (Iowa,) 53 N. W. Rep. 310. If it be conceded that the notice to the agent, George Armfield, was in time, then, under the contract, it was incumbent on defendant to afford an opportunity to plaintiff or its agent to send a man to fix the machine so that it would work

properly. The evidence, without any conflict, shows that George Armfield, upon the notice being given him that the machine would not work well, proposed to telegraph for an expert to put the machine in order, and agreed to have him at defendant's house the next morning, but defendant would not permit him to do so. The defendant, having refused to comply with the contract in this respect, put it out of his power to rescind it. *King v. Towaley*, 64 Iowa, 75, 19 N. W. Rep. 859.

5. The defendant, in his answer, avers that plaintiff's agent "verbally agreed to receive said machine of the defendant, where it was on defendant's premises at that time." It is not necessary, in view of the issues, to determine whether—even if defendant had so far complied with the contract as to entitle him to return the machine—his return of it to the town of Redfield, 10 days after he decided not to keep it, would have been a compliance with the terms of the contract. For the reasons heretofore stated, at the time he thus undertook to return it, he had no right so to do.

6. It is urged that the court erred in admitting evidence tending to show that plaintiff had waived the condition of the contract relating to the return of the machine. In so far as this objection is grounded on the claim that George Armfield, the agent, had no authority to waive a return of the machine, it is not well founded. The evidence shows without conflict that he was the agent of plaintiff for the sale of these machines, and that he sold this one to the defendant. Having the power to sell, he had the power to waive the return of the machine. *Pitsinowsky v. Beardsley*, 37 Iowa, 9; *Mechem, Ag.* § 349; *Warder v. Robertson*, 75 Iowa, 585, 39 N. W. Rep. 905. It is said such evidence was inadmissible, because no waiver was pleaded. The waiver is not as clearly pleaded as it should have been, yet we think the facts stated are sufficient to admit introduction of the evidence, if the defendant had so far complied with his contract as to be entitled to avail himself of such a plea.

7. The sixth and eighth instructions are erroneous in ignoring the provision of the contract that one day's trial of the machine was necessary before notice could be given that it failed to work well. Under the wording of the sixth instruction the jury would be justified in finding that it was not necessary to try the machine for a day, but, if it was "fairly tested" for the half day that Charles Armfield was at the defendant's place, it would be a compliance with the contract in that respect. We have already stated that it was incumbent on defendant to comply with the contract as to a trial of the machine before he was entitled to give notice.

8. In the course of the examination of the defendant he stated that Mr. Armfield

gave him certain verbal instructions as to the running of the machine, but did not disclose what they were. He was then asked to "state whether or not you did as he told you." He answered, "I did just as he said." The question was objected to as calling for the conclusion of the witness. Defendant also moved to strike out the answer for the same reason. The motion and objection were overruled. This was error. The jury knew no more about the facts after this question was answered than before. The inquiry called for no facts, and the answer was but a conclusion based upon facts not in evidence. It might have been proper to have shown what instructions were given, and to what extent and in what manner they were followed. The facts should have been put before the jury, and they could have determined as to whether or not the instructions were followed. Other evidence of the same character was excepted to and improperly admitted. Witness Harris was asked how the draught of that machine compared with that of other machines of that character, and, if it was greater, how much greater. This was objected to, and the objection overruled. He answered he "could not say just how much greater, but it was very hard; it would just kill a team." Such evidence was not admissible under any issue in the case. The question to be determined was, did the machine "work well?" not how it worked as compared with some other machine. Did the machine comply with the warranty? not how it compared with some other machine, about which the jury knew absolutely nothing.

9. Many other errors are assigned that we cannot specially consider. Some of them raise the same questions already passed upon, others are not well grounded, and some of the questions presented we ought not to discuss in view of another trial. The judgment of the court below is reversed.

WHITESIDES et al. v. RUTAN.
(Supreme Court of Minnesota. June 16, 1898.)
PUBLIC LANDS—HOMESTEAD ENTRIES—ASSIGNMENT OF RIGHT.

Webster v. Luther, (Minn.) 52 N. W. Rep. 271, followed.

Appeal from district court, St. Louis county; Ensign, Judge.

Action by Robert B. Whitesides and others against Andreas M. Rutan to determine adverse claims to land. Judgment, from which defendant appeals. Affirmed.

J. L. Washburn and Troomey & Morris, for appellant. Jaques & Hudson, for respondents.

PER CURIAM. The points raised in this case are identical with those considered and determined in the case of Webster v. Lu-

ther, (Minn.) 52 N. W. Rep. 271, after full argument. This case must therefore be held to be governed by that, and the order of the trial court in accordance therewith is accordingly affirmed.

OLIVIER v. CUNNINGHAM, (three cases.)
(Supreme Court of Minnesota. June 16, 1893.)

Appeals from district court, Carver county; Cadwell, Judge.

Three actions by Eugene Olivier against George Cunningham. Judgment, from which plaintiff appeals. Reversed.

Savage & Purdy, for appellant. W. C. Odell, for respondent.

PER CURIAM. In the several cases entitled as above the same questions are presented as were considered and determined in *Olivier v. Cunningham*, 53 N. W. Rep. 462, (decided at the last term.) They are reversed for the same reasons. Statutory costs will be allowed in but one case. Judgments reversed.

BURNS et al. v. PHINNEY et al.
(Supreme Court of Minnesota. June 8, 1893.)
MECHANICS' LIENS—ENFORCEMENT—LIMITATION—PARTIES—APPEAL.

1. Neither the district court nor this court can give a party a right to appeal after the time for appeal prescribed by the statutes has passed.

2. One who claims no interest in the subject of controversy cannot be heard on appeal to this court.

3. Where a lien claimant, made a defendant in an action to foreclose a mechanic's lien, does not appear in it for the purpose of asserting his lien, within the time allowed him by statute to bring an action to enforce his lien, his right to enforce it is barred. That the action is brought within time to save plaintiffs' lien will not help such a defendant.

4. Where a lien claimant appears in such an action for the purpose of asserting his lien he makes the action his own for the purpose of enforcing his lien, and if he is in time the fact that plaintiffs' lien is barred, or that plaintiffs from any cause fail to recover, will not affect him.

5. Finding of fact held not justified by the evidence.

6. Judgment reversed, and new trial ordered as to plaintiffs and defendants Grier and Wilcox, and affirmed as to defendant Horst.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Egan, Judge.

Action by William H. Burns and Willis R. Shaw, copartners as Burns & Shaw, against Mamie and Albert S. Phinney, Charles J. Berryhill, Davison, Goodman, and others. Judgment for plaintiffs, and in favor also of certain of the unnamed defendants. Defendants Berryhill, Davison, and Goodman appeal.

Charles J. Berryhill, for appellants. Howard L. Smith, for respondents Burns & Shaw. Frank Ford, for respondent Horst. O. H. Hubbard, for respondents Grier and others.

GILFILLAN, C. J. This is an action to enforce a mechanic's lien, and, as in most actions of the kind, matters are a good deal complicated. So far as the record in this appeal discloses, the owners of the real estate, Mamie Phinney and Albert S., her husband, made no defense. Defendants Berryhill defended under one mortgage, defendants Davison under another, and defendant Goodman under another, and defendant Resser defended under the Davison mortgage. As to each mortgage it was claimed, although subsequent to the mechanics' liens, that it was entitled to preference over them. Defendant Horst claimed a mechanic's lien, and defendants Grier and Wilcox did the same. The liens of plaintiffs, of Horst, and of Grier and Wilcox were allowed. The judgment directed the property sold to pay them, and the claims of the other defendants to be barred, except their rights of redemption. The appeal is brought by the Berryhills, the Davisons, and Goodman.

After his time to appeal had expired an application was made to the court below on behalf of Resser to be permitted to join in the appeal taken by the others, and a similar application is made here. There is no authority in the district court nor in this court to give a party a right to appeal after the right given him by the statute has lapsed by his failure to exercise it, and to grant his application would be, in effect, giving him a right to appeal. See Gen. St. 1878, c. 66, § 79. The mortgage executed by the Phinneys to Davison was, as appears from his answer, by him assigned to Resser, and thereupon his interest in the subject of litigation ceased, and consequently he has no right to complain of the decision of the court below, and cannot be heard here. The dates of the mechanics' liens were as follows: Plaintiffs', July 16, 1890; Horst's, September 12, 1890; Grier's and Wilcox's, October 15, 1890. The mortgage under which Goodman claims was executed December 4, 1890, by the plaintiffs to the National Investment Company, and by that company assigned to Goodman. No reason is apparent upon the record, and none is suggested in the appellants' brief, why the lien of this mortgage is not subordinate to the mechanics' liens; therefore the eighth assignment of error, directed to the decision giving the mechanics' liens precedence of that mortgage, is not well founded.

The mortgage of the Phinneys to Berryhill was executed December 5, 1890. No assignment of error calls in question the decision of the court subordinating this mortgage to the mechanics' liens, and it is therefore unnecessary to consider it.

The defendants Grier and Wilcox were named as defendants in the summons and complaint, but they did not appear in the action till they filed their answer, March 5, 1892, more than a year and four months after the date of their last item. Their right

to enforce their lien had then become barred. The fact that plaintiffs commenced their action in time did not keep the Grier and Wilcox lien alive. When an action to foreclose a mechanic's lien is begun, the appearance in it of other lien claimants for the purpose of asserting their liens is equivalent to the commencement by them of an action for the purpose, and if within the time allowed them to commence an action will preserve their right to enforce their liens. Horst's answer was filed before his lien was barred, and, so far as he was concerned, it was immaterial whether plaintiffs commenced the action in time to save their lien. When the action is to foreclose a mechanic's lien, the right of a lien-claiming defendant does not depend on the plaintiff's right to recover, nor on his recovery. The failure of plaintiff to recover from any cause will not affect the right of any lien-claiming defendant. Each such defendant makes the action his, for the purpose of enforcing his lien, from the moment he appears in it for that purpose. We think the court below was justified in finding that the plaintiffs' action was commenced in time to save their lien.

From assignment of error 5, "in refusing to find a lien in favor of Goodman for the amount of his mortgage," and a similar one (7) in respect to the Berryhill mortgage, it is difficult to see what the appellants complain of. The court found the existence of those mortgages, and in its direction for judgment recognized the right of those defendants to redeem. We infer the assignments were intended to present the point that the court ought to have directed a sale on account of those mortgages as well as of the liens, and allowed those defendants to participate in the distribution of the proceeds of sale. It is probably a sufficient reason for the court not so directing that those defendants did not ask for any such relief. Their answers merely put them in the attitude of resisting the mechanics' liens. The mortgage of Goodman was not due; whether Berryhill's was or not nowhere appears. Those defendants may have preferred to retain their liens, take the chances of the owners redeeming, and redeeming themselves in case they did not. But the findings of fact were not sufficient to justify any such direction. The amounts still due on the mortgages were not found, and the court was not asked to make any such findings.

The court, however, erred in finding as a fact that the plaintiffs' claim was not paid. The evidence was such as to require a finding that it was paid December 5, 1890. Upon the transaction which constituted payment there was no conflict in the evidence. It is true, Burns testified generally that no part of the claim had been paid, but, as he had no personal knowledge of that transaction, his general statement could make no conflict in the evidence upon it. The trans-

action was that Phinney, having given to Burns & Shaw two orders on Berryhill and Davison,—one for the payment of the balance due on house No. 2, Berryhill and Davison's rearrangement; the other for payment of the balance due on house No. 4 of said rearrangement,—the orders were taken by one Othea, an agent of Burns & Shaw, to Berryhill, who paid the same. The latter testified, and he was corroborated by Othea, and in no way contradicted, that at the time of paying he told Othea distinctly a number of times that the houses on which he was paying were those on lots 2 and 4, being the second and fourth houses from the corner. The house on lot 4, or the fourth one from the corner, was that in controversy here. Of course, as the party paying has the right, ordinarily, to make the application of the payment, it must be accepted, and must operate as if so applied. The way in which the misunderstanding must have arisen was this: The land platted as Berryhill & Davison's rearrangement was situate at the corner of Marshall avenue and Victoria street, St. Paul, and was divided by the plat into six lots, one (No. 6) fronting on Marshall avenue, the others fronting on Victoria street, and numbered consecutively, beginning with the corner lot, Nos. 1, 2, 3, 4, and 5. The Phinneys built at about the same time a house on each lot. Because the house on lot 6 was built first, and the others in succession, beginning at the corner, those working on the houses, and the plaintiffs also, were in the habit of designating the houses, not according to the numbers of the lots, but according to the order in which they were built, thus designating that on lot 6 as house 1, and that on lot 1 as house 2, and so on. It does not appear that Berryhill knew anything of that way of designating the houses. It is easy to see how the plaintiffs, and, on the trial, the court below, may have been misled by this manner of designating the houses. The judgment must be reversed, and a new trial ordered, as between the plaintiffs and the defendants Grier and Wilcox and the defendants the Berryhills and Goodman, and affirmed as to the defendant Horst.

VANDEBURGH, J., took no part in this decision.

CLARK v. ABBOTT.

(Supreme Court of Minnesota. April 25, 1893.)
COMPROMISE OF DEBT BY THIRD PARTY—RELEASE OF DEBTOR.

Where one not the debtor, nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay, a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Lochren, Judge.

Action by Thomas L. Clark against Seth Abbott to recover damages for breach of a covenant against incumbrances in a conveyance of real estate, and to recover money paid at defendant's request. The defendant in 1883 conveyed to plaintiff certain real estate, by warranty deed, with covenant against incumbrances, and the consideration therefor was paid. At the time there was a mortgage upon the premises, which was thereafter foreclosed, and plaintiff's title thereby destroyed. Defendant subsequently instituted an action in the name of himself and plaintiff to set aside the foreclosure, which was decided adversely to them, and plaintiff was forced to pay the judgment for costs. The evidence was conflicting on the question of defendant's authority to use plaintiff's name in this suit. Thereafter, one Witherell, defendant's son-in-law,—a stranger to the transaction,—paid the plaintiff \$50 in satisfaction, as alleged, of his claim against defendant, and the plaintiff then made and delivered his receipt, as follows: "Minneapolis, Nov. 14th, 1887. Received of Seth Abbott fifty (50) dollars in full to date. Thomas L. Clark." Plaintiff had a verdict. From an order granting a new trial, plaintiff appeals. Affirmed.

Roberts & Baxter, for appellant. A. D. Smith, for respondent.

COLLINS, J. It is well settled that where the amount of a debt is undisputed the receipt of a less sum from the debtor than the whole, upon an agreement to discharge the entire indebtedness, is not a satisfaction, and that such an agreement is nonenforceable. There is no consideration, it is said, for the relinquishment of a part of the debt, and hence an agreement so to do is nudum pactum. But the principles which can be applied in such cases have no application in the case now before us. The respondent, Abbott, owed the debt in question. Witherell was under no moral or legal obligation to pay any portion of it, but he offered to pay to the creditor, this appellant, the sum of \$50 in full of all claims against Abbott. The offer was accepted, the money paid, and a receipt given "in full to date." Here was the act of a third person, who owed no duty in the premises, and the consideration essential to sustain the agreement was thus furnished. The technical reason for the application of the rule first mentioned, namely, an absence of consideration, no longer exists. When one not the debtor, nor under any legal or moral obligation to pay a debt, agrees to pay, and does pay, a sum less than the whole debt, in consideration of an agreement on the part of the creditor to satisfy and discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness. See *Sonnenberg v. Riedel*, 16 Minn. 83, (Gil. 72); *Mason v. Campbell*, 27 Minn. 54, 6 N.

W. Rep. 405; Schmidt v. Ludwig, 26 Minn. 87, 1 N. W. Rep. 803; Laboyteaux v. Swigart, 103 Ind. 596, 3 N. E. Rep. 373; Varney v. Conery, 77 Me. 527, 1 Atl. Rep. 683; Bank v. Fletcher, 5 Wend. 85; Brooks v. White, 2 Metc. (Mass.) 283; Welby v. Drake, 1 Car. & P. 557; Henderson v. Stobart, 5 Exch. 99. Order affirmed.

VANDERBURGH, J., absent, did not participate.

REYNOLDS v. CURTISS et al.

(Supreme Court of Minnesota. May 11, 1893.)

SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to sustain a finding of fact.

(Syllabus by the Court.)

Appeal from district court, Otter Tail county; Baxter, Judge.

Action by Wilbur S. Reynolds against Sidney H. Curtiss and others, seeking to redeem certain real property from a sale thereof made upon foreclosure of a mortgage. The statutory period of redemption expired September 15, 1889. Plaintiff alleged that on September 10, 1889, an oral agreement for extension of the period of redemption was made. Defendants denied the making of such agreement. The evidence upon the question was conflicting. The action was tried by the court, a jury having been waived, and judgment was ordered for defendants. From an order denying his motion to amend the findings, and for a new trial, plaintiff appeals. Affirmed.

Chas. L. Lewis, for appellant. Taylor, Calhoun & Rhodes and W. P. Bayley, for respondents.

GILFILLAN, C. J. The court below having found against the allegation that there was an agreement extending the time for redemption, there is no basis for any of the questions of law raised; and the evidence was such as to justify the court's finding of fact. Order affirmed.

VANDERBURGH, J., took no part in this decision.

WENTWORTH et al. v. TUBBS et al.

(Supreme Court of Minnesota. June 1, 1893.)

MECHANICS' LIENS—WHEN LIEN ATTACHES—SUBROGATION.

1. As respects the date of acquiring a lien, the term "furnish," as used in the mechanic's lien law, means furnished on the premises; and the liens of all mechanics and material men attach as of the date of the performance of the first work, or the delivery of the first material on the ground; that is, from the commencement of the improvement on the land.

2. Upon the facts found, a mortgagee was not entitled to be subrogated to the rights of

the holders of certain lienable claims against the mortgaged premises, which he paid with the proceeds of the mortgage.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Thomas Canty, Judge.

Action to enforce a mechanic's lien by Colyer T. Wentworth and others, copartners, as C. T. Wentworth & Co., against Jerome F. Tubbs and others. From the judgment entered, defendant Charles S. Sedgwick appeals. Affirmed.

Roberts & Baxter, for appellant. Taylor & Woodard, for respondents C. T. Wentworth & Co. Daniel Fish, for respondent Mary F. Topliff.

MITCHELL, J. This action, which was to foreclose a mechanic's lien, is brought here on the findings of the court, without any case or bill of exceptions, and hence the only question is whether the conclusions of law are justified by the findings of fact. Tubbs is the owner of the premises, who contracted for the construction of the building. Topliff is a mortgagee of the premises, and the other defendants and the plaintiff claim liens for labor and material performed or furnished for the construction of the building. As Sedgwick is the only appellant, and as his assignments of error relate only to the decision of the court in favor of Topliff, we have only to consider the relative rights of these two parties.

Sedgwick claims a lien for labor and skill performed and furnished, at the request of Tubbs, in preparing plans for the building, and in superintending its construction. The court finds "that he commenced to draw the plans on the 1st of February, 1890, but that this work was then commenced in his office, and not upon the ground; that there was nothing upon the premises up to May 26, 1890, to indicate that any architect had been employed for any purpose in connection with the premises, or for the purpose of erecting any building or structure thereon; and that up to said time said architect performed no labor, services, or skill upon said premises." The court also finds that "after said 26th of May, 1890, said Tubbs commenced the erection of a building on said lot." We construe this as meaning that no work had been commenced and no labor performed or materials furnished on the premises by any one until after May 26th.

There is a finding that Tubbs caused an excavation to be made on the lot about March 1, 1890, but there is none as to its extent and character, or that it had any relation to the erection of this building; hence we deem the finding wholly immaterial.

Topliff's claim is based on two mortgages on the premises, executed by Tubbs,—one for \$13,000, executed March 13, 1890, and recorded on the 26th of the same month; and the other for \$10,000, executed August

5, 1890, while the building was in process of erection, and recorded the 11th of the same month.

1. Appellant's first assignment of error is that the court erred in holding that his lien was inferior and subordinate to the lien of this first mortgage. This presents the question when appellant's lien attached, his contention being that it was acquired February 1, 1890, when he commenced drawing the plans for the building in his office. This involves the construction of the statute. The mechanic's lien law nowhere in express terms declares when a lien attaches. Section 8 of the act requires that the statement filed shall contain the time when the first and last items of labor or material were furnished, and provides that the statement, when filed, "shall operate to continue such lien during all the period of time from the time of the furnishing of the first item of such labor, etc., until the expiration of one year after the time of furnishing the last item of the same." It is on this provision that appellant relies for support for his contention. The tenth section of the act, in effect, provides that all liens for labor, material, etc., furnished for the construction of a building, without regard to the relative dates at which it was furnished, shall be co-ordinate, and without priority one over the other. The time when a lien is to be considered as acquired depends upon the statute authorizing the remedy. The statutes are not uniform on the subject. The larger number fix the commencement of the work on the premises—the first labor done or materials furnished on the ground—as the date when the mechanic's or material man's lien attaches. This is exceedingly fair and liberal to the mechanic, especially under our statute making all liens co-ordinate; so that all who furnish material or labor at any time during the process of construction of the building get a preference over all other liens of a date posterior to "the commencement of improvement on the land" by the one who performs the first labor or furnishes the first material on the ground. *Gardner v. Leck*, (Minn.) 54 N. W. Rep. 746. This works no injustice to any one dealing with the property, as the work itself is notice to all of the mechanics' claims. It enables them by ocular examination to ascertain whether they can do so safely.

But, on the other hand, it would be very unjust if the land could be afterwards swallowed up by mechanics' liens for work which had not been commenced on the ground, and of which consequently one who might buy the property or take a mortgage upon it had no notice or means of knowledge when he took his deed or his mortgage. The injustice of this would be forcibly illustrated by the facts of this case, where appellant claims a lien as of the date of February 1st, when he perhaps began the mental labor or skill of designing the plans

of the proposed building, which furnished no visible trace of work or labor on the ground itself. If the date of the lien could thus antedate the actual commencement of operations on the premises three months, there is no reason why it might not antedate it three years. The injustice of this would be intensified under our statute, in view of the fact that the date of the lien of the person who furnished the first material or labor would fix the date of all other mechanics' liens, regardless of the dates at which such material or labor was in fact furnished. Hence we ought not to give to the statute the construction contended for by appellant, unless it will not reasonably admit of any other; and in determining the meaning of the phrase "time of furnishing," as used in the eighth section, reference should be had to all the other provisions of the act, as well as its general scope and plan. Of course, as against the owner who contracts for the erection of the building, the question when a mechanic's lien attaches is of no practical importance. It only becomes material with reference to subsequent purchasers and mortgages. Taking into consideration all the different provisions of the statute, as well as our previous decisions construing it, we are of the opinion that, as regards the date of acquiring a lien, the word "furnished" or "furnishing," as used in the law, means furnished on the premises, and that the liens of mechanics or material men all attach as of the date of the performance of the first work or the delivery of the first material on the ground. This was the view taken in *Glass v. Freeberg*, (Minn.) 52 N. W. Rep. 900, and *Gardner v. Leck*, (Minn.) 54 N. W. Rep. 746, and it was upon this theory of the law that in the latter case it was held that all liens for labor or material furnished by any one, at any time during the progress of the work, attach as of the date of the commencement of improvement on the land. Our decisions to the effect that a party might, under certain circumstances, have a lien for material which was never actually delivered on the premises, or not actually used in the building, are not inconsistent with this view. In all these cases it will be found that not only was no question of bona fide purchaser or mortgagee involved, but in every instance there was in fact a building in process of construction, and the material was either in fact delivered on the premises, but subsequently diverted by the contractor, or its delivery was prevented by the fault of the owner. See *Howes v. Wire-Works Co.*, 46 Minn. 44-48, 48 N. W. Rep. 448; *Hickey v. Collom*, 47 Minn. 565, 50 N. W. Rep. 918; *Burns v. Sewell*, 48 Minn. 425, 51 N. W. Rep. 224.

2. Topliß's second mortgage was given to secure a loan of \$10,000. The court finds that, at the time this mortgage was made, it was agreed between the parties thereto that

the money thus borrowed should be paid by the mortgagee to persons holding liens on the premises for labor and material furnished in the erection of this building, and releases of such claims procured from the holders; that, pursuant to this arrangement, the mortgagee paid over the proceeds of the mortgage on claims due for labor and material so furnished by persons holding liens therefor; that the amount so paid operated to extinguish liens on the premises to that amount, which were co-ordinate and of equal priority with the other liens for labor and material, including that of appellant, enumerated in what, in the findings, is called the "Second Division." Where the court speaks of these claims, to the payment of which the proceeds of this mortgage was applied, as being liens on the premises, we understand that he means what, for want of a better term, we may call "inchoate liens;" for it is not found that either the holders or any one else had ever filed statements of liens as required by the statutes. Inasmuch as the proceeds of this second Toppliff mortgage were thus used to pay off claims which were lienable against the property, and thereby reduced by that amount the liens which would have been co-ordinate with the lien of appellant and the other liens of the second division, the court held, on what he considered the doctrine of equitable subrogation, that the lien of the mortgage was co-ordinate with the liens of the second division, and directed the distribution of the proceeds of the sale of the premises on that basis. This is the subject of appellant's second and third assignment of error. As this goes only to the distribution of the proceeds of the sale, and will not affect the sale itself, and inasmuch as it was admitted on the argument that the sale had already taken place at which the premises (which were sold subject to Toppliff's first mortgage) only brought the gross sum of \$150, this question is of no real practical importance, as appellant's share would only be a very few dollars. But we are unable to see how, upon the facts, the doctrine of subrogation can apply. This doctrine, we are aware, is a favorite one with the courts, but its application is regulated by certain well-defined rules. It can only apply where the payment operates as a purchase or equitable assignment, and not an extinguishment of a claim. It only applies in favor of one who has bought the debt either expressly, or by paying it under circumstances which render the payment equivalent to a purchase. Whether the payment amounts to a purchase or an extinguishment is really a question of intention, either express or presumed from the relation of the party to the debt or other circumstances under which the payment was made. There is no finding that the parties intended the payment of these claims as a purchase, or intended that they should be kept alive for the ben-

efit of Toppliff. On the contrary, the court finds that the agreement was that she should pay the claims, and obtain releases therefor, and that the payment operated to extinguish them. Nor are any facts found from which an intention to keep the claims alive can be presumed. The payment was not made by one collaterally liable for the debts, when the law, by reason of the right of the party, would presume that the payment was intended as a purchase, and not as an extinguishment. Neither is it found that, as in *Emmert v. Thompson*, (Minn.) 52 N. W. Rep. 31, the payment was made under any mistake of fact as to the state of the title of the premises. So far as appears, Toppliff obtained just the security under her mortgage which she expected to get, with these claims extinguished. In short, the facts found do not bring the case within any recognized ground for equitable subrogation. The mere fact that, if subrogation is not allowed, the other lienors may be in better position, or, if allowed, may be in no worse position than if these claims had not been paid, is not, of itself, ground for subrogation. Judgment modified in so far as it makes the second Toppliff mortgage co-ordinate with plaintiff's lien; but the amount is so trifling that appellant is not entitled to statutory costs.

VANDERBURGH, J., absent, took no part.

JAGGER v. NATIONAL GERMAN AMERICAN BANK OF ST. PAUL.

(Supreme Court of Minnesota. June 1, 1893.)

BANKS AND BANKING — PROTESTING NEGOTIABLE PAPER—NEGLIGENCE—EVIDENCE—"NOTICE."

1. When a bank receives commercial paper for collection there is an implied undertaking on its part that, in case of its dishonor, it will take all steps necessary to protect the holder's rights against all previous parties to the paper; and an allegation that the holder instructed the bank to do so only states what the law implies, and changes neither the issues nor the burden of proof.

2. The collection clerk, to whom the paper was delivered, having testified that the holder told him not to protest it in case of non-payment, and having in corroboration of his testimony introduced the collection book in which he had, at the time, made an entry to that effect, the defendant offered to prove that the clerk was a cautious, careful man, and that this was the only error ever attributed to him. *Held*, that the offered evidence was inadmissible.

3. Mere knowledge on part of an indorser, derived from the maker, that paper has been dishonored, is not "notice." The notice must come from a party who is entitled to look to him for payment.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Egan, Judge.

Action by John Jagger against the National German American Bank of St. Paul. Plaintiff had judgment, and defendant appeals. Affirmed.

John B. & E. P. Sanborn, for appellant.
C. D. & Thos. D. O'Brien, for respondent.

MITCHELL, J. This was an action to recover damages for the alleged failure of the defendant to take the necessary steps to fix the liability of the indorsers on a promissory note which plaintiff deposited with it for collection. The allegation of the complaint is that plaintiff delivered the note to the bank for collection, "notifying it to take all necessary steps, in case of nonpayment of the note at maturity, to hold the indorsers upon the same by due notice of nonpayment." Defendant insists that, having alleged express instructions to the bank, plaintiff was bound to prove it, and could not rest on the undertaking of the bank implied from the mere fact of receiving the paper for collection. There is nothing in this. The complaint alleged nothing more than would have been implied in the absence of any express instructions. The allegation referred to neither changed the issues nor the burden of proof. The position of counsel is, in effect, that if a party alleges more than is necessary he is bound to prove it.

2. Defendant's collection clerk testified that when plaintiff delivered the note for collection he notified him not to protest it, and in corroboration of this he was allowed to introduce in evidence the collection book, in which he made an entry at the time that the note was not to be protested. It can hardly be necessary to say that it would not have been competent, for any purpose, to prove that this clerk was a cautious, careful man, and this was the only error ever attributed to him. If he committed an error on this occasion the defendant is liable, although it may have been the only mistake he ever made. Nor would the evidence offered have any legal bearing upon the question at issue, viz. whether the plaintiff gave express instructions not to protest the note.

3. Defendant offered to prove that the maker of the note, at the time it fell due, notified the plaintiff that it would not be paid, and that the latter said "he would carry the note along for a time;" also, that on the day the note fell due, or the day subsequent, the maker notified one of the indorsers of the dishonor of the note. If this evidence was offered for the purpose of proving that plaintiff had knowledge of the dishonor of the note, and therefore should himself have notified the indorsers, the answer is that he had intrusted that matter to the defendant, and had a right to assume that it would attend to it. If it was offered for the purpose of proving that plaintiff had extended the time of payment to the maker, and thereby himself released the indorsers, it is enough to say that the evidence had no tendency to prove any such extension. And if it was offered for the purpose of proving that the indorsers had notice of the dishonor of the paper, and therefore was not released,

the answer is that what was offered to be proved would have been insufficient as notice in respect to both its source and its substance. Mere knowledge of the dishonor of paper is not notice. Notice signifies more. It must come from one who is entitled to look to the party for payment, and must inform him (1) that the note has been duly presented for payment; (2) that it has been dishonored; (3) that the holder looks to him for payment. Although, probably, if the notice comes from the proper party, and contains the first two of these requisites, the third would be implied. The evidence was inadmissible for any purpose.

Order affirmed.

VANDEBURGH, J., absent, took no part.

MINNEAPOLIS TIMES CO. v. NIMOCKS.
(Supreme Court of Minnesota. June 1, 1893.)
CORPORATIONS—MEETING OF OFFICERS—NOTICE—
—EVIDENCE—INSTRUCTIONS.

1. *Held*, that secondary evidence of the contents of a written notice served on defendant was properly admitted.

2. The fact that notice of a special meeting of a board of directors was not given as provided by the by-laws of a corporation is immaterial if all the members of the board were in fact present and participated in the proceedings.

3. Certain inaccuracies in the charge *held* to have been corrected by subsequent instructions to the jury.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Hicks, Judge.

Action by the Minneapolis Times Company against Charles A. Nimocks. Plaintiff had judgment, and defendant appeals. Affirmed.

Geo. P. Edwards, for appellant. Cobb & Wheelwright, for respondent.

MITCHELL, J. This was an action to recover a call or assessment on the stock of the plaintiff corporation. From an examination of the record we are satisfied that the trial court correctly ruled that upon the evidence the only question for the jury was whether the defendant had notice of the assessment, and upon that question the evidence abundantly justified the verdict. It must consequently be affirmed, unless the court committed some error of law during the trial.

1. The allowance of the amendments to the complaint on the trial was clearly a proper exercise of discretion on part of the court.

2. It is contended that the court erred in admitting the testimony of plaintiff's secretary as to the contents of the notice of the call which he sent to defendant, for the reason that the secretary had a copy of the notice, which would have been better evidence than his recollection of its contents. We do not think the case presents the question which

counsel seeks to raise, viz. whether the law recognizes any degrees in the various kinds of secondary evidence. The secretary testified that the notices which he sent to stockholders were dictated by him to a typewriter from a general form which had been furnished by the attorneys of the company for use on such occasions, but that he could not say that he accurately followed the form; that this form had blanks for names, amounts, signatures, etc., which had to be filled up in the notices sent out. He testified that he thought he had a copy of this general form in his office, but that he did not know whether he had any copy of the notice which he sent to defendant. It did not appear that the notice sent out was ever compared with the general form used in dictating it. It is very evident that on this state of facts the copy of the general form, even if offered, would not have been admissible, because it was not a copy of the notice; and it was not made to appear that plaintiff had any such copy in its possession. Even under what is sometimes called the "American doctrine,"—that a copy of a document is better evidence than the recollection of a witness as to its contents,—the rule is that, where the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also prove that it was known to the other party in season to have been produced on the trial. 1 Greenl. Ev. § 84, note.

3. If it was the fact that the special meeting of the directors which made the assessment was not called upon notice as provided in the by-laws, it is wholly immaterial, for the reason that all the directors were personally present, and participated in making the assessment. The only object of notice is that the directors have an opportunity of being present at the meeting and taking part in its proceedings.

4. Some exceptions were taken to the charge of the court on the subject of notice. The statute under which plaintiff was organized provides that the directors may call in the subscription to the capital stock by installments "by giving such notice thereof as the by-laws shall prescribe." Plaintiff's by-laws made no provision on the subject of notice, but the court correctly instructed the jury that the notice must be actual or personal, so that, if sent by mail, it would be effectual only when received. In some portions of his charge the learned judge inaccurately used the expression "notice or knowledge," which might have been understood as meaning that it would be sufficient if the defendant by any means or from any source ascertained the fact that an assessment had been made on his stock. Of course, this would not be correct, for, while no particular form is necessary, yet the notice must come from the proper corporate authority, and give the stockholder to understand that a call has been made, and that he is requested

to pay the amount. But when the court's attention was called to this inaccuracy of expression he immediately corrected it by instructing the jury that the defendant "must either have had notice or he must have promised to pay with full knowledge of the assessment, one or the other." It seems to us that this must have prevented or removed any misconception on part of the jury. If, however, defendant still feared that they might misunderstand what was meant by "notice," he should have asked for more specific instructions. Order affirmed.

VANDERBURGH, J., absent, took no part.

MORRILL v. LITTLE FALLS MANUF'G CO. et al.

(Supreme Court of Minnesota. June 1, 1893.)

CORPORATIONS—MEETINGS OF STOCKHOLDERS—NOTICE—ACTION FOR FRAUD—LIMITATION—TRANSFERRING STOCK—EVIDENCE.

1. If the charter or by-laws of a corporation fix the time and place at which regular meetings shall be held, this is itself sufficient notice to stockholders, and no further notice is necessary.

2. Unless otherwise provided in the charter or by-laws of an incorporation, such of the stockholders as actually assemble at a properly convened meeting, whether one or more, and although a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business. The distinction in that regard pointed out between a corporate act to be done by a select and definite body, as by a board of directors or trustees, and one to be performed by the constituent members of the corporation.

3. Where a party seeks relief on the ground of fraud more than six years after the commission of the act constituting the alleged fraud, he must allege and prove that the facts were not discovered until within six years before the commencement of the action.

4. If a conveyance was in fact the deed of a corporation, but voidable because of fraud, if stockholders desire to have it set aside on that ground, they must allege the facts constituting the alleged fraud, and ask the appropriate relief; they cannot prove the fraud under a mere denial of the execution of the deed by the corporation.

5. Where stock is transferable only on the books of the corporation, the person in whose name the stock stands on such books is entitled to vote it, and the books of the company are conclusive upon the question as to who is entitled to vote stock legally issued.

6. Certain findings held not justified by the evidence.

(Syllabus by the Court.)

Appeal from district court, Morrison county; D. B. Searle, Judge.

Action by Ashley C. Morrill against the Little Falls Manufacturing Company and others to try title to realty. Plaintiff had judgment, and defendants appeal. Reversed.

For report on former appeal, see 48 N. W. Rep. 1124.

W. F. Bailey, for appellants. Taylor, Calhoun & Rhodes, for respondent.

MITCHELL, J. This was the ordinary statutory action to determine adverse claims

to real property, the plaintiff alleging generally that he was the owner in fee and in possession, and that the defendants claimed some interest adverse to him. Bullen and Mayhew, as stockholders, were admitted to defend on behalf of the defendant corporation, for reasons assigned when the case was here on a former appeal. 46 Minn. 200, 48 N. W. Rep. 1124. Their answer, in brief, is that the corporation is the owner of property in controversy; that the interest claimed by plaintiff is by virtue of a deed purporting to have been executed by the corporation to one Eustis on July 11, 1882, and recorded June 18, 1883, which deed they attack on two grounds: (1) That the party by whom it was executed was not an officer of the corporation, and had no authority to execute conveyances in its behalf; and (2) that it was executed without consideration, for the purpose of defrauding the corporation out of the property. On the first ground, if established, the deed would, of course, be absolutely void; on the second ground, it would be voidable only. Upon the trial it was admitted that all the property in dispute, except one tract called the "Hayes Land," formerly belonged to the corporation; hence the plaintiff had to deraign his title from that source. For that purpose, in addition to the deed or deeds executed in 1882, (and which it appears did not cover all the property,) the plaintiff introduced in evidence: (1) Sundry conveyances purporting to have been executed in 1886 and 1887, by or on behalf of the corporation, to various parties to whose rights he had succeeded by mesne conveyance; (2) the records of various sales on execution to one Herrick, (to whose rights he had also succeeded,) on judgments against the defendant corporation, and which have been the subject of much litigation in this court. See *Herrick v. Ammerman*, 32 Minn. 544, 21 N. W. Rep. 836; *Herrick v. Churchill*, 35 Minn. 318, 29 N. W. Rep. 129; *Herrick v. Morrill*, 37 Minn. 250, 33 N. W. Rep. 849. The attorneys have stipulated into this case the record in the case last cited, but we do not feel called upon to wade through it, to ascertain which of these execution sales were valid, or what part of the property they covered, even if the record contained (which is doubtful) the data from which these facts could be ascertained. All we deem necessary to consider, for the purpose of a determination of this appeal, are the conveyances purporting to have been made by the corporation to plaintiff's grantors in 1882 and in 1886 and 1887, upon which alone the court below seems to have based its decision in favor of the plaintiff.

To a full understanding of the case, it is necessary to refer briefly to the history of the Little Falls Manufacturing Company. It was a corporation organized in 1856, under a special charter, (Laws 1856, c. 138,) with

power to adopt by-laws determining the amount of its capital stock, and providing for the transfer thereof. It was made the duty of the president, under the authority of the by-laws, or under the direction of a majority of the directors, to execute conveyances, etc., in behalf of the corporation. The corporation adopted by-laws, which provided, among other things, that the shares of stock should be transferable only on the books of the company at Little Falls, in person or by attorney, legally authorized, in presence of the president or secretary, on surrender of the certificate of stock, and that the secretary should certify on the certificate that the transfer had been made. They also provided that the directors should be elected at the office of the company at Little Falls, either in person or by proxy, on the second Monday of August in each year, all votes to be given in proportion to the amount of stock. There was nothing in the by-laws requiring any notice to be given of this annual meeting. The company acquired a considerable amount of real estate in or near what is now Little Falls, and continued in business, or at least kept up its organization, until 1864, by which time it seems to have become hopelessly insolvent, its business wholly abandoned, and the organization practically defunct, without any effort on part of any of the stockholders to revive it, or to look after its property, until 1881,—a period of about 17 years. In the mean time plaintiff, who as yet had no connection with the company, had been attempting to acquire title to its lands through tax titles, and through the Herrick execution sales. Finally, in 1881, and at the suggestion of plaintiff, one Thayer, for himself and as proxy for certain other stockholders, went to Little Falls, on the second Monday of August, (the time and place fixed by the by-laws for the annual meeting,) and cast the votes of himself and those for whom he was proxy for a board of directors. Thayer was the only person present at the meeting. The same thing was done on the second Monday of August, 1882, by one Tomlinson, who was the only stockholder who was personally present. During these years Thayer acted as president of the company, and, as such, in June, 1882, executed in its behalf the deeds to Eustis already referred to. In June, 1883, a special meeting was called, when, for the first time, the appellants Bullen and Mayhew appeared on the scene; but, as the regularity of this meeting is not here involved, it may be passed over without consideration. At the annual meeting on the second Monday of August, 1883, a large number of stockholders were present, either in person or by proxy, and were divided into two parties, respectively known as the "Morrill Faction" and the "Bullen Faction," each desirous of obtaining control of the corporate organization. Disputes having

arisen among them as to the right to vote certain shares of stock, the meeting virtually divided into two, each assuming to hold an election, and each declaring a different set of men elected as directors. These two rival organizations have been continued ever since, each claiming to represent the corporation. It was the president elected by the Morrill directors who executed the deeds of 1886 and 1887, under which plaintiff in part claims title. These deeds were executed and recorded before the appellants interposed their answer, but they entirely ignored them, and asked no relief as to them.

As affecting the validity of the deeds executed in 1882, in behalf of the corporation, by Thayer as president, the appellants assail the finding of the court as to the election of directors in August, 1881. The grounds of objection are: First, that no notice was given of the meeting; and, second, that it required a majority of the shares of stock to constitute a quorum to hold a meeting, or, in any event, that one person could not hold a meeting; that at least two persons are necessary to constitute a corporate meeting.

As to the first point, all that is necessary to say is that the by-laws fixed the time and place of holding the meeting, and neither the charter nor the by-laws required any notice to be given. Under such circumstances, the rule is that the by-laws themselves are sufficient notice to all the stockholders, and no further notice is necessary. 1 Mor. Priv. Corp. § 479.

The second objection is equally untenable. Where the charter and by-laws of a corporation are silent on the subject, the common-law rule is that such of the shareholders as actually assemble at a properly convened meeting, although a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business, and may express the corporate will, and the body will be bound by their acts. Cook, Stock & S. §§ 607, 623; 2 Kent, Comm. 293; Mor. Priv. Corp. § 476; Cray v. First Presbyterian Church, 88 Pa. St. 42; Rex v. Varlo, Cowp. 248; Levee Co. v. Meier, 39 Mo. 53; Ex parte Willcocks, 7 Cow. 402; Field v. Field, 9 Wend. 395. The contention of appellants that this rule applies only to such organizations as towns, churches, and the like, and not to stock corporations, finds no support either in reason or authority. The correct distinction is between a corporate act to be done by a select body, of a definite number, as, for example, a board of directors or trustees, and one to be performed by the constituent members of the corporation. In the latter case a majority of those who appear may act. This distinction is clearly made in several of the cases above cited, and also in the leading case of Rex v. Bellringer, 4 Term R. 810. As was said by Lord Mansfield in Rex v. Varlo, *supra*: "It is in the nature of all corporations

to do corporate acts; and, when the power of doing them is not specially delegated to a particular number, the general mode is for the members to meet on the charter days, and the major part who are present to do the act. But, when there is a select body, it is a different thing, for then it is a special appointment." And, this being so, it is immaterial whether the number present is only one or more than one. It was held in Sharpe v. Daves, 46 Law J. Q. B. 104, followed reluctantly in another case, that one person cannot constitute a quorum; that at least two persons are necessary to hold a corporate meeting; but this decision is based upon a narrow lexicographical definition of the word "meeting," as the coming together of two or more persons,—a reason that does not commend itself to our judgment. Therefore, in our opinion, the court was justified in holding that the election of directors in 1881 was regular; and it follows that the deeds executed in 1882 by Thayer, the president elected by them, were the deeds of the corporation. If, however, they were made in fraud of the rights of stockholders, they were voidable at their suit seasonably instituted. Such action would have to be commenced within six years after the discovery by the aggrieved party of the facts constituting the fraud. Gen. St. 1878, c. 66, § 6, subd. 6. But, if the acts constituting the fraud were committed more than six years before the commencement of the suit, the party must allege and prove that these facts were not discovered until within six years. Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. Rep. 67. The same rule would apply where, as in this case, the defendant, in his answer, seeks the affirmative relief of having the voidable instrument set aside on the ground of fraud. In this case, although more than six years had elapsed, there is not a word of evidence as to when appellants discovered the facts. For anything that appears, they, and every other stockholder, might have had full knowledge of all the facts connected with the transaction the very day on which the deeds were executed. The result is that the appellants were not entitled to any relief as to the deeds of 1882.

2. We now come to the deeds of 1886 and 1887. As already stated, the answer is silent as to these deeds. If they were the deeds of the corporation, but voidable on the ground of fraud, it was incumbent on appellants, if they desired to have them set aside on that ground, to allege the facts constituting the fraud, and ask for the appropriate relief. Not having done so, the only question open to them is whether or not the conveyances were the deeds of the corporation. This depends on whether the person who executed them was president of the corporation,—a question which, in turn, depends on who were elected directors at the annual meeting in August, 1883. There is no question of "de facto," as distinguished from "de jure," officers involved. Neither set of directors was in posses-

sion of the office more than the other. In fact, there appears to have been nothing to take possession of. The Bullen directors never performed any corporate act, and the Morrill directors never performed any, except to execute these deeds; and the possession of such fragments of corporate records as were still in existence seems to have been pretty equally divided between them. Hence the matter reduces itself down to the simple question, which set were the *de jure* directors? The evidence on this point is extremely vague and unsatisfactory. Each party relies mainly upon the record of the annual meeting made by itself. But this is merely working in a circle. If it was once established that one party was regular, and represented the corporation, then, of course, the records kept by it would be evidence of the corporate action. But it has to be first determined which party represented the corporation, and on that question neither party could manufacture evidence for itself by making up a pretended corporate record. As might be expected in the case of a corporation organized at so early a date, and which had been practically defunct for so many years, the evidence as to how much stock was out, and who owned it, is exceedingly meager, as well as obscure. About the only tangible evidence on the subject which we can find is "Book No. 5," introduced by the defendants, which appears to have been the company's record of stock issued, and when and to whom issued or transferred. It appears that, according to the by-laws, stock was transferable only on the books of the corporation. This provision is for the protection and benefit of the corporation, so that it may know with whom to deal as stockholders, and who have a right to vote as such; and, as against the corporation, a transfer of stock is ineffectual until made on the books of the company. The general and better rule is that the person in whose name stock stands on the books is entitled to vote it; that the books of the company are conclusive upon the inspectors as to who are entitled to vote; and that neither inspectors nor stockholders can successfully dispute the right of any one to vote who appears by the company's books to be the holder of stock legally issued. Upon any other rule it would never be known who were entitled to vote until the courts had settled the dispute. A person who has purchased stock, and who desires to be recognized as a stockholder, for the purpose of voting, must secure such a standing by having the transfer recorded upon the books. If the transfer is not duly made upon request, he has, as his remedy, to compel it to be made. *Cook, Stocks & S.* § 611; *People v. Robinson*, 64 Cal. 373, 1 Pac. Rep. 156; *Downing v. Potts*, 23 N. J. Law, 66; *State v. Ferris*, 42 Conn. 500; *Railroad Co. v. Schuyler*, 34 N. Y. 80; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Hoppin v. Buffum*, 9 R. I. 513; *In re Steamboat Co.*, 44 N. J. Law, 529. Upon examina-

tion of the record in this case, we fail to find any competent evidence that the Morrill directors received a majority of the legal votes cast at the meeting of 1883. Out of 311 votes claimed to have been cast for them, 297 were cast by Morrill himself, but there is no evidence that any such amount of stock stood in his name on the stock or transfer books of the company. The main dispute seems to have been as to who was entitled to vote the so-called "Babbett Stock," but none of this stock had been transferred to Morrill on the books of the company, and we have been unable to discover any evidence that he was even the equitable owner of it. The burden was on plaintiff to prove the election of the officers through whose deeds he claims title, and this he has failed to do. This goes to the validity of the deeds of 1886 and 1887, upon which, in part at least, the court below based its decision in favor of plaintiff. We are not able to determine from the record as to how much or to what portions of the property in controversy plaintiff's title depends on these deeds.

Judgment reversed, and new trial ordered.

VANDEBURGH, J., absent, took no part.

WILLIS v. ST. PAUL SANITATION CO.
et al.
(Supreme Court of Minnesota. June 1, 1893.)
CORPORATIONS—AUTHORITY OF OFFICERS—RATIFICATION.

If a corporation retains and uses money borrowed for it by its officer in excess of his authority, it ratifies the transaction, and is liable.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Hascal R. Brill, Judge.

Action by Elizabeth L. Willis against the St. Paul Sanitation Company and others. Plaintiff had judgment, and defendant E. L. Mabon appeals. Affirmed.

James H. Foote, for appellant. J. C. & W. H. Michaels, for respondents.

MITCHELL, J. This appeal presents no question of any merit. The action was to recover money loaned to the defendant corporation, and to enforce the individual liability of the defendant stockholders therefor. That the money was loaned to the corporation by either the plaintiff or her husband is not in dispute under the evidence. It was paid into the company's treasury by the husband as the plaintiff's money, and at his direction credited to her on its books. He has never made any claim to it, but, on the contrary, insisted on the trial that the money belonged to his wife; and it is no concern of the company to whom it in fact originally belonged. Neither is it material whether the officer who procured the loan had authority to do so or not.

By retaining the money and appropriating it to its own use, the company has ratified the transaction. It is equally unimportant that the inducement to plaintiff to make the loan might have been the provisions of the contract between her husband and certain stockholders and officers of the company, looking to a transfer to him of a controlling interest in its stock, etc. Order affirmed.

VANDEBURGH, J., absent, took no part.

**ALFRED SHRIMPTON & SONS, Limited,
v. PHILBRICK.**

(Supreme Court of Minnesota. June 1, 1893.)

**RESCISSON OF CONTRACT—FRAUD—DEFENSES—
EVIDENCE.**

1. Where one of the parties to a written contract was induced to execute it by the intentional fraud of the other party, the defrauded party may defend against its enforcement, notwithstanding that he was lacking in ordinary business prudence in executing it. Following former decisions.

2. Evidence held sufficient to justify the verdict.

3. Held, also, that there was no prejudicial error in admitting evidence of certain collateral facts, for the reason that, even if not relevant, substantially the same evidence had been already admitted without objection.

(Syllabus by the Court.)

Appeal from district court, Redwood county; Webber, Judge.

Action by Alfred Shrimpton & Sons, Limited, against F. W. Philbrick, to recover for goods sold and delivered. Defendant had judgment, and plaintiffs appeal. Affirmed.

L. G. Davis and J. A. Eckstein, for appellants. M. M. Madigan, for respondent.

MITCHELL, J. 1. This action was brought to recover the purchase price of certain merchandise, the principal item of which was four great gross of papers of pins, which plaintiffs claim defendant ordered, and which they shipped to him, but which he refused to accept, on the ground that he had ordered only four gross. Defendant's written order read "four great gross," but he alleged that the actual contract, as orally agreed on between him and plaintiffs' agent, was for only four gross, but that the agent, who voluntarily assumed to reduce the contract to writing, with intent to cheat and defraud the defendant, wrote it for "four great gross," and then falsely represented to him that it was written in accordance with the actual agreement; and that, relying upon these false and fraudulent statements, the defendant signed the order without reading it, believing that it was for four gross, as they had agreed. If the defendant established these allegations, it would be a good defense, notwithstanding that he might have been negligent in relying on the representations of plaintiffs' agent and in signing the order without reading

it. *Aultman v. Olson*, 34 Minn. 450, 26 N. W. Rep. 451; *Maxfield v. Schwartz*, 45 Minn. 150, 47 N. W. Rep. 448; *Erickson v. Fisher*, (Minn.) 53 N. W. Rep. 638. Of course, as the court correctly instructed the jury, the mere fact that the defendant signed the order, without reading it, for a greater quantity of goods than he intended to purchase, would constitute no defense. The defense, if defense there was, consisted in the fraud practiced by the plaintiffs' agent in procuring the execution of a written contract different in terms from those in fact agreed on.

2. While, like the learned trial judge, we do not think that there was "an overwhelming preponderance of evidence in favor of the defendant," and while we recognize the danger in allowing the written contracts of parties to be set aside on oral testimony, yet, after examining the record, we think that the evidence fairly made a case for the jury, and that this court would not be warranted in disturbing the verdict.

3. Upon the trial the main issue was as to the actual agreement of the parties, and the circumstances under which the written order was executed. The transaction was had between defendant and plaintiffs' traveling salesman, at the store of the former. It appeared that defendant was a retail merchant in the village of Sleepy Eye, and presumably acquainted with the demands of his trade; also that plaintiffs' agent had been in their employment for some five years soliciting orders for this line of goods from the trade, and hence presumably acquainted with the usual size of orders given by country retail dealers. The agent had testified positively that all the negotiations leading up to the contract were expressly and minutely conducted with reference to "great gross;" that he gave defendant a price list, in which the prices were given by the great gross; that defendant figured on this list; that he offered defendant special prices in consideration of his taking four great gross; that defendant accepted this offer; and that, after the order was put in writing, it was read over by, and fully explained to, him before he signed it. Defendant, on the other hand, had testified positively and explicitly that all the negotiations were with reference to so many gross, and that "great gross" was never mentioned or alluded to, and that, after asking his clerk whether they could stand \$20 (the approximate cost of four gross) for pins, he agreed to take four gross; that the agent then drew up the order, and, upon his representation that it was exactly as they had agreed, the defendant signed it without reading it. Under this state of the evidence, the defendant was allowed to testify without objection that any merchant doing his business would not sell four great gross of papers of pins in ten years. He further testified, but under plaintiffs' objection, that it would take him two

or three years to sell four gross. My own opinion, in which Justice COLLINS concurs, is that, under the circumstances, and in view of the sharp conflict of testimony, all this evidence was admissible, as having a natural and logical tendency to prove that defendant's statement was the more reasonable and probable; and that, under the situation of the case, it was not seriously subject to the evils at which the general rule against the admissibility of evidence of collateral facts is aimed. The other justices are of the opinion that none of the evidence was relevant, but that, the first, and perhaps most cogent, part of it having been admitted without objection, there was no prejudicial error in admitting the last, which was, in effect, but a repetition of the first in another form. Order affirmed.

VANDERBURGH, J., absent, took no part.

CULVER et al. v. SCOTT & WOLSTON LUMBER CO.

(Supreme Court of Minnesota. June 1, 1893.)

EVIDENCE—REFRESHING MEMORY FROM MEMORANDUM—INSTRUCTIONS.

1. Evidence held to justify the verdict.

2. It is not necessary that the memorandum used by a witness to refresh his memory should have been made by himself. He may use one made by any one, if, after inspecting it, he can testify of the facts from his own recollection.

3. The issue being whether certain goods were sold and delivered on the credit of defendants or of one C., defendants requested the court to charge the jury that the fact that the goods were charged on plaintiffs' books to C. was evidence that the credit was given to him, and not to defendants. Held not error to modify the request by instructing the jury that this fact was a circumstance in the case which should be considered by them in determining to whom the credit was given.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Ensign, Judge.

Action by Charles W. Culver and others against the Scott & Wolston Lumber Company to recover the price of goods sold and delivered. Plaintiffs had judgment, and defendants appeal. Affirmed.

Wm. B. Phelps, for appellants. Draper, Davis & Hollister, for respondents.

MITCHELL, J. This action was brought to recover for lumbermen's supplies which the plaintiffs allege they delivered, at the request of the defendants, and upon their promise to pay for the same, to one Campbell, who was engaged as a contractor in cutting logs for defendants.

1. The main issue on the trial was as to whether the goods were sold to Campbell on his own credit, or were delivered to him on the credit of the defendants, and upon their promise to pay therefor; and the first assign-

ment of error is that the verdict, which was for the plaintiffs, was not justified by the evidence. It is so natural to look to the proprietor for payment of goods furnished to a contractor in case the latter proves to be irresponsible that observation has impressed us with the feeling that cases of this kind, even where the alleged promise is original, are practically as much within the mischiefs of the statute of frauds as where the promise is collateral, and hence that the evidence should be scanned quite carefully. But while there is much in the manner in which the business was transacted that points to the theory that plaintiffs sold these goods, as they had previously sold others, to Campbell himself, although with the expectation that they would get their pay by orders from him on the defendants, yet, after a careful examination of the record, we are compelled to the conclusion that there was evidence from which the jury were justified in finding that defendants expressly promised to pay for the goods; and, if they did, we think the evidence was plenary that the promise was an original, and not a collateral, one, and hence not within the statute of frauds. We think this court could not disturb the verdict on the ground of the insufficiency of the evidence.

2. While the issue referred to was the principal one, yet the defendants, by their denial of knowledge or information sufficient to form a belief on the subject, put the defendants to their proof of the amount and value of goods delivered to Campbell; and it is this issue to which the second assignment of error relates, to wit, that "the court erred in permitting the witness Charles Culver [one of the plaintiffs] to testify to the items of the account sued on, by reading the same from the books of the plaintiffs." This assignment does not refer to any particular ruling, either by folio or otherwise; and upon reference to the record we find that the testimony of the witness on the subject of the account extends through seven pages of the paper book, consisting of very scrambled and desultory examination and cross-examination, and including several different rulings of the court. The assignment of error is certainly not in compliance with the spirit of the rules of court. But, waiving this, we fail to find in the record any exception which raises the point probably intended to be suggested by the assignment of error. For some reason, probably because they did not consider it very important, counsel conducted the trial of this issue, both in the introduction of testimony and in the interposition of objections, rather carelessly, and without keeping in mind the exact rules of evidence applicable to the case. Counsel for the plaintiffs did not introduce their books of account, and laid no foundation for doing so, but proceeded to examine the witness Charles Culver as to the items of the account from his memory of the transac-

tions, refreshed by reference to a written memorandum. The first memorandum used for that purpose seems to have been copied from plaintiff's books, but, finally, the books themselves were brought into court, and the witness began to use his ledger to refresh his memory. To this defendants' counsel objected, for the reasons "that the books themselves were the best evidence," and "that the proper foundation had not been laid for the question," viz. what goods were delivered after the date of the alleged promise of defendants to pay? This objection having been sustained by the court, plaintiffs' counsel then resorted to the use of the plaintiffs' daybook, as a memorandum to refresh the witness' memory. Then followed considerable preliminary examination and cross-examination of the witness, from which it appeared that the daybook was plaintiffs' book of original entries; that these entries were made at or about the dates of the transactions, but were not all made by the witness, a great many of them having been made by different persons employed by plaintiffs in their office. Plaintiffs' counsel then renewed his question, when defendants' counsel interposed an objection "to the witness testifying to any transaction where he did not make the entry himself." The exception to the ruling of the court overruling this objection is the only tangible exception possibly covered by the assignment of error. The preliminary examination of the witness left it in a good deal of doubt as to how far, and as to what items, he had a personal recollection after refreshing his memory by reference to the entries in the daybook; and, if the objection of counsel had gone to that point, there might have been some merit in it, for the rule is that if, after examination of the memorandum, the memory of the witness is not refreshed, and he has no recollection of the transaction, and no remembrance of having recognized the memorandum as true, his testimony, so far as founded on the writing, would be mere hearsay. But this was not the point of counsels' objection, which was merely to the effect that the witness could only use, for the purpose of refreshing his memory, entries made by himself personally. In this the counsel misapprehended the rule. It is not necessary that the writing should have been made by the witness himself. He may use an entry made by any one if, after inspecting it, he can speak of the facts from his own recollection. It is not the writing, but the recollection of the witness, that is the evidence in the case; and it is not important who made the entry, providing it, in fact, revives or refreshes the memory. 1 Greenl. Ev. § 436; 2 Rice, Ev. 744, 747.

3. The defendant requested the court to instruct the jury that "the fact that on the plaintiffs' books the articles are charged to Campbell is evidence that the credit was given to him, and not to defendants." This

the court modified, and gave as follows: "The fact that on the plaintiffs' books the articles are charged to Campbell is a circumstance in the case that should be considered by the jury in determining to whom the credit was given." There was no error in this modification. A lay jury are liable to confound "evidence" and "proof," and hence the request in the form asked for might have misled them; and it was very likely for that reason that the court made the change in its language. But it seems to us that the charge, as given, gave the defendants all that they were entitled to. The jury must have understood from it that the fact referred to was a piece of evidence which they should consider, and it is hardly to be supposed that they were so obtuse as not to understand in whose favor it weighed. Moreover, other parts of the court's charge refer to the same evidence in such a way that the jury could not have failed to understand the matter.

Judgment affirmed.

VANDEBURGH, J., absent, took no part.

STATE v. CAMPBELL et al.

(Supreme Court of Minnesota. June 1, 1893.)

INDIANS—CRIMES ON RESERVATION—ADULTERY.

1. Unless otherwise provided by treaty with an Indian tribe, or by the act admitting the state into the Union, the criminal laws of the state, except so far as restricted by the authority of congress "to regulate commerce with the Indian tribes," extend to all crimes committed on an Indian reservation by persons other than tribal Indians.

2. But Indians, while preserving their tribal relations, and residing on a reservation set apart for them by the United States, are the wards of the general government, and as such the subject of federal authority, and the power to legislate for them is exclusively in congress. And for acts committed within the limits of the reservation, they are not subject to the criminal laws of the state.

(Syllabus by the Court.)

Case certified from district court, Becker county; Mills, Judge.

Mary Campbell and one Belonge were convicted of adultery, and the cause was certified to the supreme court for the determination of questions of law on the facts found, which fully appear in the opinion.

Jeff H. Irish, H. W. Childs, Atty. Gen., and Geo. B. Edgerton, Asst. Atty. Gen., for the State.

MATCHELL, J. The defendants were indicted, tried, and convicted, in the district court of Becker county, of the crime of adultery, committed within the limits of the White Earth reservation, in that county, which had been set apart by the United States for the residence of a tribe of Indians which still retained their tribal organization, and were under the care and supervision of the federal government. Belonge was an In-

dian belonging to this tribe, who retained his tribal relations, and lived on the reservation under the charge of a government agent, and as such received annuities from the United States. Campbell was a half-blood, being the child (legitimate, as we must presume) of a white father and an Indian mother, who did not sustain any tribal relations, but lived with her husband on a farm in Pine county, where the defendant Campbell was raised, and where she was married to a white man, with whom she resided in the same county until shortly before the commission of the alleged offense, when she left him, and went to the White Earth agency, where she has drawn one annuity from the United States as an Indian. The question which the court below certifies to this court is, in brief, whether, under this state of facts, the defendants, or either of them, are subject to the jurisdiction of the criminal laws of this state. This reservation was not excepted from the general jurisdiction of the laws of the state by the act admitting the state into the Union, and our attention has not been called to any existing treaty between the United States and this tribe of Indians excepting this reservation from the jurisdiction of the state. And we take it as well settled that, when not restricted by treaty with the Indian tribe, or by the act admitting a state into the Union, the jurisdiction of the state extends over the territorial limits of an Indian reservation so as to apply to all persons therein not tribal Indians under the care of the United States. As it is evident from the facts stated that Campbell is not a "tribal Indian," we have no doubt that she is just as amenable to the criminal laws of the state for an offense committed on the reservation as she would have been had the offense been committed anywhere else in the state.

The case of the defendant Belonge is different. It presents just this question: When not expressly restricted or prohibited by an existing treaty with the Indian tribes, or by the act admitting a state into the Union, do the criminal laws of the state (except so far as restricted by the constitutional authority of congress to regulate commerce with the Indian tribes) extend and apply to tribal Indians living under the charge of the general government on a reservation set apart by the United States for that purpose, so as to make them amenable to such laws for crimes committed within the territorial limits of the reservation? The condition and status of the Indian tribes within the United States, their relations to the federal government, or to the states within whose territorial limits they happen to reside, are subjects which have given rise to much discussion in the courts, both state and federal, from a very early date. Their condition in relation to the United States is unlike that of any other two peoples. They are neither foreign nor independent nations, nor yet citizens of either the United States or of the states in which they

reside. Perhaps the best statement of their position is to be found in the opinions of Chief Justice Marshall in *Cherokee Nation v. Georgia*, 5 Pet. 1, and *Worcester v. Georgia*, 6 Pet. 515. Stated briefly, it is that, as long as they retain their tribal relations, they are domestic, dependent communities, under the guardianship and protection of the general government. While an Indian tribe resides in a territory, the ownership of the country and the right of exclusive sovereignty over it which exists in the general government would, of itself, give congress the right to legislate for the Indians as well as all other persons residing therein. And if this was the only source of such right, it would doubtless follow, as held in some cases, that, in the absence of a treaty or something in the act admitting the state into the Union restricting it, this jurisdiction would pass to the state, and thereafter the general government would have no power to legislate for the Indian tribes, except to "regulate commerce" with them. There are some decisions of state courts that go to this length, but, with one exception, they are all early decisions of southern states, within whose territorial limits the Cherokees and other southern tribes then resided, and were undoubtedly largely influenced by the intense local feeling existing on the subject at that time in those states. See *State v. Tassels*, Dud. (Ga.) 229; *State v. Foreman*, 8 Yerg. 256; *Caldwell v. State*, 1 Stew. & P. 327. There are numerous cases holding that the state has jurisdiction of crimes committed by Indians who have abandoned their tribal relations, or by whites within the limits of a reservation, or by tribal Indians outside the limits of their reservation; but these are not in point. The same is perhaps true of cases where one of the original states had, prior to the formation of the general government, entered into treaty relations with a tribe of Indians within their boundaries, residing on a reservation set apart for them by the state itself. There is no decision of the federal courts that a state can, even in the absence of a restriction in a treaty, or in the act admitting the state into the Union, extend its laws, either criminal or civil, over tribal Indians residing under the care of the general government upon a reservation set apart by it for that purpose. It was held in *Worcester v. State*, supra, that the state could not extend its laws, civil or criminal, over the Cherokee tribe. It is true that the decision was substantially placed on the ground that this would be in conflict with the terms of the treaty between that tribe and the United States; but it must be noted that when that treaty was entered into the Indians were then living, not in a territory, but within an existing state of the Union. Further, there is no authoritative decision of the federal courts that congress may not legislate in regard to crimes committed by or against tribal Indians under the charge of the general government, within the territorial

limits of a state, even in the absence of the reservation of any such right in the act admitting the state into the Union. There are certain dicta of Justice McLean to that effect in *U. S. v. Bailey*, 1 McLean, 234; but the question has been conclusively settled the other way (at least, as to crimes committed within an Indian reservation) by the supreme court of the United States in *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109, affirming the constitutionality of the act of March 3, 1885, (23 U. S. Stat. c. 341, § 9.) That act provides that "all Indians committing against the person or property of another Indian or other person any of the following crimes, viz. murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefore in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively."

* * * And all such Indians committing any of the above crimes against the person of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, held in the same courts, and in the same manner, and subject to the same penalties, as all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." The late Justice Miller, speaking for the court, after pointing out that the right of congress to legislate for Indians in territories could be maintained merely upon the ownership and exclusive sovereignty of the United States in and over the country, then proceeds to consider the second clause of the statute, which legislates with reference to Indians within a state. After conceding, what is almost self-evident, that the clause in the constitution giving congress the power to regulate commerce with Indians would not give it power to enact a system of criminal laws for Indians, having no relation to trade and intercourse with them, and suggesting that the statute does not interfere with the operation of state laws upon white people found within an Indian reservation, and that its effect is confined to acts of tribal Indians committed within the limits of the reservation, he holds that this legislation is within the competency of congress, not because the right to enact it had been reserved by some treaty, or by the act admitting a state into the Union, but upon the broad ground that Indians, while preserving their tribal relations, residing on a reservation set apart for them by the United States, are the wards of the general government, and under its protection, and as such are the subject of federal authority, over which congress has the same power to legislate within the states as over any other subject of federal jurisdiction. And if they are thus under the control of congress, that

control must be exclusive, for, as suggested in the case of *Kansas Indians*, 5 Wall. 737, "from necessity there can be no divided authority." It would never do to have both the United States and the state legislating on the same subject. By the act of 1885, presumably, congress has enumerated all the acts which in their judgment ought to be made crimes when committed by Indians, in view of their imperfect civilization. For the state to be allowed to supplement this by making every act a crime on their part which would be such if committed by a member of our more highly civilized society would be not only inappropriate, but also practically to arrogate the guardianship over these Indians which is exclusively vested in the general government. Moreover, it is very evident that the state never intended to attempt to extend its criminal laws over tribal Indians for acts committed within a reservation. See *Gen. St. 1878*, c. 25, § 1, and *Pen. Code*, § 539. The exception among the decisions of the state courts on the subject to which we have heretofore alluded is the very exhaustive and able opinion in *State v. Duxtater*, 47 Wis. 278, 2 N. W. Rep. 439. But with all due deference to that eminent court, it seems to us that they have not given due weight to the fact that the jurisdiction of the federal government over these Indian tribes rests, not upon the ownership of and sovereignty over the country in which they reside, but upon the fact that, as the wards of the general government, they are the subjects of federal authority within the states as well as within the territories,—a doctrine which the supreme court of the United States has developed and announced, in the case of *U. S. v. Kagama*, supra, much more distinctly than in any deliverance extant when *State v. Duxtater* was under consideration, some 14 years ago. This cause is remanded to the court below, with directions to proceed to judgment on the verdict as against the defendant Campbell, but to discharge the defendant Belonge.

HOLMES et al. v. STATE BANK OF DULUTH.

(Supreme Court of Minnesota. June 1, 1893.)

BONA FIDE PURCHASERS—WHO ARE—FORECLOSURE SALE—USURY.

1. Where property is sold on a usurious mortgage, one who purchases at the foreclosure sale, and pays his money, without any notice of the usurious character of the mortgage, is protected as a bona fide purchaser of the property; and the same is true where, after the foreclosure sale, and before the expiration of the time of redemption, a person buys the interest or estate of the mortgagee, who bid in the property at such sale.

2. Where one buys an accommodation note of the payee, not knowing that it was accommodation paper, but supposing that it was already a valid subsisting security in the hands of the payee, the transaction is not usurious, although he bought the paper at a discount greater than the legal rate of interest.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Ensign, Judge.

Action by George M. Holmes and others against the State Bank of Duluth to cancel certain mortgage sales. Defendant had judgment, and plaintiffs appeal. Affirmed.

White, Reynolds & Schmidt, for appellants. Cotton & Dibell, for respondent.

MITCHELL, J. The court finds that in March, 1889, plaintiff Holmes executed to one Gonska a promissory note for \$350, payable four months after date, with interest at 8 per cent. per annum, and, to secure the same, executed a mortgage upon certain real property; that this note and mortgage were usurious; that in December, 1890, Gonska foreclosed the mortgage by advertisement, and bid in the property for \$450, and received the usual sheriff's certificate, which was put on record; that in September, 1891, Gonska executed to defendant an assignment of this certificate, and a conveyance of his interest in the premises, for which defendant then paid him \$425; that at the time of receiving this assignment and deed, and paying the consideration therefor, the defendant had no notice or knowledge that the note and mortgage referred to were usurious, but bought and paid the consideration in good faith; that in March, 1889, plaintiff Holmes executed to one McDonald a negotiable promissory note for \$200, due in four months, with 8 per cent. interest, and, as security therefor, executed a second mortgage on the same premises; that he executed this note and mortgage for the accommodation of McDonald, and received no consideration therefor; that, before the maturity of this note, McDonald sold, transferred, and indorsed this note, and assigned the mortgage to defendant for \$180, then paid by it; that neither at the time of this purchase, nor at any time until after the foreclosure of this mortgage and the expiration of the time for redemption as hereinafter stated, did defendant have any notice or knowledge that this note was accommodation paper, or that plaintiff had received no consideration therefor; that in August, 1890, defendant foreclosed this mortgage by advertisement, and bid in the premises for the amount due thereon, viz. \$275.98; that the time for redemption from both of these mortgage sales has expired, and no redemption has been made from either. All of these findings are, in our opinion, amply sustained by the evidence.

Plaintiffs bring this action to have both sales set aside and declared void, on the ground that both mortgages were usurious and void. Defendant, on the other hand, claims to be the owner of the premises, and asks that it be so decreed, and that plaintiffs be adjudged to have no interest therein. Of course, if defendant has a good title under either sale, it must prevail. In our opinion, its title is good under both.

Taking up, first, the title under the Gonska mortgage, it cannot be questioned but that, if defendant itself had purchased at the foreclosure sale, it would have been protected as an innocent purchaser of the property, notwithstanding the usurious character of the mortgage on which it was being sold. *Jordan v. Humphrey*, 31 Minn. 495, 18 N. W. Rep. 450. And it can make no difference whether defendant bought at the sale, or subsequently from Gonska, who did buy at the sale. After the sale, and during the time for redemption, Gonska had a conveyable interest in the land. *Lindley v. Crombie*, 31 Minn. 232, 17 N. W. Rep. 372. It was this interest in the land, and not the note and mortgage, which defendant bought from Gonska.

The same result is reached if we look to the McDonald mortgage. We are aware of the doctrine, of the courts of New York and some other states, that accommodation paper in the hands of the payee cannot be the subject of a sale; "that, to be the subject of a sale, the paper must have a pre-existing vitality;" that, an accommodation note having in fact, as against the maker, no validity, and no legal inception, any one who buys it of the payee takes the precise place of the payee in respect to the defense of usury, although he purchases in ignorance of its true character, and supposing it to be, as it appears on its face, business paper, and given for value; and hence when such a note is sold, even to a bona fide purchaser, at a discount greater than the legal rate of interest, the transaction is usurious. The same courts hold, as do all courts, that, if a party buys of the payee an accommodation note for its face, he can recover on it, and that the fact that the maker received no consideration will be no defense; also, that after paper has had an inception, and has become live business paper, a person may buy at any discount he can get it for, without rendering the transaction usurious. We confess that these distinctions are altogether too refined to commend themselves to our judgment. The doctrine of the New York courts virtually converts the purchase of a note into what the purchaser never intended or supposed it to be, viz. a loan of money, without which there can be no such thing as usury. Undoubtedly, if defendant had purchased this note knowing that it was accommodation paper, and hence had no vitality while still in the hands of the payee, the transaction would have amounted to a loan of money, upon the promise of the maker, Holmes, to pay back a sum that exceeded the rate of interest which defendant might legally exact, and hence would have been usurious. Or, to state the proposition generally, if no party, prior to the purchase, could have brought an action on the note, and the purchaser knew that fact when he bought it, then he must be taken to have loaned the money to the maker. But the

better rule, and the one as we think most consonant with reason and justice, is that if the holder, at the time he bought the paper, did not know that it was not already a valid subsisting security in the hands of the payee, there can be no intention of lending money, which is of the very essence of usury, and he may recover upon it of the maker. He must assume that the apparent relation of the parties and character of the paper is the real one. We think the question is already covered by the decision of this court in *Jackson v. Travis*, 42 Minn. 438, 44 N. W. Rep. 318, which is not distinguishable in principle from the present case; and in this view of the law we are not without the support of authority elsewhere. See *Daniel*, Neg. Inst. § 752, and cases cited. Judgment affirmed.

VANDEBURGH, J., absent, took no part.

WILLIAMS v. GRUNDYSEN, Sheriff.

(Supreme Court of Minnesota. June 1, 1893.)
SHERIFFS—MONEY RECEIVED "BY VIRTUE OF HIS OFFICE"—WHAT IS — ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY.

1. Money paid to a sheriff to redeem land from a foreclosure sale is money received by him "by virtue of his office," within the meaning of Gen. St. 1878, c. 8, § 198, as amended in 1885.

2. The foreclosure of a mortgage under a power of sale is not "a special proceeding," within the meaning of Gen. St. 1878, c. 88, § 9.

3. The mere employment of an attorney to foreclose a mortgage does not give him authority to receive from the sheriff money paid after foreclosure to redeem the property from a sale to the mortgagee.

(Syllabus by the Court.)

Appeal from district court, Polk county; Ives, Judge.

Statutory proceedings by W. H. Williams against Arny Grundysen, sheriff, for an alleged failure to turn over certain money. Defendant had judgment, and plaintiff appeals. Affirmed.

White, Reynolds & Schmidt, for appellant. A. A. Miller, for respondent.

MITCHELL, J. This was a summary proceeding, under Gen. St. 1878, c. 8, § 198, as amended by Laws 1885, c. 74, against the sheriff of Polk county, to compel him to pay over certain moneys received by him by virtue of his office, together with 20 per cent. damages and costs. The material facts are that the law firm of White, Reynolds & Schmidt, of Duluth, foreclosed by advertisement for Williams, a resident of New York, a mortgage on certain real estate in Polk county, their names appearing as his attorneys in the printed notice of sale, and they, as such, attending to the foreclosure proceedings throughout. At the sale the property was bid off in the name of Williams,

the mortgagee, to whom the usual certificate was executed by the sheriff who conducted the sale. Just before the expiration of one year from the date of sale, the land was redeemed, the redemptioner, as authorized by statute, paying the money to the sheriff. Thereupon White, Reynolds & Schmidt demanded the money, as attorneys for Williams. The sheriff refused to pay it over unless and until they produced an order from Williams for the money, or some other evidence of their authority from him to receive it. This they declined to do, resting their right and authority to demand this redemption money upon their employment by Williams to foreclose the mortgage. Upon the refusal of the sheriff to comply with their demand, these proceedings were commenced. We have no doubt that this money was received by the sheriff "by virtue of his office," within the meaning of the statute. The amendment of 1885 was unquestionably passed to cover, among others, just such cases. The authority of White, Reynolds & Schmidt to demand and receive this money is put on two grounds. The first is under Gen. St. 1878, c. 88, § 9, which provides that an attorney has authority "to receive money claimed by his client in an action or special proceeding, during the pendency thereof, or within two years after judgment, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment." The contention is that the foreclosure of a mortgage under a power of sale is "a special proceeding," within the meaning of this statute. If the phrase "special proceeding" could be dissected, and lexicographers' definitions of each word separately adopted, it could be made to include almost anything. But in our statutes, in common with all the reformed codes of procedure, it has a well-understood meaning. It is a generic term for all civil remedies in courts of justice which are not ordinary actions. It always has reference to a proceeding in court which may culminate in a judgment; and it is evidently in this sense in which it is used in this statute. It does not include a foreclosure under a power of sale, which is a proceeding wholly in pais. The case therefore resolves itself into the question whether an employment of an attorney to foreclose a mortgage in this manner confers authority to receive the redemption money, where the property is subsequently redeemed from a sale to the mortgagee. This is to be determined by the general rules of the law of principal and agent. Of course, authority to do a particular thing carries with it every power necessary to accomplish the object; in other words, the power to use all appropriate means necessary to accomplish the desired end. As in every other case, the intention of the parties is the cardinal test. The extent of the implied authority depends on the nature of the business to be transacted; but implied

authority is never to be extended beyond its legitimate scope. It is also a cardinal rule of the law of agency that the agency is always terminated by the accomplishment of its object; when it is created for the purpose of performing some specific act or acts, the agency will be terminated by the accomplishment of the purpose which called it into being. When an attorney is employed to "foreclose" a mortgage, we think the common understanding is that this refers to the proceedings which culminate in the sale of the property, and the preparation and record of the papers evidencing that sale. If it should happen, which it rarely does, that another party buys at the sale, we think that the authority to foreclose would fairly imply authority to receive the money from the purchaser. But if, as is usually the case, the property is bid in by the mortgagee, we think that the agency of one employed to foreclose would have accomplished its object and be terminated when the sale proceedings were completed, and the proper evidences of sale and muniments of title under it were prepared or procured; and that a mere employment to foreclose would not confer authority, in case of redemption or attempted redemption from the sale, to pass upon the validity or sufficiency of the redemption, or to collect the redemption money from the sheriff. Hence we think the sheriff had the legal right, if he insisted on it, to require evidence of the authority of White, Reynolds & Schmidt to receive the money. It is suggested that, in any event, the court should have in these proceedings, which were instituted by Williams himself, ordered the sheriff to pay over the money. But we do not think a party has a right to use these summary proceedings for any such purpose. They were designed to apply exclusively to sheriffs who were previously in default in the performance of their legal duty. Order affirmed.

VANDEBURGH, J., absent, took no part.

STATE v. BANNOCK.

(Supreme Court of Minnesota. June 6, 1893.)

LARCENY—TRIAL BY JURY—WAIVER.

1. One accused in the municipal court of the city of Duluth of a criminal offense within the jurisdiction of justices of the peace may waive the right of trial by jury.

2. The right, having been waived, cannot be recalled at will.

(Syllabus by the Court.)

Case certified from municipal court of Duluth.

Frank O. Bannock was convicted of larceny, and the case was certified to the supreme court for the determination of questions of law on the facts. Affirmed.

Henry F. Greene, H. W. Childs, Atty. Gen., and Geo. B. Edgerton, Asst. Atty. Gen., for the State. Edson, Edson & Campbell, for defendant.

DICKINSON, J. In the municipal court of the city of Duluth the defendant was accused of the crime of larceny of the grade of a misdemeanor. He interposed a plea of not guilty, and waived a trial by jury. The cause was then adjourned to a subsequent day, at which time the defendant asked leave to withdraw his waiver of a trial by jury, and he then demanded a jury trial. This was refused; the judge proceeded to a trial without a jury; the defendant was found guilty, and a fine of \$25 and costs was imposed. The case is certified to this court, under the statute, for our opinion upon the questions (1) whether the defendant could effectually waive his right to a jury trial, and (2) whether, having declared such waiver, he could afterwards revoke it, and demand a trial by jury.

1. The reasons upon which our decision in *State v. Woodling*, (Minn.) 54 N. W. Rep. 1068, was founded, are decisive of the first of the questions above stated. In that case it was considered, with respect to offenses within the jurisdiction of justices of the peace, that the constitution does not require that trials shall be by jury; that, if the accused cannot effectually waive his right of trial by jury, it is only because public policy forbids it; and that public policy does not forbid this, as respects such offenses. The statute, long in force, expressly authorizing the accused in a justice's court to waive a trial by jury, was considered as strongly expressive of what is public policy as to this matter. We held that one accused, in the municipal court of Minneapolis, of an offense within the jurisdiction of a justice of the peace, might waive his right to trial by jury. The same reasons control the decision of this case. The defense charged was within the jurisdiction of justices of the peace. If the trial had been in such a court, there could have been no doubt that the right might be waived. The municipal court was by law invested with the same jurisdiction, in criminal matters, as that belonging to justices of the peace. Sp. Laws 1891, p. 596, c. 53, § 1, subds. 8, 9. We deem it unimportant that elsewhere (section 40 of the same law) it is provided that trial by jury in this court shall be "conducted" as in the district courts, and that all laws of a general nature applicable to jury trials in the district court shall apply to this court, except as otherwise provided. Indeed, if this prosecution had been by indictment in the district court, we think that the accused might have waived his right of trial by jury. In view of the reasons above referred to, it can make no difference whether the trial is in a justice's court or in some other court having jurisdiction.

2. The right of trial by jury having been voluntarily relinquished, the accused had no power to revoke his waiver, and demand a trial by jury. It would be a self-contradiction to say that the right, once expressly

and effectually waived by the defendant, could be recalled at his mere will. The right to thus revoke is inconsistent with the essential nature of a waiver.

Judgment affirmed.

VANDEBURGH, J., absent.

GASPER et al. v. HEIMBACH.

(Supreme Court of Minnesota. June 6, 1893.)
CONTRACT OF SALE—CONSTRUCTION—DELIVERY—
PAROL EVIDENCE—WAIVER.

1. A written contract for the sale of logs "boomed and delivered to tug" construed, in connection with the evidence, as meaning that the seller was to inclose the logs in a boom, so that a tug could fasten to them and tow them away.

2. A contemporaneous oral agreement to inclose the logs within a boom, and fasten the two separate ends of the boom to the shore, held incompetent, as being at variance with the written agreement.

3. A party excepting to the admission of objectionable evidence does not waive his exception by subsequently moving that the evidence be stricken out, if such motion be not granted.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Eusign, Judge.

Action by Charles Gasper and others against W. P. Heimbach. Plaintiffs had judgment, and defendant appeals. Reversed.

White, Reynolds & Schmidt, for appellant. Cotton & Dibell, for respondents.

DICKINSON, J. These parties entered into a written contract for the sale, by the plaintiffs to the defendant, of a quantity of saw logs "boomed and delivered to tug." The purchaser was to furnish the sellers with chains necessary to boom them. The logs were on or at an island in the St. Louis river. The plaintiffs inclosed the logs in a boom, the two ends of which were fastened to the island, so that the boom did not completely surround the logs. While the logs were in this situation the boom broke, under circumstances concerning which the evidence was conflicting, and many of the logs were lost. The controversy in this action is as to which party should bear the loss; and that depends upon the question whether the plaintiffs had done all that was required of them under the contract; whether they were still in possession and control of the logs, or whether the same had been delivered to, and were under the control of, the defendant. The evidence on the part of the plaintiffs, as well as on the part of the defendant, showed, and without contradiction, that, as applied in business of this kind, the language of the contract, "boomed and delivered to tug," signifies that the logs are to be completely inclosed in a boom, so that a tug can fasten to them and tow them away; and even without such evidence this would seem to be the meaning of that language of the contract. At the trial one of the plaintiffs

was allowed to testify to a conversation between themselves and the defendant, at or prior to the making of the written contract, as follows: "We said we would sell the logs right to him on the spot where they lay, but we would take no more responsibility after he had bought them. We would put in the chains, and tie them to the shore; and that is the way we wanted to sell them."

* * * He said, 'All right, I will take—' At this point the witness was interrupted by a motion on the part of the defendant to strike out the evidence, and the sentence was not completed; but the witness had stated so much that the jury would probably understand the testimony as indicating that the defendant accepted the terms thus proposed. All this evidence was properly objected to, for the reason that it was at variance with the written contract. The objection was well founded. Particularly that part of this evidence which we have put in italics went to vary the written agreement of the plaintiffs that the logs should be "boomed and delivered to tug." The obvious purpose and tendency of the testimony was to show that the plaintiffs' undertaking was only to do what they had done,—inclose the logs within a boom, the two separate ends of which should be fastened to the shore. The written contract expressed a different obligation. The contention that this error was waived or cured by the motion of the defendant that the evidence be stricken out, and by the ruling of the court thereon, cannot prevail. The court did not strike out the objectionable testimony. The most that can be said in support of the respondents in this particular is that the court left it entirely uncertain whether any of the testimony was stricken out, and what, if any, was thus excluded. The exception to the reception of the evidence was well taken. It may be assumed that, by moving to have the evidence stricken out, the defendant consented to that mode of remedying the error, so that, if his motion had been granted, the defendant would have been deemed to have waived his previous exception; but, as that remedy was not granted, he cannot be supposed to have relinquished his exception to the admission of the evidence, even though he did not except to the ruling of the court on his motion. Our conclusion is not affected by the fact that, when the defendant was about to send to have the logs taken down the river, he concluded to dispense with the use of a tug, and to employ men to float the logs, within the inclosing boom, down the river. There does not appear to have been any modification of the conditions of the written contract as to the manner in which the plaintiffs should boom the logs for delivery; at least, it is not clear that there was any modification or waiver of the agreement in this particular. Order reversed.

VANDEBURGH, J., absent.

ORME v. MACKUBIN.

(Supreme Court of Minnesota. June 6, 1893.)

CONTRACT—CONSTRUCTION—EVIDENCE.

1. A contract by the defendant, upon whom rested no other obligation than that expressed, "to at once proceed to procure, and use all reasonable efforts to procure," from a specified person, a release of her interest in certain land, construed as not an absolute undertaking to procure the release, but only to make reasonable effort to do so.

2. Evidence held sufficient to show that this duty had been performed.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Kelly, Judge.

Action on a contract by George H. Orme against Charles C. Mackubin. Defendant had judgment, and plaintiff appeals. Affirmed.

Morphy, Gilbert & Morphy, for appellant. Alfred S. Hall, for respondent.

DICKINSON, J. In 1884 the defendant acted as an attorney in fact for his mother, Ellen M. Mackubin, in effecting a sale to the plaintiff of certain city lots supposed to be owned by her. The sale was completed, Mrs. Mackubin conveying to the plaintiff by warranty deed; but at the same time, there appearing to be a defect in the title, the defendant entered into the undertaking with the plaintiff upon which this action is brought, wherein he (defendant) agreed "to at once proceed to procure, and use all reasonable efforts to procure, from Jane Milliken and the heirs of Samuel H. Wilkin, a release of any and all claim they, or either of them, have, or may have," to the lots which were then conveyed to the plaintiff. Within a few weeks after that the defendant did procure, and cause to be placed on record, a quitclaim deed of the premises to Mrs. Mackubin, the plaintiff's grantor, from Jane Milliken, and others, who were the heirs of Samuel J. Wilkin. It appears that they resided in the state of New York. The procuring of this deed is claimed not to have constituted a performance of the defendant's agreement because Jane Milliken was a married woman, and her husband did not join in the deed.

Our view of the construction of the contract is in accordance with that of the court whose decision is here for review. The defendant did not undertake, absolutely, to procure the specified releases, but to "*use all reasonable efforts*" to do so. The meaning of those words is perfectly plain and certain, and they determine the meaning of the immediately preceding words, which, if standing alone, would be more uncertain. Read together, the sense is that the defendant would at once set about procuring such releases, and would use all reasonable efforts to accomplish that end. The language which we have italicized forbids construing the instrument as expressing an absolute undertaking to procure the releases. The court

found that the defendant did proceed at once in the matter, and that he used all reasonable efforts and diligence to procure the desired releases; and in this we deem the evidence to have justified the finding. It is urged that the defendant ought to have ascertained that Jane Milliken was married, and so have procured her husband's execution of the deed. It is true that the defendant caused a deed to be prepared and sent to New York to be executed, in which Jane Milliken was described as a widow, and that when the deed was returned and recorded the word "widow" had been erased. But, on the other hand, it is to be considered that the attorneys who examined the title for the plaintiff, and pointed out the defect, recommending the procuring of a deed from Mrs. Milliken, stated that she was a widow. And it seems that such was supposed to be the case until after her death. She had not lived with her husband for 20 years. The contract of the defendant, it will also be noticed, specified Jane Milliken, only, without mentioning her husband. It was at least questionable whether, under these circumstances, reasonable diligence required the defendant to make inquiry as to the fact concerning which the plaintiff's attorneys had thus advised the defendant. The court might well find that proper diligence had been exercised. After the death of Mrs. Milliken, and the discovery that she was not a widow when the deed was made, the defendant went to New York, and endeavored to procure her surviving husband and heirs to release their claims to the entire tract (10 acres) of which these lots were a part. The undisputed evidence is that he offered them a reasonable consideration therefor, but that they refused. The evidence justified the court in its conclusion that the result would have been the same if the defendant had sought a release of these lots only. We see no reason to doubt the correctness of the findings and conclusion of the court, and the order denying a new trial is affirmed.

VANDEBURGH, J., did not take part.

ST. PAUL & D. R. CO. v. VILLAGE OF HINCKLEY.

(Supreme Court of Minnesota. June 6, 1893.)

ADVERSE POSSESSION OF HIGHWAY—EVIDENCE.

Facts found, considered as not showing that the exclusive occupancy for 15 years, by a railroad for station yard purposes, of land previously dedicated (but not used) as a public highway, was not adverse to the public, so as to have conferred title by adverse possession; the court not having found that such possession was adverse. Mitchell, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Pine county; Crosby, Judge.

Action by the St. Paul & Duluth Railroad Company against the village of Hinckley for

an injunction. Defendant had judgment, and, from an order denying a new trial, plaintiff appeals. Affirmed.

Lusk, Bunn & Hadley and J. D. Armstrong, for appellant. Robert C. Saunders, for respondent.

DICKINSON, J. By this action the plaintiff seeks to have the defendant enjoined from opening and maintaining a public street across its railroad tracks and station yard. The case involved an issue of fact as to whether the plaintiff had, by adverse possession of the premises for the period of 15 years, acquired a right to the same to the exclusion of the public. The plaintiff, appealing from an order denying a new trial, brings before us for review only the findings and conclusion of the court, upon which judgment was directed for the defendant.

It appears from the findings of the court that the premises in question became a highway by dedication as early as 1872, but that, until recently, this part of the highway or street had not been needed for public use, and had not been opened for public travel. More than 15 years before the commencement of this action the plaintiff had entered upon the part of the street here in question, laid its tracks across the same, consisting of a main track and two side tracks, which it has ever since maintained and operated, using these premises as a part of its railroad yard. The court found that this use of the land by the plaintiff had been such as to exclude the public from the use thereof. We understand the meaning of this to be that the use by the railroad was of such a nature as to be incompatible with a use of the same premises by the public. The court also found that the plaintiff never had any claim or color of title except such as may arise from the facts found. The conclusion and decision of the court was that the plaintiff was not entitled to any relief against the proposed opening of the street.

The contention of the plaintiff is that, upon the facts found, judgment should have been directed in its favor, upon the ground that by its adverse possession for 15 years the public easement had been extinguished. Adverse possession may have such an effect, even against the public. *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 45 Minn. 387, 48 N. W. Rep. 17. It will, however, be noticed, and it is virtually conceded on the part of the plaintiff, that the express findings of the court do not embrace one of the facts always essential to constitute title by adverse possession, viz. that the possession was hostile or adverse. The court has not so found; but the plaintiff insists that it is necessarily to be inferred, from the facts found, that the plaintiff's possession was hostile, and hence that the court erred in its conclusion. The plaintiff would have us, on appeal, infer the existence of the fact

referred to; and having thus supplied, by inference, the fact which is necessary for the plaintiff's case, we are asked to declare that the conclusion of the court below was wrong. This cannot be done. We may accept as correct the proposition that from the facts as found by the court, if those were the only facts shown on a trial, the inference of fact would naturally be drawn that the plaintiff's possession was adverse to the public. But whether the possession was adverse—hostile—is a matter of fact, and not of law. We are asked on appeal to supply by inference a fact which is essential to the plaintiff's case, and without which the decision of the court below was right. It is not for an appellate court to do this, (*Miller v. Chatterton*, 46 Minn. 338, 48 N. W. Rep. 1109;) and, even if it were true that, under any circumstances, we could supply facts by intendment, we cannot do so in this case, upon a review of the findings only, and without the evidence. The facts in issue, and upon which a judgment is to rest, must be established by the evidence and admissions of the parties at the trial, and no fact necessarily involved in the issues can be judicially determined in ignorance or disregard of the evidence. However natural might be the inference of fact that the plaintiff's possession was hostile, if, upon the trial, only such facts should be disclosed as are expressed in these findings of the court, yet how can we know or assume that in the trial of this case the evidence was not such as to render that inference doubtful, or even impossible? The facts found are not necessarily, and in their nature, inconsistent with the plaintiff's occupancy having been in subordination to, and in constant and express recognition of, the right of the public to use the premises for street purposes whenever such use should become necessary or expedient. If we were to now infer, as a fact, that the possession was adverse, our inference might be directly contrary to the facts as shown by the evidence. The findings before us do not compel such an inference. The burden of proof was upon the plaintiff. If it does not here show a case justifying relief, it must fail, and judgment was rightly ordered for the defendant. Its remedy for curing a defect in the finding of facts which it had to establish was by motion in the trial court for a specific finding upon this issue. Order affirmed.

MITCHELL, J. I am unable to concur with the views of my brethren. In my opinion the assumption that there might have been other facts established by the evidence which would modify the effect of the facts found is wholly unwarranted. On the contrary, I think we are bound to assume that the court found all the material facts which the evidence established. The facts found are in effect that plaintiff's possession was continued, exclusive, and just as incom-

patible with any use of the premises by the public as if they had been covered with buildings. From these facts, in the absence of any other modifying or doing away with their force, the adverse or hostile character of the possession followed as a conclusion or inference of law.

VANDERBURGH, J., did not participate in this decision.

**ATTORNEY GENERAL v. DETROIT
SUBURBAN RY. CO.**

(Supreme Court of Michigan. June 16, 1893.)

**QUO WARRANTO AGAINST CORPORATION — WHEN
LIES—EXERCISE OF ILLEGAL FRANCHISE.**

The mere fact that a street-railway company, whose existence is limited to 30 years, is operating under a grant of the "exclusive and perpetual" right to construct and operate its road in a street, is not an exercise of "any franchise or privilege not conferred upon it by law," within the meaning of How. St. § 8646, subd. 5, providing that in such case an information in the nature of a quo warranto may be filed by the attorney general against any corporate body.

Original application by the attorney general for leave to file an information in the nature of a quo warranto against the Detroit Suburban Railway Company. Application denied.

John J. Speed and C. A. Kent, for relator.
Russel & Campbell, for respondent.

GRANT, J. The attorney general asks leave of this court to file an information in the nature of a quo warranto against the Detroit Suburban Railway Company. The petition was filed March 7, 1893. The reason assigned for the petition is that said railway company is exercising a franchise and privilege not conferred by law, in that the permit given by the township board is void upon its face, because it purports to grant an exclusive and perpetual right. The authority conferred by the township board of the township of Greenfield is attached to the petition, and reads as follows: "Franchise for Woodward Avenue Street Railway, or Highland Park Road. At a session of the township board of Greenfield, county of Wayne, and state of Michigan, held on the 17th day of October, A. D. 1885, at which a quorum of the board was present, the following preamble and resolution was submitted, and, after a careful consideration, was unanimously adopted: 'Whereas, Frank E. Snow and William A. Jackson, of Detroit, Michigan, contemplate the construction of a railway on Woodward avenue, commencing at the railroad crossing, and running thence northwesterly along, upon, and adjacent to the Detroit and Birmingham Plank Road to the six-mile stake on said road; and whereas, the construction of said railway is deemed to be a valuable improvement to the property along said road, and to the township

of Greenfield: Therefore, resolved, that for and in consideration of the sum of one (1) dollar to the township board in hand paid by the said Frank E. Snow and William E. Jackson, the receipt whereof is hereby acknowledged, we, the township board, hereby grant, convey, and quitclaim unto the said Frank E. Snow and William E. Jackson, their successors and assigns, the exclusive and perpetual right and privilege of constructing, maintaining, and operating a railway for the transportation of passengers along and upon said road as aforesaid, and hereby authorize the execution of an instrument conveying the said right and privilege to the said Snow and Jackson for the perpetual use of said roadway for the purpose of said railway, together with the right to construct and operate all necessary switches and appurtenances thereto belonging: provided, that said railway shall be constructed at least ten feet east of the west line of said highway, and also that said railway shall at all times maintain an open ditch or suitable drainage along said road with all necessary sluiceways and other conveniences for the proper drainage of said road, and the property abutting thereon; and provided, that the rate of fare on said railway shall not exceed five (5) cents for each passenger per trip.' " The authority conferred by statute upon the township board is found in How. St. § 3548, and is as follows: "Any such company may extend, construct, use, and maintain their road in and along the streets or highways of any township, adjacent to said city or village, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement, and the acceptance by the company of the terms thereof, shall be recorded by the township clerk in the records of his township." The statute authorizing the attorney general to file informations of this character reads as follows: "An information in the nature of a quo warranto may also be filed by the attorney general, upon his own relation, or upon the relation of any private party, on leave granted, against any corporate body, whenever such corporation shall (1) offend against any of the provisions of the act or acts creating, altering, or renewing such corporation; or (2) violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or (3) whenever it shall have forfeited its privileges and franchises by nonuser; or (4) whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges, and franchises; or (5) whenever it shall exercise any franchise or privilege not conferred upon it by law. And it shall be the duty of the attorney general, whenever he shall have good reason to believe that the same can be established by proof, to file such information in every case of public interest, and also in every other case in which

satisfactory security shall be given to indemnify the people of this state against all costs and expenses to be incurred thereby." How. St. § 8046.

Snow and Jackson and others organized a corporation known as the Highland Park Railway Company, May 11, 1886, and Snow and Jackson then transferred all their rights to said company. This company constructed the road, and operated it till February 1, 1893, when it transferred all its franchises, rights, and property to the respondent. No claim is made that either the Highland Park Railway Company or the respondent was not duly organized, or that the road was not constructed in full compliance with the terms of the resolution of the township board, or that the respondent or its assignor has violated any of the conditions thereby imposed. No person living in the locality has made complaint. The municipality makes no objection. The sole contention of counsel for the relator is that the case falls within subdivision 5 of section 8046, above quoted, for the reason that the franchise conferred upon a legal corporation, in terms, extended beyond the life of that corporation. If the 30 years had expired, a different question might be presented. The sole question is whether the petitioner establishes a case of such public interest as to justify the interference of the state. The statute confers the power upon the township board to grant the right, which may be exercised for a period of 30 years. The respondent is exercising that right within the period of its life, and after the construction of its plant and road at great expense, and the use thereof for nearly seven years. In *Maybury v. Gaslight Co.*, 38 Mich. 154, it was sought to deprive the corporation of its franchise for violations of the conditions under which the franchise was granted. The court said: "But the permission to lay these pipes does not differ in any respect from that required for laying railways over land, or ditches through it. It is not a state franchise, but a mere grant of authority, which, whether coming from private owners or public agents, rests in contract or license, and in nothing else. A violation of the contract, or an unauthorized intrusion, must be redressed, as all ordinary wrongs are redressed, by the usual legal remedies. It in no way concerns the state whether the power is granted or withheld, nor whether the corporation has or has not fulfilled its agreements. The injured party has a remedy for any grievance, but the state is no more interested than it would be in the question whether or not a railroad company has lawfully acquired its right of way." This case was cited with approval in *People v. Ft. Wayne & E. Ry. Co.*, 92 Mich. 522, 52 N. W. Rep. 1010, in which it was said: "The right being such a one as the common council had a right to grant, and the common council having assumed to grant the right, the case presented is not

such a one as calls for the exercise of the jurisdiction of this court in a public proceeding instituted by quo warranto." It is true that in the present case the question relates to the validity of the franchise or privilege as granted, while in the former cases the forfeiture of the franchises was involved. But we do not think that the petition presents a case of such public interest as to justify the granting of the application. It is a matter of local interest, in which the municipality and its people are interested. So long as they are content, we do not think the state is interested. Application denied.

The other justices concurred.

JENKS v. ST. CLAIR PROBATE JUDGE.

(Supreme Court of Michigan. June 16, 1893.)

ADMINISTRATION — ALLOWANCE OF CLAIMS — ESTATE OF TOPPEL.

Where the heirs interested in a decedent's estate, before the appointment of the general administrator, without objection, participate in the hearing of claims before the judge of probate, they are estopped to question the regularity of such hearing, or to insist on the appointment of commissioners on claims after the appointment of such administrator.

Original proceedings at the relation of William L. Jenks, administrator of the estate of Harriet J. Comstock, deceased, for mandamus to the St. Clair probate judge. Writ denied.

P. H. Phillips, for relator. Cyrus A. Hovey, for respondent.

MONTGOMERY, J. Relator asks for a writ of mandamus to compel the respondent to proceed to appoint commissioners on claims in the estate of Harriet J. Comstock, deceased. It appears that an order for the hearing of claims before the judge of probate was made on the 29th of August, 1890, and that, proceeding under such order, the creditors filed claims against said estate; that a hearing was had, and various claims allowed. This was after the appointment of a special administrator, and before the general administrator was appointed. The relator was subsequently appointed general administrator of the estate, and made application to have commissioners appointed to hear claims against the estate, which was denied.

The relator contends that the judge had no power to make the order which has been proceeded under until a general administrator was appointed, and that such appointment was void. It may perhaps be doubted whether the statute (2 How. St. § 5853) is broad enough to authorize the proceedings taken in this case; but, if it be conceded that the application was not sufficient to justify the court in proceeding to the allowance of all the claims which were considered, it is very evident that the more appropriate remedy to test the valid-

ity of the action would have been by appeal. But a more conclusive answer to the present application, we think, is that it appears that all parties to these proceedings have waived any objection to the proceedings, and are estopped now from invoking the remedy sought. It is very evident that the present proceeding is directed against the action of the probate court in allowing the claim of William B. Comstock. After the allowance of this claim, one of the three other heirs interested appealed to the circuit court from the order, and afterwards, having parted with her interest in the estate, dismissed her appeal. Subsequently the two remaining heirs sought to reinstate the appeal, and in that proceeding set out "that such claim of appeal from the probate court was taken by the appellant, Helen E. Coombs, after consulting the relators," who were the other heirs interested. See *Comstock v. Circuit Judge*, (Mich.) 54 N. W. Rep. 635. The position taken in that proceeding by the parties in interest was so inconsistent with the present application as to work an estoppel against their right to contest the action here brought in question. We think it very clear that, if they were the parties directly asking the aid of the court, they would be concluded by the judgment in that case. As the administrator represents only their interests in this proceeding, he should also be estopped. *Wells, Res Adj.* § 54. The writ should be denied, with costs payable out of the estate. The other justices concurred.

DOUBLE v. McQUEEN et al., County Supervisors.

(Supreme Court of Michigan. June 7, 1893.)

REMOVAL OF COUNTY SEAT—ELECTION—CANVASS OF VOTES—MANDAMUS.

1. Mandamus will not issue to compel a county board of supervisors to reconvene and canvass the vote for removal of the county seat, where their return to the petition alleges that they have not refused to canvass the votes, but propose to make a canvass on a day to which they have adjourned.

2. The answer of the board of supervisors alleged that prior to the election the board of election commissioners printed and distributed to the inspectors of election official ballots to be used in voting for certain officers and various questions, including the removal of the county seat; that a great many of said ballots were cast against the removal of the county seat; that thereafter the election inspectors furnished other electors a different ballot to be cast in a separate box on the question of removal, and that the election inspectors then decided that the votes cast against the removal on the official ballots were illegal. The answer further asked that it be taken as a petition for an order to show cause against the inspectors of election why they had not returned the statement of the votes on the official ballots. *Held* that, as the decision of the board of supervisors under How. St. § 491, in determining the result of the canvass was conclusive and final, and the votes cast on the official ballot should not be excluded, the order to show cause against the inspectors would issue.

Petition for mandamus on the relation of Thomas Double against James McQueen, Andrew Dickey, and William Murphy, as board of county supervisors, to compel them to canvass a vote for removal of a county seat. Respondents' answer petitioned for an order to show cause against the inspectors of elections. Relator's petition denied. Respondents' petition granted.

T. S. Joslin, J. E. Kinnane, and C. E. Pierce, for relator. J. H. Cobb and Frank Emerick, for respondents.

LONG, J. The county of Montmorency is composed of the six townships of Albert, Briley, Hillman, Montmorency, Rust, and Wheatfield. James McQueen is the supervisor of the township of Rust, Dickey of the township of Montmorency, and Murphy of the township of Hillman. February 24, 1893, a special meeting of the board of supervisors of the county was called for the purpose of considering the question of the removal of the county seat from Hillman to another place nearer the center of the county. A resolution was passed by the board, directing that the question be submitted to the electors of the several townships at the annual election to be held on April 3d following. This notice was published, and it is alleged by the petition here that all the proceedings relative to submitting the question to the electors were regular and in compliance with the statute. The electors of the different townships voted by ballot upon the question, and the votes were certified by the inspectors of election to the county clerk within 10 days. On April 21st a meeting of the board of supervisors was called for the purpose of canvassing these votes. The clerk laid before the board the statement of votes as returned by the inspectors. It is claimed by the petition that after the votes in the township of Hillman had been canvassed the respondents refused to proceed further with the canvass. The other three supervisors attempted to proceed with the canvass, and offered motions and resolutions for that purpose, but were unable to do so, and thereupon the board adjourned until July 5, 1893. A mandamus is asked to compel the board to reconvene, and canvass the votes as certified by the inspectors of election from the different townships, and determine and declare the result of the vote, and enter the result upon its record, and perform all things relative to the removal of the county seat, as is required by section 491, How. St. An order to show cause was issued, and the three respondents answer, admitting the calling of the board of supervisors upon the question of the removal of the county seat, and the submitting of that question to the electors, but setting up some irregularities in the publication of the notice of election and proofs of publication, claiming that such proofs were never properly brought before the board as required by law. They admit that

the board adjourned until July 5th, but insist that such adjournment was for the purpose of canvassing the votes cast upon the question, and determining the result. The reason of the adjournment of the board is stated in the answer, substantially, that prior to the election the board of election commissioners caused to be prepared and printed official ballots to be used by the electors of the county in voting at such election for candidates for the offices of justice of the supreme court, regents of the university, circuit judge, and county school commissioner, and upon four proposed amendments to the constitution, as also upon the questions of raising by bond the sum of \$5,000 for building purposes, and of the removal of the county seat in accordance with the terms of the resolution adopted by the board of supervisors; that such official ballots were properly distributed by the board of election commissioners, and placed in the hands of the inspectors of election of the different townships before the election, and were used and voted by the electors of each of said townships at such election; that in the township of Albert there were cast for such candidates 110 votes for justice of the supreme court, 105 votes for regents of the university, 110 votes for circuit judge, 117 votes for supervisors, and for the various other township officers from 108 to 110 votes. The respondents state upon information and belief that in the township of Albert there were cast at such election at least 80 votes against the removal of the county seat; that such votes were cast by the electors properly marking such official ballots in the square opposite the words: "A proposition to remove the county seat to the northwest quarter of the southwest quarter of section 12, township 30 north, range 2 east. No." That most of such votes so cast against the removal of the county seat were voted by residents of the village of Lewiston, in such township, and situate about nine miles from the polling place in such township. That the electors residing in said village came early to said polling place, substantially together, and voted almost to a man before noon of that day. That such electors were informed by the inspectors of election that they were to vote upon the question of the removal of the county seat upon an official ballot provided and furnished them by the election inspectors, but were not informed that it was intended that they should vote upon such proposition in a separate ballot box, or in any other way than upon such official ballots. That after the electors from the village of Lewiston had gone home, the election inspectors—of which the relator was one—produced a small ballot box, and ballots which had printed thereon: "For the removal of the county seat. Yes." That thereupon 23 electors residing in the northerly part of the township, who had purposely refrained from voting until that time, under an understanding with the election inspectors, came

forward and voted the tickets handed them by the election inspectors, which were placed in the small box. That the election inspectors thereupon assumed to decide that the 80 votes and more cast against the removal of the county seat upon the official ballots were illegal, and canvassed and returned to the board of supervisors only the 23 votes placed in the small box, and all of which were in favor of such removal. That these facts were made to appear to the board of supervisors by protests supported by affidavits against the canvassing of the votes returned by the inspectors of election. It further appears by the answer that while many electors voted in the separate ballot box, those electors also had an opportunity to vote twice upon the question; that is, once by the official ballot, and again by a separate ballot printed by the election inspectors. It is also claimed that the same state of facts existed in the township of Wheatfield. By the answer it further appears that upon the convening of the board of supervisors they canvassed those from the township of Hillman, and found 6 votes cast for the removal and 117 against it. The board thereupon proceeded to canvass the votes of the township of Albert, and, upon reading the protest and affidavits against the canvass from that township as returned by the inspectors, they suspended their canvass, and adjourned until the following day, and thereafter adjourned until July 5th. The respondents contend that the board of supervisors, convened for the purpose of canvassing votes for the removal of the county seat, is possessed of greater powers than a board of canvassers to determine the result of an election; that they have a right to determine the result of the ballots, and whether the question of such removal is carried by the vote of a majority of the electors; that such determination, when made by the board of supervisors, is final, and cannot thereafter be questioned in any court; that, being possessed of such powers, the adjournment was had for the purpose of ascertaining by a full investigation whether the official ballots in these two townships had been thrown out by the board of inspectors of election; that they intend to meet and determine the true result of all the votes cast, and to this end the respondents petition in their answer that an order may issue directed to the election inspectors of the township of Albert, compelling them to reconvene and recanvass the votes cast in that township upon that question, and make a further return thereof.

Under the return made by the respondents—that they had not refused to canvass the votes, but propose to make canvass on July 5th, the day to which they have adjourned—there is no necessity for issuing the writ. Under a somewhat similar return in *Belknap v. Board*, (Mich.) 54 N. W. Rep. 376, the writ was denied. Counsel on the argument of the case in this court, however, asked us

to determine some of the other questions involved, as they were of great public importance, and their settlement now would save the county and respondents considerable expense. The answer must be taken as true. It sets up facts which, if true, would change the result of the election. Upon the face of the returns made by the inspectors of election the majority of the votes cast was in favor of the removal. By the return made by the respondents it appears that the majority of the votes actually cast was against the removal. The inspectors of election in two townships are charged with fraudulently omitting to make true and correct returns. This charge is made upon affidavits filed with the board of supervisors, who now ask that the inspectors of election be compelled to make a return to the facts set up in the answer. The respondents desire that their answer be taken as a petition for an order to show cause against the inspectors of election of the township of Albert why they have not returned the statement of the votes cast upon the "official ballot," so called. The true result of the ballots of those townships should be ascertained before the board of supervisors should be compelled to determine what the total vote of the county on that question is. The decision of the board of supervisors under the statute (How. St. § 491) in determining and entering upon their records the result of their canvass of the votes cast at an election regularly held is conclusive for all purposes, and leaves no question open to contest afterwards, and the removal could not thereafter be defeated in the courts by a showing that it was carried by an omission to return all the votes cast against such removal. *Attorney General v. Supervisors of Lake Co.*, 33 Mich. 289; *People v. Supervisors of Benzie Co.*, 34 Mich. 211; *People v. Treasurer of Benzie Co.*, 41 Mich. 6; *Hipp v. Board*, 62 Mich. 456, 29 N. W. Rep. 77; *Attorney General v. Board of Canvassers*, 64 Mich. 612, 31 N. W. Rep. 539. In *Hipp v. Board*, supra, it was said by Mr. Justice Campbell: "The constitution has not empowered this court to settle controversies not judicial, which are very wisely left to the proper local and representative agencies of the people." The statute authorizing the board of supervisors to canvass the votes and declare the result provides that when the result is ascertained by the board and entered upon their records, if it is in favor of the removal, they shall provide for such removal within one year, and the place so designated shall continue the county seat of said county for all purposes whatsoever. It is evident from the language of this statute that the supervisors alone are to determine the final result of the vote. For the purpose of this determination they have the right to know what the will of the people is as expressed at the polls. The votes cast upon the official ballot in the form thereon printed should not be excluded by the in-

spectors of election. The voters of that township cannot be thus disfranchised. The answer herein will be treated as a petition, and an order to show cause will issue, according to the prayer in the answer, against the inspectors of election of the township of Albert, and also against the inspectors of election of the township of Wheatfield. The other justices concurred.

RANKANS v. OTTAWA CIRCUIT JUDGE. (Supreme Court of Michigan. June 14, 1893.)

MANDAMUS—PREMATURE DEFAULT.

Where plaintiff, a nonresident, gave security for costs on an order therefor made on application by defendant, an entry of default against defendant for failure to plead on the same day that security was filed was premature, and mandamus will lie to set it aside.

Application by Gerrit Rankans for mandamus to compel the circuit judge of Ottawa county to set aside a default entered against relator, and a judgment entered thereon. Mandamus granted.

Farr & Soule, for relator. Walter L. Lillie, for respondent.

PER CURIAM. Where plaintiff, a nonresident, gave security for costs upon an order therefor made upon application by defendant, defendant's default for not pleading, entered upon the same day that security was filed, was prematurely entered. Writ of mandamus requiring the vacating of the judgment and setting aside of default granted.

FRENCH v. STATE.

(Supreme Court of Wisconsin. May 23, 1893.)

CRIMINAL LAW—JURY—INSANITY OF ACCUSED—
PRESENCE DURING TRIAL—RECORD.

1. Under Laws 1883, c. 164, providing that if, upon the preliminary trial of a special issue of insanity, the jury shall be unable to agree, the court shall "discharge them from the further consideration of such issue," and, unless the plea of insanity be withdrawn, "forthwith order the trial upon the plea of not guilty to proceed, and the question of insanity involved in such special issue shall be tried and determined by the jury with the plea of not guilty," where the jury disagrees, it is error to order the trial upon the pleas of not guilty and insanity to proceed before the same jury, because such jury is not impartial, and defendant is deprived of his right to have the jury specially impaneled to try him for the crime charged, and is denied his right of challenge.

2. It being the constitutional right of one accused of crime to be present during the trial and to confront the witnesses against him, a conviction of murder will be set aside where neither the minutes of the clerk nor the record shows that the accused was present when the verdict was rendered and sentence pronounced against him, or that he was asked by the court if he had anything to say why sentence should not be pronounced against him.

Error to circuit court, Ashland county; J. K. Parish, Judge.

William G. French was convicted of mur-

der, and he prosecutes a writ of error. Reversed.

Charles N. Gregory and George T. Merrill, for plaintiff in error, cited, in behalf of the proposition that the record must show that the prisoner was present at the trial, and asked before sentence whether he had anything to say why sentence should not be pronounced against him, the following: Whart. Crim. Pl. & Pr. (9th Ed.) §§ 540, 545, 549; 1 Bish. Crim. Proc. (3d Ed.) § 1353; Dougherty v. Com., 69 Pa. St. 286; Prine v. Com., 18 Pa. St. 103; Hooker v. Com., 13 Grat. 763; Dyson v. State, 26 Miss. 362; Rolls v. State, 52 Miss. 391; Beardon v. State, 44 Ark. 331; Smith v. People, 8 Colo. 457, 8 Pac. Rep. 920; State v. Schoenwald, 31 Mo. 147; State v. Johnson, 35 La. Ann. 208; State v. Jones, 61 Mo. 232; Shapoonmash v. U. S., 1 Wash. T. 188; Lovett v. State, (Fla.) 11 South. Rep. 172; Chit. Crim. Law, *414; State v. Buckner, 25 Mo. 167; State v. Braunschweig, 36 Mo. 397; State v. Mathews, 20 Mo. 55; State v. Cross, 27 Mo. 382; People v. Perkins, 1 Wend. 91; Clark v. State, 4 Humph. 254; Andrews v. State, 2 Sneed, 550; Scaggs v. State, 8 Smedes & M. 722; Hopt v. People, 110 U. S. 574, 4 Sup. Ct. Rep. 202; Sylvester v. State, 71 Ala. 17; State v. Greer, 22 W. Va. 800; Hill v. State, 17 Wis. 675; Anderson v. State, 3 Pin. 367; Sasse v. State, 68 Wis. 530, 32 N. W. Rep. 849; Douglass v. State, 3 Wis. 820; Davis v. State, 38 Wis. 487; Com. v. Andrews, 3 Mass. 126; Biggs v. Lloyd, (Cal.) 11 Pac. Rep. 831; Peterson v. State, 45 Wis. 535.

J. L. O'Connor, Atty. Gen., and J. M. Clancy, Asst. Atty. Gen., in behalf of the state, cited, per contra, the following: Hill v. State, 17 Wis. 675; Barrett v. State, 1 Wis. 156; Griswold v. State, 24 Wis. 145; Lawrence v. Com., 30 Grat. 845; Dodge v. People, 4 Neb. 220; State v. Craton, 6 Ired. 164; Sweeden v. State, 19 Ark. 205; Stephens v. People, 4 Parker, Crim. R. 396; Id., 19 N. Y. 549; Schirmer v. People, 33 Ill. 276; State v. Wood, 17 Iowa, 18; Rhodes v. State, 23 Ind. 24; Jeffries v. Com., 12 Allen, 146.

ORTON, J. The plaintiff in error was tried, convicted, and sentenced for the murder of Gavin M. Steel, on the 5th day of March, 1891. A motion in arrest of judgment and a motion for a new trial were overruled. The case comes before this court on writ of error; and a great many errors are assigned for the reversal of the judgment. The first two errors assigned and urged by the learned counsel of the plaintiff in error appear by the record, and are of the gravest importance and material, and in our opinion are fatal to the conviction. It is necessary to consider only these, as a new trial must be had in the case; and the other errors assigned, of less importance and not so clearly apparent, may not again occur.

1. The prisoner was compelled to be tried before the same jury that had heard and considered the evidence on the special issue of insanity, and had been unable to agree, and had been discharged from further consideration of such special issue as such. The provisions of the Revised Statutes on this subject were such that, if the jury impaneled to try such special issue of insanity failed to agree, the court could discharge them, and impanel another jury to try the same, and so on until there should be an agreement and verdict as in other cases. To remedy what was supposed to be an omission or defect, chapter 164, Laws 1883, was enacted, as follows: "If the jury shall be unable to agree upon a verdict on the trial of such special issue, the court shall, for that reason, discharge them from the further consideration of such special issue as such, and, unless such special plea be withdrawn by such accused person or counsel in his behalf, the court shall forthwith order the trial upon the plea of not guilty to proceed, and the question of insanity involved in such special issue shall be tried and determined by the jury with the plea of not guilty." Under this provision the circuit court, when the jury impaneled to try such special issue of the insanity of the accused when he did the killing were unable to agree upon a verdict, ordered the trial upon the plea of not guilty to proceed before the same jury. This was a very grave error. This statute does not so provide. If it did, its constitutionality would be at least questionable. The court should "forthwith order the trial upon the plea of not guilty to proceed" before another jury, to be selected, impaneled, and sworn to try the case. This is consistent with the act and the prisoner's rights. This jury had heard all the evidence and arguments, as well as the instructions of the court on the issue of insanity, the question on which the guilt or innocence of the accused depended, and had deliberated upon it sufficiently to know that they were unable to agree, and had disagreed. The very fact of their disagreement implies that they had all formed opinions on it, and that their opinions did not agree. Part of the jury had formed an opinion that the accused was insane, and part that he was not. It is said, although it is not material, that the jury stood ten one way and two the other way. The same issue of the insanity of the accused was still undetermined, and had to be tried again with his plea of not guilty. He had the undoubted right to have that question, as well as all others involved in his plea of not guilty, tried by an impartial jury. The case stood precisely as it would if these statutes in relation to a special issue of insanity had not been enacted. The accused is placed on trial for the crime. His insanity is a question material to the case. A jury is forced upon him to try his case, all of whom had formed and expressed an opinion on the ques-

tion whether he was or was not insane when he killed the deceased. Does the law suffer or sanction such a biased, partial, and prejudiced jury for the trial of one charged with the crime of murder? Any one would say that this would be a judicial outrage upon the legal and constitutional rights of the accused. And yet this is just such a case. The accused has the right to demand that he be tried before a fair and impartial jury. Const. art. 1, § 7, provides that the accused shall have "a speedy public trial before an impartial jury." Besides this, the right of the accused to have a jury specially selected and impaneled to try him for the crime charged, and his right of challenge, were cut off and denied. It is obvious and self-evident that this jury was an unlawful one, and that the accused was deprived of his constitutional right of trial by jury. It has been uniformly held, and from early times in the history of jury trials for crime, that the grand jury that found the indictment, and each one of them, is disqualified from sitting on the petit jury to try the accused. *Oates' Case*, 10 How. St. Tr. 1079-1081; 1 Bish. Crim. Proc. § 912; *Colledge's Case*, 8 How. St. Tr. 588; *Hawk. P. C. bk. 2, c. 43, § 27*. Our own statute disqualifies the grand juror from being a petit juror on the trial of the case. Section 4088, Rev. St. "It is the right of the accused, who is to be tried by a jury, that the first opinion formed by the jurors shall be the one which results from the evidence produced at the trial." Therefore the members of the grand jury that framed the indictment, and those who have passed upon the question as jurors in the same case, are disqualified to be jurors to try the accused. 1 Bish. Crim. Proc. § 911; *Rice v. State*, 16 Ind. 298; *Stewart v. State*, 15 Ohio St. 155. A juror on a former trial that resulted in a mistrial is not competent to serve on the second trial. *Edmondson v. Wallace*, 20 Ga. 600. And that is so, even if the case is not the same, if the issues and the defendant are the same. *Garthwaite v. Tatum*, 21 Ark. 336. A juror who has formed an opinion on hearing all the evidence in the case, not then being a juror, is disqualified. Much more where the juror has heard the evidence, and formed an opinion once as a juror is disqualified. *Argent v. Darrell*, 2 Salk. 648; *Weeks v. Medler*, 20 Kan. 57; *State v. Sheeley*, 15 Iowa, 404; *Thomp. & M. Jur.* 195; *Greenfield v. People*, 74 N. Y. 277. Many more authorities are cited to the same principle in the very excellent brief of the learned counsel of the plaintiff in error. But, as said before, it is self-evident that such a jury is not only disqualified from trying the accused for the crime charged, but to force the accused to be tried before such a jury is a denial of his right to a jury trial, so clearly protected by the constitution and the laws. If the grand jury are unfit jurors to try the accused, on the ground that they have formed an opinion in the case, and expressed it by the indictment

on a mere ex parte examination of the evidence, much more is this jury, that has heard all the evidence on both sides, and disagreed in their opinions.

2. It is conceded by the learned attorney general that neither the minutes of the clerk nor the record shows that the prisoner was present in court when the verdict of guilty was rendered against him by the jury, or that he was present when the sentence was pronounced against him, or immediately before, or that he was asked by the court if he had anything to say why he should not be so sentenced. The record does not show that he was present at any time during the trial for the crime, except when he was arraigned and pleaded. It was his constitutional right, that he may not waive, to be present during the whole trial, and "meet the witnesses face to face," and "to be confronted with the witnesses against him." Article 6, Const. U. S.; section 7, art. 1, State Const. This is not only the indispensable right of the accused, but the record must show that he enjoyed that right, or it does not show that he had a legal and constitutional trial. "In felonies, the record must show the defendant to have been present at the arraignment and testing of the jurors. In capital cases, if not in all felonies, the record must show that the defendant was present at the trial, verdict, and sentence." *Whart. Crim. Pl. & Pr.* §§ 545-549. The crime of murder is still a capital crime in this state, because so recently followed by the death penalty. *People v. Perkins*, 1 Wend. 91. In such cases "the presence of the prisoner is essential, and where the law requires it the record must show it." 1 Bish. Crim. Proc. § 1353; *Dougherty v. Com.*, 69 Pa. St. 286; *Prine v. Com.*, 18 Pa. St. 103. This is the rule as well in all felonies. *Hooker v. Com.*, 13 Grat. 763; *Dyson v. State*, 26 Miss. 362; *Rolls v. State*, 52 Miss. 391; *Beardon v. State*, 44 Ark. 331; *Smith v. People*, 8 Colo. 457, 8 Pac. Rep. 920; *State v. Johnson*, 35 La. Ann. 208; *State v. Jones*, 61 Mo. 232; *Shapoonmash v. U. S.*, 1 Wash. T. 188; *Lovett v. State*, (Fla.) 11 South. Rep. 172; *Chit. Crim. Law*, 414; *State v. Buckner*, 25 Mo. 167; *State v. Mathews*, 20 Mo. 55; *Clark v. State*, 4 Humph. 254; *Andrews v. State*, 2 Sneed, 550; *Scaggs v. State*, 8 Smedes & M. 722; *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. Rep. 202; *Sylvester v. State*, 71 Ala. 17. No presumption will be indulged in that the prisoner was present if the records fail to show it. *Douglass v. State*, 3 Wis. 820; *Davis v. State*, 38 Wis. 487. This is held as to the arraignment of the prisoner, but his presence is just as essential. In the late case of *Ball v. U. S.*, 140 U. S. 118, 11 Sup. Ct. Rep. 761, it is held essential that the record should show that the prisoner was present, and asked before sentence whether he had anything to say why sentence should not be pronounced against him. The chief justice cites *Rex v. Harris*, 1 Ld. Raym. 267; 2 Hale, P. C. 401;

Com. Dig. "Indictment," N; 2 Hawk. P. C. c. 48, § 22; Whart. Crim. Pl. & Pr. §§ 549-906; Messner v. People, 45 N. Y. 1; Dougherty v. Com., supra; 1 Bish. Crim. Proc. §§ 273, 1293, and other cases cited above. This case is of itself the highest authority as to this constitutional right of a prisoner in a capital case. The learned counsel of the plaintiff in error has also briefed this question very ably and exhaustively, and has made many quotations of the text of the opinions to which reference may be made. Many of the above authorities also hold that no presumptions will be indulged in to supply the record in such a case, and that there is no waiver of the right less than a positive and personal relinquishment of it, and this I understand to be the effect of our own decisions. The learned attorney general has cited a few cases that seem to hold the other way, but they are certainly against the great weight of authority in this country, as well as in England. These great common-law rights have been made constitutional provisions in the various states, and so made essential and paramount, and also indispensable, in trials for capital offenses and felonies. It is not too strict to hold that in all such cases the accused must be present in court to meet the witnesses face to face, and to test the jury, and when the verdict is rendered, and be asked if he has anything to say why the sentence should not be pronounced against him, and to meet his sentence, and also still more important that he have a trial "by an impartial jury." These are great constitutional safeguards against oppression and injustice that must not be abridged or compromised.

The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison at Waupun will deliver the prisoner to the sheriff of Ashland county, to be held in custody by him until he is discharged from such custody according to law.

SHROEDER v. WEBSTER.

(Supreme Court of Iowa. May 27, 1893.)

INSTRUCTIONS—PLEADING—OBJECTIONS WAIVED—
ALTERATION OF WRITTEN INSTRUMENTS—BUR-
DEN OF PROOF.

1. A defendant cannot complain that the instructions were not sufficiently full, when he asked no instructions himself.

2. Where a demurrer to the answer is overruled, plaintiff, by filing a reply, and going to trial on the issues thus formed, waives objections to the overruling of the demurrer.

3. A general assignment of error directed against a charge is in violation of Code, § 3207, and will not be considered.

4. Where the record on appeal shows that certain evidence offered on the trial was objected to, but no ruling appears to have been made on it, it will be presumed that the objection was waived.

5. Where defendant alleges that the note sued on had been altered since execution by substituting the word "bearer" for "order," the

burden is on him to show the alteration, and if this is established the burden is on plaintiff to show that the alteration was made with defendant's knowledge and consent. Hagan v. Insurance Co., 46 N. W. Rep. 1114, 81 Iowa, 321, distinguished. Robinson v. Reed, 46 Iowa, 220, followed.

6. A charge that, if it was found that the note had been altered since execution in the manner claimed, then the law presumed that such alteration was made with a fraudulent purpose, and by the payee or plaintiff, is correct. Robinson v. Reed, supra, followed.

Appeal from district court, Audubon county; George Carson, Judge.

Action on two promissory notes. From a verdict for the defendant, plaintiff appeals.

H. U. Funk, John M. Griggs, and Theo. F. Myers, for appellant. Nash, Phelps & Green, for appellee.

KINNE, J. 1. Plaintiff sues on two promissory notes executed by defendant, and delivered to one Eads on the days they respectively bear date. One is dated August 13, and the other August 15, 1888, and plaintiff claims they were indorsed by Eads to him before maturity. Defendant pleads—First, that plaintiff is not the real owner of the notes, and that the suit is not prosecuted in the name of the real party in interest; second, that they were obtained from the defendant by Eads by means of fraud practiced upon him; third, that there is a failure of consideration; fourth, that the notes have been materially altered since their execution.

2. Complaint is made because the court failed to instruct the jury that there was no evidence to sustain the defendant's claim that plaintiff was not the owner of the notes. It is said that they should have been instructed that under the evidence plaintiff was a bona fide purchaser of them before their maturity, for value, and without notice of equities, if any, existing in favor of the maker. There is nothing said in the instructions touching the ownership of the notes except in the statement of the issues, wherein it is said that defendant claims that plaintiff is not the real owner of the notes, and that the suit is not prosecuted by the real party in interest. The jury were instructed that it was incumbent upon the defendant to establish his claims by a preponderance of the evidence. As plaintiff asked no instructions touching this question, he is not in a position to complain that those given were not as full as they might have been, since they were correct as far as they went.

3. The plaintiff demurred to the count of defendant's answer which pleaded fraud in procuring the notes. The demurrer was based upon three grounds, and it was sustained as to the first ground, and overruled as to the second and third grounds. This action of the court is assigned as error. The count demurred to was then amended, whereupon plaintiff demurred again. This

demurrer was overruled, and this ruling is assigned as error. We need not discuss the questions thus raised, as plaintiff, by filing a reply and going to trial on the issues thus formed, waived any objection he might have had to the overruling of his demurrer. 2 McClain's Dig. p. 316, § 944; Carson & Rand Lumber Co. v. Knapp, Stout & Co., 80 Iowa, 619, 45 N. W. Rep. 544.

4. Error is assigned because the court submitted the questions of fraud and failure of consideration to the jury. No particular instruction is pointed out as being erroneous in this respect, but the charge is generally made. The assignment is too general. It does not comply with the statute or rules of this court, and we cannot consider questions thus raised. Code, § 3207, rule 51. Blair v. Madison Co., 81 Iowa, 313, 46 N. W. Rep. 1093.

5. Error is assigned in the overruling of plaintiff's motion to strike out certain testimony. An examination of the record fails to show any ruling on the motion, and the presumption in such a case is that the motion was waived. Gable v. Hainer, (Iowa,) 49 N. W. Rep. 1024; Rosenthal v. Bilger, (Iowa,) 53 N. W. Rep. 255.

6. Counsel insist that the court erred in giving the eleventh division of his charge to the jury. By it the jury were told that if they found that either or both the notes in suit had been altered since their execution, by crossing out the word "order" printed therein, and writing in place thereof the word "bearer," such an alteration would be a material one, "and, when found to have been so made, the burden of proof is on the plaintiff to show that such alteration was made with the knowledge and consent of the defendant; and if you find that such an alteration was made in both of said notes after the execution thereof, and if you further find that the plaintiff has failed to establish by a fair preponderance of the evidence that it was done with the knowledge and consent of this defendant, then your verdict should be for the defendant, even though you also find that plaintiff bought and paid for said notes before they matured, without knowledge of the equities existing between the payee, Theo. Eads, and the defendant." It is said that this was an incorrect statement of the law, and it is claimed that under the instruction the burden was on plaintiff to establish the alteration, and also to show that it was made with the defendant's consent. We do not so understand the instruction. It clearly recognizes the fact that the burden of proving the alteration is on the defendant, but, when that is done, then it is incumbent on the plaintiff to show that the alteration was made with defendant's consent. One of the material matters pleaded by defendant was the fact that the notes had been altered since their execution and delivery. In the third paragraph of the charge the jury are

told that the burden is on the defendant to establish the averments of his answer. Under all the instructions it is clear the jury could not have understood that the burden was on plaintiff to show the alteration. Was the instruction objectionable, then, in directing the jury that, after the defendant had established the fact that the notes were materially altered, the burden was on plaintiff to show that such alteration was made with defendant's consent? In the case of Odell v. Gallup, 62 Iowa, 253, 17 N. W. Rep. 502, it was simply held that when defendant pleaded the alteration it was incumbent upon him to prove it. In Wing v. Stewart, 68 Iowa, 13, 25 N. W. Rep. 905, it was held that, even if it was the rule that one offering an instrument of writing in evidence was bound to explain any apparent alteration in it before introducing it, it was not applicable under the facts of the case. In Warren v. Chickasaw Co., 13 Iowa, 588, plaintiff offered the instrument in evidence, to which defendant objected, claiming that the words "or bearer" had been inserted therein without his knowledge or consent. The court held that, the execution of the instrument not being denied under oath, it was incumbent on the defendant to show that the alteration was made without the defendant's knowledge or consent. Hagan v. Insurance Co., 81 Iowa, 321, 46 N. W. Rep. 1114, was an action on a policy of insurance. The plaintiff offered his policy in evidence. Defendant objected, on the ground that it was apparent on its face that it had been changed, and hence the burden was on plaintiff to account for the change before he could introduce the policy in evidence; also because plaintiff admitted the change in his reply, and had offered no evidence tending to avoid it. The objection was overruled. Defendant asked an instruction to the effect that, if the jury found there was ground for suspicion on the face of the instrument that the policy had been altered as alleged, then the burden was upon the party offering it in evidence to show when such alteration took place, and by whom it was made, and the intent of it. This was refused, and the court instructed the jury that the burden of establishing the alteration after the delivery of the policy was with the defendant. It will be observed that but two questions were thus raised: (1) Must the plaintiff, in a case where it is apparent, on the face of the instrument that it had been changed, account for the change before he can introduce the instrument in evidence? (2) Was it incumbent on plaintiff, when the face of the instrument showed the change, to show when and by whom such change was made? This court held that ordinarily an apparent alteration raised no presumptions as to when the change was made, and the burden was with the one pleading that an alteration was made after delivery of an instrument, and without the maker's consent, to estab-

lish such facts. The questions in that case were not like that presented in the case at bar. If they had been, we cannot doubt that the case of *Robinson v. Reed*, 46 Iowa, 220, would have been followed. In the latter case it is expressly held that, after the alteration is established, the law imposes upon the plaintiff the burden of showing facts supporting the sufficiency of the indorsement upon which the action is brought. This case was not referred to in the *Hagan Case*. The case of *Robinson v. Reed* is decisive of the questions presented in the case at bar, and the instruction complained of is in harmony therewith. We believe the law as herein announced is correct. *Whitmer v. Frye*, 10 Mo. 348; *Cochran v. Nebeker*, 48 Ind. 459; *Herrick v. Malin*, 22 Wend. 388; *Smith v. McGowan*, 3 Barb. 404; *Simpson v. Davis*, 119 Mass. 269; *Town of Solon v. Bank*, (N. Y. App.) 21 N. E. Rep. 170; *Croswell v. Labree*, 81 Me. 44, 16 Atl. Rep. 331; *Warder, Bushnell & Glessner Co. v. Williard*, (Minn.) 49 N. W. Rep. 300; *Burgwin v. Bishop*, 91 Pa. St. 336; *Eckert v. Loula*, 84 Ind. 99.

7. Objection is made to the twelfth paragraph of the charge given to the jury. In it the court, in effect, told the jury that, if they found that the notes had been altered since their execution in the manner claimed, then the law presumed that such alteration was made with a fraudulent purpose, and by the payee or the plaintiff. We understand this instruction to state the law as announced by this court in *Robinson v. Reed*, *supra*, and in the cases therein cited. We see no reason for departing from the doctrine of that case. We have considered all of the errors properly assigned, and reach the conclusion that the judgment of the court below must be affirmed.

WILSON v. WEBSTER.

(Supreme Court of Iowa. May 24, 1893.)

REAL-ESTATE BROKERS—COMMISSIONS.

M.'s agent agreed to pay plaintiff a commission for selling M.'s land, and defendant offered to exchange his land therefor, and for \$210 in addition. Plaintiff submitted the proposition to M.'s agent, who accepted it, and an agreement for exchange was executed by such agent, in accordance with defendant's proposition, and placed in plaintiff's hands, to have defendant sign it. Without disclosing the fact that an agreement for exchange had already been executed by M., plaintiff told defendant that the trade could be made, and defendant said that he would pay no commissions, but would trade "even," if such a trade could be effected, and executed a written agreement to that effect. The exchange was duly made on the terms first proposed by defendant, and the \$210 paid over to him. *Held*, to show that plaintiff was acting as M.'s agent, and that he was not entitled to recover the \$210 or any other commission from defendant.

Appeal from district court, Woodbury county; Scott M. Ladd, Judge.

Action to recover an amount alleged to be

due plaintiff for services rendered in effecting an exchange of real estate. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Blood & Robinson, for appellant. D. A. Holmes, for appellee.

ROBINSON, C. J. In January, 1891, the defendant owned three lots in Sioux City, on two of which there were mortgages to the amount of \$1,315. At the same time one E. L. Miller owned one lot in Sioux City, on which there were mortgages to the amount of \$8,125. F. B. Robinson, for some time, had been the agent of Miller, with authority to place his property with agents for the purpose of effecting a sale. Plaintiff was a real-estate agent of the city, and there had been some conversation between him and Robinson in regard to the sale of Miller's property. There is some conflict in the evidence, but the facts testified to by plaintiff, or shown without material conflict in the evidence, are substantially as follows: Some time before the transaction in controversy occurred, Robinson agreed with plaintiff to pay him one-half of the commissions usually paid in such cases, or \$181.25, if he would find a purchaser for Miller's lot. About the middle of the month named, plaintiff called on defendant, at his place of business, and told him that an exchange for the Miller property could probably be made. They then examined it, and defendant made a proposition to exchange his property, which we have described, for Miller's lot, excepting a part thereof, 5 feet wide and 40 feet long, and for \$210 in money. In that proposition the value of the interest which he proposed to convey was estimated to be \$5,585, and the value of Miller's interest in his lot to be conveyed was estimated to be \$5,375. When he received the proposition, plaintiff asked defendant what commission he was willing to pay to have the exchange effected. Defendant said he did not think he should pay anything; that he was willing to pay for the making of a cash sale, but "he wouldn't agree to pay anything for a trade until he found out what kind we could get him." Plaintiff submitted the proposition for an exchange to Robinson, who, about 10 days later, notified him that it had been accepted. An agreement for an exchange according to the proposition was drawn by Robinson, in duplicate, and signed by him for Miller. The agreement was then given to plaintiff, for the purpose of having it signed by defendant, and, with it in his pocket, he went to defendant, and, not disclosing what had been done, told him the prospects for making a trade were fair, and asked him what he thought of it, and what commission he was willing to pay. The defendant said the commission would have to come from the other party, but that he would make an even exchange, and that plaintiff might have what-

ever he could get in addition. At the request of plaintiff, a statement to that effect was made, in writing, by defendant. They then went to Robinson's office, and, when there, defendant for the first time learned that his proposition as first made had been accepted, and that the agreement to carry it into effect had been drawn, and signed in behalf of Miller. He read the agreement in the absence of Robinson, and, when he observed the clause which provided for the payment of \$210, plaintiff told him not to say anything about it to Robinson, and he did not, but signed the agreement, in duplicate, as drawn. After they left the office, defendant said that he was making a good thing out of the transaction, and that plaintiff was getting a good deal out of it, but that what he was getting was all right. The agreement was subsequently performed, and the \$210 were paid to defendant. Plaintiff seeks to recover that amount, and obtained judgment therefor in the district court.

The appellant contends that plaintiff acted in the transaction as the agent of Miller, and for that reason is not entitled to recover; that, if he acted as the agent of defendant, the promise to pay a commission was for services already rendered, and therefore was without a sufficient consideration; and that the verdict is contrary to the evidence. The court charged the jury that, if plaintiff acted as the agent of Miller in making the exchange, he could not recover on his alleged agreement with defendant, unless Miller or his agent, Robinson, knew of and consented to it. The plaintiff testified that he was not the agent of Miller in making the exchange; and we are required to determine whether his statement to that effect is sustained by other evidence, or if there is evidence to the contrary, whether there was such a conflict that the jury were justified in finding that the statement of plaintiff is true. As has been stated, Robinson had agreed to pay to plaintiff \$181.25 if he should find a purchaser for the Miller property. It is true plaintiff claims that the terms then given him by Robinson were for a sale, and not for an exchange, but it is clear that when he negotiated the exchange, and for some time thereafter, he fully expected and demanded the payment by Miller of the sum agreed upon by Robinson. He told the latter that defendant was unwilling to pay a commission. The defendant states that plaintiff told him there was a regular commission of \$360 in the Miller deal, and, if plaintiff made it, he would receive one-half of that amount; also that defendant, when asked for a commission before the agreement was signed, told plaintiff he ought to be satisfied with \$181. These statements are not denied by plaintiff. The most reasonable explanation which can be made of his direction to defendant to say nothing to Robinson about the \$210 is that he expected to receive a

commission from Miller through Robinson; that he had led the latter to believe that defendant would not pay a commission; and that, if the fact were known, he believed he would receive nothing from Robinson, or would have to divide with him the \$210. Two days before the exchange was completed, plaintiff first disclosed to Robinson the agreement with defendant in regard to compensation; said that defendant refused to pay him; and requested Robinson to hold the \$210 for his benefit. That Robinson refused to do, accusing him of duplicity, and stating that he had always said he was not to receive anything from defendant. The plaintiff then telegraphed to Miller as follows: "Robinson refuses to pay me any commission for selling your Jennings street property. I shall sue you for regular commission unless paid at once. Wire answer. Geo. W. Wilson, Agent." It appears that Miller made some answer to the telegram, and plaintiff then wrote him a letter, stating that he had been working very hard to sell the property for several months; that Robinson had given him the property at \$13,500, saying that, in case of a sale at that price, there would be \$500 to divide between them; that, in December, Robinson promised him that, if he would obtain a proposition which should be accepted, he would be paid one-half the regular commission, or \$181.25. He requested that the money be sent according to the directions he gave, although he stated he had been advised by his attorney that he could not collect commission by suit from both parties, and that he should not sue Miller or Robinson for what the latter had agreed to give him. It is too clear for serious controversy that plaintiff regarded himself as the agent of Miller, as well as of defendant, in making the exchange, and that his statement as a witness to the contrary is in the nature of a legal conclusion, based upon facts which do not sustain it. The statement made in his letter, after being advised by his attorney that he could not recover commission from both parties, is entitled to no weight as showing that he did not act as the agent of Miller. The evidence also shows that Robinson supposed him to be acting for Miller, and that neither Robinson nor Miller had any knowledge of the fact that plaintiff claimed to be acting as the agent of defendant until after the agreement had been made, and until plaintiff asked that the \$210 in controversy be withheld from defendant. The verdict of the jury necessarily involved a finding to the effect that plaintiff did not act as the agent of Miller in making the exchange, or, if he did so act, that Miller or Robinson knew of his agreement with defendant, and consented to it, and in either case it was not supported by the evidence, and should have been set aside, as contrary to the law of the case as given in the charge. Other questions discussed by counsel depend upon

the evidence, and, as that may not be the same upon another trial, they need not be determined. For the reason indicated, the judgment of the district court is reversed.

SNYDER v. HOCHSTETLER.

(Supreme Court of Iowa. May 27, 1898.)

JURISDICTION—ADMINISTRATION—ACCOUNTING IN ANOTHER STATE.

Where administration was granted by a probate court in Ohio of property there located, an action in a district court in Iowa by an heir living in that state to require an accounting of the administrator cannot be maintained before final settlement and order of distribution by the probate court in Ohio.

Appeal from district court, Polk county; W. F. Conrad, Judge.

Plaintiff, a resident of the state of Iowa, brought this action in equity, aided by attachment, against the defendant, a resident of the state of Ohio, to set aside a settlement, and for an accounting and judgment. Defendant's motion to dismiss the action was sustained, and judgment entered accordingly, from which plaintiff appeals.

Park & Odell, for appellant. Gatch, Connor & Weaver and J. Leonard & Sons, for appellee.

GIVEN, J. 1. Defendant's motion to dismiss is based upon three grounds, namely, that the plaintiff has attempted to bring the defendant into court by the abuse of the process of the court; that the court had no jurisdiction of the person of the defendant; and no jurisdiction of the subject-matter of the action.

We first inquire as to jurisdiction of the subject-matter. The petition shows that plaintiff, a resident of Iowa, the defendant and two others, residents of Ohio, are the children and only heirs of Adam Hochstetler, who died intestate in Holmes county, Ohio, January 13, 1882, leaving said children and his widow surviving him; that for a number of years next prior to his death decedent and defendant were partners in buying, improving, and selling real estate, and in farming operations, which business was open and unsettled at the time decedent died; that decedent was sole owner of certain real and personal property in Holmes county, Ohio, at the time of his death, and of an undivided interest in certain other real and personal property in Holmes county, in common with the defendant as his partner; and that deceased had an interest in certain real estate in Madison county, Iowa, the title to which was in the defendant. The petition further shows that on January 23, 1882, the widow and heirs entered into an agreement in writing containing the following: "And said heirs and legal representatives having agreed upon a division of all the real and personal property, except a small amount of personal

property, and except claims which, with said undivided property, amount to about \$8,000; and said heirs desiring to save expense of administration, and all being over twenty-one years of age,—hereby appoint and designate Josiah Hochstetler as agent for and in our behalf to collect all claims in favor of said estate, and make sale of all property, use, divide, or dispose of the same as he may deem most profitable, and to apply all moneys collected or realized from the sale of property to—First, the payment of all debts of said estate; and, second, to divide all surplus remaining in his hands, after deducting all expenses, and an amount for compensation equal to the amount allowed by law to administrators of estates of deceased persons, equally among the three aforesaid daughters and the said Josiah Hochstetler, in the proportion of one-fourth to each person." On the same day, defendant accepted the agency by written indorsement on said agreement. Plaintiff alleges that she was induced to enter into said agreement upon the representations of defendant that he was sole owner of certain of said lands in Ohio and the land in Iowa, and that he was not indebted to the deceased, all of which representations were false. Wherefore she alleges "that said settlement referred to in the said contract above set out was procured through the said fraudulent statements and representations of defendant, and is therefore fraudulent and void;" that in pursuance of said written contract she and the other heirs deeded to the defendant their interest in the lands in Ohio, and that he now holds the same, and refuses to account to her for her share; that the widow at the same time, "for value received, released to the heirs her dower interest in and to all of said property, and also by deed conveyed her interest in and to the said real estate to the defendant." The prayer of the petition is as follows: "Wherefore, plaintiff prays that said settlement be set aside, and the defendant be adjudged and decreed to render a just and true and explicit account in detail of all property of said decedent which has, at any time, either before or after the death of the said Adam Hochstetler, come into his hands, either as a copartner with said decedent, or under the said agreement hereinbefore set out, or otherwise, or of which he has at any time had knowledge, or of which he has himself or his attorneys or agent had control, and that he make full discovery of all the property, real or personal, or of rights in action, in which the said defendant and the said decedent were joint owners or tenants in common, and the disposition which he has made of such property since the death of said decedent, that the interest of plaintiff may be fully ascertained and determined by this court; and that the defendant be adjudged and decreed to account therefor, with interest thereon, and that she have judgment for said amount of fifteen thousand dollars, (\$15,000.00,) and

such additional sum that may be found due her, and for costs, and such further and other relief as she may in equity be entitled, and that an attachment issue against the property of said defendant for the sum of one thousand dollars, (\$1,000.00) and costs." The defendant shows, by affidavit in support of his motion, that on February 20, 1885, he was duly appointed by the probate court of Holmes county, Ohio, administrator of the estate of said decedent; that he qualified as such, and entered upon the discharge of his duties; and that the estate is not yet fully settled, and that no order of distribution among the heirs has been made; that on April 25, 1885, W. R. Shriver was duly appointed as administrator of said estate by the circuit court of Madison county, Iowa, and qualified as such; and that the estate in Iowa is still in process of settlement, and no distribution has been ordered. Plaintiff shows in resistance of the motion that she and another heir filed exceptions to the first account of defendant as administrator to the probate court of Holmes county, Ohio, certain of which were sustained. The journal entry shows that those sustained were to items wherein the defendant accounted as agent under the contract. The court held that it "has no jurisdiction of the matters done as agent by agreement of heirs." Plaintiff questions the right of defendant to support his motion by affidavit. No such objection was made in the court below, but, on the contrary, plaintiff not only acquiesced in the right, but filed a counter showing. The district court no doubt considered the petition and these showings in passing upon the motion, and under these circumstances they will be considered in this court without determining the question of practice discussed.

2. It will be seen from the foregoing that the plaintiff makes no claim against the defendant, except as relates to rights that came to her as one of the heirs of Adam Hochstetler. As such heir she is entitled to one-fourth of the estate that may remain for distribution to the heirs upon final settlement. By the written contract she made the defendant her agent to settle the estate without administration, and to receive and dispose of her share for her. This contract she declares to be fraudulent and void, and cannot therefore be said to base her action upon it. She does not ask that defendant account as such agent, nor does she show that anything has come into his hands as such. The showing is that the property in his hands is held either as surviving partner or administrator. This being the state of the record, we do not determine the legality of said contract. The petition does not show a cause of action based upon the deed made by plaintiff to defendant. It is not alleged upon what consideration or agreement the deed was made. If we may infer that it was to enable defendant in his individual capacity to receive plaintiff's share for her, there is

no averment that he has received any part of her share in that capacity. It seems to us entirely clear that the subject of the action is not the liability of the defendant to account under the contract of agency or the deed of conveyance. The action is not to recover back the interest in real estate conveyed, for an accounting and money judgment is all that is asked. The whole tenor of the petition shows the cause of action to be for an accounting by the defendant for all property that came into his hands belonging to the estate, including any balance due from him as surviving partner. It is certainly clear that the probate court of Holmes county, Ohio, has jurisdiction to require such accountings. It is not questioned but that the defendant as administrator is amenable to that court alone. In accounting to that court as administrator, he must of necessity show the state of the account with himself as surviving partner. It requires neither argument nor citations to show that the district court of the state of Iowa has no jurisdiction to require the defendant to account as administrator of the estate of Adam Hochstetler, deceased, before final settlement and order of distribution by the probate court of Holmes county, Ohio. The holding of the learned judge of that court that he had no jurisdiction over the defendant as agent is not in conflict with the views we have expressed. It seems to us entirely clear that the subject-matter of this action is for an accounting by the defendant as to the assets in his hands as administrator, and that the district court of Iowa has no jurisdiction to require such an accounting. This view of the case renders it unnecessary that we notice other questions discussed. The judgment of the district court is affirmed.

DORSEY v. BANKS, (CULBRETH, Intervener.)

(Supreme Court of Iowa. May 26, 1893.)

SALE BY TRUSTEE — RATIFICATION BY COURT — PROBATE OF WILL — FRAUDULENT CONVEYANCES.

1. Defendant, who owned an undivided one-third interest in land, and held the balance as trustee, sold it without notice to the cestuis que trustent, as ordered by the court. Shortly thereafter he filed a report with the court in which the estate was being administered, and, on notice to the cestuis que trustent, such sale was confirmed. *Held* a valid sale, the irregularity in failing to give notice to the cestuis que trustent of intent to sell being cured by the ratification and affirmation.

2. Acts 18th Gen. Assem. c. 162, provides that no executor of a will first admitted to probate in another state shall convey any land until three months after the recording of a copy of the will in the probate record of the county where the land is situated. *Held* that, though defendant sold such land within less than three months after record of the will, (the will having been first probated in another state,) such defect would not necessarily invalidate the sale, and that, while it might have authorized the purchaser to refuse the deed tendered, it

was a personal right, which he might waive. 3. Code, § 1923, providing that no sale or mortgage of personal property, "where the vendor retains actual possession thereof," is valid, against existing creditors or subsequent purchasers without notice, unless conveyance thereof is recorded in the county where the holder of the property resides, does not apply to an assignment of notes held by another as agent of the assignor.

Appeal from district court, Sioux county; Scott M. Ladd, Judge.

Action at law, aided by attachment, to recover the amount of a judgment rendered in Maryland. Richard S. Culbreth intervened, claiming an interest in the attached property. There was a trial by jury, and a verdict and judgment in favor of plaintiff for \$18,230.15 and costs, and in favor of intervenor as to the attached property. The plaintiff appeals.

Schmucker & Whitelock and Pitts & Kessey, for appellants. Haines & Tiffany, Richard S. Culbreth, and Kauffman & Guernsey, for appellees.

ROBINSON, C. J. The judgment upon which this action is brought was recovered by plaintiff against defendant, Andrew Banks, in the circuit court of Howard county, Md., on the 5th day of September, 1889. This action was commenced on the 7th day of the same month, and on the same day the writ of attachment was issued, and levied upon the S. $\frac{1}{2}$ of section 11, in township 95 N., of range 46 W., in Sioux county. On the 9th day of the month named, W. H. Siemen was garnished under the writ, and, on the 13th day of the same month, William Rieckhoff was also garnished. The plaintiff, defendant, and intervenor are nonresidents of this state. The answer alleges that on the 27th day of August, 1889, defendant was the owner in fee simple of an undivided one-third of the land attached, and that he held the undivided two-thirds as trustee for the benefit of plaintiff and Annie W. Goodwin, under the provisions of the will of Daniel B. Banks, deceased, all of which was known to plaintiff before the attachment in this case issued; that on the day last named he entered into an agreement in writing with Siemen for the sale of the land, and that immediately thereafter Siemen entered into the actual possession of it, and has continued to occupy it since that time; that before the 5th day of September, 1889, defendant sold and assigned his interest in the proceeds of the sale of the land to intervenor. The petition of intervention alleges that intervenor is the owner of the proceeds of the sale of defendant's interest in the land. The plaintiff admits that defendant held an undivided two-thirds of the land as trustee, as claimed, and that Siemen has been in possession of the land since the date of the alleged sale, but denies that he was in possession in consequence and by virtue of the sale, and alleges that he was in possession as the ten-

ant of defendant. She denies that she had notice of the alleged change of possession before the attachment was levied, and insists that defendant had an attachable interest in the land when the levy was made.

1. Among the facts admitted in this case, or proven without conflict in the evidence, are the following: The land in question was owned by Daniel B. Banks, of Baltimore, Md., now deceased, and was devised by him to defendant; an undivided one-third to be held by him in his own right, and the remainder to be held in trust for plaintiff and Annie W. Goodwin, in equal shares. The will of decedent was probated in Maryland on a date not shown, but was not probated in Iowa until the 25th day of November, 1889. In April, 1888, the circuit court of Baltimore city, Md., having jurisdiction of the estate of decedent, ordered "that hereafter, before making any sales or other disposition of the trust property, the trustee give written notice, and an opportunity to be heard in reference thereto, to the solicitors for the cestui que trust." On the 27th day of August, 1889, the defendant, without having given the notice and opportunity to be heard contemplated by the order of the court, entered into an agreement in writing for the sale of the land, of which the following is a copy: "This agreement witnesseth that Andrew Banks has this day sold to W. Henry Siemen the south half of section eleven, township ninety-five, range forty-six, west of the 5th P. M., in Sioux county, Iowa, for eight thousand dollars, as follows: \$2,000 cash when deed is delivered, and \$6,000 due as follows: Five years from Sept. 1, 1889, provided six months' notice is given; interest 7 per cent. annually from November 1st, 1889, each year. Said Banks is to give warranty deed, and all necessary papers, so that title is vested in him absolute, and all expense of perfecting title is to be paid for by said Banks. The taxes of year 1889 and thereafter are to be paid by Siemen. If either party to this agreement fail to comply strictly with the above provisions, the party so forfeiting shall pay to the other party five hundred dollars in cash, and any court of record shall have power to enter up such judgment. [Signed] Andrew Banks. W. Henry Siemen." On the 4th day of September, 1889, the defendant, as trustee, and in his own right, and his wife, executed to Siemen a deed for the land. On the 17th day of September, 1889, the defendant, as trustee, reported the sale to the circuit court of Baltimore city,—service of the report having been acknowledged on that day by the solicitors of plaintiff and Annie W. Goodwin,—and the report was ratified and confirmed by the court on the 19th day of the next month. The deed was sent to the garnishee, William Rieckhoff, and received by him on the 11th day of September, 1889, and was by him handed to Siemen, but immediately returned to be held until the title should be settled. At the same

time, Siemen obtained from Rieckhoff a loan of \$2,000, and executed his notes and mortgages according to the contract of purchase. The \$2,000 in cash, and a note for \$666.67, were designed for the payment of the amount due for defendant's share of the land. A note for the remainder was made to defendant as trustee. The money and papers were left with Rieckhoff, to be held until the attachment proceedings should be settled. The evidence also tended to show that on the 4th day of September, 1889, defendant assigned, in writing, all the money due and to become due to him from Siemen, to intervener. The consideration of the assignment was the agreement of intervener to pay a note which he had indorsed for the accommodation of defendant, for the sum of \$3,000, and which he has paid. These facts having been shown, the court charged the jury as follows: "Par. 4. The court instructs you that the contract between Siemen and Banks, in the light of all the circumstances surrounding such transaction, together with the subsequent conduct of the parties thereto, was a valid contract of sale of the lands by Banks to Siemen on the 27th day of August, 1889, and that such land would not be subject to the writ of attachment levied thereon at the instance of the plaintiff."

The appellant contends that her rights were fixed on the 7th day of September, 1889, when her writ of attachment was served, and that they could not have been defeated nor affected by any subsequent acts of the defendant and intervener; therefore, that the court erred in giving the portion of the charge quoted. Among the reasons urged in support of this claim is that the contract of sale was not valid and binding; that a court of equity would not have enforced a specific performance of it; and, therefore, that there was not such a change in the character of the interest of defendant in the land as would defeat the levy of the writ. It may be conceded that the contract was not of a character to be fully enforced by a court of equity. It was signed by defendant individually, but not as trustee. It was not signed by his wife, and could not have been enforced against her. It was entered into without notice to the solicitors of plaintiff and Annie W. Goodwin, contrary to the order of the court. But, notwithstanding all this, it does not follow that plaintiff may take advantage of defenses which the purchaser could have made in an action brought to compel him to perform his part of it. It must not be forgotten that an undivided two-thirds of the land could not, in any event, have been appropriated to pay the judgment of plaintiff, and that the attachment and garnishment were ineffectual to create any lien upon such interest, or to impose any liability on account of the proceeds of its sale. The agreement to sell was made contrary to the order of court, it is true; but after it was made

and reported, and due notice had been given to the parties in interest, the court ratified and confirmed it, and the irregularity was thereby waived. The agreement was not made in the name of the defendant, as trustee, but it could have been enforced as to an undivided one-third of the land, subject to the contingent rights of his wife, and created a valid obligation on his part to transfer to the purchaser a perfect title to the entire tract. It may be true that Siemen could not have been compelled to accept what defendant could have been, by a court of equity, compelled to convey; but that did not affect the right of Siemen to demand and accept a conveyance made according to the agreement, and to carry it out on his part. The attachment was not effectual to transfer to plaintiff any defense he may have had to the agreement, but his rights acquired by virtue of it, whatever they were, remained to him intact. He is willing to accept the conveyance tendered by defendant, and the attachment confers no power to prevent such acceptance. As there was no conflict in the evidence in regard to the material facts, the court rightly instructed the jury that the sale was valid.

2. It is said that the agreement was contrary to chapter 162 of the Acts of the 18th General Assembly, which provides that no conveyance of land shall be made by an executor or trustee acting under a will first admitted to probate in another state until three months after the recording of a duly-authenticated copy of the will, original record of appointment, qualification, and bond, (unless bond was waived in the will,) in the proper probate record of the county where the land is situated. In this case, as already stated, the formal conveyance was made September 4, 1889, but the will was not recorded in Sioux county, until November 25, 1889. This objection goes only to the trust estate, and not to the undivided estate of the defendant. While it might have authorized the purchaser to refuse the deed tendered, yet that was a personal right which he could waive. The defect in the proceedings did not necessarily defeat the sale.

3. It is contended that, even if the sale be valid, yet plaintiff has acquired a right, by virtue of the garnishment proceedings, paramount to the interest of intervener in the proceeds of the sale. This claim is founded upon section 1923 of the Code, which is as follows: "No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides." It is not shown that plaintiff had actual notice of the assignment by defendant to intervener of the proceeds of the

sale before the notices of garnishment were served, and the assignment was not recorded in Sioux county. The question presented is whether Rieckhoff is liable for the money and note in his hands, as the property of defendant, notwithstanding their assignment to intervenor five days before the notice of garnishment was served on Siemen, and nine days before it was served on Rieckhoff. The money and note are to be held by the latter until the attachment should be discharged. He knew when he received them that they had been appropriated by defendant to a specific purpose. He appears to have been made a trustee to hold them until the parties in interest shall have ascertained their rights. But it may be conceded, for the purposes of this case, that he received them as agent for defendant. Does section 1923 apply to a case of this kind? It refers to a sale or mortgage of personal property when the vendor or mortgagor "retains actual possession thereof." The meaning of the words "actual possession" was considered in *King v. Wallace*, 78 Iowa, 222, 42 N. W. Rep. 776; and such possession was held to exist where the mortgagor retains the property under his immediate supervision and control, although he employ others to aid in that control, and not to exist where the mortgagor resided in one county, and the property was in the immediate custody, and under the control, of his agent in another county. Under the rule of that case, defendant never had actual possession of the money and note, and did not retain it when the assignment was made. Therefore the section does not apply.

What we have said disposes of the controlling questions in the case. The evidence was sufficient to support the judgment, and we discover no sufficient reason for disturbing it. Affirmed.

TANSEY v. PETERSON et al.

(Supreme Court of Iowa. May 25, 1893.)

GUARANTY.

Under an agreement to guaranty the payment of a draft for a certain sum, a person will not be required to guaranty the payment of a draft for an amount equal to such sum and the interest thereon up to the date the draft is payable.

Appeal from district court, Chickasaw county; L. O. Hatch, Judge.

Action at law to recover of the defendants for the failure to guaranty the payment of a draft drawn by plaintiff's assignor on the Nashua Union Woolen-Mill Company. It is averred in the petition that the said company is a corporation, and that the defendants are directors thereof, and that previous to drawing said draft the said defendants had promised and agreed that they would indorse their personal guaranty upon said draft, and that they failed and refused to perform said undertaking, by which plaintiff's assignor

failed to collect the said draft. There was a demurrer to the petition, which was sustained, and plaintiff appeals.

Boles, Couch & Boles, for appellant. Ellis & Ellis and A. G. Lawrence, for appellees.

ROTHROCK, J. As the question to be determined arises upon the ruling of the district court upon a demurrer, it will be necessary to set out the substance of the petition. It appears therefrom that the Nashua Union Woolen-Mill Company is a corporation doing business at Nashua, in this state. It was engaged in the purchase of wool, and the manufacture and sale of woolen goods. S. Bienenstok & Co. were a partnership doing business in the city of St. Louis, and on December 3, 1888, they addressed a letter to the woolen-mill company, of which letter the following is a copy: "St. Louis, December 3rd, 1888. Nashua Woolen-Mill Co., Nashua, Iowa: Your favor of the first inst. at hand, and contents carefully noted, for which you have our thanks. We have expressed to you to-day one package wool, lot 8, representing about 16,000 lbs., good, strict, selected, and medium. Price 22½ cts. On receipt of sample, please let us hear from you. Yours, very respt., S. Bienenstok & Co." One J. E. Noble was an agent and employee of the woolen-mill company. On the 5th day of December, 1888, Noble answered said letter, as follows: "Nashua, Iowa, December 5th, 1888. S. Bienenstok & Co.—Gents: We have your favor of December 3rd, and have noted the contents. If your wool, lot 8, is as good as the sample sent, we can use it at price named, and you may ship it, say four to five thousand pounds, so we can try it. You can draw on B. L., at sixty days, and our directors will indorse draft as heretofore, and will see it paid promptly when due. If that is not satisfactory, you will wire us on receipt hereof, and, if it is, please ship at once. Yours, truly, Nashua Union Woolen-Mill Co. J. E. Noble, Manager." Noble was authorized by the defendants to pledge and offer the credit of said defendants in the purchase of wool to be used and worked up in the woolen mill, and to write the letter, and make the agreement and order in said letter contained. Prior to writing the last above letter, the said Bienenstok & Co. had sold and shipped to the woolen-mill company a quantity of wool, and had drawn on the woolen-mill company therefor, at 60 days from date of shipment, for the contract price of said wool, together with interest thereon for 63 days, at the rate of 7 per cent. per annum; and the then directors had made and signed the following indorsement on the said draft: "We hereby guaranty the payment of the within draft, and waive notice on non-payment and protest." On the 7th day of December, 1888, Bienenstok & Co. shipped to the woolen-mill company 5,900 pounds of wool, which were as good as the sample referred to in the letter offering to make the

sale. The woolen-mill company refused to accept a larger quantity of wool than was ordered, and reshipped a part of it to the consignors, but retained and converted to its use between 4,000 and 5,000 pounds. After the part of the wool was so returned, Blenenstok & Co. drew their draft on the woolen-mill company for the amount of wool retained by it, at the contract price therefor, together with interest, at the rate of 7 per cent. per annum, for the period of 63 days. The following is a copy of said draft: "S. Blenenstok & Co. \$1,117.36. St. Louis, December 7th, 1888. Sixty days after date, pay to the order of Mechanics' Bank, eleven hundred seventeen and thirty-six one-hundredth dollars, value received, and charge to the order of S. Blenenstok & Co., to the Nashua Union Woolen-Mill Co., Nashua, Iowa." Said Blenenstok & Co., about the time of drawing this draft, demanded of defendants, and each of them, that they guaranty the payment thereof, by indorsing thereon a guaranty similar to that indorsed upon the former draft drawn by them upon the woolen-mill company. The defendants, and each of them, refused to indorse the draft, and, although it was accepted by the woolen-mill company, no part of it has been paid. The plaintiff is assignee of the claim, and the owner and holder thereof. The demurrer is based upon several grounds. They are all to the effect that the transaction between the parties created no binding obligation upon the defendants to indorse that draft presented to them for their written guaranty.

The contract or agreement to guaranty the draft was explicit, in this: that it limited the shipment to four or five thousand pounds, and it required that the draft should be on "B. L." at 60 days. The letters "B. L." stand for "Bill of Lading." It was not intended by the letter written by Noble that the draft should be written on the bill of lading. It merely meant that the usual course should be pursued in this commercial transaction; that is, that the draft should accompany the bill of lading. The defendants were under no obligation to guaranty a draft for more than 5,000 pounds, and they had the right to require that the draft should be presented for their guaranty promptly, and upon the delivery of the wool. It may be that, as part of the wool was returned, and a draft forwarded for a quantity within the terms of the order for wool, the fact that more was shipped in the first instance than was ordered is not material. It is not necessary to decide that question, because, in our opinion, the defendants were not required to indorse the draft for another reason, which we will now consider.

Conceding that the letter written by Noble was binding on the defendants, it was no more than authority to draw at 60 days for the price named. There is no provision in the offer for interest at 7 per cent., or in any other amount. Drawing at 60 days means

payable in 60 days, and, if interest is not named, the instrument draws no interest. It is claimed that the statement that the draft would be indorsed by the directors as heretofore should be held to be an obligation to pay 7 per cent. interest, because interest at that rate was included in the previous transaction. It appears to us that the reference to the former draft cannot be allowed to have that effect. Indorsing "the draft as heretofore" has reference to the form of the indorsement, and not its amount or the rate of interest. This, it appears to us, is apparent from the form of the indorsement. It is a full guaranty of payment, and a waiver of notice of nonpayment and protest. The case is fully within the rule announced by this court in the case of *Lindley v. Bank*, 76 Iowa, 629, 41 N. W. Rep. 381. The judgment of the district court is affirmed.

COLONIAL & U. S. MORTG. CO. v. STEVENS et al.

(Supreme Court of North Dakota. May 9, 1893.)

SURETYSHIP—LIABILITY OF MARRIED WOMEN.

A married woman is liable on a note signed by her as surety for her husband, although she does not charge her separate estate with the payment thereof.

(Syllabus by the Court.)

Appeal from district court, Cass county: William B. McConnell, Judge.

Action by the Colonial & United States Mortgage Company against Orlando Stevens and Ellen A. Stevens on a note. From a judgment dismissing the case, plaintiff appeals. Reversed.

W. J. Kneeshaw, (Byron Abbott, of counsel,) for appellant. Charles A. Pollock, for respondents.

CORLISS, J. We have to determine on this appeal a single question of law. The essential facts are few and simple. The defendant Ellen A. Stevens executed, as surety with her husband, a promissory note to the plaintiff. To secure the note, they both executed a mortgage upon the homestead of the husband. In neither the note nor the mortgage did the wife charge her separate estate with the payment of the amount of the note; nor did she in any other manner charge such estate with its payment. At the time the note was signed she owned no separate estate whatever. The action is brought against her upon the note. The only defense is that she is not liable thereon, because she was a married woman at the time the note was given. This defense was successful below. From the judgment dismissing the action the appeal to this court has been taken, and whether we affirm or reverse this judgment depends upon the question whether a married woman is liable on her contract under the circumstances

existing in this case. The rule which renders her liable must be found in the statute, or it does not exist. At common law, and even under equitable rules, this contract would be void. It is unnecessary to restate the reasons which have been given for the doctrine which exempts married women from liability on their contracts. Neither is a citation of authorities to support this rule necessary. The reasons which gave birth to this rule, and the rule itself, are familiar to bench and bar.

Whenever it is claimed that a married woman is liable upon her contract, and the case does not fall within any exception to the general doctrine of nonliability known to courts of law or equity, we must turn to statutory law for our guide. Several sections of our statutes are referred to by counsel for plaintiff as sustaining his contention that the defendant Ellen A. Stevens is liable upon the note which she signed as surety for her husband. The one which bears most directly upon the question is section 2590 of the Compiled Laws. It declares that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." This statute is very broad in its language. It is true that the contract must be one respecting property; but we cannot assent to the view that it must relate to the married woman's separate property. It would have been easy to have said so in express terms had such been the purpose of the lawmaking power. When the legislature has established the single and simple test that the contract must be one respecting property generally, we have no right to amend the law, and thereby inject into the act a further limitation which will exclude many contracts respecting property. To add another limitation by interpretation would ignore the drift of legislation on the subject of the rights and liabilities of married women. The current runs steadily and strongly in the direction of emancipation of the wife, and of the imposition of responsibility commensurate with her increased rights. Why the words "respecting property" were inserted in the law it is not necessary to determine. It is sufficient for the purposes of this case to give full effect to them. This we do by holding that any contract respecting property is binding upon the wife, whether the agreement does or does not relate to her own separate estate. Some courts have looked upon the married woman as needing protection from her husband in matters relating to property. We are not in accord with these views, which regard the state as more friendly to the wife than her own husband, especially under the sys-

tem which here prevails,—a system which recognizes her legal independence so far, at least, as property and the right to enter into contracts are concerned. Increased rights bring increased responsibilities. It is quite significant that in several of the states the married woman's power to contract is expressly limited to contracts relating to her separate property. Here we have no such limitation in terms, and yet it is urged that these dissimilar statutes are to have the same interpretation. On what principle this contention is based we are unable to discover. A contract to pay money is a contract respecting property. If it does not relate to property, then money is not property. And to what else does such a contract relate if not to property? But we are not without authority on this point. Section 158 of the Civil Code of California is identical in its language with our section 2590 of the Compiled Laws. In *Good v. Moulton*, (Cal.) 8 Pac. Rep. 63, the supreme court of that state held that a wife was liable upon a note signed by her as surety. We quote briefly from the opinion to show the scope of the decision. After referring to an instruction which the trial judge had given, the court said: "The instruction, in effect, told the jury that if Mrs. Moulton was a married woman, and, without consideration, executed the note for the accommodation of D. L. Moulton, and the plaintiff knew these facts, then their verdict must be for the defendants. This was error. In this state a married woman may enter into any engagement or transaction respecting property which she might if unmarried. Section 158, Civil Code. A promissory note is an engagement respecting property which a married woman may make, though it can be enforced only as against her separate property. *Marlow v. Barlew*, 53 Cal. 456; *Alexander v. Bouton*, 55 Cal. 15. If Mrs. Moulton had been unmarried, she could have made a promissory note for the accommodation of her father without receiving any consideration for so doing; and the note so made, in the hands of one who received it for value, would, beyond question, have been valid and binding upon her, though the holder knew how and why it was made. But the fact that she was married does not at all change the rule, or limit her power in this respect." The case is directly in point. No authority to the contrary can be found. The decision is in harmony with advanced ideas upon the subject. It accords with the spirit of our legislation touching married women. By various statutes her property has been wrested from the control of her husband. He is no longer liable for her debts. She is made responsible for her own engagements. Sections 2580, 2593, 2594, Comp. Laws. The policy disclosed by all the legislation in this state upon the subject is to place the married woman upon the same footing as a feme sole with respect to her

property and to her rights to make binding contracts. See, also, as tending to support our views, *Wood v. Orford*, 52 Cal. 412, and *Marlow v. Barlew*, 53 Cal. 456. We have no fear that, under the construction we have placed upon the statute, the wife will become the victim of the husband's machinations to strip her of her property for his own benefit. Nor would the denial of her power to bind herself for the payment of his debts afford her any protection as against her husband. It is always in her power to give him her entire estate, or to pay all his debts out of her separate property. The judgment is reversed, and the district court is directed to enter judgment for plaintiff for the amount due upon the note, with costs. All concur.

FAHEY v. ESTERLEY HARVESTING MACH. CO.

(Supreme Court of North Dakota. March 21, 1893.)

SALE — RESCISSION BY BUYER — WARRANTY — NOTICE OF BREACH TO SELLER — RECOVERY OF AMOUNT PAID — PAYMENT BY NOTE — RES JUDICATA.

1. Before the purchaser after a sale can recover back the purchase price, on the theory of breach of warranty and rescission, he must fully perform all conditions precedent on his part to be performed according to the terms of the warranty. On sale of a harvester, the contract of warranty provided that the purchaser should give written notice of defects, not only to the agent from whom the machine was received, but also to the company at its headquarters. No notice to the company was given. *Held*, under the evidence, that there was no waiver of this requirement, and that therefore plaintiff could not recover back the purchase price on breach of warranty, although the machine was returned by him.

2. When it is not certain that the same question was determined in favor of the party, in another action, who relies on the judgment therein as conclusive as to such question, the judgment is not final on the point. *Held* that, in an action to recover the purchase price of a harvester, on the theory of a breach of the warranty and rescission of the contract, defendant herein could not rely on a judgment against plaintiff in favor of the indorsee for value of a note given by plaintiff on the purchase of such harvester, as settling the issue of a breach of warranty and rescission of the contract of sale against the plaintiff, for the reason that the judgment against plaintiff might have been rendered on the ground that, despite a breach of warranty and rescission of the contract of sale, the indorsee of the note might have recovered as an innocent purchaser thereof before maturity; such a defense not being available as against such a purchaser of negotiable paper, and there being nothing to show on what particular ground the judgment was rendered.

3. Where a purchaser of property gives his note therefor, and afterwards rescinds the contract of sale on the ground of breach of warranty, he may recover the amount of the note and interest, without first paying the same, when the note was negotiated before maturity to an innocent purchaser for value. But the judgment should provide that upon the return of the note to the plaintiff, and his release from all liability thereon growing out of any

judgment which has been recovered thereon, and on payment of costs within a specified time, the judgment should be satisfied.

(Syllabus by the Court.)

Appeal from district court, Richland county; W. S. Lauder, Judge.

Action by Patrick Fahey against the Esterley Harvesting Machine Company for a rescission of contract. Plaintiff had judgment, and from an order denying a new trial, defendant appeals. Reversed.

McCumber & Bogart, for appellant. W. H. Purcell and L. B. Everdell, for respondent.

CORLISS, J. The basis of this action is the rescission of a contract for the sale and purchase of a twine-binding harvester. The plaintiff purchased the property of the defendant for \$110, giving his negotiable promissory note therefor. Upon the sale a written warranty was given to plaintiff by defendant. Plaintiff, claiming that the harvester was not as warranted, returned the machine, and brought suit to recover the purchase price, alleging that defendant had negotiated the note before maturity thereof. One of the defenses set forth in the answer was estoppel by record. This defense was struck out on motion at the trial. We are thus compelled to determine its sufficiency. It set up, in substance, that the note was transferred to the First National Bank of Whitewater, Wis., and that suit was brought upon it by the bank before a justice of the peace, and that in that suit the defendant therein, and the plaintiff in the case at bar, relied as a defense upon the same breach of warranty, followed by the same rescission of the contract of purchase, which constitutes the groundwork of his cause of action in this case. Judgment was rendered in that action against the defendant therein (the plaintiff in this case) for the full amount of the note. The defendant in the present action was not a party to that suit; but waiving this point, whatever force it may have, we are clear that the trial court did not err in holding the defense insufficient. The record of the case before the justice of the peace is set forth in the answer. It appears from that record that the plaintiff therein alleged that it purchased the note, and that the same was indorsed to it by the payee before maturity for a valuable consideration and in good faith. This averment was denied. But we are unable to say that the court did not find this fact in favor of the plaintiff. Such a finding would, of course, preclude all inquiry into the questions of the breach of warranty and rescission. Even though the justice had been convinced of the truth of the defense in this regard, he must have given judgment for plaintiff because of his being a bona fide purchaser before maturity. It thus appears, upon the face of the answer in the case at bar.

that the former judgment may have rested on either of these points,—that there was no breach of warranty and rescission, or that the defendant therein could not, despite such breach of warranty and rescission, sustain his defense, because the plaintiff therein was a good-faith purchaser and indorsee of the note before maturity. The defendant in the case at bar should have shown, by additional allegations in his answer, that the issue as to the breach of the warranty and rescission was in fact found against the defendant in that case, the plaintiff herein. When the record does not settle the question, oral evidence is admissible to show what was in fact decided; but the answer must clearly show the ultimate fact, as to what was decided. If that fact is left in doubt by the answer the defense fails. The case we have to decide falls within that class of cases where a judgment on one cause of action is sought to be used as conclusive in a suit on another cause of action. In such cases the judgment is final only as to the matters which were in fact determined in the former case and adjudicated by the judgment. *Foye v. Patch*, 132 Mass. 105, and cases cited; *Stone v. Stamping Co.*, (Mass.) 29 N. E. Rep. 623; *Cromwell v. County of Sac*, 94 U. S. 351; *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. Rep. 746; *Bell v. Merrifield*, 109 N. Y. 202, 16 N. E. Rep. 55. The least uncertainty as to what was in fact determined in the suit before the justice of the peace is fatal to the use of the judgment as an estoppel on the question of breach of warranty and rescission. This uncertainty created by the record of the proceedings before the justice is not in any manner cleared up by allegations in the answer that the question was in fact determined by the justice against the defendant therein, the plaintiff in the case at bar. "According to Coke, an estoppel must be certain to every intent; and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty upon this head on this record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new

contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined." *Russell v. Place*, 94 U. S. 606. To same effect are *Bell v. Merrifield*, 109 N. Y. 202, 16 N. E. Rep. 55; *Stowell v. Chamberlain*, 60 N. Y. 272; *Stone v. Stamping Co.*, (Mass.) 29 N. E. Rep. 623; *Cook v. Burnley*, 45 Tex. 97; *McDowell v. Langdon*, 3 Gray, 513; *Downer v. Shaw*, 22 N. H. 277; *Chrisman v. Harman*, 29 Grat. 494; *Lea v. Lea*, 99 Mass. 493. If everything alleged in this part of the answer had been established on the trial, it would have been impossible to determine what was in fact settled by the judgment given by the justice of the peace; whether defendant was liable because there was not a breach of warranty and rescission, or because, notwithstanding such breach and rescission, the defense must fail as against the plaintiff, found by the court to be a bona fide purchaser of negotiable paper before maturity. To recover, it was incumbent on plaintiff to show that he had performed all the conditions precedent of the warranty to be performed on his part. This he did not do. Mere breach of the warranty did not entitle him to rely upon its promises. He must have taken action to hold the defendant to its warranty after a breach. It is only upon giving written notice to the agent from whom he received the machine, and also to the Esterley Harvester Machine Company, at Whitewater, Wis., that he is allowed to avail himself of the warranty. Failure to give such notice, if it is provided, is conclusive against the purchaser's right to rely on the warranty. The same evenhanded justice which requires the defendant to keep its promise demands of the plaintiff that he perform his part of the agreement. Neither will it do to assert that notice to the company, in addition to notice to the agent from whom the machine was received, was of no value to the company. The plaintiff has foreclosed all inquiry into that question by agreeing to give such notice. Nor is it difficult to conceive of good reasons for requiring this additional notice. Agents in their zeal to establish a reputation for making sales, and in their natural desire to earn commissions, may often be inclined to go to greater lengths in their endeavor to sustain a sale than the sound business judgment of the company would approve. It is necessary that the company should have direct notice of the purchaser's claim that the machine is unsatisfactory, that the company may act itself in determining what shall be done in such an exigency. If notice is to be given only to the agent, there is no certainty that the company will ever in fact know of the trouble, in time to act prudently. It may often learn of it too late to save itself from heavy loss, and may find its rights seriously embarrassed by the actions and agreements of a subordinate agent directly interested in

supporting the sale. Other sound business reasons will readily suggest themselves to the mind for insisting upon such notice as will insure actual knowledge of the trouble at the headquarters of the company. In this case notice was given to the agent, but no notice, either written or oral, was ever given to the company as required by the warranty. Was the giving of such notice waived by the conduct of any of defendant's agents? We think not. We find no evidence showing any action taken by any agent of the defendant having authority to act for it in the matter of receiving such notice. Certainly, notice to the agent from whom the machine was received was not notice to the company. To hold otherwise would render meaningless that clause which provides for notice to the company in addition to notice to such agent. All the evidence of a waiver of such notice is that which relates to the conduct and words of certain experts employed by defendant, but not sent specially to fix plaintiff's machine, but placed under the control of the agent by whom it was sold, to keep the machines sold by the company in repair. These facts do not show any authority in these experts to substitute their judgment for that of the company in deciding the business proposition, what should be done when complaint should be made that a particular machine was not, when sold, in the condition warranted. They were to fix such machines as the company should conclude to fix, but there was nothing in the nature of their employment which gave them authority to substitute their judgment for that of the company in determining what should be done in any particular case in which the claim of breach of warranty should be made. It is absurd to suppose that, while notice to the agent was not to be sufficient, the company intended that these experts, exercising special powers, under the agent himself, and acting under his direction and control, were to be given complete authority to do away in any case with this explicit requirement that written notice should be sent to the home office,—a requirement so important to enable them to protect their rights. Is there greater certainty that an expert, acting entirely under the direction of the agent, will bother himself to notify the company of difficulties of which his immediate superior has notice, and which he is setting about to remedy? The waiver of notice must come from some agent having power to waive it. The warranty expressly provides that "no agent or expert has any authority to add to or abridge or change it in any manner." The power to waive notice was not in fact vested in these experts, or any one of them; there was nothing in the nature of their employment or the kind of work they were performing to justify the belief that they were authorized to decide for the company all matters it would be called upon to decide when ap-

prised of a claim of breach of warranty; and therefore they had no power to do away with the necessity of notice. The purchaser was distinctly informed that they had no such power, and in the same connection he agreed to give notice to the company itself,—an act simple in its nature, and easy of performance. Business faith required him to send such notice, whatever the agent or other persons might say, for the very nature of the requirement informed him that the company desired and insisted upon such a notice, that there would be no uncertainty of its receipt at the center of power and responsibility,—to guard against the concealment of facts by local agents who might be tempted to withhold full information. The case is so plain that we do not feel the need of authority. But we find adjudications in harmony with our views: *Furneaux v. Esterly*, (Kan.) 13 Pac. Rep. 824, and cases cited; *Nichols v. Knowles*, (Minn.) 18 N. W. Rep. 413.

It is urged that the court erred in striking out what is designated as the equitable defense in the action. On the theory that plaintiff might be able to show, on a new trial, a waiver of the condition requiring notice to be sent to the home office, we will refer to this point. The true theory of this action is that the consideration for the \$110 note failed because of a breach of the warranty, followed by the performance by the plaintiff of all the conditions of the warranty, and by a complete rescission, and that it then became the duty of the defendant to return the note. The authorities seem to sustain the doctrine that on demand for a note, under such circumstances, the cause of action arises, and that the maker may recover the full face value thereof, although he has not paid it or been held liable upon it. *Thayer v. Manley*, 73 N. Y. 305; *Comstock v. Hler*, *Id.* 269; *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. Rep. 784; *Decker v. Matthews*, 12 N. Y. 313. Where the note has been negotiated before maturity for value, as in this case, there would seem to be no doubt as to the soundness of the doctrine; and when the note is still in the hands of the original party, the defendant, but is not due when the action is brought, the rule ought to be and is the same. *Thayer v. Manley*, 73 N. Y. 305. Neither does the fact that the maker might restrain the negotiation of such a note, and compel its surrender in an equitable action, affect his right to maintain an action at law for damages. *Id.* But the judgment ought not to be absolute, if the defendant requests the privilege of restoring the note, and saving plaintiff from all possibility of loss on account thereof. The plaintiff has paid nothing. His right to damages depends upon the danger of being compelled to pay the note. When that danger is removed, it would be a perversion of justice to allow him still to recover judgment for a damage he has not suffered, and cannot possibly suffer in the fu-

ture. If the judgment is to stand absolute, then the note becomes valid, and another action is necessary to settle rights which ought to be adjusted in one suit. Under our system the defendant may urge as defenses matters in legal actions, which under the old system he must by appropriate equitable actions have relied on as the basis of equitable relief. The policy of the law is to settle all the controversy in a single suit. If the maker is insolvent, the defendant is powerless to compel him to disgorge what he has received without any substantial right thereto. The defendant, however, has assumed that the fact of nonpayment of the note, when coupled with the insolvency of the maker, would constitute an absolute defense. In this we think he is in error. His right is to have the judgment contain a provision which will enable him, by a return of the note within a certain time, and the payment of the costs, and the satisfaction of the judgment obtained on the note by the First National Bank of Whitewater, to have the judgment in this case satisfied, should such a judgment on a new trial be rendered against defendant. *Thayer v. Manley*, 73 N. Y. 305.

For the error of the court in refusing to take the case from the jury, on the ground that plaintiff had failed to comply with the condition of the warranty requiring written notice of the defect to be given to the company at their office in Whitewater, Wis., the order denying motion for a new trial is reversed, and a new trial is ordered. All concur.

On Rehearing.

(April 14, 1893.)

We have carefully considered the petition for rehearing, but are unable to agree to the view therein stated, and which appears to have been the view of the learned trial judge. The contention in the petition is that sending out these experts was a waiver of the provision requiring notice to the company at the home office; or that a reasonable man would be justified in construing it as a waiver. They were sent out to remedy such defects as the company should decide to remedy, and not to make that decision for the company in any particular case. It was convenient and even necessary to have them so near their field of labor that they could readily do the work which the company might decide to do. But so placing them that they would be reasonably close to whatever work they might be called upon to perform was no evidence of a purpose to do away with the provision requiring notice at headquarters. Nor could it be construed by any reasonable man as a waiver of such notice. They were not sent out as business managers to decide whether in a given case an alleged defect should be remedied,—whether the company in case of breach of warranty would furnish another machine, as it might under the contract, or remedy the defects in the one sold;

they were sent out as mere experts in the performance of the kind of work involved in making a defective machine a good one. On what principle, then, can it be said that the company intended to waive this provision touching notice, and, in effect, intrust these important business questions to the decision of those who were no employed or sent out for that purpose.

The petition for a rehearing is denied.

CANHAM v. PLANO MANUF'G CO.

(Supreme Court of North Dakota. March 21, 1893.)

POWER OF AGENT TO WARRANT MACHINERY SOLD—RESCISSION OF SALE—WHAT IS.

1. An agent authorized to sell binders for another has power to warrant that the binders will do as good work as any other machine in the market.

2. His general authority to so warrant cannot be restricted as to third persons who have no knowledge of such restriction.

3. Where the purchaser of a binder was induced to keep the machine by repeated promises and attempts to fix the same, made by the agent who sold the same, a return of the binder immediately after discovering that it would not work as warranted, after the last attempt to fix it, is in time to entitle purchaser to claim that he has rescinded the contract for breach of warranty promptly, within the provisions of section 3591, Comp. Laws.

4. *Fahey v. Harvesting Co.*, 55 N. W. Rep. 580, (decided at this term,) followed, as to liability of vendor of property sold with warranty, when the contract of sale is rescinded by vendee for breach of warranty, for the amount of a negotiable note given for purchase price, and negotiated to a bona fide indorsee before maturity, although such note has not been paid.

(Syllabus by the Court.)

Appeal from district court, Richland county; W. S. Lauder, Judge.

Action for breach of contract by John Canham against the Plano Manufacturing Company. Plaintiff had judgment, and defendant appeals. Affirmed.

W. E. Purcell and L. B. Everdell, for appellant. McCumber & Bogart, for respondent.

CORLISS, J. The defendant sold and delivered to plaintiff a twine binder. For this, plaintiff gave him three promissory notes. He subsequently returned the machine, claiming that there was a breach of the warranty accompanying the sale, and, having paid two of these notes, he brings suit to recover the amount so paid, and also the amount due on the other note. If there was a valid warranty on such sale, and a breach thereof, and a valid rescission of the contract, then the consideration for these notes failed, and it was the duty of the defendant to return the note which remained unpaid, and to restore the money which had been paid by the plaintiff in satisfaction of the other two notes. One of the notes was paid to the agent on his promise to remedy

defects in the machine, and the other one was paid by plaintiff to one claiming to be an innocent purchaser for value. In making these payments, plaintiff did not waive his right to a return of the money on failure of the consideration of these notes. The other note having been negotiated before maturity by the defendant, it is liable to plaintiff for the amount due thereon if a failure of consideration is established. *Fahney v. Harvesting Co.*, 55 N. W. Rep. 580, (decided at this term,) and cases there cited.

The sufficiency of the complaint was challenged, but it is clearly sufficient. It shows a breach of warranty and rescission of the contract which would entitle plaintiff to recover the amounts paid on the two notes and the amount due on the note negotiated by defendant before maturity. All these facts relating to these notes are fully set forth in the complaint. It therefore states a cause of action. The court directed a verdict for the plaintiff for the full amount claimed. From the judgment entered upon this verdict, defendant appeals. Was it error to direct this verdict? The machine was sold by an agent of the defendant whose name was Crafts. The warranty was oral. It was, in substance, that the binder would do as good work as any other binder in the market. There is no controversy either as to the fact of this warranty, or as to the fact of a breach thereof. But it is insisted that the plaintiff did not rescind the contract promptly, after discovering the defect. This would be fatal to plaintiff's recovery unless he was induced to delay action by defendant's promise to make the machine work. Section 3591, Comp. Laws. The sale was in July, 1889, and the binder was not in fact returned until August 4, 1890. It is undisputed, however, that the agent Crafts repeatedly promised to put the binder in working order, and requested the plaintiff to keep it, to enable him (Crafts) to do this. A number of efforts to fix it were made during the season of 1889, but they all proved abortive. Each time the attempt failed, plaintiff expressed his determination to return the binder, but was deterred from doing so by Crafts' repeated promises to make the binder do good work, and his often-repeated entreaties that the plaintiff keep the machine, to give him (Crafts) a chance to make it fulfill the warranty. Finally, not being able to make it work during the harvest of 1889, Crafts promised plaintiff that, if he, plaintiff, would keep the binder until next season, he would agree to see that it was put in good working order for next harvest, to do as good work as any other machine in the market. Relying on this promise, plaintiff did keep the binder. It was urged on the argument that Crafts gave his mere personal guaranty that this should be done, but we do not so construe the record. It was undoubtedly understood by both the parties that he was acting for the

defendant in making this promise. During all of this time Crafts was agent for the defendant in the sale of these machines. He was their general agent for this purpose, being intrusted with this business of selling generally, and not merely with the sale of this particular machine. "An agent for a particular transaction is called a special agent. All others are general agents." Section 3962, Comp. Laws. As such agent he had authority to make the warranty on the sale already referred to. Section 3985, Id.; *McCormick v. Kelly*, 28 Minn. 135, 9 N. W. Rep. 675. It cannot be doubted that he had power to represent and bind the defendant by his subsequent conduct and promises, inducing plaintiff to refrain from prompt action on discovery of the defects in the machine. *Snody v. Shier*, (Mich.) 50 N. W. Rep. 252; *Pitsinowsky v. Beardsley*, 37 Iowa, 9. Defendant, through its authorized agent, by its promises and conduct, lulled the plaintiff into a sense of security against prejudice from his failure promptly to restore the property, and cannot be heard to insist that the delay until the year 1890 is fatal to plaintiff's right to rescind for breach of warranty. *Snody v. Shier*, (Mich.) 50 N. W. Rep. 252; *Manufacturing Co. v. Kelly*, 26 Ill. App. 394. In fact, there was a new warranty made in the fall of 1889 that the machine would do as good work the next season as any other binder in the market. In the month of August, 1890, after repeated efforts by plaintiff to induce Crafts to send an expert to fix the binder in accordance with his promise, one was finally sent out to plaintiff's farm. It was Saturday night before the work was finished. Early Monday morning plaintiff started the machine. It did not do good work. The same day it was returned by plaintiff to the same place from which he took it when he purchased it, and he then notified the agent Crafts that he had returned it, and demanded a return of his notes. If Crafts was agent for the defendant during the year 1890 in the sale of its machines, there can be no doubt that plaintiff acted promptly in returning the property to defendant, in view of the promises and conduct of defendant's agent inducing delay, and therefore amounting to a waiver of return until after defendant's final effort to fix the machine. That Crafts could give a new warranty, after failure to make the binder work during the harvest of 1889, cannot be doubted. There being a breach of a former warranty, plaintiff had it in his power to return the binder, and have back his notes, or a new machine in place of the defective one. This new machine would be delivered upon the same warranty which related to the old one. The parties could agree, after the return of the old one, to a new contract of sale of the old binder with warranty, and therefore the agent could make a new warranty without the formality of a return, which he could not prevent.

This same reasoning leads to the conclusion that the agent could attach to the continued holding of the binder by the plaintiff a condition that if it should not do as good work the next season as any other binder in the market he would take it back. This is precisely what he did agree to. It amounted, in effect, to a keeping of the machine by the plaintiff on trial, with a right to return it next year if it should fail to work as stipulated by defendant's agent. Had the binder been returned as sold Crafts would have had power to sell it on trial. *Deering v. Thom*, 29 Minn. 120, 12 N. W. Rep. 350; *Oster v. Mickley*, 35 Minn. 245, 28 N. W. Rep. 710. He therefore had power to promise to take back the binder if it did not work as warranted, without the necessity of a formal surrender of the machine and the cancellation of the contract of sale and the making of a new contract. Whatever view we take of the matter,—whether we regard the old warranty as undisturbed, or consider that a new warranty was made relating to the work the binder would do during the year 1890, or that an agreement was made to take back the binder if it should fail to do good work during the year 1890,—we reach the same conclusion. We hold, as a matter of law, that the binder was returned in time.

But it is urged that Crafts had no authority to give the oral warranty which he made on the sale of the binder. His employment was in writing. It restricted his power to warrant to a written warranty of a specified character, differing from the oral warranty given to plaintiff. This writing was offered in evidence, but on objection of plaintiff it was excluded. In this there was no error. There is no pretense that plaintiff had notice of this restriction of the power of the agent. On the contrary, it affirmatively appears that he did not have such notice. Unless actually restricted in his authority an agent to sell has power to warrant in the manner in which Crafts warranted this binder. Section 3985, Comp. Laws. Crafts was intrusted with the sale of defendant's binders, and had them in his possession for sale. And even if restricted in his authority he would still have such authority to warrant as to all persons who did not have actual or constructive notice of the restrictions upon his powers. Section 3980, *Id.* See, also, *Boothby v. Scales*, 27 Wis. 635.

It is also urged that this written employment of Crafts as agent should have been received, because it showed on its face that his employment was only for the season of 1889, and that therefore nothing done by Crafts during 1890 would bind the defendant. In the same connection it is urged that the return of the property to Crafts in 1890 would not be a good delivery to defendant if Crafts had ceased to be defendant's agent. This excluded writing, it is urged, was evidence of the fact that he was not such agent

for 1890. But it was not evidence of this fact. It did not show that he was not agent for 1890. It was not at all inconsistent with his employment as agent the following year. Moreover, there is another reason why it was not error to receive this writing for this purpose. It was plainly offered for another purpose, for which it was incompetent, i. e. to bind plaintiff by restrictions on what would otherwise be the agent's authority, without offering to bring home to plaintiff notice of such restriction. Being rejected as evidence for this purpose, the defendant should have stated the other object for which it was desired to have it admitted in evidence. Having failed to do so, he cannot complain of the refusal to receive it as error. There was no claim on the trial that Crafts was not the agent of defendant during the year 1890, the same as the year before. We do not think that the presumption of the continuance of the agency, after the fact of agency had been once established, could be rebutted by the introduction of the written contract of employment, silent on the point as to whether the agent was employed the ensuing year, when the agent himself was put upon the stand by the defendant as a witness for defendant. A simple inquiry would have settled this question, and the fact that Crafts was not interrogated by defendant on this point is convincing to our minds that there was no thought of raising any such point, and this confirms our belief that the written instrument under which Crafts was employed was not offered for the purpose of overthrowing the presumption of the continuance of the agency. We have carefully considered the points raised, and finding no error the judgment is affirmed. All concur.

STATE ex rel. DIEBOLD SAFE & LOCK CO. v. GETCHELL, County Auditor.

(Supreme Court of North Dakota. April 25, 1893.)

COUNTIES—EXPENDITURES IN EXCESS OF REVENUE
—ASSENT OF VOTERS—BENEFITS—ACCEPTANCE.

1. The writ of mandamus is never awarded to aid in the collection of an illegal claim.

2. The county commissioners of Eddy county allowed the bill of the relator, and directed a warrant to be drawn therefor in payment for corridor and cells put up in the county jail by relator at the request of such board. The question of such expenditure was never submitted to the voters of the county, and the amount of such bill and proposed warrant was greater than could be paid out of the annual revenue of the county for the current year. The defendant, as auditor, refused to attest and certify such warrant, and the district court refused to award the writ of mandamus compelling him to do so. *Held*, that the ruling of the court below was proper, as the expenditure would have been illegal, under section 607, Comp. Laws.

3. The voters not having assented to such expenditure, the commissioners were without lawful authority to make the same, and hence

their acceptance of the benefits would not operate to bind the county.

(Syllabus by the Court.)

Appeal from district court, Eddy county; Roderick Rose, Judge.

Application by the Diebold Safe & Lock Company for writ of mandate to Fred O. Getchell, county auditor of Eddy county. Application denied. Plaintiff appeals. Affirmed.

E. W. Camp, (Edward B. Graves, of counsel,) for appellant. J. F. Kelme and Fredrus Baldwin, for respondent.

CORLISS, J. The appeal is from an order denying relator's application for a writ of mandamus to compel defendant, as auditor of Eddy county, to attest and certify a county warrant issued by the board of county commissioners, and signed by the chairman thereof. The relator did not secure, in the first instance, an alternative writ, but applied on notice for a permanent writ. The better and more regular practice is to obtain the alternative writ on an ex parte application. The alternate writ constitutes both the process and the pleading in the special proceeding. But it cannot be doubted that there are precedents warranting an application for a peremptory writ on notice without the preliminary issue of the alternative writ, and our Code recognizes this practice. Sections 5520, 5521, Comp. Laws. Accompanying the notice of application for the writ was an affidavit, and in the notice it was stated that the relator would apply for a "writ of mandamus" upon the facts set forth in such affidavit. On the hearing a petition was also filed, embodying, in substance, the same facts embraced in the affidavit. In this petition there was a prayer for a peremptory writ of mandamus. The defendant filed an answer on the return day, and also an affidavit in which were set forth the same facts which were contained in the answer. The contention of the relator in this court is that he applied on this hearing for an alternative writ, and that the court erred in refusing to issue such writ. We do not so construe the record. It is apparent from the record that the parties intended to and did submit to the court all controverted questions of fact upon the pleadings and the affidavits, and upon admissions made in open court after the answer was filed. The order denying the application for the writ recites that there was a hearing of the relator's application for a writ of mandamus at a regular term of court, and that on this hearing these affidavits were read and filed, and that certain facts were admitted by the parties to the proceeding. Why these admissions were made, if the only object was to ask for an alternative writ, it is impossible to discover. The issues to be tried would be formed by the return or answer to the alternative writ, were it intended that such writ should be issued.

Why, therefore, make admissions on the application for such a writ? The time for admissions, and the use of affidavits, would be upon the trial of such issues, after the alternative writ had been granted. What possible object could the relator have had in securing an alternative writ? To this writ the same answer would have been made, and thus the same issues would have been presented for trial which were already before the court for trial in this more informal manner. Section 5520 of the Compiled Laws contemplates that there may be a trial of matters of fact upon the hearing, based upon notice, instead of upon an alternative writ. It provides that when the application is upon notice the peremptory writ may be issued in the first instance. But the peremptory writ will never issue so long as a material fact is in controversy; and if it may issue in the first instance, in such a case, it must be that the court has power, upon the hearing based upon notice, to try and determine all disputed matters of fact. There is no absolute right to a jury trial. The court, in its discretion, may order the issues to be tried before a jury. Section 5522, Comp. Laws.

As we are of opinion that the parties submitted the case on the merits, and that, therefore, the relator asked for a peremptory writ, the question arises whether the court was bound, in any view of the case, to award such peremptory writ. In deciding this question we must assume that the trial judge found in favor of the defendant any and all facts necessary to support his decision, of which there was evidence before him. The county warrant which the relator is seeking to compel the defendant to attest and certify as auditor was ordered to be drawn, by resolution of the board, in payment for jail cells and a corridor furnished during the year 1891 by the relator to Eddy county, and put in place by the relator, in the jail of such county, under a contract made in 1891 with the board of county commissioners of such county to pay therefor the sum of \$1,785. In the answer it is alleged "that neither said sum of \$1,785 alleged in the petition, nor any part of said sum, could be paid out of the current revenue of said county for said year 1891; that to pay said sum it was necessary to create an indebtedness." And in the defendant's affidavit used upon the hearing it is stated "that the current income of Eddy county in the year of 1891 was not large enough to pay the warrants drawn in that year, and the said county was at that time owing a larger sum of money on unpaid county warrants than one year's revenue of said county; that there was no money in the county treasury, then, out of which said so-called warrant could be paid; that said sum could not be paid out of the annual tax; that said so-called warrant created, or would create, an indebtedness that Eddy county could not

possibly meet for more than one year from its date." The contract was made in October, 1891, and it was admitted upon the hearing that the question of making such expenditure was never submitted to a vote of the people of such county. It is practically conceded that under these facts the contract is void, under section 607, Comp. Laws, unless the illegal action of the board of county commissioners in making this contract was subsequently ratified. But the court had no evidence of ratification before it. It is true that it is stated in the petition and affidavit of relator that the board of county commissioners accepted the work. But this does not constitute ratification. What the board could not do in the first instance, it could not thereafter make valid by ratification. The power must come from a higher source,—the vote of the people. It is not a case where there has been some irregularity in the exercise of a power vested in the board. It is a usurpation of power by the board which the legislature, in express terms, has withheld from the board, and vested in the people, and in the people alone. The people must ratify, because ratification presupposes power to do the act ratified. *Mechem, Ag. § 121; People v. Gleason, (N. Y. App.) 25 N. E. Rep. 4; Dickinson v. City of Poughkeepsie, 75 N. Y. 65; McDonald v. Mayor, etc., 68 N. Y. 23; Capital Bank of St. Paul v. School Dist. No. 53, 1 N. Dak. 479, 48 N. W. Rep. 363.* There was no evidence that the people have ever taken any action pointing towards a ratification of this unlawful agreement. Under section 3972 "a ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified," except in cases where an oral authorization would have been sufficient. In such cases, and only in such cases, will the acceptance and retention of the benefits of the act, with notice thereof, constitute a ratification thereof. As the board of county commissioners could derive their authority to make such a contract only from a vote of the people, and not from any oral authorization of the act, it is difficult to see how anything short of such a vote, or of an act of the legislature, can render the county liable on this contract. Mere use of the property by officials should not be evidence of ratification. The people cannot prevent such use, nor are they under obligations to take steps to prevent such use. Neither are they required to cause to be removed from the county building property which was placed there without their consent; such consent, as evidenced by a vote of the people, being necessary to bind them. The legislature has prescribed the mode of ascertaining their will towards such extraordinary expenditures. It is by a vote of the people. It would be a dangerous doctrine that any other conduct of the people would be sufficient evidence of their will

as to such unusual expenditures, for it would be impossible to determine by any other test whether a majority of the people were desirous of incurring such a debt. It is to such majority that the law confides the power, and the only safe rule to ascertain whether a majority of the people favor the project is by a popular vote. In the following cases the defendants retained the benefits of the void contracts, and yet it was adjudged that there was no liability on that account: *People v. Gleason, (N. Y. App.) 25 N. E. Rep. 4; Dickinson v. City of Poughkeepsie, 75 N. Y. 65; McDonald v. Mayor, etc., 68 N. Y. 23.* The mere auditing of the claim by the board of county commissioners did not validate the contract. *People v. Gleason, (N. Y. App.) 25 N. E. Rep. 4.* This case is very much in point on the merits of the case at bar.

It appearing from this record that the warrant was issued to pay an illegal debt, and there being no evidence of ratification thereof, the defendant was fully justified in refusing to attest the warrant under section 187 of the state constitution. See *State v. Hill, 32 Minn. 275, 20 N. W. Rep. 196; High, Extr. Rem. § 40.* We do not wish to be understood as deciding that the illegality of this claim is finally settled, so far as the facts are concerned, the county of Eddy not being a party to this proceeding.

The order is affirmed. All concur.

COLER et al. v. DWIGHT SCHOOL TP. OF RICHLAND COUNTY.

(Supreme Court of North Dakota. April 25, 1893.)

SCHOOL TOWNSHIP—ISSUE OF BONDS BY DISTRICT
—LIABILITY — ESTOPPEL — EXISTENCE OF DISTRICT.

1. The county superintendent of schools, under chapter 14, Laws 1879, organized a school district. School-district officers were elected, and exercised the functions of their respective offices; teachers were employed by the district, and school was taught therein, and a school meeting was held in the district to vote upon the question of issuing bonds to build a schoolhouse. Such bonds were thereafter issued. In an action upon some of the interest coupons of such bonds, *held*, that the district was a de facto municipal corporation, and that therefore the defense could not be interposed that the bonds were void on the ground that the district had no legal existence because of failure to comply with provisions of the statute regulating the organization of such districts in matters which went to the jurisdiction of the county superintendent to organize the district.

2. Municipal corporations are estopped, as against bona fide holders of municipal bonds, from setting up as a defense to an action thereon that all the preliminary steps necessary to authorize the issue of the bonds were not taken, when the officers who have charge of the issue of such bonds are especially or impliedly authorized to determine whether all the conditions precedent to the issue of valid bonds have been complied with, and recite in the bonds so issued that they have been complied with. It is not necessary to estop the corpora-

district is thereby rendered void? The county superintendent creates the district. His decision, embodied in written form, is the act which calls the new corporation into being, provided he has been given authority to proceed by the presentation and filing of the proper petition. The statute requires him to keep a record of his official acts, (section 12,) and it is to this record that the court must look to see if the district has been formed. The record so kept by the county superintendent shows the following entry: "District No. 22, organized October 24th, 1881, and includes the following described territory: South half of sections 19, 20, 21, 22, and 23, and all of sections 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, in township 133, range 49, and one-half of section 5, in township 132, range 49, and sections 24, 25, and 36, township 133, range 50." The statute does not declare that furnishing the county commissioners with a written description of the boundaries, and the filing thereof in the office of the register of deeds, are conditions precedent to the existence of the district. Quite the contrary. The statute refers to the district as a corporation already formed before the doing of these acts. It does not withhold corporate life until the description is furnished and filed. It merely provides that the district shall not be entitled to proceed with its organization by the election of school officers before these acts are performed. The corporation exists; the district offices exist; but no election of officers can be held until after certain acts are performed. This is the plain reading of the statute. Said the court in *School Directors of Union School Dist. No. 4 v. School Directors of New Union School Dist. No. 2*, (Ill. Sup.) 28 N. E. Rep. 49, at page 52: "And the failure of the township trustees to file with the county a map showing the lands embraced in the new district will not have the effect to destroy its corporate existence, or to prevent the directors of a new district from levying taxes for school purposes therein;" citing *School Directors of Dist. No. 5 v. School Directors of Dist. No. 10*, 73 Ill. 250. A municipal corporation may have life, although there are no officers in office. No claim is made that the officers who in fact signed the bonds and coupons were not at least de facto officers of the district, provided there was a legal organization thereof. Nor could it be successfully contended that such officers were not at least de facto officers, there having been an attempt to comply with the law requiring the furnishing and filing of the description before officers should be elected, and the officers being in actual possession of their respective offices and exercising the functions thereof, and there being no other persons pretending to lay claim to such offices. Nor would we reach a different conclusion were we of opinion that the organization of the district was so defective that the proceedings would be set aside on

certiorari, or the right of the district to act as such would be denied by judgment in quo warranto. At the time these bonds were issued the district was acting as a de facto district under at least color of organization. It had elected its district officers; had held its district meetings; had voted to borrow money to build a schoolhouse; and it appears to be undisputed that the proceeds of these bonds were used for that purpose, and the inhabitants received the benefit thereof. A schoolhouse has been built, and school has been taught therein. To allow the defense that the proceedings in the organization were defective to defeat the debt represented by these bonds would, under these circumstances, be to sanction repudiation of an honest obligation. We are firm in the opinion that the legality of the organization of a municipal corporation cannot be thus collaterally attacked. Citizens of the district who are opposed to the formation of such a corporation are not without remedy. Certiorari will reach the action of the county superintendent when without jurisdiction. *People v. Board of Sup'rs*, 41 Mich. 647, 2 N. W. Rep. 904. The statute allows an appeal. Section 25, c. 14, Laws 1879. The corporate existence may be attacked by quo warranto. *State v. Bradford*, 32 Vt. 50; *People v. Clark*, 70 N. Y. 518; *Cheshire v. Kelley*, (Ill. Sup.) 6 N. E. Rep. 486; *Comp. Laws*, § 5348, subd. 3; *Territory v. Armstrong*, 6 Dak. 226, 50 N. W. Rep. 832. The evils resulting from a doctrine which would permit the legality of the organization of a municipal corporation to be inquired into collaterally—in an action to enforce a debt, in a proceeding to collect a tax levied by the de facto corporation, or in a litigation over a tax title growing out of a tax imposed by such municipality—would be as great as the evils which would flow from the collateral inquiry into the title of a person to an office, the functions of which he is in fact exercising. This same argument reaches the objection that no sufficient petition was ever presented and filed, even assuming that the record sustained the claim that this requirement of the statute was not complied with. It does not follow, because the organization was illegal for want of power in the county superintendent, that at all times, in every species of litigation, and by any person, the existence of the de facto district can be assailed. It is no more essential to the exercise by the county superintendent of this power that a petition should be filed than that it should be signed by a majority of the citizens residing in the district. It is the fact, and not the decision of the superintendent that the fact exists, which gives him jurisdiction. A petition is filed lacking the signature of one citizen to make it a petition signed by a majority of the citizens; in all other respects the organization is regular; bonds are issued, a schoolhouse built, and school taught. Is all this to be ignored, to be treated as illegal, because there

was no de jure district? Who are the real parties interested in defeating such a debt? The taxpayers within the district. In what position are those to object who participated in the organization? They have attempted to form a district. They for a time believe that they have formed it. They elect officers; borrow money on bonds for district purposes; build a schoolhouse therewith; and use the money for other purposes connected with the functions of the district. On what principle can the existence of the district be denied by them for their benefit? If any within the district refrained from affirmative action, still they are chargeable with passive acquiescence when they might have acted, and acted effectually, against the de facto existence of the district, and thus have prevented an imposition upon the innocent who were justified in taking that to be a legal district which was acting as such, and to all appearances was warranted in acting as such. Those who were silent, when in conscience they should have spoken, have no claim upon the equity of this court. They did not protest; they did not appeal; they did not resort to certiorari; they made no effort to have the district attorney overthrow this de facto district by quo warranto; and when the bonds were voted for they appealed to no chancellor to protect their property from an illegal debt. Not only the considerations which lie at the foundation of the rule protecting the public in dealing with a de facto officer, but also a principle very analogous to that of equitable estoppel, protects these bondholders against repudiation under the forms of the law. If there cannot be a de facto school district, there cannot be a de facto city. If illegality in the proceedings to effect organization is fatal to the existence of a district, it is equally as fatal to the existence of a municipal corporation of a higher grade. Given a case where the defects in the incorporation of the city are as fatal as in this case, and then deny to that corporation any effect, although a city government is in fact inaugurated and carried on, and the consequences would be intolerable. Open and acknowledged anarchy would for some reasons be preferable. In after years tax titles would be destroyed; every officer of the city would be a trespasser when the discharge of what would be his duty on the theory of the existence of the corporation led to an interference with the property or person of others. Every police or other peace officer and every magistrate acting under the supposed authority of the city government would be liable for extortion, for assault and battery, for false imprisonment, and could be prosecuted criminally for acts done in good faith in the enforcement of the criminal law. An army of creditors whose savings have gone into the city treasury, and through the treasury into public buildings and other public improvements, find, to their astonishment and

dismay, that they have received in exchange beautifully lithographed but worthless bonds as souvenirs of their abused confidence. All that has been done in good faith under color of law is only barefaced usurpation, and to be treated as such for all purposes. Such a doctrine would be the author of confusion, injustice, and almost endless litigation. The imagination cannot embrace all the gross wrong to which it would lead when pushed, as it must be, to its logical consequences. On the other hand, no great injury can result to the citizens or state by recognizing a de facto corporation; one acting as such under color of organization. If the law is disregarded in the attempt to organize the municipality, the violation of law always can be nipped in the bud by appropriate judicial proceedings. We find that our views are by no means novel. The rule that the existence of a de facto municipal corporation cannot be collaterally assailed has frequently been recognized and applied by the courts. *Stuart v. School Dist.*, 30 Mich. 69; *People v. Maynard*, 15 Mich. 470; *Krutz v. Town Co.*, 20 Kan. 397; *Tisdale v. Town of Minonk*, 40 Ill. 9; *Geneva v. Cole*, 61 Ill. 397; *People v. Farnham*, 35 Ill. 562; *Jameson v. People*, 16 Ill. 257; *Sherry v. Gilmore*, (Wis.) 17 N. W. Rep. 252; *State v. Railroad Co.*, (Nev.) 25 Pac. Rep. 296; *School Dist. No. 2 v. School Dist. No. 1*, (Kan.) 26 Pac. Rep. 43; *Railroad Co. v. Wilson*, (Kan.) 6 Pac. Rep. 281; *Clement v. Everest*, 29 Mich. 19; *Stockle v. Silsbee*, 41 Mich. 615, 2 N. W. Rep. 900; *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. Rep. 285, 289; *Mendenhall v. Burton*, (Kan.) 22 Pac. Rep. 558; *School Directors of Union School Dist. No. 4 v. School Directors of New Union School Dist. No. 2*, (Ill. Sup.) 28 N. E. Rep. 49; 15 Amer. & Eng. Enc. Law, 965; 1 Dill. Mun. Corp. § 43; *President, etc., v. Thompson*, 20 Ill. 197; *Town of Enterprise v. State*, (Fla.) 10 South. Rep. 740. See 2 Dill. Mun. Corp. § 894; *State v. Wennerby*, 45 Mo. 17; *Board v. Lewis*, 10 Sup. Ct. Rep. 286; *Austrian v. Guy*, 21 Fed. Rep. 500. In some of the cases time seems to have been considered an element of some importance, but the public may as effectually be deceived by a de facto organization the day after it is complete as a decade thereafter. The time a de facto officer has been in possession of an office is never regarded as controlling. He is as much an officer, as to the public, the day after he intrudes into the office as a year later. "The same rule which recognizes the rights of officers de facto, recognizes corporations de facto, and this is necessary for public and private security." *Clement v. Everest*, 29 Mich. 19-23.

We have treated this power as if the action were upon the bonds themselves, because the holders of interest coupons may recover if they could maintain an action on the bonds under the same circumstances. It is also urged that there was a failure to com-

ply with certain conditions precedent to the valid exercise of the power conferred upon such districts by law to borrow money on district bonds. The statute regulating the issuing of such bonds provides, in substance, that they can be issued only when a majority of the electors of the district present and voting at a district meeting shall vote to issue the same. Chapter 24, Laws 1881, § 1. Section 2 of this act provides: "Before the question of issuing bonds shall be submitted to a vote of the district, notices shall be posted in at least three public and conspicuous places in said district, stating the time and place of meeting, the amount of bonds that will be required to be issued, and the time in which they shall be made payable, at least twenty days before the time of meeting; and the voting shall be done by means of written or printed ballots, and all ballots deposited in favor of issuing bonds shall have thereon the words 'for issuing bonds,' and those opposed thereto shall have thereon the words 'against issuing bonds,' and if the majority of all the votes cast shall be in favor of issuing bonds, the school board, or other proper officers, shall forthwith proceed to issue bonds in accordance with the vote; but if a majority of all the votes cast are opposed to issuing bonds, then no further action can be had, and the question shall not be again submitted to vote for one year thereafter: provided, however, that the question of issuing bonds shall not be submitted to a vote of the district, and no meeting shall be called for that purpose, until the district school board shall have been so petitioned, in writing, by a majority of the resident electors of said school district." It is contended that the school board was not petitioned to submit the question of issuing the bonds to a vote as required by the proviso to section 2. We think the defendant is not in position to raise this point. The plaintiffs are bona fide holders of the coupons. The recital in the bonds is therefore fatal to this defense. Upon their face appears the following statement: "This bond is issued on the 24th day of June, 1882, by School District No. 22, county of Richland, D. T., for building and furnishing a school-house, under and in pursuance of, and in strict conformity with, the provisions of an act of the legislative assembly of the territory of Dakota, entitled 'An act to empower school districts to issue bonds for building schoolhouses,' approved March 3, 1881, and of a vote of said district at a special meeting had on the 29th day of November, 1881." Upon the back of each bond is the following certificate, signed by the clerk of the district: "I certify that the within bond is issued in accordance with a vote of School District No. 22, of Richland county, Dakota territory, at a special meeting held on the 29th day of November, A. D. 1881, to issue bonds to the amount of twelve hundred dollars." It is obvious from the statute that the officers by whom the bonds are to be issued

are intrusted with the duty of determining whether the statute has been complied with as to all matters necessary to give them authority to issue the bonds. Their statement embodied in these bonds therefore estops the district and its successors from showing aught to the contrary. The rule and the reason for it have been so often stated, and are so well known to the profession, that it will suffice to cite some of the numerous authorities on the point: *Inhabitants v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333; *Oregon v. Jennings*, 119 U. S. 74-92, 7 Sup. Ct. Rep. 124; *County of Moultrie v. Rockingham, etc., Bank*, 92 U. S. 631; *Venice v. Murdock, Id.* 404; *Town of Colona v. Eaves, Id.* 484; *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; *Humboldt Tp. v. Long*, 92 U. S. 642; *Commissioners of Knox Co. v. Aspinwall*, 21 How. 539; *Fulton v. Town of Riverton, (Minn.)* 44 N. W. Rep. 257; 15 Amer. & Eng. Enc. Law, 1295 et seq.; *Burr. Pub. Secur.* 299 et seq. It is not necessary that the power to determine these facts should have been expressly conferred upon the district officers by the statute. "It is enough that full control in the matter is given to the officers named." *Inhabitants v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333; *Fulton v. Town of Riverton, (Minn.)* 44 N. W. Rep. 257. Nor is it essential that the statement should set forth in detail that all of the various conditions precedent have been complied with. It is sufficient if it is stated that the bond was issued in pursuance of the statute, designating it in such a manner as to identify it. This is in legal effect a statement that each and all of the necessary preliminary steps were taken to authorize the issue of the bonds. *Inhabitants v. Morrison*, 133 U. S. 523, 10 Sup. Ct. Rep. 333; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315; 15 Amer. & Eng. Enc. Law, 1300; *County of Moultrie v. Rockingham, etc., Bank*, 92 U. S. 631. But the statement went much further. It asserted that the bonds had been issued under and in pursuance of, and in strict conformity with, the act authorizing their issue, "and of a vote of said district at a special meeting had on the 29th day of November, 1881." The certificate indorsed on the bonds by the clerk was required by the statute to be indorsed thereon. Chapter 24, Laws 1881, § 4. The statute specifies what the certificate shall contain, and this provision was strictly complied with in the issuing of these bonds. This requirement indicates that it was for the protection of the purchaser of the bonds, who might implicitly rely upon the clerk's certificate as conclusive evidence that all necessary preliminary steps had been legally and regularly taken.

We come now to the claim that the plaintiffs have sued the wrong corporation. The defendant did not issue these bonds. If liable at all, it must be by virtue of some statute. Chapter 44, Laws 1883, is pointed to as

the act which binds the defendant to pay these bonds. This law provides for a new system. The district school system was to be abolished, and the township school system to take its place. Under this statute it was the duty of the board of county commissioners to divide all organized counties into school townships. The finding of the court is that on May 23, 1883, the commissioners of Richland county duly organized the school township of Dwight in that county, and that the territory within this new school township embraced nearly all of the territory of the old school district No. 22; and that the schoolhouse and school furniture belonging to the district were received into and are owned by the defendant. There is sufficient evidence to support the finding that the schoolhouse belonging to district No. 22 is within the territorial limits of the defendant. Under these facts the liability of the defendant on these bonds would be clear, under section 144 of the act, were it not for the provisions of section 136, to which we will in a moment refer. Section 144 provides as follows: "Every school township shall be liable for, and shall assume and pay fully, according to their legal tenor, effect, and obligation, all the outstanding bonds and the interest thereon, of every school district, the schoolhouse and furniture of which are received and included within the school township, and owned thereby, the same as if said bonds had been issued by said school township; and the law which authorized the school district to issue bonds shall apply to the school township the same as if it had originally been authorized to issue, and had issued, the said bonds. The bonds shall be deemed in law the bonds of the school township, with the same validity for securing and enforcing the payment of principal and interest that they would have had against the district that issued them." There can be no question as to the power of the legislature to impose upon a new municipality, which includes all or a portion of the territory of an old municipal corporation, liability for the debts of the old corporation, where the property of the latter is turned over to and received by the former under the law. *Mt. Pleasant v. Beckwith*, 100 U. S. 514; 1 Dill. Mun. Corp. § 63; *State v. City of Lake City*, 25 Minn. 404; *City of Winona v. School Dist. No. 82*, 40 Minn. 13, 41 N. W. Rep. 539; *Demattos v. City of New Whatcom*, (Wash.) 29 Pac. Rep. 933; *Laramie County v. Albany County*, 92 U. S. 307; *Schröber v. Town of Langlade*, (Wis.) 29 N. W. Rep. 547, and cases cited in opinion; *Knight v. Town of Ashland*, (Wis.) 21 N. W. Rep. 65-70. See, also, note to *Staté v. Clevenger*, [Neb., 43 N. W. Rep. 243,] in 20 Amer. St. Rep. 677. Indeed, many of the cases go much further than is necessary to support this legislation. But it is contended that School District No. 22 has not ceased to exist; that the organization of the defendant

is not complete; and the argument from these premises is that district No. 22, and not the defendant, is at present liable for these bonds. The section of the statute on which the claim rests is section 136. It provides as follows: "The adoption of the system herein provided, and the passage and approval of this act, shall not have the effect to discontinue, abolish, and render null such school districts or their organization as they may now exist in any county, but they shall continue to exist, and their officers to act as such, in law and fact, until the school township organization is complete, so far as it includes any particular district or districts, or the larger part of any particular district. And such township organization shall not be deemed complete, nor such districts so cease to exist, and their officers to act as such, until all matters between the district and the township are adjusted, and the property delivered, funds paid over, and an adjustment is reached for the equalization of taxes and property between the districts which enter into the school township, so far as such taxes and property remain permanent in houses, sites, furniture, and other parts of houses and grounds." The next two sections prescribe the procedure by which the equalization of taxes is to be determined, and the rules which are to govern such equalization. Now, it is quite clear to our mind that section 136 was incorporated in the statute merely to keep the old districts alive, for the purpose of adjusting their rights among themselves, so that taxpayers living in each portion of the new township which formerly constituted a school district should not pay more of the aggregate of the old indebtedness of the several districts embraced in the township than would be equitable, considering the rights of the taxpayers of the other districts, so included, to the same treatment. The school boards of the several old districts constituted, with the county superintendent, a body to adjust these matters, and it was necessary to keep the districts alive for this special purpose after the organization of the township. The legislature intended to work an immediate, radical revolution in the school system for the whole territory. We do not believe that they contemplated that, while a long drawn out contest was going on to settle these questions between the old districts, this new system should be held in abeyance. Moreover, there would be no reason for making the organization of the school township, and its right to carry on the school system, depend upon the determination of a matter, the prior settlement of which was not essential to the corporate existence of the school township and the administration of the school law. Settlement must inevitably come. Should those charged with the duty of making it fail to obey the law, mandamus would set them in motion. The nature of their decision could not be dictated by any court; but they could be compelled to make some

decision. The discharge of this duty, whether voluntary or under compulsion, can as well go on after as before the school township becomes liable for the district debts and is authorized to carry on the schools. The township is by the statute made liable for these bonds. It is the formal party against which judgment may be recovered. When execution in the form of mandamus to compel a levy of taxes is applied for, the court will observe the decision of the board of adjustment in the apportionment of the burden. If no settlement has at that time been voluntarily reached, the court in a separate proceeding will compel the performance of this duty specially enjoined by law, and when such adjustment is consummated the writ of mandamus to compel the levy of a tax to pay the judgment must observe and follow this adjustment in the apportioning of the tax among the several old districts of the new township. The statute is not clear. The question is by no means free from doubts. If the eye is riveted on section 136 alone there is much force in the defendant's position. But we must scan the whole act to find out its spirit, and in the light of that spirit we must interpret section 136. We can discover a good reason for keeping these districts alive, after the organization of the school township, for the special purpose of adjustment of equities. We believe it would be highly inconvenient to preserve their existence thereafter for general school purposes, and that such was not the intention of the lawmaking power. The existence of these districts for this particular purpose is not incompatible with the existence of the school township. It in no manner interferes with the full exercise by the school township of all its powers. These districts were to be kept alive for a short period, to accomplish a special object entirely foreign to the power conferred upon school townships. Their utter extinction for all purposes contemporaneously with the creation of school townships would have left the latter no more completely in possession of all their functions as municipal corporations. Finding no error, the judgment is affirmed. All concur.

On Rehearing.

(May 31, 1893.)

We are asked to grant a rehearing on the assumption that we have overlooked the case of *Dartmouth Sav. Bank v. School Dist.* Nos. 6 and 31, 6 Dak. 332, 43 N. W. Rep. 822. We had not overlooked it. We do not regard it as in point. In that case it might be said that there was no color of organization. There was no petition ever filed, or even signed. In so far as that decision can be regarded as conflicting with our conclusions we feel constrained to differ from the court which pronounced it.

Another matter is referred to in the petition for rehearing which strikes us with much force. It is insisted that, unless we

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modify the judgment, it will stand as an unqualified judgment against the defendant, to be collected the same as any other judgment against it. To save any question, we will modify the judgment so that the collection of it must be enforced according to the provisions of sections 136-141, c. 41, Laws 1883. The district court will modify the judgment by inserting therein the following clause: This judgment is to be enforced subject to the provisions of sections 136-141, c. 44, Laws 1883; the debt on which it is rendered being a debt subject to equalization as therein provided. Modified and affirmed. All concur.

TAYLOR v. JONES.¹

(Supreme Court of North Dakota. April 14, 1893.)

PLEDGE — WHAT CONSTITUTES — VERDICT — SUFFICIENCY OF EVIDENCE.

1. The claim that a verdict is without support in the evidence cannot be maintained when the explicit and consistent testimony of one witness sustains it, even though a number of witnesses may as explicitly testify to the contrary.

2. The fact that one party, claiming under a legal right, however unfounded, declares to another party that he will hold certain property of such other party until a debt owing by such party to him is secured, and that such other party remains silent, and makes no objection thereto, does not constitute a pledge of such property as security for such debt.

(Syllabus by the Court.)

Appeal from district court, Richland county; W. S. Lauder, Judge.

Action by Theophilus L. Taylor against John R. Jones, for conversion. Judgment for plaintiff. Defendant appeals. Affirmed.

McCumber & Bogart, for appellant. W. E. Purcell and L. B. Everdell, for respondent.

BARTHOLOMEW, C. J. Taylor, the plaintiff below and respondent herein, sued John R. Jones, the defendant and appellant, in conversion for the value of a team, harness, and buggy. There was a verdict for plaintiff, a motion for a new trial denied, and judgment on the verdict. It is uncontroverted that respondent was the owner of the property prior to bringing this action, and that it was in appellant's possession; that respondent demanded the same, and appellant refused to deliver it. The answer alleged, in substance, that on the 2d day of June, 1891, respondent delivered the property to appellant, as a pledge to secure an indebtedness that respondent owed to appellant, and that appellant held the property under and in accordance with the terms of the pledge, and that the debt had not been paid. That the debt existed and was unpaid seems to be conceded. The case was made to turn entirely upon the truth or falsity of the allegation that the property was pledged.

¹Rehearing denied May 6, 1893.

Appellant presents the case in this court under three heads, which cover all his assignments of error: First, insufficiency of the evidence to justify the verdict, and herein error of the court in refusing to direct a verdict for appellant, and in refusing a new trial; second, error in refusing and giving instructions; third, error in admitting and excluding evidence.

From a mass of testimony we summarize the following facts as sufficient to render our rulings intelligible: Prior to June 2, 1891, one Holding recovered a judgment against the respondent, Taylor, and caused execution to issue thereon, under which the sheriff of the proper county seized the horses and harness in question. Taylor claimed this property of the sheriff as exempt from sale on execution, but the sheriff refused to recognize this claim, and had advertised the property for sale on said June 2, 1891. Taylor desired to preserve this particular property, and also to preserve his right of action against the sheriff for selling exempt property. This he could properly do. See *Northrup v. Cross*, 2 N. Dak. 433, 51 N. W. Rep. 718. The day before the sale the respondent saw one David Jones, the brother and agent of appellant, and one Malloy, appellant's bookkeeper. Appellant was absent. Respondent desired David Jones and Mr. Malloy to go with him the next day to Forman, where the sale was to take place. The witnesses differ as to respondent's object in having David Jones and Malloy present at the sale. Respondent testifies that he desired them to help him to raise money in case the property should be bid up at the sale to a figure in excess of what money he had. David Jones and Malloy testify that he wanted them to attach the property on his debt to appellant, in order to head off certain other creditors. Appellant was notified by telegram to be present at Forman, but it was feared he could not get there before the sale. Early on the morning of June 2d, David Jones and Mr. Malloy went with respondent to Forman. They immediately saw Mr. Ellsworth, an attorney, and, after consultation, an attachment action was commenced by said attorney in the name of appellant against respondent, and a writ of attachment procured and delivered to the sheriff, who immediately levied it upon the property. This was known to respondent before the hour fixed for the sale. At the sale the property was bought by David Jones, in his own name, but with money furnished entirely by respondent. Soon after the sale, appellant reached Forman. It is proper here to state that respondent's debt to appellant was for lumber purchased, and appellant had it secured by mechanic's lien. When appellant and respondent met at Forman, appellant began to upbraid respondent for getting his (appellant's) men to bring the attachment action, and thus invalidate the mechanic's lien, and declared that he would

hold the property until he was secured. Appellant then testifies, in detail, that respondent, not wishing to have further expense, asked him to release the attachment, saying that he would turn the property over as a pledge until he got other sufficient security. To this appellant agreed, and the attachment was released, and the horses and harness, and, under the advice of Mr. Ellsworth, the buggy also, were turned over to David Jones, as pledge holder for appellant. A careful scrutiny of the testimony fails to disclose that any other witness says anything about a pledge. All of the other witnesses seem to have understood that the team and harness were held by virtue of the purchase of David Jones at the sheriff's sale. David Jones testifies: "I bid the team in for the interest of John R. Jones. I bid it in myself, in my own name." "I bid the team in for John R. Jones. I held the team by that bid. I hold the team." "I said, at the time I purchased this property, I purchased in the interests of John R. Jones." "It was to be given back by myself or John R. Jones, to him, [Taylor;] no difference which." "I held them as John R. Jones' property until the thing was settled,—until a bill of sale was made to Mrs. Taylor." Speaking of the agreement with respondent, he says: "The horses should be in my charge, or in my brother John's, himself, until he settled the account." The witness Malloy narrates the circumstances attending the sale; that respondent gave him the money to purchase the property, and he turned it over to David Jones; that, by the subsequent agreement, the property was to remain in David Jones' possession until the account was secured, and then a bill of sale was to be made to Mrs. Taylor. Mr. Ellsworth, the attorney, was also a witness for the appellant. In speaking of what took place after the sale, and at the time when it is claimed the pledge was made, he says: "He [Taylor] said he wanted it understood that the sale, or the purchase of this property at the sale, was a bona fide purchase, and that he would arrange it with Mr. Jones in a short time." He further said that, when the account was secured, a bill of sale of the property was to be made to respondent's wife, Mrs. Taylor; that respondent wanted it done in that manner, so that no other party could seize the property; that, as the buggy had not been sold, he (witness) suggested to Mr. Jones, in Taylor's presence, that it would be better if Taylor would turn over the buggy also, to which Taylor agreed; that he then sent for the sheriff, and gave him a written order releasing the attachment. Respondent, in his testimony, claims that he furnished the money to Malloy to buy the property in for him; that, instead of doing so, Malloy turned the money over to David Jones, who bought the property in his own name. He unequivocally denies that the property was ever turned over as a pledge or otherwise; claims

that it was taken by appellant or his agents after the sale, without his (respondent's) knowledge or consent; and denies all knowledge that the attachment was released. He admits that appellant told him that the attachment had invalidated his lien, and that he would hold the team, but says that he made no reply; admits, also, that Mr. Ellsworth advised him to turn over the buggy, but says he made no reply. Under this evidence, not only was there a conflict upon the question of a pledge, but the preponderance was clearly against it. The proof tended to show that the parties treated the purchase by David Jones at the sheriff's sale as passing the title of the property to him, which could only be divested by a resale, and that David Jones, acting in the interest and at the instance of his brother, determined to hold the property so purchased at the sale until respondent secured the account owing to his brother, when a bill of sale was to be made to respondent's wife. The buggy had not been purchased at the execution sale, but had been attached, and the attorney testifies that he suggested to Mr. Jones that it would be well to have Mr. Taylor turn that over also, and that Taylor consented so to do. Taylor says he simply made no reply. Several witnesses testify that Taylor did, in fact, turn the buggy over. Taylor as explicitly swears that he did not. The question was for the jury. Respondent's testimony is all consistent with the theory that he did not turn the buggy over as a pledge or otherwise, and the fact that he is opposed by a number of witnesses does not render the verdict so entirely unsupported by evidence as to warrant a court in disturbing it. It may be true, as urged by learned counsel, that if respondent knew that appellant understood him to consent to turn over the property, or any portion of it, as a pledge, and if he knew that, relying upon such consent, appellant dismissed the attachment, and thus altered his condition to his prejudice, respondent would be estopped from denying his consent. The trouble in applying the proposition in this case is the fact that respondent swears he had no knowledge that appellant released the attachment. If that be true, there is no element of estoppel in the situation. We may add that respondent's statement has strong corroboration in the circumstances, as they seem to have been understood by the parties. If the horses and harness passed to David Jones by virtue of the purchase, and were to be held by him unless security was given for the account, then the attachment became a mere useless appendage, as the value of such property far exceeded the amount of the account, and it would be only natural that respondent should give no further thought to the attachment. There is a direct conflict in the evidence as to whether or not respondent consented that the horses and harness might be held even under the purchase. This discussion of the

evidence demonstrates, we think, that the verdict has substantial support, and that there was no error in refusing to direct a verdict for appellant, or in denying the motion for a new trial, on the ground that the verdict was not sustained by the evidence.

This also practically disposes of the error assigned on the refusal to give an instruction asked by appellant. This instruction, without qualification or condition, stated that if the jury found that on said June 2, 1891, defendant told plaintiff that he would hold said property as security for his debt, and plaintiff made no objection thereto, but allowed defendant to take the property, this would be an assent upon the part of the plaintiff to such holding, and the verdict must be for defendant. Now, without holding that mere silence and inaction could be more than evidence of assent, in any case where the other party had not been induced thereby to alter his condition to his prejudice, it yet seems too plain for argument in this case that if appellant was claiming a legal right to hold the property, either under the purchase by David Jones or under the attachment in his own name, and respondent silently acquiesced in such claim of right, such fact would fall far short of constituting a contract of pledge between the parties. Moreover, the instruction disregards respondent's testimony that the property was taken without his knowledge or consent.

It is pressed against the charge of the court that it makes unduly and unnecessarily prominent the thought that a pledge is a contract, and that it takes two persons to make a contract, and that their minds must meet on the same line. Both must understand the transaction in the same way, and it must be voluntarily entered into. We think the criticism not applicable. There was but one issue in the case, and that was upon the allegation in the answer that respondent pledged the property to appellant as security for the debt. Appellant must succeed, if at all, upon the theory of a pledge. Possession by other means would not help him. It was entirely proper for the court to specifically define a pledge and its constituent elements; and to guard the jury against any mistake by reason of the fact, if such it was, that respondent acquiesced in appellant's claim of legal right to hold the property, it was pertinent for the court to impress upon the jury the voluntary nature of the contract of pledge.

Numerous errors are assigned upon the admission and exclusion of testimony. Some of these have been already indirectly answered, and none of them are of sufficient general importance to warrant any lengthy notice. Some days after the transaction, on June 2d, appellant had the property at the town of Straubville. Early in the morning, respondent and another party sought to get possession of the property by stealth or force, or both. Something of an altercation took

place between appellant and respondent. It was sought to give in evidence all the details of that difficulty by appellant when on the stand. This was objected to, and the court limited the witness to "what was said in regard to your holding the team, or right to hold it, or any agreement you and Mr. Taylor had before that." Certainly, that was broad enough. Anything further could only prejudice the jury. The same remark applies to the third error assigned. The evidence excluded under the fourth and sixth assignments would necessarily have been the same whether the property was held under the purchase or the attachment or the pledge, and hence was incompetent to establish a pledge. The answer excluded under the fifth assignment was purely a conclusion of law. The seventh assignment is more difficult. The respondent, while on the stand, was asked: "Did you in any way consent to John R. Jones', or any other person for him, holding this team as security for any debt you might be owing him?" This was objected to, as calling for a conclusion, and not for a fact, and the objection overruled, and in this we think the court did not pass the bounds of discretion necessarily lodged with a trial court in excluding and admitting testimony. This was on rebuttal. Appellant's witnesses had given the facts from their standpoint, and had repeatedly asserted that respondent did so consent, and we do not think it was improper to permit respondent, after he had given all the facts from his standpoint, to testify that he did not consent. The objection is argued on the theory that, on his own testimony, respondent had consented as a matter of law. We have already ruled that such was not the case. The other assignments require no notice further than that they have already received. No error in the record has been shown, and the judgment below is accordingly affirmed. All concur.

OLSON v. SWENSEN, Sheriff.

(Supreme Court of Minnesota. June 16, 1893.)
EXECUTION—CLAIM BY THIRD PERSONS—DECLARATIONS OF TITLE.

1. Evidence held insufficient to make a case in behalf of plaintiff for the consideration of the jury.

2. Upon the cross-examination of the plaintiff, his admissions or declarations, made to third parties, touching the ownership of the property in controversy, held competent.

3. But evidence of the declarations of third persons, not parties to the suit, respecting such ownership, though in possession of the property, held inadmissible in a suit between other parties involving the title thereto.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

Action by Christian Olson against Peter P. Swensen, sheriff, to recover property levied on as that of a third person. Judgment, from which defendant appeals. Reversed.

A. H. Noyes and A. J. Smith, for appellant.
Christensen & Tuttle, for respondent.

VANDERBURGH, J. The defendant, Swensen, as sheriff, levied on and sold the personal property in controversy, upon an execution issued on a judgment against Samuel Olson and wife, in favor of the Sidle-Fletcher-Holmes Company. The plaintiff, who is the son of the execution defendants, claims that he owned the property, and seeks by this action to recover the value thereof. Upon the trial he testified that his father was engaged in the bakery business, and the establishment was known as the "Riverside Bakery," and that all the property in question was in the possession of his father, and used in the business of the Riverside bakery; and the name "Riverside Bakery" was painted on the delivery wagon which was so used by him. All the property was used and treated as the property of the Riverside bakery, apparently with his knowledge and consent. He also worked under his father in the business, and the property was furnished for the business, and used in connection with it. He also testifies that he went to work for his father about three years before he went to Madella, which was in 1890, and says: "I was in as a partner, and was going to get so much out of the partnership before I left him. * * * I did not start in to work for my father as soon as he went into business there. I furnished him the money, and then went to work to drive wagons for him. I started to work for my father about as soon as he started in business,—three years before I went to Madella. He was baking a couple of weeks before I went in with him. Then I went to work under this deal: These horses were used in connection with that business. One of them was driven on this one of the delivery wagons. The sign 'Riverside Bakery' was painted on that delivery wagon. That was the name of the bakery or business carried on there. My father was owing me money all this time. He is owing me now. When I went to Madella, we squared up then; was about square." He further testified: "I was acquainted with the manager of the Sidle-Fletcher-Holmes Company before I went to Madella. The Riverside bakery was dealing with them, and had been dealing with them some time." In addition to this, he permitted his father to mortgage the property as his own. This evidence by the plaintiff in his own behalf, unexplained or qualified, it seems to us not only warranted, but required, the jury to find that he was interested in the bakery, and that the horses and wagons were not only used in the business, but, as to the public and particularly creditors dealing with the bakery, should be treated as a part of its property and assets. Plaintiff was in the business, furnished money for it, and put the property into the business, and when he quit and went to Madella, he squared up with his father, and left the property in the business

as before. He testified that he was a partner, and, whether the relations between him and his parents were strictly such or not, he ought not to be permitted to dispute that the property in question belonged to the Riverside bakery, or the firm of S. Olson & Co. In this view of the case, the court erred in not directing a verdict for the defendants.

2. The plaintiff was asked on the cross-examination whether he had reported to the Bradstreet Commercial Agency as to the property invested in the business, and to whom it belonged. The ruling of the court sustaining the plaintiff's objection to this evidence is assigned as error. We think the court erred in rejecting the evidence. It was certainly proper on the cross-examination to inquire of the plaintiff touching his admissions made to third parties in respect to the ownership of this property. It is true that the interrogating did not particularly specify the date of the conversation, but the objection was not rested on this ground.

3. The evidence of the declarations of S. Olson and his wife that they were the owners of the property in controversy were properly ruled out as hearsay, under the issues in this case. They were evidently offered for the purpose of establishing title in them, and not merely as explanatory of their possession. This point was ruled on by this court in a similar case. *King v. Frost*, 28 Minn. 417, 10 N. W. Rep. 423. And see dissenting opinion of Dixon, C. J., in *Roebke v. Andrews*, 26 Wis. 312.

Order reversed, and new trial granted.

GATES v. BANHOLZER.

(Supreme Court of Minnesota. June 16, 1893.)

REPAIRS—ACTIONS FOR—ORIGINAL CONTRACT—EVIDENCE.

Certain findings of fact held not justified by the evidence.

(Syllabus by the Court.)

Appeal from municipal court of St. Paul; Twohy, Judge.

Action by Hiram D. Gates against William Banholzer. Judgment for defendant. Plaintiff appeals. Reversed.

Walter L. Chapin, for appellant. A. E. Bowe, for respondent.

VANDERBURGH, J. This action is brought by plaintiff to recover for work and labor and materials furnished in repairing an artesian well for defendant in the year 1886, and a second count sets up another claim for work done and materials furnished in and about the same well in the year 1889. The defense is that the well was dug by plaintiff for defendant in the year 1886, by contract, and that the work and materials for which a recovery is sought in this action were furnished in completion

or fulfillment of his duty under this contract, which had never been satisfactorily completed, and so the trial court found.

1. As respects the first cause of action, we think the defendant's contention may be sustained, though the evidence is not very clear or satisfactory. The defendant called upon plaintiff to make the repairs or changes necessary to the satisfactory operation of the well shortly after the job was done. The evidence tends to prove that the plaintiff undertook to bring the water into the defendant's house above the level of this well by means of a water ram and fixtures. Defendant, finding that it did not operate well, sent word to the plaintiff to come and fix it, which plaintiff promised to do, and thereupon made sundry changes and repairs, which he now sues to recover for. We think there is sufficient evidence in the case to uphold the finding in defendant's favor.

2. But we are unable to say that the defense to the second cause of action is made out. The plaintiff, having made proof of the performance of the labor and that the materials were furnished as alleged, in the fall of 1889, at the defendant's request, is entitled to recover, unless the defendant establishes the fact by a preponderance of evidence that it was done under the original contract. This, we think, he failed to do on the trial. The evidence tends to show that the water in the well was lowered from a cause common to similar wells in the vicinity, and hence some changes were required in the position of the ram and pipes, and certain of the joints and connections in the pipes had become loose and in disrepair, which was the occasion of plaintiff's being called on; and we do not think it was made to appear that the plaintiff was under an existing obligation to do the work in question by virtue of the original contract, or the manner of its execution. Order reversed.

WROlsen v. ANDERSON.

(Supreme Court of Minnesota. June 16, 1893.)

APPEAL—FROM JUSTICE'S COURT—JURISDICTION—VOLUNTARY APPEARANCE—IRREGULARITIES.

An unauthorized appeal to the district court was taken from the judgment of a justice of the peace. The parties appeared in the district court, submitted to its jurisdiction, amended their pleadings, and consented to a trial of the case on a day fixed. Held, that the district court acquired jurisdiction to hear and determine the case on its merits, notwithstanding the irregular mode in which the case was brought into that court.

(Syllabus by the Court.)

Appeal from district court, Sterns county; Searle, Judge.

Action by Betsey Wrolsen against Simon Anderson. Judgment of dismissal. Plaintiff appeals. Affirmed.

Bruckart & Brower, for appellant. George W. Stewart, for respondent.

VANDERBURGH, J. Judgment was rendered in justice's court against the defendant and in plaintiff's favor for the sum of \$15 damages and costs. The case was appealed to the district court upon questions of both law and fact. The appellant having failed to enter his appeal on or before the second day of the term of the district court, judgment was ordered for the plaintiff respondent. Afterwards the defendant moved upon affidavits to vacate the order for judgment, and to reinstate the case on the calendar. The plaintiff appeared on the hearing, and resisted the application, which was, however, granted. On the 1st day of December, 1890, at a regular term of the court, the plaintiff applied for and obtained leave to amend his complaint, and defendant also amended his answer, and thereupon by consent of both parties the case was set for trial on the merits in the district court for December 9, 1890. Afterwards, upon December 2, 1890, the plaintiff moved to dismiss the appeal, which motion was denied, and the case was thereafter tried by jury, and a verdict rendered, which was afterwards set aside, and a new trial awarded; and at a subsequent trial the action was dismissed on defendant's motion, for want of prosecution by the plaintiff. It is now claimed by the plaintiff on this appeal that the judgment of dismissal was invalid for want of jurisdiction of the district court of the cause because the judgment of the justice, being for \$15 damages, and not in excess of that amount, the case could not be brought to trial de novo on appeal in the district court. But the district court has original jurisdiction without respect to the amount in controversy, and had jurisdiction of the subject-matter of this action, if the parties voluntarily appeared and submitted the controversy to the court, which it is very clear they did do. After the pleadings were amended, and the case voluntarily set for trial, it was too late to move to dismiss, and the irregularity in the mode of bringing the case into that court in the first instance was waived. The parties appeared in the district court, and consented to the trial of a controversy, the subject of which was within the jurisdiction of the court. Why should the court stop to inquire into the preliminary procedure? The question involved is substantially covered by the cases of *Lee v. Parrett*, 25 Minn. 128, and *Anderson v. Hanson*, 28 Minn. 402, 10 N. W. Rep. 429. And see *Danforth v. Thompson*, 34 Iowa, 243; *Mackey v. Briggs*, (Colo. Sup.) 26 Pac. Rep. 131. Since the trial court was, strictly speaking, concerned only with the issues raised by the pleadings under which the trial was conducted, it is not material to inquire as to the effect of that trial upon the judgment attempted to be appealed from. But we think it but rea-

sonable to hold that the effect of such retrial was to abrogate such judgment by the implied consent of the parties.
Judgment affirmed.

KNEIS v. GREEN.

(Supreme Court of Minnesota. June 16, 1893.)

Appeal from district court, Hennepin county; Smith, Judge.

Action by Ellen Kneis against E. P. Green. Judgment, from which plaintiff appeals. Affirmed.

C. E. Brame, for appellant. A. Q. Rogers, for respondent.

VANDERBURGH, J. The question involved in this appeal was considered and determined in the case of *Wrolsen v. Anderson*, 55 N. W. Rep. 597, (decided at the present term.)
Judgment affirmed.

MINNEHAHA DRIVING-PARK ASS'N OF MINNEAPOLIS v. DICKENS et al.

(Supreme Court of Minnesota. June 8, 1893.)

CORPORATIONS — ASSIGNMENT FOR CREDITORS — CALLS ON STOCKHOLDERS — UNPAID SUBSCRIPTIONS — PROOF OF CLAIMS — APPLICATION TO COURT.

1. In proceedings under Laws 1881, c. 148, upon an assignment by a corporation for the benefit of its creditors, the court may make or direct calls upon the unpaid subscriptions to stock subject to call.

2. Such a call does not determine the liability of stockholders, but only makes due and payable whatever they may be liable for under a call, so that suit may be brought for it.

3. The authority of the court to call in unpaid subscriptions depends on the necessity of applying them to payment of debts.

4. Under that chapter, proof of claims against the insolvent is, in the first instance, to be made to the receiver or assignee, and his decision upon them, if acquiesced in, is final.

5. When he allows a claim, the debtor or other party interested in the assets, or their distribution, may, before the decision of the receiver or assignee has become final by acquiescence, apply to the court for, and is entitled thereupon to have, a judicial examination and decision of such claim.

6. But it must be applied for in a direct proceeding, and not as a part of, or collateral to, some other proceeding, such as a proceeding to authorize a dividend, or to call in the assets.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

Proceedings in assignment of the Minnehaha Driving-Park Association of Minneapolis, (Wayland B. Augir, assignee,) against Chester B. Dickens and others. From an order making a call upon unpaid subscriptions to the stock of the association, defendants appeal. Affirmed.

A. M. Harrison and Jamison, Penney & Hayne, for appellants. Byers & Augir, for respondent.

GILFILLAN, C. J. This is an appeal from an order of the district court making a call

upon the unpaid subscriptions to the stock of a corporation, in proceedings upon an assignment by such corporation for the benefit of its creditors. The return is somewhat short in several particulars. It does not disclose distinctly whether the assignment was under Gen. St. 1878, c. 41, or Laws 1881, c. 148, but we infer that it was under the latter. It does not make it appear very satisfactorily at what stage of the proceedings the assignee applied to the court to make or direct the call; that is, what had been done in the proceedings prior to the application. But we infer that the claims to satisfy which the call was applied for had been presented to, and allowed by, the assignee, or accepted by him as valid, and that nothing else had been done in respect to them. When a court has charge, through its receiver or assignee, of collecting and converting the assets of a corporation, and applying the proceeds to the satisfaction of its debts, the court's call for the unpaid subscriptions to stock stands precisely as does a call made by the directors of an operating corporation. Such a call does not determine absolutely the liability of the stockholders. It has not the effect of a judgment. Its effect is to make whatever the stockholders are liable for, within the call, become due and payable, so that suit may be brought to enforce such liability. Though the order, in this case, directs the stockholder to pay the unpaid subscriptions within 10 days after they shall be called for by the assignee, it has no other effect. There can be no question of the power of the court, in insolvency proceedings, under chapter 148, to direct the collection of unpaid subscriptions, and the application of the proceeds in payment of the debts of the corporation. What remains unpaid on the subscriptions are debts due the corporation, and are its assets. When it is insolvent, they constitute a fund for the payment of its debts. It is true that, as the primary purpose of the proceedings in insolvency is to apply the assets to payment of the debts, the power of the court to make or direct calls for the unpaid subscriptions, and direct the enforcement thereof, must be limited to cases where it is necessary to resort to that fund for the purpose, and the extent of the call must be determined by the amounts of the debts and of the other assets.

According to the petition of the assignee, on which the application for the call was made, from the other assets not more than \$200 can be realized; and this seems admitted by the answer of the objecting stockholders, and it also seems admitted that the aggregate of the unpaid, uncalled subscriptions is \$13,335, and, of the claims filed with the assignee, \$8,906.73. The assignee alleges in the petition that so many of the stockholders are insolvent, others being dead, and leaving no estate, and many having left the state, and gone to parts unknown, that he be-

lieves not more than one-half of the amounts unpaid on the stock are collectible. The answer does not attempt any showing as to this, but it alleges that, upon calls made by the directors before the assignment, there is uncollected \$9,178, which is good and collectible. In response to this allegation the assignee states in an affidavit that, as attorney for the corporation before the assignment, and, since then, as the assignee, he has many times demanded payment of such unpaid subscriptions, and has endeavored to collect all thereof, and that all the subscribers refuse to pay, claiming that they owe the corporation and its assignee nothing; that nearly all whom he considers responsible have been sued, and the actions are now pending; that the amounts are so small that in only two or three cases can statute costs be recovered; and that the costs and expenses of recovery will absorb a large part of the proceeds. The answer also disputes the validity of the claims filed with the assignee, and asks that the holders thereof be required to prove their claims, and that the court, before making a call, ascertain what, if any, claims there are, having any legal or equitable right to be paid by a call upon the subscribers to stock. Assuming that a case was made for a call, we think it was proper to make it for the whole of the unpaid subscriptions. It was the duty of the court, so far as it could do so, to make the call produce enough to pay the debts of the corporation, and, in determining how much it might be necessary to call for, to take into account that a call upon some subscribers would, either from death, insolvency, removal from the state, or other causes, produce nothing, and that to enforce the call upon others would be attended with costs and expenses large in comparison with the sums collected. It had information enough to justify it in concluding that, to produce net the amount required to pay all the claims filed with the assignee, it was necessary to call in all the unpaid subscriptions, so far as they could be collected.

But the chief objection to the call is that the claims against the corporation had not been ascertained and determined, and, as we understand the appellants, that upon the application for the call the court ought to have first proceeded to ascertain and determine those claims, making it a part of the proceedings to determine whether the call should be directed. Whatever may be the proper mode for finally determining the validity of claims against the estate of an insolvent assignor, it would seem that the orderly way would be by a direct proceeding for that purpose alone, not making it collateral to some other proceeding, as, for instance, to an application for an order directing a dividend among the creditors, or to any proceeding for collecting the assets.

The consideration of how the claims shall be determined in insolvency proceedings re-

quires an examination of some of the provisions of the act of 1881. That act was so badly drawn that, in order to prevent it falling altogether, we have frequently been obliged to apply to it the most liberal rules of interpretation, and to derive from it by implication meanings which its terms failed directly to express. The matter of the proof of claims is one of those upon which the terms of the act are inadequate. It clearly intends that a claim shall be presented to, and, in the first instance, allowed or disallowed by, the assignee or receiver. Section 8: "Any creditor whose claim is disallowed in whole or in part by any assignee or receiver appointed or selected under this act, or under the provisions of the assignment laws of this state regarding the assignment of debtors, may appeal from such disallowance to the district court, and there have such claim tried as other civil actions." The section then provides how, and within what time, such appeal shall be taken. What is to be done by a creditor to secure a judicial hearing in case of a disallowance is clear enough. But there is in the act no express provision securing such a hearing to the debtor, or to any person interested in the assets and their distribution, when the assignee or receiver improperly allows a claim. Yet it is hardly conceivable that the legislature intended the decision of the assignee or receiver—an administrative, and not a judicial, officer—to finally and conclusively determine the rights of any of the parties interested, except by their consent. That he should determine them in the first instance, and that his determination should become final, through the acquiescence of the parties, is well enough, and the act undoubtedly intends as much. But, as the act makes no direct provision for a judicial hearing upon claims except at the instance of a creditor whose claim is disallowed in whole or in part, the authority and duty to provide such a hearing, when asked for by others, may be found in the general power of the court over the insolvency proceedings,—a power large enough to secure their just rights to all parties interested. The power given it over the matter of proof of claims is sufficient for the purpose. Section 2 provides, among other things, for distribution among creditors who shall file releases, and "who shall come in and prove their respective claims within such time, and in such manner, as the court or judge shall direct." This, of course, is to be taken in connection with the manifest intent of the act, that the proof in the first instance is to be made to, and passed on, by the assignee or receiver, and that, if acquiesced in by all interested, his decision is to be final. The clause authorizes the court to direct what proofs shall be presented to the assignee or receiver, but the court's power in the matter of proving claims cannot stop there. It must extend to giving to

parties interested (where not expressly given by the act) an opportunity to prove or disprove claims upon a judicial examination, and have such claims determined in a judicial way. We do not know what general rules the district court has on the subject, but we shall assume that it either has general rules adequate to give a complaining party proper redress against an erroneous allowance of a claim, or, if it has no such general rule, that it would, upon reasonable application, make such order as would give such party an opportunity for a judicial examination of the claim. As we have said, we assume that the claims mentioned in the petition were allowed by the assignee, and, as it does not appear that any proper application has been made for a judicial hearing upon them, it is to be deemed that the allowance has been acquiesced in, and become final. An application by the assignee for leave to call in the assets is not a proceeding in which it is proper to institute what would be, in effect, an appeal from the assignee's allowance of claims.

Order affirmed.

VANDEBURGH, J., took no part.

SAUNDERS v. GALLAGHER.

(Supreme Court of Minnesota. June 8, 1893.)

CONTRACT FOR WORK—PRICE—PAROL EVIDENCE.

1. Evidence held sufficient to sustain the verdict.

2. When the evidence is conflicting on the question whether a certain price was orally agreed to be paid for doing certain work, evidence of the value of the work is admissible. *Kumler v. Ferguson*, 7 Minn. 442, (Gil. 351); *Schwerin v. De Graff*, 21 Minn. 354; and *Miller v. Lamb*, 22 Minn. 43,—followed.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Stearns, Judge.

Action by O. W. Saunders against James Gallagher. Order, from which plaintiff appeals. Affirmed.

White, Reynolds & Schmidt, for appellant. W. H. Hammons, for respondent.

GILFILLAN, C. J. The evidence on the issue in the case was conflicting, the two parties testifying directly contrary to each other. The testimony of plaintiff was to some extent corroborated, but it left a fair question for the jury to determine which was the true account, and we can easily see how, from the appearance and demeanor of the witnesses, and their manner of testifying, the jury might credit defendant rather than plaintiff. Their decision is final. The plaintiff having testified that defendant accepted his offer of \$3.25 per M. for doing the work, and defendant having squarely testified to the contrary, evidence of the value of the work was admissible, as it would tend to show which was the more credible statement. *Kumler v. Fer-*

guson. 7 Minn. 442, (Gil 351); Schwerin v. De Graff, 21 Minn. 354; Miller v. Lamb, 22 Minn. 43. What it cost in fact to do the work was not admissible, for, in the nature of things, neither party could know it when they made their contract. The question calling for a statement of the cost was objectionable; but the witness did not answer responsively to the question, but, instead, stated the value of the work.

Order affirmed.

VANDERBURGH, J., took no part in the decision.

FOUNTAIN v. MENARD et al.

(Supreme Court of Minnesota. June 8, 1893.)
PARTNERSHIP—FOR BUYING LAND—HOW FORMED
—PAROL EVIDENCE.

1. A partnership may be formed by parol for the purpose of buying, improving, and selling a particular piece of real estate.

2. Evidence held to justify findings of fact. (Syllabus by the Court.)

Appeal from district court, Hennepin county; Hooker, Judge.

Action by Samuel Fountain against Joseph Menard and others. Order denying defendants' motion for judgment on the pleadings. Defendants appeal. Affirmed.

O. Tessier and Benjamin Davenport, for appellants. Day & Enches, for respondent.

GILFILLAN, C. J. The complaint in this action was so drawn as to suggest the question whether the plaintiff was proceeding on the theory of a partnership between the parties to deal in the real estate or of an attempt merely to create a trust in it. It does allege a partnership formed for the purpose; and, without an application to require the plaintiff to make the complaint more definite and certain, or to elect on which theory he would proceed, he had a right to prove any cause of action within the allegations of the complaint, and, as there were enough of them to show a case of partnership, the defendants' motion for judgment on the pleadings was properly denied. From the evidence, though it also pointed to the two theories suggested by the complaint, the referee might fairly find that a partnership to buy, improve, and dispose of the real estate was formed. The right to share in the profits or losses, if any, though nothing was expressly agreed on with respect to them, would, of course follow. There is no question that a partnership may be formed by parol to deal in real estate, (Hodge v. Twitchell, 33 Minn. 391, 23 N. W. Rep. 547; Newell v. Cochran, 41 Minn. 378, 43 N. W. Rep. 84,) and we see no reason to doubt that one may be formed to buy, improve, and sell, for joint profit, a particular piece of real estate. Where real estate is acquired in a partnership business and for its purposes it

is partnership assets, though the legal title be taken in the name of one of the partners; and in closing the affairs of the concern the court may convert it into personal property for distribution, the same as other assets. There was no prejudicial error in admitting evidence. That in relation to the value of the property and of alleged extra work of plaintiff was immaterial, but no finding of fact is based upon it, and manifestly it could have had no influence upon the findings as made. Order affirmed.

VANDERBURGH, J., took no part in the decision.

O'NEILL v. JOHNSON.

(Supreme Court of Minnesota. June 8, 1893.)
MALICIOUS PROSECUTION OF CIVIL ACTION—COMPLAINT—DAMAGES—INJURY TO BUSINESS.

1. Complaint held to state a cause of action for malicious prosecution.

2. An action will lie for malicious prosecution of a civil action.

3. The allegations being, in effect, that a garnishment in the action prevented the payment of \$54 to plaintiff's firm; that by reason of its nonpayment they were unable to pay their rent and employes, and because they were so unable their landlord became dissatisfied, and terminated their lease, and their employes became dissatisfied, and refused to work, and in consequence thereof their business was ruined,—held, the injury to the business was not the natural and proximate result of the garnishment, and the damage too remote and speculative.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Lochren, Judge.

Action by Frank P. O'Neill against Anna R. Johnson for malicious prosecution. Judgment for defendant. Plaintiff appeals. Reversed.

J. M. Burlingame, for appellant. McHale & Abell, for respondent.

GILFILLAN, C. J. The court below, in ordering judgment for defendant on the pleadings, undoubtedly did so because it considered the complaint does not state a cause of action. The statement of damage recoverable in such an action is so obscured by statements in regard to damages not recoverable, because too remote and speculative, that we suspect the court overlooked the former, its attention being wholly directed to the latter. An action will lie for maliciously and without probable cause prosecuting a civil action, whereby damage is caused to the defendant in such action. McPherson v. Runyon, 41 Minn. 524, 43 N. W. Rep. 392; Burton v. Railway Co., 33 Minn. 189, 22 N. W. Rep. 300; Rachelman v. Skinner, 46 Minn. 196, 48 N. W. Rep. 776. In an action for malicious prosecution malice is a fact to be pleaded as such, and it would be bad pleading to set forth the evidence to establish it. Want of probable cause, though made up of a question of fact and a

question of law, is, like many other composite facts,—such, for instance, as title to property,—a fact for the purpose of pleading, and may be stated directly. In this complaint it is alleged that the action by defendant against plaintiff was instituted maliciously and without probable cause, and it is further alleged “that this plaintiff was indebted to the defendant in no sum, and liable to her in no manner, whatever, which defendant well knew,” from which facts as matter of law there was no probable cause. The termination of that action is alleged, and also that plaintiff necessarily lost time and performed work in and about the defending said action in the sum of \$10, and employed attorneys and was compelled to pay and did pay them \$5 for their services in the defense of the action. These were direct and proximate damages from the malicious bringing of the action, and are recoverable. The complaint, therefore, states a cause of action.

But the damages predicated on the allegations that by reason of the garnishment in the action the \$54 was not paid to plaintiff's firm, and because it was not paid they were unable to pay their rent and employes in their business, and because they were unable to pay their rent and employes their landlord became dissatisfied, and terminated and canceled their lease, and their employes became dissatisfied, and refused to work for them, and as a consequence their business was ruined, and their prospects blighted, are too remote and speculative. There is too much room for contingencies and intervening causes between the garnishment of the \$54 and the alleged injury to the firm's business and prospects to permit of the latter being considered as the natural and proximate result of the former. Whether it was the result of the former at all must necessarily be arrived at by conjecture and speculation. *Cushing v. Seymour, Sabin & Co.*, 30 Minn. 301, 15 N. W. Rep. 249; *Simmer v. City of St. Paul*, 23 Minn. 408; *Swinfin v. Lowry*, 37 Minn. 345, 34 N. W. Rep. 22; *Carsten v. Railroad Co.*, 44 Minn. 454, 47 N. W. Rep. 49. In *Goebel v. Hough*, 26 Minn. 252, 2 N. W. Rep. 847, the injury to the business was the direct, immediate result of the wrongful act.

Judgment reversed.

VANDEBURGH, J., absent.

GOTZIAN et al. v. STEINKAMP.

(Supreme Court of Minnesota. June 8, 1893.)

PROMISSORY NOTES—CONSIDERATION.

S. executed notes payable to G., and delivered them to K., upon the understanding between them that K. should deliver them to G., and get from G., for his own benefit, money, or the equivalent of money. K., who had collected from S. money due to G., and had failed to pay it over to G., turned the

notes over to G. in lieu of that much money so collected by him, and they were received by G. as the equivalent for that amount of such money. *Held*, from the time they were so turned over there was a full consideration for them, and G. can recover on them.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Kerr, Judge.

Action on several promissory notes by C. Gotzian & Co. against Joseph Steinkamp. Plaintiff had judgment, and defendant appeals. Affirmed.

F. Barta, (Munn, Boyeson & Thygeson, of counsel,) for appellant. Morphy, Gilbert & Morphy, (John D. O'Brien, of counsel,) for respondent.

GILFILLAN, C. J. Plaintiff, through its agent, one Kopp, sold goods to defendant, for which defendant paid Kopp, who had authority from plaintiff to receive payment. Kopp did not pay over to his principal the amount collected, he being short in such payment more than the amount of the notes in suit, the principal not knowing that he had received from defendant the amount for which he was short. On application of Kopp, defendant executed the notes, (payable to plaintiff,) and delivered them to him, “with the intention and understanding on the part of defendant and Kopp that Kopp should deliver said notes to plaintiff, the payee, and get for his (Kopp's) benefit money, or the equivalent of money, from the plaintiff for the same;” and Kopp turned the notes in to plaintiff in lieu of that much money which he had collected, and the same was received by plaintiff as the equivalent for that much of such money. As between Kopp and plaintiff the transaction was the same, in effect, as if he had received from plaintiff the money on the notes, and immediately paid it to plaintiff on his account. After it, plaintiff's claim against him was diminished by the amount which the notes called for. It does not affect their validity that the consideration did not actually come into the hands of the defendant. He authorized Kopp to receive, and Kopp did receive, it; and from the time of his receiving it there was a consideration to support the notes, as fully as if the money or thing which constituted it had gone directly to defendant, or to any one else designated by him to receive it. Judgment affirmed.

VANDEBURGH, J., took no part in the decision.

DONAHUE v. DONAHUE'S ESTATE.

(Supreme Court of Minnesota. June 8, 1893.)

PARENT AND CHILD—COMPENSATION FOR SERVICES—EVIDENCE—INSTRUCTIONS.

1. The presumption that a son who, after arriving at his majority, continues a member of his father's family, working for him appar-

ently as before, is working for his support, as in his minority, may be overcome, and an agreement by the father to pay for the son's work after majority proved by evidence, indirect, or circumstantial, by the conduct or conversations of the parties, or the admissions of the father.

2. In an action to recover for such work, a request by defendant to charge that "the evidence must be clear, direct, and certain" is objectionable, as it may mislead the jury.

(Syllabus by the Court.)

Appeal from district court, Freeborn county; Buckham, Judge.

Action by Michael Donahue against the estate of Michael Donahue, deceased, to recover for services performed for decedent in his lifetime. Plaintiff had judgment, and the estate appeals. Affirmed.

Lovely & Morgan, for appellant. W. E. Todd, for respondent.

GILFILLAN, C. J. The evidence was abundant to sustain a finding that, while the plaintiff continued to work for his father after he became of age, there was an agreement between them that the father should pay him for his work. Of course, from the fact alone that the son continued, after he became of age, a member of the father's family, working for him apparently as before he became of age, no agreement to pay him for his work would be implied, but the presumption would be that he worked for his support, as while a minor. But the evidence was sufficient to overcome that presumption, and justify a finding that there was an agreement to pay. All that could be required was that it was such as to reasonably satisfy the jury of the fact. It might be indirect or circumstantial; shown by the conduct or conversations of the parties, or admissions by the father.

The statement in the appellant's second request to charge, that "the evidence must be clear, direct, and certain," might have misled the jury to suppose that, to justify a finding that there was such an agreement, it must have been directly testified to by some witness who heard it made, and that part of the charge was objectionable. All there was unobjectionable in the request was in the court's general charge, given clearly, explicitly, in much better terms than are contained in the request. Order affirmed.

VANDERBURGH, J., took no part in the decision.

NORTON et al. v. BECKMAN.

(Supreme Court of Minnesota. June 8, 1893.)

LANDLORD AND TENANT—UNLAWFUL DETAINER—JUDGMENT ON PLEADINGS—ANSWER—AFFIRMATIVE RELIEF.

1. An entry of judgment held sufficient.

2. In proceedings by a landlord against his tenant under Gen. St. 1878, c. 84, judgment on

the pleadings may be ordered as in other cases.

3. *Petsch v. Biggs*, 18 N. W. Rep. 101, 31 Minn. 392, followed, to the effect that, in proceedings under that chapter, equitable matter, which requires affirmative relief to make it a defense per se, cannot properly be interposed in the answer, and that if interposed the case cannot for that reason be certified to the district court.

(Syllabus by the Court.)

Appeal from municipal court of Duluth; Powell, Judge.

Action by George W. Norton, executor, and others, against J. W. Beckman. Judgment from which defendant appeals. Affirmed.

N. A. & H. G. Gearhart, (Lord & Norton, of counsel,) for appellant. Carey, Agatin & Carey, for respondents.

GILFILLAN, C. J. The judgment in this case was perhaps in some respects informal, but it was sufficient in substance, for it expressed the decision of the court on the matter involved, and the relief granted. It would have been good as a judgment either in the district or in a justice's court.

In proceedings under Gen. St. 1878, c. 84, the pleadings are to be construed, and are to have the same effect, as in a "civil action." When the answer expressly, or by failing to deny, admits the allegations in the complaint, the admission is equivalent to proof. *Hennessey v. Pederson*, 28 Minn., 401, 11 N. W. Rep. 63, did not decide otherwise, but that, under that chapter, judgment cannot be taken by default without proof of the allegations in the complaint, as is the case in certain civil actions. It follows that if the answer admits the material allegations in the complaint, and alleges no defense, the court may render judgment on the pleadings, as in other cases. There is in such case nothing to try, except by the allegations and admissions in the pleadings.

The only other points in the case deserving mention, to wit, that an equitable defense was alleged, and that, because the municipal court could not try such defense, it ought to have certified the cause to the district court, are fully disposed of by *Petsch v. Biggs*, 31 Minn., 392, 18 N. W. Rep. 101, in which it was held that equitable matter, which requires affirmative relief to be a defense per se, cannot be interposed in proceedings under chapter 84, but that the defendant must first obtain that equitable relief in a court competent to give it, and also that the case cannot be certified to the district court because of such equitable matter being interposed. That case came up from the municipal court of St. Paul, but in this respect there is no difference between the provisions of the act establishing that court, and those of the act establishing the municipal court of Duluth. Order and judgment affirmed.

VANDERBURGH, J., took no part in the decision.

KING v. NICHOLS & SHEPARD CO.

(Supreme Court of Minnesota. June 8, 1893.)

CONTRACTS—ACTION ON—PLEADING—MOTION TO MAKE MORE DEFINITE AND CERTAIN—OBJECTION TO EVIDENCE.

1. In an action on a contract to put a machine in good condition, the objection that the complaint does not state specifically the particulars in which it was defective ought to be made by motion to require the complaint to be made more definite and certain.

2. Evidence held sufficient to sustain the verdict.

3. Rule that, when an objection to evidence offered is of such a character that other evidence may remove it the objection must be specifically stated when the evidence is offered, applied.

4. In such an action as above, an allegation that plaintiff will be obliged to expend a specified sum to put the machine in good condition is equivalent to an allegation that the reasonably necessary cost will be such sum.

(Syllabus by the Court.)

Appeal from district court, Mower county; Farmer, Judge.

Action by B. F. King against the Nichols & Shepard Company on a contract. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. W. Somerville, for appellant. French & Wright, for respondent.

GILFILLAN, C. J. The complaint is good. It alleges a contract to put the machine in good repair and condition; a failure to do so; that it was broken in several parts, defective, and out of repair; and what it would cost to put it in the repair and condition which defendant had agreed to put it in. If the defects in the condition of it were not alleged specifically enough to enable defendant to prepare to try the issue, its proper course was by motion to require the complaint to be made more definite and certain in those particulars. The assignments of error and the objections to evidence, based on the assumed insufficiency of the complaint, have, therefore, no foundation. The evidence was sufficient to justify the jury in finding that the agent who sold the machine had authority to make the contract sued on; that the machine was out of repair; and from the evidence they might have found that it would have cost \$406 to put it in good repair and condition. Their verdict was for \$250. The objection now made to some of the evidence as to the condition of the machine, that the terms referred to by the witnesses were too remote from the time of the contract, was not specifically taken at the trial. The rule which this court has always followed,—certainly since *Gilbert v. Thompson*, 14 Minn. 544, (Gil. 414),—is that, where the real objection to evidence is of such a character that, if specifically pointed out when the evidence is offered, the party offering it may remove the objection by further evidence, the general objection that the evidence is incompetent, immaterial, or irrelevant will not cover it, but it must be specifically stated. Had it been so

made in this case, it might have been removed by proof that, when seen by the witnesses, the machine was in the same condition as when delivered to plaintiff. Upon such a contract as this, to wit, to put the machine in good repair and condition, it was not necessary that, in order to recover, plaintiff should himself put it in that condition. (As soon as defendant failed to do what it agreed to do plaintiff might recover the reasonably necessary cost of doing it; and the allegation in the complaint that plaintiff will be obliged to pay out and expend a specified sum to put the machine in the condition that defendant agreed to put it in is equivalent to an allegation that the reasonably necessary cost of putting it in such condition was that sum. We see nothing in any assignment of error not above referred to that requires special mention. Order affirmed.

VANDEBURGH, J. took no part in this decision.

JEFFERSON et al. v. ASCH et al.

(Supreme Court of Minnesota. June 8, 1893.)

CONTRACTS—RIGHT OF STRANGER TO MAINTAIN ACTION.

A stranger to a contract between others, in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, cannot recover upon it.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Kelly, Judge.

Action on a bond by Rufus C. Jefferson and others, partners as Jefferson & Kasson, against Carl Asch and others. Defendants had judgment on demurrer to the complaint, and plaintiffs appeal. Affirmed.

Owen Morris, for appellants. F. W. Zollman, for respondents.

GILFILLAN, C. J. The Boston Northwest Real-Estate Company owned a lot on Sixth street, St. Paul, with two buildings standing on it, and let it to George Benz for the term of five years from May 1, 1889, and about a year thereafter he sublet it for the remainder of his term to Smith & Co. Afterwards Smith & Co. entered into a contract with the defendant Leithauser to make certain alterations and repairs and the defendants Leithauser as principal, and Asch and Boldthen as sureties, executed a bond, in which they acknowledged themselves to be indebted to George Benz, "for the use of the Boston Northwest Real-Estate Company," "and all persons who may do work or furnish material" pursuant to said contract, to be paid to the said George Benz, his executors, administrators, or assigns, for the said use," and which was conditioned to be void if Leithauser should pay "all just claims

for all work done and to be done and all materials furnished and to be furnished pursuant to said contract and in the execution of the work therein provided for, as they shall become due, and shall indemnify and save harmless said George Benz and said Boston Northwest Real-Estate Company from all mechanics' liens," etc., and "indemnify and save harmless the said George Benz from all claims of whatever description which may arise from, in, or about said work, alterations, and repairs." The plaintiffs, having furnished materials to the contractor for the purposes of the contract, bring this action on the bond to recover the price thereof. The court below sustained a demurrer to the complaint.

From the seals to this bond there arises the presumption of a sufficient consideration to sustain it between the parties to it. The cases in which one not a party to a contract may sue upon a promise in it for his benefit were at one time limited to contracts not under seal, and this court, in stating the law on the subject, in *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. Rep. 882, expressed that limitation; but the distinction in this respect between contracts by specialty and simple contracts has not in the later authorities been adhered to, and may now be regarded as abandoned. If there ever was any reason for the distinction, it could only have been a technical one, which no longer has any merit to commend it, and we do not think we ought to recognize it. Though this seems intended as a mere bond to indemnify and save the obligee named harmless, that, and not any incidental benefit that might accrue to others not parties to it, being the primary purpose of its stipulations and promises, we will treat it, because on both sides it is so presented here, as though such primary purpose were to secure payment to the persons doing work or furnishing material under the contract mentioned in it. In considering the question presented we must lay aside, as having no bearing upon it, the cases of official or statutory bonds required or authorized for the benefit or security of persons not named as obligee, a nominal obligee being named, and where the statute expressly or by implication authorizes such persons to sue upon them. Instances of such are sheriffs' bonds, probate bonds, bonds authorized by the mechanic's lien law in Gen. St. 1878, and such as were considered in *City of St. Paul v. Butler*, 30 Minn. 459, 16 N. W. Rep. 362, and *Morton v. Power*, 33 Minn. 521, 24 N. W. Rep. 194. As, so far as appears by the complaint, Benz could not be liable to pay for the work done and materials furnished in fulfilling the contract to repair, and as, under the law then in force, his interest in the property could not be subject to a lien therefor, it was legally a matter of indifference to him whether the work and materials were paid for or not. He had no duty in respect

to it. And the question comes to this: Where, in a contract between two persons, one promises the other to do something for the benefit of a stranger to the contract, and the promisee has no relation to the thing to be done nor to the stranger to be benefited, can such stranger bring an action to enforce the promise. In some of the text-books and decisions it is stated generally "that, where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." But we do not think there is a case to be found in which such an action was sustained upon a bare promise, with no other circumstances to justify an exception to the general rule that an action upon contract can be maintained only where there is privity of contract between the parties. In *Lawrence v. Fox*, 20 N. Y. 268,—the most conspicuous and most thoroughly reasoned case in New York, sustaining an action by a stranger to a contract,—the promisee owed the debt which the promisor agreed to pay, and loaned him the money, which he agreed to pay to the promisee's creditor. *Thorpe v. Coal Co.*, 48 N. Y. 253, was a case where the grantee in a conveyance of real estate assumed to pay a mortgage resting on it to secure a debt of the grantor. In the syllabus to the case it is stated that it overrules *King v. Whitely*, 10 Paige, 465, but, as we read the opinion, it goes no further than to question the reason given by the chancellor in the latter case for sustaining an action in such a case when it can be sustained. The case in 10 Paige was one where the grantee in a conveyance assumed to pay a mortgage on real estate for which the grantor was not personally liable. It was held that the creditor could not recover of the grantee. The chancellor stated as the principle upon which a creditor can recover from a grantee so assuming to pay a debt of the grantor that a creditor is entitled to be subrogated to securities for the debts held by a surety, and that between the grantor and the grantee in such case the latter becomes the principal debtor and the former surety. Another and simpler reason might have been given, to wit, that where one delivers to or leaves in the hands of another a fund with which to satisfy an obligation of the former, a duty in the nature of a trust is thereby created. The decision in 10 Paige was followed in *Trotter v. Hughes*, 12 N. Y. 74, and approved in *Garnsey v. Rogers*, 47 N. Y. 233. In *Vrooman v. Turner*, 69 N. Y. 280, similar in its facts to the case in 10 Paige, the court go over the whole ground, recognize the decision in *Lawrence v. Fox*, and hold the two decisions consistent, and follow that in 10 Paige. It lays down this rule: "To give a third party who may derive a benefit from the performance of the promise an action there must be—First, an intent by the promisee to secure some benefit to the third party; and, second, some

privity between the two,—the promisee and the party to be benefited,—and some obligation or duty from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally.” “There must be either a new consideration, or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement;” and “there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit.” In some cases, near relationship, as of father and daughter, or uncle and nephew, has been held to supply the place of a strictly legal right in the third party. *Dutton v. Pool*, 1 Vent. 318; *Felton v. Dickinson*, 10 Mass. 287,—are instances of such. To enforce such a promise in favor of a third party, where there is no obligation to benefit him on the part of the promisor or promisee, nor anything such as near relationship, nor any consideration from the third party, would be much like enforcing an intended gift or gratuity. *Vroomer v. Turner* settled the law in New York, as the decision, though subsequently referred to with approval, (see *Wilbur v. Warren*, 104 N. Y. 193, 10 N. E. Rep. 263; *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. Rep. 58; *Comley v. Dazian*, 114 N. Y. 161, 21 N. E. Rep. 135; *Lorillard v. Clyde*, 122 N. Y. 498, 25 N. E. Rep. 917; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. Rep. 49,) has never since been questioned. The question was considered and the cases in Massachusetts summed up in an able and exhaustive opinion by Metcalf, J., in *Mellen v. Whipple*, 1 Gray, 317. That was the case of an agreement by a grantee of real estate to pay a mortgage for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. The court attempts to classify the cases in that state in which one not a party to the promise has been permitted to sue upon it. The classification may be briefly stated as—First, cases where the defendant has in his hands money which in equity and good conscience belongs to the plaintiff,—as, if A. put money or property in the hands of B. as a fund from which A.’s creditors are to be paid, and B. has promised expressly or impliedly to pay such creditors; second, cases where a near relationship, as father and child, or uncle and nephew, exists between the promisee and the person to be benefited; third, cases of which *Brewer v. Dyer*, 7 Cush. 337, is an instance, in which the defendant agreed with a lessee of premises to take the lease and pay the rent to the lessor, and entered with the knowledge of the lessor, paid him the rent for a year, and then left before the term expired. We have referred so fully to the decisions in New York and Massachusetts because in those states the question has more frequently arisen,

and been more ably and thoroughly discussed, than elsewhere in this country. There has been no decision of this court at variance with the rule as held in those two states. In every case but one the promise was to pay a debt of the promisee, and a fund was either left or put in the hands of the promisor for the purpose. That one case was decided in a line with the rule held in the *Vrooman* and *Mellen* Cases. A grantee of real estate had assumed a mortgage debt for which the grantor was not personally liable. It was held the creditor could not recover from the grantee. *Brown v. Stillman*, 43 Minn. 126, 45 N. W. Rep. 2. Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are prepared to say that, where there is nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it. Such is this case.

Order affirmed.

VANDEBURGH, J., took no part in the decision

UNION RAILWAY STORAGE CO. v. McDERMOTT et al.

(Supreme Court of Minnesota. June 6, 1893.)
CONTRACTS—RIGHT OF STRANGER TO MAINTAIN ACTION.

Jefferson v. Asch, (Minn.) 55 N. W. Rep. 604, followed, denying the right of a stranger to a contract to sue upon it, the promisee owing him no duty in the premises.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Hicks, Judge.

Action on a bond by the Union Railway Storage Company against John R. McDermott and others. Defendants had judgment, and plaintiff appeals. Affirmed.

Kellogg & Laybourn, for appellant. George E. Young, J. M. Burlingame, and Kitchel, Cohen & Shaw, for respondents.

DICKINSON, J. This is an appeal from an order sustaining demurrers of the defendants to the complaint. The cause of action set forth in the complaint may be briefly stated as follows: The defendant McDermott entered into a written contract with the United States, an assistant quartermaster of the army making the contract in behalf of the government, by the terms of which McDermott undertook to erect certain buildings for the government at Ft. Snelling, he to furnish the material and labor therefor. It was specifically expressed by article 3 of the contract that he should “be responsible for and pay all liabilities incurred for labor and material in fulfillment of this contract.” In article 6 it was agreed that “all rights of action, however, for any breach of this contract by the said

John R. McDermott are reserved to the United States." In connection with the making of this contract the defendant McDermott as principal, and the other defendants as his sureties, executed their bond to the United States in the penal sum of \$5,000, conditioned that McDermott should perform all the covenants, conditions, and agreements contained in the contract, to which the bond specifically referred, "including the covenant that the said John R. McDermott shall be responsible for and pay all liabilities incurred for labor and material in fulfillment of said contract." The plaintiff, in reliance upon the terms and conditions of the contract and bond, furnished to McDermott at an agreed price a large quantity of brick, which was used in the construction of the buildings, but for which payment was never made. The plaintiff now seeks to recover therefor in this action on the bond.

The legal question here presented—as to the right of the plaintiff, a stranger to the contract, to sue upon it—has recently been considered in *Jefferson v. Asch*, (Minn.) 55 N. W. Rep. 604, and the rule there declared is decisive of this case. The plaintiff has no right of action on the bond. He was a complete stranger to it. There was no privity between him and the promisee,—the United States. The latter rested under no duty or obligation to him upon which he could assert any legal or equitable right to avail himself of the benefit of, and enforce, the promise made by the defendants to the United States. Nor was the promisee—the United States—interested in having this part of the contract performed. It would be of no benefit to the United States if the contractor should pay his own debts for material purchased by him. It would be in no way prejudiced if he should not pay. Its property could not be subjected to a lien therefor. In brief, the right of the plaintiff to sue upon this bond has no other legal foundation than the bare fact that the defendants had by that instrument entered into an obligation towards a mere stranger to the plaintiff that his debt should be paid. In such a case the stranger to the contract cannot sue upon it. Our decision above cited is decisive. Orders affirmed.

VANDERBURGH, J., did not participate.

MAGNER v. TRUESDALE.

(Supreme Court of Minnesota. June 8, 1893.)
ACCIDENTS AT RAILROAD CROSSINGS — CONTRIBUTORY NEGLIGENCE — EVIDENCE — HARMLESS ERROR.

1. *Held*, that one attempting to cross a railroad track at a street crossing without looking to see if there is danger, when there is nothing to prevent his looking, and when, by looking, he must have discovered the danger in time to avert it, is guilty of negligence.

2. *Held*, that the evidence shows such negligence, and that defendant was entitled to the verdict rendered, so that any error in the charge was harmless.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Canty, Judge.

Action by Ellen Magner, administratrix of the estate of Edmund Magner, deceased, against William H. Truesdale, receiver of the Minneapolis & St. Louis Railway Company. Defendant had judgment, and plaintiff appeals. Affirmed.

John Moonan, for appellant. Albert E. Clarke and Wilbur F. Booth, for respondent.

GILFILLAN, C. J. Action for negligently injuring, and causing the death of, plaintiff's decedent, Edmund Magner. The Minneapolis & St. Louis Railway, of which defendant was receiver, and in the management, runs nearly north and south upon and along Mill street, a public street in the city of Waseca, and crosses Elm street, also a public street in said city. From some distance south of Elm street the track is upon a slightly descending grade to and across that street, and to the north of it there is a switch track. Those in charge of the railway switched cars from the south side of the street by running them across to and upon the switch track, or ran them along the main track north of the street, while the engine doing the switching ran upon the switch track to let them pass. At the time of the injury the railway employees were making, from the south to the north side of Elm street, what is called a "flying switch," that is, one made by attaching to the car to be switched an engine giving the car a sufficient impetus, and then detaching the engine, running it ahead, out of the way, and allowing the car, with the impetus thus imparted, to run to the place desired. The engine had been detached, had run ahead, had passed deceased; and he being on the track, or very near it, the car being switched, and following the engine, struck him, and threw him down, so that he was caught by the running gear, and injured so that he died. The evidence was largely devoted to the question whether, when struck, he was on, or just south of, Elm street, and whether, if within the limits of that street, he was walking along the track, or was attempting to cross it diagonally, towards the northwest. Whichever was the fact, he was, when struck, either on the track, or dangerously near to it, with his back to the approaching car. The fact is indisputable, on the evidence, that, had he looked back before he stepped on or so near the track, he must have seen the approaching car in time to avoid it. One or two of plaintiff's witnesses indicate that there was some fog, and that the engine threw some smoke down upon the track; but even those witnesses testify that they saw, not only the car, but the man, when they must have been

at a considerable distance. There is no evidence that he made any effort to learn if there was danger. The only evidence on the point was that he was walking along with his head down, apparently paying no attention to anything. He had lived in the city about five months; was a railroad man; section boss on the Chicago & Northwestern Railroad, the track of which crossed that of the Minneapolis & St. Louis within five or six hundred feet south of Elm street,—the two roads using the same depot at that place; and he must be presumed to have known the situation and danger of the Elm street crossing. The rule being that one approaching, and about to cross at, a railroad crossing, must use his senses, his sight and hearing, unless he is in some way, through no fault of his, prevented, to learn if he can make the crossing safely, and that it is negligence per se to place himself upon the track without looking and listening, when he can look or listen, and doing so would inform him of the approaching danger in time to avert it, the deceased was clearly guilty of such contributory negligence as must prevent a recovery. A verdict for the plaintiff could not have been sustained, and defendant was entitled to a direction to return a verdict for him.

Whether the instructions which plaintiff assigns as error were strictly accurate is, in view of the evidence, merely an abstract question. No instructions of the court could change the situation, that defendant was entitled to a verdict, and as the jury rendered the verdict they were bound, by the evidence, to render, any error in the instructions could have done no harm. Order affirmed.

VANDEBURGH, J., took no part in the decision.

PAGE et al v. MILLE LACS LUMBER CO.¹
(Supreme Court of Minnesota. June 12, 1893.)

PRIVATE NUISANCE—OBSTRUCTING NAVIGABLE
STREAM—EVIDENCE.

1. A nuisance, such as an unreasonable and unnecessary obstruction of a navigable stream, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom, distinct and apart from the common injury.

2. Persons using such streams for the driving of logs must do so with due deference to the rights of other parties engaged in the same business, and in most respects such streams are governed by the same rules as are highways upon land.

3. Plaintiffs were engaged in driving logs of their own, and, under contract, logs belonging to other persons, down a navigable stream, to their own mill and to market, having to pass through defendant's mill ponds and by its mill, its booms, and sorting gaps. There was testimony introduced upon the trial tending to show that by means of its ponds and booms, and the manner in which its own logs were handled and placed in storage booms, defend-

ant maintained a nuisance in its mill ponds, and unreasonably and unnecessarily obstructed and delayed plaintiffs' driving operations. *Held*, that the latter had shown special injuries differing in kind, not merely in degree or extent, from those suffered by the general public.

(Syllabus by the Court.)

Appeal from district court, Mille Lacs county; Searle, Judge.

Action by E. T. Page and others, as Page Bros., against the Mille Lacs Lumber Company. Defendant had judgment, and, from an order denying a new trial, plaintiffs appeal. Reversed.

W. Hammons, for appellants. Eller & How, for respondent.

COLLINS, J. When plaintiffs rested their case upon the trial the court dismissed the same on the ground that the testimony introduced was insufficient to sustain the action. A motion for a new trial was afterwards denied, and the questions involved are before us on a bill of exceptions. From this bill it appears that both parties have been engaged in lumbering for several years upon Rum river, a stream navigable for logs and timber. Both parties cut their logs on the upper waters, and drive them to their respective mills, there to be manufactured into lumber. The plaintiffs' mill is at Anoka, the defendant's about 75 miles above it, at Milaca; and it follows that plaintiffs' logs must be driven past the point at which defendant's are taken from the stream and manufactured. The only practicable way in which either of these mills could be supplied with logs was by driving them down the said river. Just above its mill the defendant company constructed two dams across the river, about a half mile apart, the natural result being to create a pond and slack water above each, the slack water in the upper pond extending about 3,000 feet above the upper dam. In this pond the defendant placed piers, piling, and boom sticks, so that a path or way was made from 40 to 70 feet wide, leading from about where the slack water began directly to the dam, and crossing the original channel of the stream twice. Side booms were put in by defendant on either side of the way, and at a convenient place a sorting gap, and all logs coming down the river had to pass men in defendant's employ, stationed at the gap, whose business it was to guide logs bearing defendant's marks into these side booms for storage, and to allow all other logs to pass on. Between the dams there was piling and booms. The inevitable result was to delay and detain plaintiffs' and all other logs destined for points below defendant's mill. In the years 1890 and 1891 these plaintiffs were engaged for themselves, and, under contract, for other persons, in making what is called a "clean drive" of the river. It is unnecessary to go into the details as to the exact manner in which it was done, but the

¹ For opinion on rehearing, see 55 N. W. 1119.

testimony produced by plaintiffs on the trial tended to show that by reason of the piers, piling, booms, boom sticks, and dams before mentioned, and the way in which defendant's employes performed their work above and at the sorting gap, and appropriated the river for the storage of defendant's logs, the passage of the logs which plaintiffs were driving was unnecessarily impeded and obstructed, and that plaintiffs were unreasonably and oppressively hindered and delayed in their driving operations, to their great damage; the object of this action being to recover the amount of such damages.

It is apparent that the learned trial judge, although convinced that by reason of the maintenance of a public nuisance in the river a wrong had been committed for which plaintiffs should have redress, felt constrained to dismiss the action on the authority of two recent cases, (*Swanson v. Boom Co.*, 42 Minn. 532, 44 N. W. Rep. 986, and *Lammers v. Brennan*, 46 Minn. 209, 48 N. W. Rep. 766), and we are obliged to admit that, if reliance could be placed on our views as to the proper application of a well-settled rule of law to a given state of facts as expressed in *Swanson v. Boom Co.*, he was fully justified in his ruling. While differing somewhat on the facts, the present case cannot be distinguished from that, and the rule there announced as applicable and controlling, preventing a recovery by the plaintiff, if rightly applied on that occasion, would be equally as pertinent and equally as determinative on this. But we are now convinced that an error was committed in the application to the facts in the *Swanson* Case of the salutary and well-established rule that an individual can not maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public, and that it is only when he sustains special injury differing in kind, not merely in degree or extent, from that sustained by the general public, that he may recover damages in a private action; and an examination of the opinion recently filed in *Aldrich v. City of Minneapolis*, 53 N. W. Rep. 1072, will indicate that we then had doubts of the correctness of the decision in *Swanson v. Boom Co.* In the opinion in *Aldrich v. City of Minneapolis* most of the cases in this court bearing on the subject, and many others, were referred to and discussed, and we are not inclined to again go over the ground. It is obvious that there has been a very marked conflict of opinion in the application of the rules pertaining to the rights of private parties to have redress in private actions when injuries have grown out of public nuisances, and as to where, on the facts, the line should be drawn. This conflict, and that the adjudicated cases are irreconcilable, is well shown in *Stetson v. Faxon*, 19 Pick. 147; *Farrelly v. City of Cincinnati*, 2

Dist. 516; and in *Wood, Nuis. c. 19*. That a nuisance, such as an unreasonable or wanton obstruction of a navigable stream, a public highway, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom, distinct and apart from the common injury, need not be demonstrated by illustration. The public wrong inflicted upon all persons must be redressed by a public prosecution, and the private injury by an appropriate private action. An obstruction to a highway, although it be an infringement upon the rights of the general public, in the nature of a public nuisance, may be, and frequently is, productive of special and particular damage to a private individual; and it would be highly unjust and inequitable to say that he has no right of redress in a private action, on the ground, merely, that the injury had resulted from an act which is a public offense in itself, and because other persons might have been injured and damaged in the same manner and to the same extent, had they met the obstruction under like circumstances. Such is not the law. The general doctrine in reference to the use of navigable streams as public highways is that each person has an equal right to their reasonable use. What constitutes a reasonable use depends upon the circumstances of each particular case, and no positive rule can be laid down to define and regulate such use with precision, so various are the subjects and occasions for it, and so diversified the relations of the parties therein interested. The defendant had the right, as had the plaintiffs, to use the river as a highway for the purposes of navigation, and, as an incident to this, the right to secure its logs in side booms, although the inevitable result would be to temporarily obstruct the logs of other persons destined for a mill or market further down the stream. And we have no doubt of its right, in a reasonable manner, to erect piers and dams, and to put in piling, and attach boom sticks, and also to maintain side booms for the storage of logs; but it was not authorized by the construction of piers, dams, booms, or boom sticks, or by the management of either, or of a sorting gap, to unreasonably or oppressively obstruct or blockade the way. It must use the stream with due deference to the rights of others, and in most respects streams used for highway purposes are governed by the same general rules of law as are highways upon land. No general rule can be laid down for determining whether a pleading shows, or whether the evidence produced upon a trial tends to establish, a case under the principle or rule that, to maintain an action for a wrong or injury arising out of the maintenance of a public nuisance, an individual must have sustained special injury differing in kind, not merely in degree or extent,

from that sustained by the general public; and we shall not attempt it. It is well discussed in *Aldrich v. City of Minneapolis*, supra. We are of the opinion that the case now under consideration was brought within the rule, and that the evidence tended to show that plaintiffs had suffered a special and particular injury. This injury, the direct result of an unreasonable detention of their logs by means and methods for which defendant company is responsible, was wholly distinct and different in kind, not merely in degree and extent, from that sustained by the general public. A private action can be maintained to redress this injury, notwithstanding there is also a remedy afforded the public. In principle the plaintiffs' rights cannot be distinguished from the individual rights considered in *Brakken v. Railway Co.*, 29 Minn. 41, 11 N. W. Rep. 124, and in numerous other cases in this court, where an action to redress a private wrong, growing out of a public nuisance, has been declared the proper remedy. Attention is called to *Brown v. Watson*, 47 Me. 161, and *Enos v. Hamilton*, 27 Wis. 256, in which the exact question now before us has been discussed briefly, and passed upon. Both cases support the conclusion herein reached, and the one last cited has been approved in at least three later cases in the same court. That it has been the common practice to bring actions at law not distinguishable from that at bar, and also in equity, and to prosecute them to a successful termination, will be seen from an examination of the following: *Powers v. Irish*, 23 Mich. 429; *Watts v. Boom Co.*, 52 Mich. 203, 17 N. W. Rep. 809; *Gifford v. McArthur*, 55 Mich. 535, 22 N. W. Rep. 28; *Enos v. Hamilton*, 24 Wis. 658; *Clark v. Peckham*, 10 R. I. 36; *Blanchard v. Telegraph Co.*, 60 N. Y. 510; *Hughes v. Helser*, 1 Bin. 463; *Welse v. Smith*, 3 Or. 445; *Lancey v. Clifford*, 54 Me. 487; *Dudley v. Kennedy*, 63 Me. 465; *McPheters v. Boom Co.*, 78 Me. 329, 5 Atl. Rep. 270; *Frink v. Lawrence*, 20 Conn. 117. Order reversed.

VANDEBURGH, J., absent, took no part herein.

MITCHELL, J. I concur in the result, and do so more especially on the ground that, for the purposes for which plaintiffs were using the river, (driving logs,) it was their only highway for getting their timber to their mill.

DARLING et al. v. JEWELL.
(Supreme Court of Michigan. June 23, 1893.)
EQUITY—CANCELLATION OF DEED—MISTAKE IN DESCRIPTION.

A deed will not be set aside for mutual mistake in description where defendant evidently believed that he was purchasing the lands described, and paid the full consideration therefor.

Appeal from circuit court, Newaygo county, in chancery; John H. Palmer, Judge.

Bill by James H. Darling and Charles H. Cook against Joseph Jewell to set aside a deed. Bill dismissed. Complainants appeal. Affirmed.

W. D. Leonardson, for appellants. A. G. Day, for appellee.

LONG, J. Complainants filed their bill in the Newaygo circuit court in chancery to set aside two deeds made by them to the defendant of certain premises in that county, on the ground of mistake in the description. The controversy arises over the question as to what was understood to be the true boundary line at the time the deeds were executed. Complainants were tenants in common of the property, but conveyed by separate deeds. It is claimed that the lands agreed to be conveyed by complainants were bounded on the south by lands of Sarah E. Whitman and H. N. Smith, but that by an error in drafting the deeds, or by the fraud of defendant, Jewell, certain lands now claimed by Sarah E. Whitman and H. N. Smith were included in the deeds so executed by the complainants to the defendant. The court below, after a full hearing upon pleadings and proofs in open court, dismissed the bill, with costs. We think the court below very properly dismissed the bill. The evidence is not convincing that any mutual mistake was made in describing the lands. Jewell evidently believed that he was purchasing all the lands described in the deeds, and paid the full consideration therefor. Defendant, Jewell, wrote the deeds for the complainants to execute. He claims to have put in such lands as were agreed upon. After the deeds were executed, ejectment was brought against him by certain parties who claimed to own some portions of the land. This bill was filed to avoid the effect of the warranty in the deeds as to those portions, and on the hearing the complainants sought to show that Jewell fraudulently put in more land than he purchased from them. We think the evidence fails to substantiate this claim. It is unnecessary to insert the evidence here. The court below, after a full hearing in open court, was of the opinion that complainants failed to make a case, and we concur in that opinion. Decree is affirmed. The other justices concurred.

HUSTON v. WALDRON.

(Supreme Court of Michigan. June 16, 1893.)
VENDOR'S LIEN—FORECLOSURE—EVIDENCE—DISMISSAL OF BILL.

In an action by an administrator to foreclose a vendor's lien on land conveyed by plaintiff's intestate to defendant, a son-in-law of the intestate, defendant's evidence was that the consideration of the conveyance, in addition to a cash payment made at the time of

the purchase, was that defendant should support the intestate during her lifetime; that the notes for the balance of the price were given to protect the intestate in case she did not live amicably with defendant; that the intestate lived with defendant until her decease, and that during her lifetime she did not ask for the payment of either the principal or the interest on the notes. *Held*, that a decree dismissing the bill was properly entered.

Appeal from circuit court, Berrien county; in chancery; Thomas O'Hara, Judge.

Action by Richard B. Huston, administrator of the estate of Mary Witter, deceased, against Josiah A. Waldron, to foreclose a vendor's lien. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Edward Bacon, for appellant. George S. Clapp, for appellee.

GRANT, J. Complainant, as administrator, filed this bill in equity to foreclose a vendor's lien upon certain real estate. The bill alleges that Mary Witter, on March 19, 1886, was possessed in fee simple of the real estate described; that defendant was her son-in-law, having married her daughter, by whom he had several children then living; that she bargained and sold on that date to the defendant, for the consideration of at least \$1,700, said land; that the deed therefor was duly executed and recorded; that to secure the payment of part of the purchase price defendant executed and delivered to Mrs. Witter two promissory notes for \$300 each, dated April 16, 1886, with interest; that prior to the execution of said deed Mrs. Witter had long lived upon said land, and had had the entire control thereof; that about the time of such conveyance said defendant moved into the house where Mrs. Witter lived, and continued to live with her there until her death; that Mrs. Witter died intestate October 11, 1884; that nothing has been paid upon said notes; that said defendant, on March 19, 1869, conveyed to one Swem 20 acres of said land, the title and possession to the rest of the land being in him; claims a lien for said purchase money, and prays for a sale of said real estate. The answer denies that Mrs. Witter, at the time of the conveyance had a good and indefeasible title in fee simple to the land; admits the conveyance to him; avers that her husband, John Witter, before he died, made a request to defendant that his wife should have a home with him while she lived; that shortly after her husband's death she removed to his house, and lived there till about March 19, 1866; that she then claimed an interest in the land described in the bill, desired him to buy it, and move into the house thereon, and agreed with him that if he would move there she would deed him her interest in the land, mainly, if not entirely, in consideration of her support by him while she lived; that as, however, it might occur that differences might arise, and she and he and his family could not live together agreeably, and she

might desire to go elsewhere to live and be supported, they agreed that, if such contingency did arise, she should be secured by the two notes; that otherwise, if she lived with him, and had her support while she lived, that was to be pay in full for all the interest conveyed by her to him, and for that reason said notes were made; that, aside from this, she was paid for her interest in said land when the deed was executed; that she lived with him from that time until her death, and was supported by him; that he built a new house on the land, in which she selected a room, which she thereafter occupied; that his wife died in 1877; that after her death he hired help to keep house for him, in order that he might more completely and satisfactorily keep and perform his agreement with her; that the heirs of her first husband claimed interests in the land; that her son, William Huston, one of such heirs, claimed an interest, and defendant paid him \$1,000, for which he received a deed bearing date the same day as the one from Mrs. Witter. Decree was entered in the court below dismissing the bill.

At the time of the conveyance by Mrs. Witter to defendant she had three children living,—Richard B. Huston, the complainant, William Huston, and the wife of the defendant. It was natural that she should choose to live with her daughter. She was possessed of some property, and loaned considerable in small sums, especially to her two sons and to Mr. Waldron, for which she took notes. Among her effects at the time of her death were 13 promissory notes. She had been married three times, and had had considerable experience in business affairs. While she may have claimed the entire title to the land conveyed,—about 91 acres,—she had not title of record to the entire land. Probably the defendant now has title by adverse possession. But it is immaterial whether she had a good title. No question is raised upon the validity of the deed, or her competency to make it, or that she was in any manner deceived. It is the fair presumption that she desired to secure a home with her daughter and her family during the remainder of her life. The evidence shows that her confidence in the defendant was not misplaced. A home was furnished her, and she was kindly and comfortably taken care of until her death at the age of 81 years. Complainant claims that she did work enough in the defendant's family to fully compensate him for her support. It is undoubtedly true that she did more or less work in accordance with her age and strength. It would be indeed strange if she did not. But this has no tendency to show that the arrangement was not made. During her lifetime she asked for no payment either of principal or interest. She undoubtedly knew when her notes would become barred by the statute of limitations. Her conduct is very strong evidence that she was living there

under some agreement. We think the evidence by a fair preponderance shows that these notes were given for the purpose stated in the answer. This bill is not filed in the interest of creditors, but in the interest of complainant and his brother, to whom she had made advances. She left a will, which was drawn by her brother, and left with him. After her death it was handed to William Huston, and was speedily lost while in his possession. Neither complainant nor his brother contributed anything towards the support of their mother. They have no equities, and, if they are entitled to a decree, it must be because they have clearly established the vendor's lien. But in this we think they have failed. The evidence shows no intention on her part of retaining a lien upon the land. At the time of the purchase defendant paid Mrs. Witter \$1,000 upon the purchase. This amount, and the care of Mrs. Witter, constitute a full consideration for the deed.

Decree affirmed, with costs.

MONTGOMERY, J., did not sit. The other justices concurred.

WHITTAKER v. FULLER.

(Supreme Court of Michigan. June 16, 1893.)

REPLEVIN—WHO MAY MAINTAIN.

A lessee of personal property sought to be taken to satisfy a tax against the lessor may maintain replevin against the officer seizing such property. *Tousey v. Post*, 52 N. W. Rep. 57, 91 Mich. 631, followed.

Error to circuit court, St. Clair county; William T. Mitchell, Judge.

Replevin by Ephraim Whittaker against Elton B. Fuller for certain sheep seized by defendant to satisfy a tax. There was judgment for defendant, and plaintiff appeals. Reversed.

A. E. Chadwick, for appellant. Henry P. Jenney, for appellee.

MONTGOMERY, J. This is an action of replevin to recover possession of 43 sheep. One Zebina McColman owned and leased to the plaintiff the southeast quarter of section 35, township of Mussey, county of St. Clair. He also leased to the plaintiff and gave him possession of 43 sheep, to be kept by the plaintiff on the farm for one-half of the wool and increase. March 5, 1891, defendant, who was township treasurer of the township of Mussey, took the 43 sheep from the plaintiff's possession, drove them to Capac, 3 or 4 miles, from the residence of plaintiff, and offered them for sale, to satisfy a special tax for a drain, called the "Doty Drain," against the land occupied by Whittaker. After forbidding Fuller to sell the sheep, and after demanding them, plaintiff brought replevin. It was conceded by counsel for the defendant on the settlement

of the bill of exceptions that, if the plaintiff, under the proofs and his theory of the case, had a right to attack the validity of the Doty drain proceedings, the case should be reversed, and sent back for a new trial. The learned circuit judge instructed the jury that, if the plaintiff was the true owner of the property, inasmuch as there was no tax or assessment against him, he might maintain replevin. But he further charged the jury that, "if the officer finds the property claimed by some person as lessee, for instance, for the purpose of increase, as is claimed in this case, while the true owner is behind, and he himself could not have taken the property away, yet the law steps in, and makes this property liable to seizure by a public officer for taxes against the owner, and does not let it be avoided by such a contract; otherwise it might be put out of the law's reach, and in that way he (the owner) would avoid taxation by simply leasing or disposing of his property in that way." He further charged the jury that "Mr. Whittaker in this suit asserts absolute property and ownership and right of possession by his writ, and now the question comes before you to determine whether he in any way, being the owner, and being entitled to possession, has waived the right of possession, so that he is now estopped by the law from asserting his claim of ownership, if he had one; and that is the main question I shall submit to you." It is claimed by the defendant that when he went to make the levy to satisfy the tax Mr. Whittaker pointed out the property in question as the property of Mr. McColman, and that he was therefore estopped from now bringing this action of replevin while the officer was proceeding to satisfy this tax. After giving an appropriate instruction upon this subject, the learned circuit judge further said to the jury: "Now, in this case, if you find for the plaintiff that Whittaker's theory is correct, and that he gave no right or permission to seize them, and that he owned the sheep, and was entitled to their possession, and did not give a right or permission in any way to Mr. Fuller to take them, then you will find a verdict for the plaintiff, and assess his damages in that case at such sum as you find to have proved before you. But if, on the other hand, you shall find that Mr. Fuller went there in good faith, and sought to find out the true condition of the property, and was misled, if the property was Whittaker's, or, if not Whittaker's, that he was told by Whittaker that it was McColman's, and he, in pursuance of that, made the levy, then Mr. Whittaker himself cannot maintain this suit." He further instructed the jury as follows: "Now, remember that in this case it depends upon who was the owner of the property. It was not claimed that Mr. Whittaker was the absolute owner; only that he was the conditional owner. You have heard what I said in reference to that.

in the first place, that a man cannot put his property beyond the reach of taxes, but, if he can, then, did Mr. Fuller levy upon this property in good faith, having reason from what was said by Mr. Whittaker to believe that it was the property of Mr. McColeman, and took it away? and in that case he is entitled to levy. Or, if you find that the property was not Mr. Whittaker's, in either of those cases you will find for the defendant, and assess his damages to the value of the property, as I say." We think that the jury must have understood from these instructions that, in order to entitle the plaintiff to recover, it must appear that he was the absolute owner of the property. This is not the law. See *Cobbey*, Rep. 72, and *Hunt v. Strew*, 33 Mich. 85, in which case it was held that the lessee of personal property is the proper plaintiff in replevin. The plaintiff having the right then to bring replevin, and it being conceded that if he had the right to attack the validity of the tax he is entitled to recover, it follows that the case must be reversed; for it must be held that one entitled to the possession of personal property sought to be taken to satisfy a tax against a third person may defend his possession against the officer. *Touney v. Post*, 91 Mich. 681, 52 N. W. Rep. 57, and cases cited.

The question of estoppel was in the case, and, apart from the erroneous instruction which places a burden upon the plaintiff to show a full title in himself, was properly submitted to the jury. Nor is the question presented here as to whether the officer had the right to levy upon an interest of McColeman in the property, and to sell such interest as he has, as not only does it not appear that such an attempt was made, but the concession of defendant would preclude him from raising this question on this hearing. The judgment will be reversed, and a new trial ordered. The other justices concurred.

PRENTISS v. ROSS' ESTATE.

(Supreme Court of Michigan. June 16, 1893.)

TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.

On presentation of a claim against the estate of a decedent for conversion of certain logs, where there was some evidence that the sale of the logs by decedent was with claimant's consent, it was proper to refuse to charge that claimant was entitled to the value "at the time of the conversion," with interest, the question of conversion being for the jury.

Error to circuit court, Marquette county; John W. Stone, Judge.

Claim of George Prentiss against the estate of James Gibb Ross. From a judgment allowing him \$6,900, claimant brings error. Affirmed.

More & Moore, T. E. Tarsney, and Ball & Hanscom, for appellant. Clark & Pearl and John D. Conely, for appellee.

HOOKER, C. J. On September 28, 1892, the claimant contracted, in writing, with James Gibb Ross, for the purchase of the pine timber on a large number of parcels of land, agreeing to pay therefor the sum of \$65,000, \$10,000 of which was paid down. He gave his two promissory notes, of \$27,500 each, payable at the expiration of one and two years, respectively, with interest at the rate of 6 per cent., for the remainder. He subsequently paid \$5,000 on one of these notes. The payment of the consideration was secured by a "lien on said pine lumber for all moneys that might from time to time be due, owing, or accruing due or owing, from" the purchaser, "for or on account of said purchase money, and interest thereon." The writing further provided "that, if at any time the sum of \$2,000 and over shall be due and payable as aforesaid, the party of the first part, his executors, administrators, or assigns, may, after thirty days' notice, in writing, given to said party of the second part, or left at his last or usual place of business or abode, sell the said pine timber, or any part thereof, by auction or otherwise, as said party of the first part may deem proper, and apply the proceeds thereof towards the payment of such sums as may be due and owing, or accruing due and owing, hereunder, and interest as aforesaid, and to the payment of the costs, charges, and expenses of the sale of the same, and to pay over the surplus," etc. It further provided "that, in case of default of payment of said installments, and interest thereon, when the same shall fall due, the whole of said unpaid sum shall at once become due and payable, * * * and party of the first part may, after thirty days' notice, in writing, given to the party of the second part, or left at his last or usual place of business or abode, in addition to his other remedies, have the right to enter in and upon, and take possession of said timber, and every part thereof, upon said lands, and to sell the said timber, as he may deem proper, upon giving thirty days' notice in writing, in manner hereinbefore mentioned, and pay over the surplus money," etc. The land was divided into two classes, from the first of which the timber was to be taken within one year, and from the second within five years, "and no longer." The claimant let a contract to one Sullivan to take off this timber, and he went upon the land, with the necessary implements, and built the necessary buildings, roads, etc., and commenced the removal of the timber. He cut and removed about 6,000,000 feet, and skidded a large quantity more upon the premises. Claimant did not pay the amount that fell due on September 23, 1893, and two days later Ross gave him notice, in writing, that he should take possession of the pine timber, standing and down, and, at the expiration of 30 days from the date of service of the notice, would proceed to sell it, at auction or

otherwise, as he might deem best, and, after applying the proceeds as provided by the contract, would pay the surplus, if there should be any, to the claimant. Ross accordingly sold the timber, both that which was on skids and that standing. He sold the skidded logs to Sullivan for \$2.50 per 1,000, i. e. \$10,000, the title not to pass until paid for. He subsequently sold the standing timber. The trial judge held that this contract entitled claimant to two notices, of 30 days' each, and that inasmuch as only one was given the sale of the timber was a conversion, and the claimant had a verdict of upwards of \$6,000, from which he has appealed.

Claimant's theory was that by taking possession of, and selling, the logs and standing timber, defendant converted it, and was liable for its value. Defendant claimed—First, that there was no conversion at all, but, this being decided against him, then that there was no conversion as to the timber standing upon the lands from which the timber was to be cut within one year, by reason of the limitation of time; second, that the sale of the logs on skids was with the consent of Prentiss, who was willing that Sullivan should have them at this price, that he might be able to realize enough from them to compensate him for getting them out, and, therefore that there was no conversion; third, that the value of the standing timber did not exceed his claim against Prentiss.

The first 15 assignments of error may be dismissed with the remark that the rulings related to the question of value of the property converted, and we think no error was committed in these rulings. They involve no legal question of interest, and a discussion of each is unnecessary. Assignments 16 and 17 relate to the amount received by Ross, and by him credited to Prentiss, on account of the standing timber. This testimony bore upon the question of the good faith of Ross, and was properly admitted.

The next three assignments relate to requests to charge. The first and second requests were given, in substance. The third was as follows: "Under the evidence in this case, you should find the value of all the property, both logs and trees, at the time they were converted, and add interest at 6 per cent. from the time of the conversion; and that amount, less what Mr. Prentiss owed Mr. Ross, with 6 per cent. interest, you will bring in as your verdict." Inasmuch as there was some evidence of knowledge and consent on the part of claimant to the sale to Sullivan, it was a question for the jury to determine. This request was therefore properly refused.

The court properly instructed the jury that the claimant could not recover the value of the standing timber upon the "one year" lands, as, by the terms of the contract, he had lost all interest in it before defendant took possession. This disposes of assignments 21 and 34.

A large number of assignments were based upon the charge of the court, that if the jury found that the claimant had ratified the sale of the logs to Sullivan, or waived a claim to damages therefor, no damages should be given him for their conversion. Under the proofs this was a proper question for the jury, as above stated, and we think that it was properly submitted to them.

Upon a review of the whole record, we fail to find any error, of which the claimant can complain, and the judgment will therefore be affirmed.

KANNENBERG v. CITY OF ALPENA.

(Supreme Court of Michigan. June 16, 1893.)

MUNICIPAL CORPORATIONS—PERSONAL INJURIES—ICE IN HIGHWAY—DIRECTION OF VERDICT.

Where, in an action against a city for personal injuries caused by slipping down on the ice on a highway, it appears that from natural causes, without fault upon the part of the city, the ice formed from the snow which fell in the highway, the direction of a verdict for defendant was proper.

Error to circuit court, Alpena county; Robert J. Kelley, Judge.

Action by Herman Kannenberg against the city of Alpena for personal injuries caused by slipping down on the ice on a highway. From a judgment for defendant, entered upon a verdict directed by the court, plaintiff brings error. Affirmed.

W. E. Depew, for appellant. J. D. Turnbull, for appellee.

HOOKER, C. J. Plaintiff brought an action against defendant to recover damages for a personal injury, occasioned by slipping down upon the ice on a highway. It is contended by defendant's counsel that the evidence conclusively shows that the plaintiff was not upon the sidewalk when he slipped. No witness swears clearly that he slipped upon the sidewalk, but the plaintiff stated once in his testimony that he was on the sidewalk when he fell. We shall therefore treat the question as one for the jury. The trial judge directed a verdict for defendant upon the ground that there was no evidence that the street was not in a reasonably safe condition for travel. The street had been recently paved, in the course of which the center of the highway was made higher than the existing sidewalks. It had previously been somewhat lower. The street was paved with cedar blocks, so laid as to make a gutter outside of the sidewalk. In this gutter was a catch-basin for the sewer, close to the place of the accident. This catch-basin had become filled up or stopped, so that the water did not run off, and, the weather being warm, the water accumulated at that point, and flowed upon the outer edge of the sidewalk, where it froze, and, it being covered with manure and dirt, plaintiff fell, and was injured.

It is claimed that defendant did not keep its walk in a reasonably safe condition for travel. Unless the municipalities of the state are to be made insurers against accident, it is difficult to see how the plaintiff can be permitted to recover. Just what duty the city neglected is not stated. By the paving improvement, the water flowed upon the sidewalk and froze. Had it not been made, it would have flowed upon the road, where it would have frozen, and made it possible for an accident to have happened there. No fault is found with the construction of the catch-basin, and upon the whole record it is plain that from natural causes, without fault upon the part of the city authorities, some ice formed from the snow which fell in the highway. No liability attaches under such circumstances. Some cases have been cited in support of the plaintiff's claim, but they relate to instances where, by neglect of the hydrants or waterspouts, water was permitted to drop upon the walk, where it froze. These cases are clearly distinguishable from the case before us. The judgment must be affirmed. The other justices concurred.

GRAY v. FINN et al.

(Supreme Court of Michigan. June 16, 1893.)
COLLECTION OF TAX — SALE OF PERSONAL PROPERTY—FRAUD.

Where a person against whom a tax is assessed makes a pretended sale of personal property for the express purpose of preventing a levy for the tax, retains possession of the property, and receives no consideration for the sale, and the vendee takes the bill of sale in order to assist in defeating the collection of the tax, the officer charged with the collection of the tax can levy on the property notwithstanding such sale.

Error to circuit court, St. Clair county; Arthur L. Canfield, Judge.

Action by Samuel J. Gray against John E. Finn and another to replevin property. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Frank Whipple, for appellant. P. H. Phillips, for appellees.

GRANT, J. Defendant Finn was collector of taxes for the Fourth ward of the city of Port Huron. By virtue of his tax warrant he levied upon certain personal property, as belonging to one Lewis Potts, to satisfy a personal tax assessed against him. Plaintiff, claiming to own the property, brought this action of replevin to recover it. As evidence of title he introduced a bill of sale from Potts to him. The court instructed the jury as follows: "It is the claim of plaintiff that at the time when the property was taken he was the owner of it; that he had a bill of sale of the same from Lewis Potts, who had been previously the owner of most of the property; and that by virtue of that he was entitled to possession. The defend-

ants, on the other hand, claim that at the time of the commencement of this suit the property in question was owned by Lewis Potts, and in his possession, and not the property of plaintiff, or in the possession of plaintiff. It appears that, at the time the property was taken by Mr. Finn and the other defendants, it was here, in the city of Port Huron, situate in a barn; and it is the claim of plaintiff that at that time it was in his possession; that he had it in his possession, and under his bill of sale. The defendants claim that as a matter of fact it was not in his possession, but was at the time the property of Mr. Potts, and was in the possession of Mr. Potts; that the plaintiff was Mr. Potts' hired man, and was taking charge of the horse, as usual,—as he had before he claims to have bought it,—and as usual for a man in his situation to be taking care of it. Now, in regard to the question of fact, as to the ownership and actual possession, and right of possession, of this property, it is for you to determine, from all the facts and circumstances of the case. The claim of defendant, you will understand, is that the transaction between Potts and Gray was simply a pretense; that it was a bill pretending sale, for the purpose of having it said that the property belonged to Mr. Gray, in order that Mr. Potts might avoid the payment of his taxes. On the contrary, Mr. Gray claims it was an actual transfer to him, in good faith. Now, as to whether it was a mere pretense is a matter for you to determine from all the facts and circumstances in the case. You should consider all the testimony that has been given in view of the transaction, in the light of the circumstances, and satisfy yourself, as ordinary, unbiassed men, what the truth is in that regard; and if the property is not the property of Mr. Gray, and was not in the possession of Mr. Gray, at the time it was taken, then the defendants would be entitled to a verdict in this case." The court further instructed the jury that if they found that plaintiff was the owner of the property, and entitled to the possession, their verdict should be for the plaintiff, but if they found that he was not the owner, and not entitled to the possession, but that Mr. Potts was owner and in possession at the time the property was seized by the defendant, then their verdict should be for the defendant.

Under the evidence and the charge of the court, the jury settled the following facts: (1) That the title and possession were in Mr. Potts; (2) that the pretended bill of sale was given with no intention to pass either title or possession to plaintiff, but that it was given for the express purpose of preventing a levy by the tax collector. There was ample evidence to sustain the verdict. Only judgment creditors can assail a transfer of property by a debtor as fraudulent, and a valid judgment is necessary to enable

the creditor to make the attack. *Millar v. Babcock*, 29 Mich. 526. But we do not think this rule obtains where the person against whom a tax is assessed makes a pretended sale of the property for the express purpose of preventing a levy, retains possession of it, receives no consideration, and the pretended vendee participates in the fraud, and takes the bill of sale, in order to assist in defeating the collection of the tax. Such party stands in no better position than his pretended vendor to contest the validity of the tax. Otherwise the statute (How. St. § 8318) which prohibits replevin for property seized by virtue of a tax warrant could be very readily evaded. The question as to the validity of the tax warrant therefore becomes immaterial. Judgment affirmed. The other justices concurred.

KENNEDY v. DAWSON.

(Supreme Court of Michigan. June 16, 1893.)

CHATTEL MORTGAGE — FAILURE TO FILE — RIGHTS OF CREDITORS AND MORTGAGOR — LIENS — REPLEVIN.

1. In replevin of a stock of goods, against an assignee for the benefit of creditors, it appeared that the chattel mortgage on the stock, given plaintiff by defendant's assignor, and under which plaintiff claimed by virtue of an insecurity clause, was not recorded until some time after its execution, and that meantime the assignor purchased certain goods on credit. *Held* that, as the mortgage was void as to creditors who became such between the execution and filing of the mortgage, defendant was entitled to possession, and hence to a general verdict, and the costs of the court below, in the absence of a tender by plaintiff of the amount of such creditors' lien.

2. It appearing that a portion of the indebtedness for which defendant had a lien belonged to plaintiff, defendant, having waived a return of the goods, is entitled to a verdict for the value of the goods, less such claim of plaintiff.

3. In such case, plaintiff is entitled to a lien over the general creditors to the amount due on his mortgage, less the amount of the lien of the creditors who gave or extended credit between the executing and filing of the mortgage.

Error to circuit court, Marquette county; John W. Stone, Judge.

Replevin by Duncan Kennedy against Thomas H. Dawson, assignee of Dennis McCarthy. There was judgment for plaintiff for damages and costs, and for defendant for a special lien. Both parties bring error. Reversed.

Hayden & Young, for plaintiff. E. E. Osborn, for defendant.

MONTGOMERY, J. On the 12th day of October, 1891, one Dennis McCarthy, who was engaged in business at Ishpeming, gave a chattel mortgage to plaintiff, in the sum of \$3,500, covering the stock then in his store, and all additions to the stock. The mortgage was withheld from record until December 22, 1891, when it was duly filed. Jan-

uary 25, 1892, McCarthy made a general assignment to the defendant, who took possession, and advertised the stock for sale. February 18, 1892, Kennedy demanded possession, and, on the refusal of the assignee to deliver the goods into his possession, brought the present action of replevin, claiming the right to possession under the insecurity clause of his mortgage. It appears that McCarthy continued to buy goods, and made purchases to the amount of \$1,037.87, after the giving of the mortgage, and prior to its filing. On the trial the jury found that there was no fraud in fact in the making of this mortgage; that the value of the goods replevied was \$3,936.53; that the amount of plaintiff's mortgage was \$3,633.58. Creditors for goods sold the mortgagor after the making of the mortgage, and before its filing, held claims to the amount of \$1,057.87; and thereupon the circuit judge ordered judgment to be entered for 6 cents damages and costs, and for the defendant, for a special lien for the amount of \$1,057.87. Both parties bring error.

The plaintiff contends that the lien of the creditors cannot be greater than is necessary for the protection of those who sold goods to McCarthy after the making of the mortgage, and before it was filed, and whose debts remain unpaid; and it is claimed that the evidence shows that a portion of these goods were paid for by plaintiff, or purchased by him, before the trial of this case. On the part of the defendant it is contended that the rights of the parties cannot be worked out in this proceeding; that under the general assignment law, there being no action permitted on the part of individual creditors to attain or assert their rights in preference to other creditors, equally unsecured, the general assignee must hold the goods which have come into his possession until such rights have been determined in proceedings taken under the assignment law itself, and that otherwise such creditors would be without remedy. In part, this contention is correct. But we think there is no difficulty in holding that there is a party before the court who can amply protect the rights of all the creditors. The assignee is the representative of all the creditors, including those whose rights were injuriously affected by withholding the mortgage from record. As a representative of such creditors, he had the right to retain possession for their protection. We find, on examination of the record, that there was evidence tending to show that a portion of the indebtedness for which the defendant was given a lien had become the property of the plaintiff. This evidence was doubtless overlooked by the circuit judge, as it cannot be that the defendant can enforce against the plaintiff a lien on account of a debt due the plaintiff himself. We think, however, the defendant is right in his contention that when this suit was instituted he was entitled to possession, *as against the*

plaintiff, as a representative of the creditors as to whose claims the mortgage was void, and that, therefore, the general verdict should not have been for the plaintiff, but for the defendant.

Can the rights of the parties be worked out in this replevin suit? And, if so, what should be the form of the judgment? The deed of assignment transferred to the defendant the general title of the goods, subject to the plaintiff's lien, and, in addition to this, a lien on the property, as a representative of the special class of creditors, which lien was entitled to precedence over that of the plaintiff. Furthermore, this right of these creditors extends further than this. It is clear that they may elect to proceed against that part of the property which would be essential to satisfy the plaintiff's debt, and the result must be, therefore, the reduction of the plaintiff's lien by so much as their claims entitled to priority amount to. If this were not so, then the general creditors would find their funds reduced by the amount of the newly-established lien in favor of these special creditors. This would be manifestly unjust to the unsecured creditors, and should not be permitted. The mortgagee, being in fault, must bear the loss. In *Root v. Earl*, 62 Mich. 423, 29 N. W. Rep. 29, the rule of distribution was established. It was there held that the special class of creditors, standing in the relation occupied by the special creditors whose rights are involved in this case, were entitled to take the place of the mortgagee, to the extent of the amount of their claims, and that the mortgage was therefore entitled to preference only to the amount of the balance due after deducting the claim allowed to the preferred creditors. This being so, the rights of the parties to this suit are these:

1. The plaintiff having failed to tender the amount of the special lien for the protection of which the assignee, as a representative of the special creditors, was entitled to hold possession of the property, the defendant is entitled to a general verdict, and to costs of the court below.

2. The defendant, having waived a return of the goods, is entitled to the verdict for the value of the property, less the plaintiff's lien, which is entitled to priority over the general creditors.

3. The amount of the plaintiff's lien which is entitled to priority over the general creditors will be ascertained by deducting the amount of the claims due the creditors who have either extended credit, or the term of credit, after the making of the mortgage, and before the filing, as well as the claims of any others who have been prejudiced by the delay, from the amount found due on his mortgage.

It may be added, while not necessary for a determination of this case, that, as to any indebtedness due to the plaintiff not realized by these proceedings, he would be entitled

to seek, and may have, his remedy on the general distribution of the funds by the assignee. The judgment will be reversed, and a new trial ordered. Neither party will recover costs in this court. The other justices concurred.

STEBBINS et al. v. TIMM et al.

(Supreme Court of Michigan. June 16, 1898.)

Appeal from circuit court, St. Joseph county, in chancery; Noah P. Loveridge, Judge.

Bill by John and Elizabeth Stebbins against John and Sophia Timm to foreclose a mortgage. Decree, from which defendants appeal. Affirmed.

O. F. Bean, for appellants. Russell R. Pealer, for appellees.

HOOKER, J. The bill in this cause was filed to foreclose a mortgage. The premises were bought in 1868 by complainants and defendants, and held for a number of years by them in partnership, when complainants sold this interest in the land and personal property to defendants, who had resided upon the premises from the time of their purchase, taking a mortgage upon the land for \$3,800. After making some payments upon this mortgage, and procuring an extension, defendants made default, and complainants filed this bill. The defendants now claim that they were defrauded by the complainants in their settlement which was the basis of the mortgage, and that they were not indebted to the complainants in any sum. It is sufficient to say that a careful review of the testimony convinces us that the learned circuit judge before whom the case was tried, and who saw the witnesses, reached a just conclusion. We deem it unnecessary to discuss the facts. The decree of the circuit court in chancery will be affirmed. The other justices concurred.

MICHIGAN DAIRY CO. v. RUNNELS.

(Supreme Court of Michigan. June 16, 1898.)

ATTACHMENT AGAINST CORPORATION — COUNTY IN WHICH ACTION WILL LIE — STATUTES — REPEAL BY IMPLICATION.

How. St. § 7986, provides that any creditor shall be entitled to proceed by attachment in the circuit court of the county in which the creditor or debtor resides. Section 8137 provided, prior to 1887, that suits against corporations might be commenced in the same manner as against individuals, and the writ or copy of the declaration shall be served on any officer or agent thereof, etc. In 1887 the section was amended by adding a proviso (3 How. St. § 8137) that in any county where plaintiff resides, other than the one where the principal office of such corporation is located, a writ of attachment may be the first process against such corporation, and on return of service the latter shall be deemed to be in court, and repealing all inconsistent acts. Held that such amendment did not repeal section

7986 by implication, and that a creditor of a corporation may maintain an action in attachment against it in the county in which it is located, and in which he resides.

Error to circuit court, Newaygo county; John H. Palmer, Judge.

Action by the Michigan Dairy Company against Allick G. Runnels for the conversion of certain personal property. There was a judgment for plaintiff, and defendant brings error. Reversed.

E. L. Gray, for appellant. M. W. Underwood, for appellee.

MONTGOMERY, J. The plaintiff sued defendant in trover for the conversion of certain personal property. The defendant sought to justify the taking under a writ of attachment issued out of the circuit court for the county of Newaygo at the suit of Albert Heath, a resident of Newaygo county, and against the present plaintiff, a corporation having its home office in Newaygo county. This proof was excluded by the circuit judge, and judgment passed for the plaintiff. The sole question presented by the record is, therefore, whether a writ of attachment may issue against a domestic corporation, in the county of its location, in favor of one also a resident of the county in like cases as in suits between individuals. The plaintiff relies upon section 8137, 3 How. St., which reads: "Suits against corporations may be commenced by writs of summons or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a corporation, shall be served on the presiding officer, cashier, secretary, or treasurer, or any other officer or agent of such corporation, or by leaving the same at the banking house or office of such corporation, and may be served in any county in the state where the plaintiff resides: provided, that in any county of the state where said plaintiff may reside, other than the one where the principal office of such corporation may be located, a writ of attachment may be the first process against such corporation, which shall be served in the same manner as other writs of attachment issuing out of the court wherein suit is commenced; and, upon the return of such service being made, such corporation shall be deemed to be in court, and the like proceedings, as near as may be, shall be thereupon had as in cases of suits against individuals. All acts or parts of acts inconsistent herewith are hereby repealed: provided, further, that the attachment proceedings, as herein provided for, shall not apply to railroad companies or corporations whose right of way, or any part of the same, is within the boundaries of the state of Michigan, nor to navigation companies or corporations."

The contention is that this section pre-

scribes the kind of process which may issue against corporations, and excludes attachment, except in the cases specified. The circuit judge so ruled. We do not deem this the correct construction of this statute. In construing a statute it is important to consider the law as it existed prior to the enactment, and particularly the mischief sought to be remedied by legislation. Under the law as it existed prior to this enactment, no substituted service could be made upon Michigan corporations in any county other than that in which the home office was situated. *Insurance Co. v. Saginaw Circuit Judge*, 23 Mich. 492. By the amendment to section 8137, adopted in 1887, a remedy by attachment was given against domestic corporations, other than railroad companies, in all cases in which the plaintiff resided in a county other than the home county of the corporation, and in case attachment of property could be had. It cannot be doubted, we think, that this was intended to extend, rather than to restrict, remedies against such corporations. Prior to the amendment of 1887, section 8137 contained the same provisions as to the commencement of suits against corporations, excepting the proviso relating to attachments. Section 7986 provided as follows: "Any creditor shall be entitled to proceed by attachment against his debtor in the circuit court of the county in which the creditor or debtor (or, in case of joint debtors, either of them) shall reside, if the debtor have property subject to attachment in such county," etc. Section 7987 provides for an affidavit which shall set out the cause for issuing the attachment, and, among others, prescribes that one sufficient cause shall be that the defendant is a foreign corporation. This reference to foreign corporations does not exclude the remedy against domestic corporations. The true construction, we think, is that while, as against foreign corporations, that fact alone is sufficient to authorize the writ, in a suit against a domestic corporation some other ground in the statute specified shall be set out. Certainly, a domestic corporation may be a debtor, and such corporation may, acting in the only manner that corporations may act,—by its agents,—fraudulently transfer its property. The terms of the general statute are broad enough, therefore, to include domestic corporations; and such, we are convinced, has been the interpretation placed upon this statute at the circuit for many years. The provision of section 8137 for attachment in counties other than the home office of the corporation is an enlargement of the remedy, and does not operate to repeal, by implication, section 7986. It follows that the judgment must be reversed, and a new trial had.

GRANT, J., did not sit. The other justices concurred.

REED v. BOND et al.

(Supreme Court of Michigan. June 16, 1893.)

FORECLOSURE OF MORTGAGE—DEFENSES—FRAUDULENT ASSIGNMENT—CONSTRUCTION OF DEED—OPTION TO REPURCHASE.

1. The fact that the consideration for the assignment of a mortgage was a gaming debt owed the assignee by the assignor is no defense to an action by the assignee against the mortgagor for the foreclosure of the mortgage.

2. Though a conveyance of land contained a clause providing that the grantee was to reconvey the land to the grantor upon receiving a certain sum within a specified time, such fact will not affect the construction of the instrument as a deed with an option to repurchase, it appearing that repurchase was optional with the grantor, and that the conveyance was made and accepted in payment of an existing debt.

Appeal from circuit court, Ontonagon county, in chancery; John W. Stone, Judge.

Action by Charles Reed against Clara A. Bond and others to foreclose a mortgage. From a decree for plaintiff, defendants appeal. Affirmed.

J. R. Rauch, for appellants. T. L. Chadbourne, (Chadbourne & Rees, of counsel,) for appellee.

MONTGOMERY, J. The bill in this case was filed to foreclose a mortgage on the undivided one-fourth of certain lands in the county of Ontonagon, given on the 1st day of November, 1872, by George W. Knowlton to one James O'Brien, which mortgage was assigned to complainant in December, 1873. The defense is: First, that the assignment from O'Brien to complainant was made in payment of a gaming debt; second, that at the time of the execution of the mortgage by Knowlton his interest in the property was that of a mortgagee only, and that, therefore, the mortgage by Knowlton was, in effect, a mortgage of a mortgage. This determined, it is claimed that the statute of limitations has run against the Knowlton deed considered as a mortgage, and hence that the complainant is not entitled to relief; and defendant asks for affirmative relief, and that the cloud upon her title be removed.

1. The gaming contract is fully executed, and where this is so the court will usually leave the parties where it finds them. Whatever remedy the assignor may have does not concern the defendants. They are fully protected by the assignment to the complainant. *Bagg v. Jerome*, 7 Mich. 145.

2. A question of greater difficulty is that of whether the instrument under which Knowlton derived his title is to be treated as an absolute conveyance with an option to repurchase, or, in legal effect, a mortgage. The instrument, in its material parts, is as follows: "This indenture, made the 7th day of June, in the year 1859, between William A. Pratt, of the city, county, and state of New York, party of the first part, and George W. Knowlton, of the same place, party of the second part, witnesseth that the

said party of the first part, for and in consideration of the sum of \$2,738, lawful money of the United States of America, to him in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all his right, title, and interest in and to all the undivided one-fourth part of those certain lands and premises situate in the state of Michigan." Here follows a full description, and the habendum clause, as follows: "To have and to hold, all and singular, the above mentioned and described premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever." This is followed with the covenants of warranty, concluding: "And that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably hold, use, and possess and enjoy the same without any let, suit, trouble, or disturbance of said party of the first part, his heirs or assigns, or any other person lawfully claiming or to claim the same, except under and in pursuance of the agreements for the repurchase of the same, hereinafter contained." The agreement contains this further provision: "Whereas, this conveyance is made by the said Pratt to said Knowlton on account of said Pratt's indebtedness to said Knowlton, and no searches against the property above described have yet been made by said Knowlton as to the title or the incumbrance thereon, it is therefore further hereby agreed that said Knowlton have six weeks from the date hereof to make such searches, and that, if no deed, mortgage, attachment, or execution against said Pratt, or incumbrance of any kind, exists, or is to be found therein, the above conveyance shall be in full of all claims, demands, and causes of action of every kind whatever between the parties hereto, except the agreement for the said Pratt's right to repurchase said property within fourteen months from May 9, 1859, hereinafter mentioned. * * * On the payment of the price of \$2,738, and interest from May 9, 1859, to the time of reconveyance, at seven per cent. per annum, and all taxes and necessary charges on said property incurred and paid for by said Knowlton, said Knowlton agrees to sell and convey to said Pratt, his heirs, executors, administrators, and assigns, at any time within fourteen months from May 9, 1859, all his equitable or legal claim and interest in said property, with the same title as he obtained by this deed, and with all the title which he may be entitled to obtain by virtue of this agreement, free from incumbrances on said property by him made or

suffered, and to give a deed thereof with covenants against the acts of said Knowlton; and said Pratt or his said representatives have the right to repurchase said property on those terms within that time, but not otherwise." There are no extraneous or attendant facts which throw light on the intention of the parties. It appears that the grantor and Knowlton had been in litigation, before the making of this deed, and had agreed upon a settlement at the sum stated in the deed as the consideration. Neither party was at the time in possession, so that there is no inference to be drawn from a change in possession, or, on the other hand, from a continuance in possession.

As to whether an instrument in the form of a conveyance, with an agreement back to resell, is to be deemed a mortgage, is often a question difficult of solution, and is frequently made to depend upon the peculiar circumstances of the case. It is usual that in the instrument itself, or in the attendant circumstances, facts which clearly indicate the intention of the parties appear, and when this is so the court will carry such intention into effect. Where this is done by declaring a deed and agreement to reconvey a mortgage, it has most usually been in recognition of the right of the parties to contract as they saw fit, unless there is some additional principle of equity to control the decision,—as, for instance, the principle, "once a mortgage, always a mortgage;" but where the question is to be determined upon the naked agreement, the question, as in all cases involving a construction of an agreement in writing, is, what is the engagement on either hand? What did the parties intend by their agreement? In the present case the deed was given for a present consideration, and, as the grantee had not then examined the title, it was declared that, if the title was found satisfactory, "the above conveyance shall be in full of all claims, demands, and causes of action of every kind whatever between the parties, except the agreement to repurchase." By a subsequent clause Pratt is given the right to repurchase within 14 months, and Knowlton agrees to sell within that time at the consideration price and interest.

Two things are apparent: (1) That the intention was that the debt from Pratt to Knowlton should be extinguished by the conveyance; (2) that it was optional with Pratt whether he purchased or not, and hence that no new debt was created from Pratt to Knowlton. In *Jones, Mortg.*, at section 264, it is said: "The rights of the parties to the conveyance must be reciprocal. If the transaction be in the nature of a mortgage, so that the grantor may insist upon a reconveyance, the grantee at the same time may insist upon repayment; but if it be a conditional sale, so that the grantor need not repurchase, except at his option, the grantee cannot insist upon repayment." And at sec-

tion 265 it is said: "If an absolute conveyance be made and accepted in payment of an existing debt, and not merely as security for it, an agreement by the grantee to reconvey the land to the grantor upon receiving a certain sum within a specified time does not create a mortgage, but a conditional sale, and the grantee holds the premises subject only to the right of the grantor to demand a reconveyance according to the terms of the agreement. A debt, either pre-existing or created at the time, is an essential requisite of a mortgage. Where there is no debt and no loan it is impossible to say that an agreement to resell will change an absolute deed into a mortgage. The debt may not be evidenced by any bond or note, or covenant to pay it; so that the facts and circumstances of the transaction must be inquired into in order to ascertain whether the consideration of the deed was really a debt or a loan. If not one or the other, the deed can hardly be a mortgage." This text is supported by abundant authority, and is in line with the decisions of our own state. See *Swetland v. Swetland*, 3 Mich. 428; *Cornell v. Hall*, 22 Mich. 377. It was said in *Jeffery v. Hursh*, 58 Mich. 257, 25 N. W. Rep. 176, 27 N. W. Rep. 7: "It is now settled, as well as any principle of law can be, that an absolute deed, with a bond or separate defeasance or agreement executed at the same time, to reconvey the estate upon payment of a certain sum of money, constitute a mortgage. If the instruments are of the same date, or are executed and delivered at the same time, and as one transaction; and when this is the case it is a conclusion of law that they constitute a legal mortgage." This case is cited with approval in *Clark v. Landon*, 90 Mich. 83, 51 N. W. Rep. 357. In each of the cases cited, however, there was extraneous evidence making the intent of the parties that the transaction should amount to a mortgage apparent. If it be assumed that the *prima facie* intent is that a deed with a defeasance back amounts, in effect, to a mortgage, and that the engagement on the part of the grantor to pay the debt will be implied, it still does not follow that in the present case this interest should be held to be a mortgage; for the question of whether there should be an indebtedness is not left to inference, but is determined by the instrument itself, which provides in plain language that the indebtedness should be discharged upon acceptance of the deed, and that the repurchase should be optional with the grantor. In *Swetland v. Swetland*, *supra*, the court say, in discussing this question: "If the debt which formed the consideration of the deed was extinguished at the time by the express agreement of the parties, it must be deemed purchase money, and the transaction will be a sale upon condition." In *Cornell v. Hall* it was said: "Courts do not presume to change contracts which par-

ties have made. While these principles do not permit a transaction which, in substance, is a mortgage, to have the effect of a sale, there is no principle or maxim which forbids the making of a conditional sale, or which will allow the court to interfere and convert one into a mortgage." In *Martind. Conv. 366*, it is said: "If the debt is extinguished at the time by the express agreement of the parties, then it must be regarded as purchase money, and the transaction will be a conditional sale." See, also, *Conway v. Alexander*, 7 Cranch, 218; *Jones, Mortg. §§ 260, 267*, and cases cited in note 4; *Henley v. Hotelling*, 41 Cal. 22. Such, we think, is the effect of the agreement in this case. The decree will be affirmed, with costs. The other justices concurred.

CLEGG et al. v. BOARD OF AUDITORS OF WAYNE COUNTY.

(Supreme Court of Michigan. June 23, 1893.)

COUNTY SUPERVISORS OF WAYNE COUNTY — EXAMINATION OF BOOKS OF COUNTY OFFICIALS.

1. Const. art. 10, § 10, confers on the board of county auditors of Wayne county exclusive authority to fix the compensation for services rendered the county, and adjust claims against it. Section 10 provides for a board of supervisors in each county, with powers as prescribed by law. Act 1889, § 8, (3 How. St. § 518i,) gives the board of auditors of Wayne county authority to examine the books of the county treasurer, and audit the accounts, and provides that after such audit it shall not be necessary for the board of supervisors to audit them. The legislature also conferred by a general law on boards of supervisors power to examine county trasurers' accounts. *Held*, that the county supervisors of Wayne county had no authority to examine the books of the board of county auditors, nor those of the county treasurer.

2. If such county supervisors had authority to employ experts to examine the books of the county treasurer, they had no power to fix their compensation.

Application for writ of mandamus by John H. Clegg and William H. Brooke against the board of auditors of Wayne county. Writ denied.

John J. Speed and Henry M. Duffield, for relators. F. A. Baker, for respondent.

GRANT, J. October 14, 1892, the board of supervisors of Wayne county adopted a resolution appointing a committee to consider the necessity of an examination by an expert accountant of the books and records of the board of county auditors and county treasurer, and to make such recommendation thereon as they deemed advisable. October 19, 1892, the committee reported, recommending a biennial examination by an expert accountant, who should report to the board of supervisors each year. October 28, 1892, a special committee of the supervisors was appointed by the board for that purpose, and directed to employ an expert accountant to assist them, and such committee was directed to make such examination for a period of

years as they should find expedient and necessary. February 6, 1893, the relators were employed by said committee as experts, in accordance with the above resolution, and a compensation of \$25 per day was agreed upon, with 8 hours to constitute a day's work; the term of such employment to be at the pleasure of the committee. Relators entered upon such employment, and continued therein till February 28, 1893, when they presented to the respondents a bill for services rendered of \$343.75, which was certified by the committee to be correct. The respondents refused to allow the account, and in their answer to the petition in this case alleged three reasons for such refusal, viz: (1) Said account is not a legal claim against the county of Wayne; (2) the services rendered were not reasonably worth the sum charged; (3) no moneys had been raised for the payment of any such expense.

The constitution (article 10, § 10) reads as follows: "The board of supervisors, or, in the county of Wayne, the board of county auditors, shall have the exclusive power to prescribe and fix the compensation for the services rendered for, and to adjust all claims against, their respective counties, and the sum so fixed or defined shall be subject to no appeal." Section 6, art. 10, provides: "A board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law." In 1889 the legislature enacted a law relative to the powers, duties, and compensation of the board of auditors of Wayne county. 3 How. St. § 518b. Section 8 of said act provides: "Said board shall have power, and they are hereby authorized—First, at any time to examine the books and accounts of the county treasurer and other county officers, and they shall, on demand, be exhibited to them by said officers; and, as often as they may require, the accounts and vouchers of the county treasurer shall be audited and allowed by them, and after the same shall have been audited by said board it shall not be requisite that such accounts and vouchers be again audited by the board of supervisors." In *Attorney General v. Board of Auditors*, 73 Mich. 53, 40 N. W. Rep. 852, this court entered into a full and careful review of the above clause of the constitution, examining the debates of the constitutional convention, the history of the legislation prior to the adoption of the present constitution and subsequent thereto. The conclusion there reached was that "neither legislation nor acquiescence can take away from the supervisors any of the jurisdiction given them by the constitution, and not given by that instrument to the county auditors of Wayne." It was there also said: "There can be no doubt that the convention meant to exclude any board but the supervisors from managing the business given into their charge by the constitution in express terms,

except in the single subject of services and claims in Wayne county." But it must be remembered in that case the board of auditors were assuming power over a subject which was expressly conferred by the constitution (section 9, art. 10) upon the board of supervisors. In the present case the power sought to be exercised is not among those expressly enumerated in the constitution as belonging either to the board of auditors or to the board of supervisors. The power conferred by the act of 1889 upon the board of auditors is very broad, and the only conclusion from its terms is that the legislature designed to place the accounts and books of the county treasurer under the exclusive control of that board. The last section of the act provides that "the board of supervisors shall not have or exercise the power herein conferred upon said board of auditors." The act of 1885 contained a like provision. The legislature, under the constitution, enacted a general law defining the powers and duties of the boards of supervisors of the several counties, and conferring upon them certain local administrative and legislative powers. Among the powers so conferred was the examination of the accounts of the county treasurer. Under the constitutional provision in regard to Wayne county the board of supervisors cannot fix the compensation to be paid for any services rendered the county. They may hire the services, but the board of auditors must fix the compensation, and from their decision there is no appeal. It follows that, even if the board of supervisors had the right to employ the relators, they had no right to fix their services.

The important question, however, still remains, whether such board possesses the power to examine the books and accounts of the county treasurer, and the books and accounts kept by the board of auditors. Except as to the power enumerated in the constitution, the board of supervisors are not vested with any other powers or duties than those conferred upon them by statute. There is no statute giving them any control over, or any right to examine, the books kept by the board of auditors. As to them, therefore, the resolution of the board of supervisors is clearly void. Under the general statute above cited, defining the powers of the boards of supervisors, these boards have the right to examine the books and accounts of the county treasurer. 1 How. St. § 478. The constitution is silent upon this subject, and therefore such boards possess only such power in this regard as is conferred upon them by statute. This act makes no exception to the county of Wayne, but it must be construed in connection with the act prescribing the duties and powers of the board of auditors of Wayne county. Referring to that act, we find, as already shown, that the power is in express terms taken away from the board of supervisors, and limited to the board of auditors. The

intent of the legislature is clear, and its power to enact the law undoubted. It follows that the action of the board of supervisors is void, and the writ must be denied. The other justices concurred.

HENDRICKSON v. TRACY et al.

(Supreme Court of Minnesota. June 6, 1893.)

CANCELING MORTGAGE—EVIDENCE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. A finding of the court upon conflicting evidence *held* justified.

2. Application for a new trial for newly-discovered evidence *held* not well supported; the party having gone to trial without seeking a postponement to enable him to ascertain the whereabouts, and procure the testimony, of a person known to be a material witness.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Egan, Judge.

Action by Eugene A. Hendrickson against Bridget Tracy and others to cancel a mortgage. Defendants had judgment, and, from an order denying a new trial, plaintiff appeals. Affirmed.

James H. Foote, (John D. O'Brien, of counsel,) for appellant. Joseph Schroll, for respondents.

DICKINSON, J. In January, 1889, the defendants Thomas and Lawrence Tracy owned two tracts of land in the city of St. Paul, one of which may be called the "residence lot," and the other the "business lot." At that time, and on the same day, they executed to the defendant Bridget Tracy, who is their mother, a mortgage of the residence lot to secure the payment of the sum of \$1,500, and a separate mortgage of the business lot to secure the further sum of \$1,500. In July following they executed to the London & Northwest American Mortgage Company, Limited, a mortgage covering both lots, to secure the repayment of \$3,500, then loaned to them by that company. The latter mortgage was afterwards foreclosed; this plaintiff, who was a managing agent of the company, being the purchaser. He prosecutes this action to secure the cancellation of the \$1,500 mortgage on the residence lot, upon the ground that it was released by the mortgagee, Bridget Tracy, at the time or prior to the execution of the \$3,500 mortgage, for the purpose, as is claimed, of allowing the latter mortgage to have priority, and with the agreement that her mortgage security should be renewed subsequent to the execution of the \$3,500 mortgage. The issue of fact in the case was as to whether she had executed a formal release of her mortgage on the residence lot. The court found that she had not. We are asked to reverse this determination on the ground that it was not justified by the evidence.

In view of all the evidence the finding of the court must be sustained. We shall not

here set forth the evidence going to support the plaintiff's contention, but only briefly indicate the nature of that on the part of the defendants, by reason of which we think that the finding of the court, who heard the testimony and could best judge of the credibility of the witnesses, should be accepted as final. It is an admitted fact that, on the occasion when it is claimed that Bridget Tracy executed the release in question, she did execute another instrument releasing her mortgage on the business lot. It is also an undisputed fact that, if a release of the mortgage on the residence lot was executed, it was a separate instrument from the other; so that if, in fact, she then executed only one instrument, the conclusion would be inevitable that she did not execute the release in question. Her own testimony was that she did not execute a release of this mortgage, and that she executed only one instrument, that being the release of the mortgage on the business lot. The notary public who took her acknowledgment thinks there was only one paper executed, although he is not positive. One Garlough, who was present, testifies that there was only one. To the same effect, and in positive terms, is the testimony of three sons of Bridget, two of whom were the mortgagors, and the third of whom appears to have subscribed his mother's name to the release which was then executed of the other mortgage. It must be admitted that the testimony of some of these witnesses, as it appears in the record, is not beyond criticism, but the opportunity of the trial court to judge of their credibility was better than ours. Besides, this evidence is the more credible from the facts that this business was transacted, in behalf of the company in whose favor the release was made, if at all, by business men, who understood the importance of the instrument; and, while the other release was properly taken care of and placed on record, as we understand, the one here in question was never recorded, and the plaintiff was compelled to rely upon proof that after its delivery it had been lost. Besides this, the proof does not clearly show, if it shows at all, any agreement on the part of Mrs. Tracy, prior to the time when she executed whatever instruments she did execute, that she would release these mortgages. It is to be considered, too, that the burden of proof rested on the plaintiff. The strongest circumstance in favor of the plaintiff is the fact that after the giving of the \$8,500 mortgage (one, at least, of the \$1,500 mortgages having been released) there was executed and placed on record a mortgage to Bridget for the sum of \$3,000, covering both lots, and bearing date the same as her two former mortgages. Her explanation of that is that she did not know of the execution of this mortgage for that amount until long afterwards; and it appears that she was not present when it was prepared or placed on

record. Our conclusion is that the evidence was sufficient to support the finding of the court. Upon the point that the mortgage on the residence lot was void for uncertainty in the description of the premises, it is only necessary to say that the action was evidently not brought to avoid the mortgage upon that ground. That was not the subject of this litigation. There was no error in refusing the motion for a new trial, so far as it was based on the ground of newly-discovered evidence. The importance of the testimony of Wallbridge, who was a subscribing witness to the execution of the other release, was known when the case came on for trial; yet the plaintiff does not appear to have sought a postponement of the trial to enable him to ascertain the whereabouts, and to secure the testimony, of that person. This is a sufficient reason to support the ruling of the court. Order affirmed.

VANDERBURGH, J., absent, did not take part in this decision.

PROUTY v. HALLOWELL et al.

(Supreme Court of Minnesota. June 12, 1893.)

APPEAL—REVIEW—RECORD—APPOINTING RECEIVER—PRACTICE.

1. Application of the rule that error cannot be alleged upon, nor irregularity or misconduct of the trial court shown (on appeal) by, any statement of what took place at the trial contained in the finding of facts or decision filed by the trial judge.

2. The rule of the district court relative to the hearing of orders to show cause upon affidavits, solely, has no application on the trial or hearing of a petition for the appointment of a receiver under the insolvency laws of this state. The court, upon the trial or hearing of the petition, should proceed upon the merits, receiving such evidence as may be pertinent, without regard to the manner in which the alleged insolvent has been brought into court.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Ponce, Judge.

Action by Charles N. Prouty against Morris L. Hallowell, Jr., and others, as M. L. Hallowell & Co., and others. From an order denying a petition for the appointment of a receiver, plaintiff appeals. Affirmed.

O. C. Joslyn, for appellant. Cross, Carleton & Cross, for respondents.

COLLINS, J. On the petition duly signed and verified by the attorney for the plaintiff in the above-entitled action, (which was then awaiting trial,) the court issued its order that upon said affidavit (petition) defendants show cause, at a specified time and place, why a receiver should not be appointed under the provisions of the insolvency laws of this state. Both parties filed other affidavits bearing upon the matter, and, after a number of continuances, a final hearing was had, July 2, 1892. The court thereafter

made and filed findings of fact and conclusions of law to the effect that defendants were entitled to have the order vacated and discharged. It also vacated and discharged said order and all subsequent proceedings. Plaintiff's counsel appeal directly from the order, and the record presented to us consists, according to the certificate of the clerk of the court below, of the before-mentioned affidavits, the order to show cause, and the findings or decision of the court. There is no certificate of the judge before whom the proceedings were had, and who passed upon the petition, nor has a case or a bill of exceptions been settled, so far as we are informed. Treating the petition as setting forth a proper case for the appointment of a receiver under the provisions of Gen. Laws 1889, c. 30, § 2, we are unable to see how, on the record, the alleged action of the district judge in refusing to take testimony offered by the petitioner at the hearing can be reviewed. As preliminary to the findings of fact, the judge stated that the counsel offered to support the petition with proof, and objected to a trial of the matters involved upon affidavits; but this is insufficient to bring the question before us. This was a fact occurring at the trial, not a matter of record, and, although stated in the findings or decision, is not reviewable on appeal. What took place at the trial cannot be made to appear by the findings of fact or by the decision. *Osborne v. Williams*, 39 Minn. 352, 40 N. W. Rep. 165, and cases cited. Even if this were not so, the assignments of error relative to the right of the petitioner to introduce testimony in support of his petition could not properly be considered here, because it nowhere appears that the court was called upon or made any ruling whatsoever on the offer or the objection. Again, it elsewhere appears in the decision or findings that the latter were made upon the affidavits presented and read by the parties, "and from the admissions then made in open court." If, from these admissions, the court was as fully informed of the facts as it would have been had oral or documentary evidence been submitted,—and in the absence of any showing to the contrary we cannot presume that it was not,—there was no mistrial of the matters alleged in the petition. We have no doubt that on the order to show cause, which practically amounted to nothing more than a "short notice," the court should have tried the case on its merits, receiving such evidence as was pertinent, unless waived or rendered unnecessary by the acts or admissions of the parties. The rule of court relative to the hearing of orders to show cause on affidavits, solely, has no application in the trial or hearing of a petition for the appointment of a receiver under the insolvency laws, no matter how the alleged insolvent may be brought before the court. Order affirmed.

VANDEBURGH, J., absent.

LILLSTROM v. NORTHERN PAC. R. CO.
(Supreme Court of Minnesota. June 12, 1893.)
ACCIDENTS AT RAILROAD CROSSINGS—WHAT IS A CROSSING—EVIDENCE.

1. The rule laid down in *Kelly v. Railway Co.*, 9 N. W. Rep. 588, 28 Minn. 98, that where a road is openly and notoriously used as a highway by the public, and is recognized by a railway company as such, by permitting the public to cross the track, and by assuming to maintain a crossing at that point, it is immaterial that the road has not been legally laid out or established, followed and applied to the facts in this case.

2. In civil actions it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth.

(Syllabus by the Court.)

Appeal from district court, Clay county; Mills, Judge.

Action by Ingri Lillstrom administratrix of the estate of Peter Lillstrom, deceased, against the Northern Pacific Railroad Company, to recover for the wrongful killing of decedent. Plaintiff had judgment, and defendant appeals. Affirmed.

J. H. Mitchell, Jr., and Tilden R. Selmes, for appellant. W. B. Douglas and Davis, Kellogg & Severance, for respondent.

COLLINS, J. The plaintiff's intestate, her husband in his lifetime, came to his death through the negligence of defendant railway company, it is claimed, and in this action, which was brought to recover for the alleged wrongful killing, plaintiff had a verdict. The facts as established on the trial were that, when living, the deceased resided with his family on a farm in a prairie country about one mile east of defendant's line of railway. On the morning of February 18, 1890, Lillstrom, the intestate, left home with a pair of horses attached to bob sleighs to go several miles northwesterly for a load of wood, to obtain which he had to cross to the west side of said line of railway. Leading in the direction he had to go was a generally traveled wagon road, which crossed the railway about five miles from his residence. This road, at least where it crossed the track, was not a regularly laid out highway, but it, including the crossing, had been used by the public for several years. Immediately after the railway was constructed, some five years before the accident in question, two farmers residing in the vicinity had prepared the crossing by digging the approaches, and by placing planking inside and outside the rails. The defendant's section men took charge of the crossing at once, repaired the planking, replaced the same as needed, and otherwise kept the same in proper condition for travel, as fully as if it had been a legally laid out or established highway. The evidence was abundant upon this point, and also that the traveling public had very generally crossed the railway at this point while it had been maintained, pre-

ferring it to other crossings on either side. The planking between the rails before mentioned had been kept in place continuously from the time it was first put in until about one month prior to the day on which Lillstrom received his injuries, and was then removed by defendant's section men to prevent the accumulation of snow at that point, and thus facilitate the operation of the railway. No sign was put up, or barriers erected, to notify the traveler of this removal. On the trial it was shown that, in his lifetime, Lillstrom had used this crossing, and when it was in good repair. It appeared that he crossed at another place when going for the wood, and it was not shown that he had been at this crossing at all after the planks were taken up, until he was injured. The 19th of February was a stormy day. About 4 P. M. a neighbor discovered Lillstrom lying upon the ground, then covered with snow, at this crossing. His horses, attached to the bob sleighs with one trace only, stood on the west side of the rails. One singletree was broken. Upon the sleighs was a heavy load of wood. He had evidently approached the place along the road from the west, (the railway running north and south,) for the rear bob stood west of the rails in the traveled track, while the forward bob stood lengthwise and upon the rails, faced to the south. Lillstrom lay across the rails in front of the forward bob. He was conscious, and said that he had broken his neck. His injuries were such as to cause his death the following day.

1. It is contended by defendant company that because the crossing in question was not upon a public highway, regularly laid out or established, it owed no duty to the public to keep it in repair, and therefore was not guilty of negligence when removing the planking from between the rails. As hereinbefore stated, the evidence was plenary that the crossing was openly and notoriously used as such by the public, and that defendant had recognized it as such by permitting the public to use it. It had assumed to maintain a crossing at that point for years, and all of the time had encouraged its use by keeping it in repair. It owed the duty of reasonable care to those using the crossing, and was bound to exercise precisely the same precautions to keep it in repair as if it was in fact upon a legally laid out or established highway. *Kelly v. Railway Co.*, 28 Minn. 98, 9 N. W. Rep. 588. To the same effect are the cases of *Ewen v. Railway Co.*, 38 Wis. 634; *Barry v. Railway Co.*, 92 N. Y. 289; *Murphy v. Railway Co.*, 133 Mass. 121; and *Taylor v. Railway Co.*, 113 Pa. St. 162, 8 Atl. Rep. 43. The question of defendant's negligence was properly one for the jury to pass upon.

2. It is further contended by defendant company, even if its negligence be established, that there was no testimony tending to connect the accident which befell Lillstrom with such negligence; in other words, that it was not shown that the removal of the

planks was the cause of his death. We have stated the circumstances under which he was found, and undoubtedly the jurors came to the conclusion that they were warranted in believing that, while Lillstrom was attempting to cross defendant's track at the crossing with a heavy load of wood upon his bob sleighs, the runners of either the forward or the rear bob, or both together, struck the rails, which projected a few inches above the snow, with such violence as to suddenly stop the horses, cause one singletree to break, three out of the four traces to become detached, and to throw the forward bob at right angles with the one in the rear, all concurring to precipitate Lillstrom, who, as driver of the horses, would naturally sit upon the top of the load of wood, with great force to the ground, across the rails, and in front of his sleighs, where he was found, so injured that he died the next day. The facts as related upon the trial fully justified the jury in believing that the accident happened in this way, and that the removal of the planking was the primary cause of the injuries. It was not necessary for plaintiff to show by an eyewitness exactly how these injuries were received, and that is really what was demanded by defendant's counsel on the argument here. It is not necessary in any action, civil or criminal, that the material facts should be established by direct evidence. In civil cases it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove, and it is the duty of the jury to decide according to the reasonable probability of the truth. 1 Greenl. Ev. (15th Ed.) § 13a. There was no direct evidence as to the exact manner in which Mr. Lillstrom was fatally injured, but there were circumstances in evidence from which it may be justly and fairly inferred that, when the runners of his sleighs struck the projecting rails, the shock was such as to throw him upon and across the rails with great force and violence. If such be the fair and just inference to be deduced from the evidence, it was sufficient. *Railway Co. v. Collingwood*, 71 Ind. 476; *Railway Co. v. Thomas*, 84 Ind. 197; *Hays v. Gallagher*, 72 Pa. St. 136. The case of *Orth v. Railway Co.*, 47 Minn. 384, 50 N. W. Rep. 363, cited by counsel for appellant, was altogether different from that at bar.

3. This brings us to a consideration of the claim of appellant's counsel that plaintiff cannot recover because there was no evidence produced upon the trial that Lillstrom was exercising ordinary care and caution when attempting to cross the rails. The presumption is that he was, and that he was not guilty of contributory negligence. Such is the settled law in this state, and the cases cited by counsel are from states in which the opposite rule prevails. There was nothing in the established facts which tended to indicate that he failed to exercise due care when approaching the crossing, of which he had

some knowledge. To be sure, the planks had been removed, and to a careful, or perhaps even to an ordinary, observer, this might have been obvious. But Lillstrom knew that the crossing had been kept in good condition, and to some extent was warranted in relying upon this knowledge. It was a stormy day in winter, with snow upon the ground which had drifted in, thus rendering the projecting rails and the absence of the planking less noticeable than would have been the case under other circumstances. Again, it was a railway crossing where the danger to be apprehended was from approaching trains, and where a traveler who knew of the previously good condition of the way would naturally be paying more attention to the right and left along the track than he would to the road over which he was traveling. But even had Lillstrom known of the defective condition of the crossing before he came to it, or had he then observed it, contributory negligence could not conclusively or necessarily be attributed to him. This would depend upon circumstances. It was not made to appear that the crossing was in so dangerous a condition but that a man of ordinary prudence might have reasonably supposed that, with the snow partially filling the space between the rails, and in the exercise of ordinary care, he could drive over in safety. *Nichols v. City of Minneapolis*, 33 Minn. 430, 23 N. W. Rep. 868.

4. We have examined each of the assignments of error not covered by the foregoing, and there are none which need special attention. Order affirmed.

VANDERBURGH, J., did not participate.

WILSON v. NORTHWESTERN MUT. ACC. ASS'N.

(Supreme Court of Minnesota. June 12, 1893.)

ACCIDENT INSURANCE—ACTION BY ADMINISTRATOR AFTER PROOF OF DEATH BY ANOTHER—CONDITIONS AS TO OCCUPATION—VOLUNTARY EXPOSURE TO DANGER—EVIDENCE.

1. Where an administrator, with the implied consent of an accident indemnity association, adopts and relies upon the act of a third party, who has filed with such association proof of a claim growing out of the accidental killing of such administrator's intestate, a member of the association, the latter will not be allowed to defeat a recovery upon the ground that it was incumbent on the administrator to file the proof himself, or that he could not, with its implied consent, adopt as his own that filed by such third party.

2. Where a certain alleged trade or occupation is not mentioned at all in a manual of classification prepared and adopted by such an association, it is not classed as noninsurable.

3. Where an accident happens, and injuries result to a member of such an association, the certificate being in the form of that held by plaintiff's intestate, a recovery cannot be defeated on the ground of a voluntary exposure to a danger contemplated by the parties. Nor is it a good defense that the accident was caused by the mere carelessness or negligence of the assured.

4. *Held*, upon the evidence produced upon the trial, that the jury was warranted in finding that the work in which the assured was engaged when fatally injured was part of the trade or occupation of a brick mason.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

Action by James C. Wilson, administrator of the estate of Snorri Benson, deceased, against the Northwestern Mutual Accident Association, on a certificate of insurance. Plaintiff had judgment, and defendant appeals. Affirmed.

James O. Pierce, for appellant. Steele & Rees and W. A. Kerr, for respondent.

COLLINS, J. Plaintiff's intestate, Benson, whose occupation was therein stated as that of a brick mason, held a certificate of membership in defendant indemnity association, when he accidentally received injuries which caused his death soon afterwards. This certificate contained several conditions,—one being that, if Benson should be injured when engaged in an occupation classed as not insurable by the association, nothing should be paid; and another, that a recovery could not be had, under the terms of the certificate, in case the injury received was the result of unnecessary exposure to danger, unless in an effort to save human life. Satisfactory proof of a claim was required as a condition precedent to payment. At the time of the accident, Benson, with other men, was at work upon a swinging scaffold, engaged in "pointing" the walls of an eight-story brick building, the scaffold being suspended from the roof by means of ropes. Between the third and fourth stories of the building there was a projection some three feet wide, and the scaffold had been dropped below this projection as the men progressed downward with their work, which consisted in "pointing" or finishing up the lines of mortar, and replacing defective or broken brick in the walls. The projection carried the scaffold out too far from the building, and it had been brought back to convenient working distance by means of small guy ropes, one at each end, running from the scaffold to windows. One of the workmen stepped from the scaffold into a window, and immediately after one of these ropes broke, causing the scaffold to swing out several feet, throwing Benson and another workman to the walk below. Fatal injuries were received by the former.

1. It is claimed by defendant that no proof of the claim was presented to it prior to the commencement of this action by plaintiff administrator. It appears from the evidence that, soon after Benson's death, one Jones, who claimed to be a creditor of his estate, procured a blank form for proof of the claim from defendant association. This blank was filled out and verified by Jones, and filed with the secretary of the associa-

tion by one of the plaintiff's attorneys. No point is made that the proof was insufficient in form. Soon afterwards plaintiff was appointed administrator of the estate by the proper tribunal, and at once called upon the secretary, in company with the attorney before mentioned, a duly-certified copy of the letters of administration being presented. The secretary was asked if the proof theretofore served was sufficient, and was informed that if further proof was required it would be furnished by the administrator. He replied that the papers then filed were sufficient, so far as he knew, and that if anything was lacking, or if further proof was needed by himself or the association, the administrator or his attorney would be notified. It is conceded that no other or further proof was demanded, and that afterwards, prior to the bringing of the suit, the association, by its agents and officers, made several attempts to settle the claim. Its officers knew that the administrator relied upon their statement in respect to further proof, and relied upon, and had adopted, the action of Jones in respect to proof. The association never objected to this, or to paying the claim on the ground now advocated. After the time has expired within which plaintiff, as administrator, could file proof of the claim, and an action has been commenced, the defendant cannot be allowed to defeat a recovery on the ground that it was incumbent upon plaintiff himself to file the proof, or that he could not, with its implied consent, adopt the act of Jones. It is analogous to the reception and retention of defective proof of a claim. In such cases good faith would require that the association give notice indicating the defect, and the failure to object to defective proofs, or a refusal to pay on other grounds, is regarded as an acceptance of the defective proofs, and a waiver of defects. *Insurance Co. v. Mahone*, 56 Miss. 180; *Miller v. Insurance Co.*, 2 E. D. Smith, 268; *Insurance Co. v. Rogers*, 119 Ill. 474, 10 N. E. Rep. 242. But appellant calls attention to the fact that, in the complaint, plaintiff alleged the making and filing of proper proof of the claim by him, which was put in issue by the answer, and that no waiver of full performance of the condition precedent to recovery was pleaded in the reply. Not having pleaded a waiver, plaintiff was limited to proof of performance as alleged in the complaint, is the position of appellant's counsel, who cites *Guerin v. Insurance Co.*, 44 Minn. 20, 46 N. W. Rep. 138, and *Moeness v. Insurance Co.*, (Minn.) 52 N. W. Rep. 932, in support of his position. We need not consider the condition of the pleadings on this subject, because no objection was made on that ground to the reception of testimony relative to the filing of proof of the claim by Jones, plaintiff's subsequent reliance upon and adoption thereof, with the implied consent of defendant's officers,

the statement of the secretary that this proof was satisfactory, so far as he knew, and other statements and acts which estopped defendant association from asserting that satisfactory proof of the claim had not been made. Nor was the point made when defendant moved for a verdict in its favor at the close of the evidence. All questions of ratification, adoption, and waiver of proof, other than that furnished by Jones, were evidently regarded as proper issues under the pleadings, and it is now too late for counsel to insist that they were not. He is concluded by his course upon the trial.

2. The certificate stated that Benson was a brick mason by occupation, as hereinbefore mentioned, and it was claimed by appellant that he was not a brick mason, nor engaged in the work of a mason, when injured; that "pointing" up a wall is no part of a mason's work, and that the occupation of a "pointer" was classed by defendant association as non-insurable; so that, under the conditions of the certificate, no indemnity was to be paid. An attempt was made by appellant to show, by means of a manual pertaining to classification, that the occupation of a pointer was classed as noninsurable. This manual has not been made a part of the record and its contents are unknown to us; but, from an admission of counsel made upon the trial in connection with this attempt, it seems that the occupation of a pointer was not classified at all in the same. With this admission it is apparent that such occupation, if there be such, was not classed as noninsurable. In this connection it may be well to consider the claim of defendant association that the trade or occupation of a pointer is not that of a brick mason. There was testimony produced in its behalf, upon the trial, to the effect that these are distinct trades or occupations, but the preponderance of proof was that the work of finishing or pointing up a wall is usually done by masons. On small or common brick buildings the workmen do this as they remove the staging used when laying up the walls; commencing at the top, of course. On large or elegant structures, especially when pressed brick are used for facings, the staging so used is first removed, and then a hanging scaffolding is swung from the top, as it was in this instance, and as the work proceeds the workmen lower themselves by means of ropes and pulleys, exactly as do painters who have occasion to paint the outside of a building. Undoubtedly, in the large cities, where there is an abundance of this special branch of a mason's work, there are men who become adepts in it, and are usually employed in finishing and pointing up walls, precisely as there are men who are engaged in the work of shingling roofs, or putting on lath; and there are probably men who have become skilled as pointers or shinglers or lathers, who could not be put down as brick masons

or as carpenters. Yet at the same time the work of pointing is a part of a brick mason's trade, just as the work of shingling a roof or putting on lath is, properly speaking, that of a carpenter. This was clearly established by the testimony, and is a matter of common observation.

3. Counsel argue that, even if pointing up a wall is part of the trade of a brick mason, Benson unnecessarily exposed himself to danger when working upon a scaffold suspended as this was. There is nothing of merit in this argument. When he became a member of defendant association, both parties contemplated that he would be exposed to the danger incident to his occupation. The association was organized for the very purpose of indemnifying persons engaged in trades or occupations in which accidents were imminent, and almost unavoidable, and Benson's object was to secure indemnity in case of accident. When such accident happens, and injuries result, a recovery cannot be defeated on the ground of voluntary exposure to a danger contemplated by the parties because pertaining to the business of the assured. *Association v. Jackson*, 114 Ill. 533, 2 N. E. Rep. 414. Yet if the scaffold on which Benson was at work was insecure and unsafe, and he knew it, he would be exposing himself to danger unnecessarily, and in case of accident the defendant would not be liable. These were matters for the jury to pass upon, under proper instructions, and on this feature of the case the court charged as requested by defendant's counsel. Ordinarily, what is due diligence for personal care and safety, in a given case, is for the jury. *Stone v. Casualty Co.*, 84 N. J. Law, 371. Nor is it a good defense, in an action of this nature, that the accident was caused by the mere carelessness or negligence of the assured. In cases where the foundation of the action is an injury occasioned by the negligence of a defendant, and the liability grows out of such negligence, it is always a good defense to show contributory negligence on the part of the plaintiff; but here the liability is created by a contract, one of the chief objects of which was to protect the assured against his own mere carelessness or negligence. *Insurance Co. v. Martin*, 32 Md. 310.

4. Referring to the defense interposed by defendant, that Benson had unnecessarily exposed himself to danger, the learned trial court erroneously used the words "gross negligence." But this error was at once corrected, for in connection with this language the court gave the very full and elaborate instructions prepared by defendant's counsel, as to what would constitute an unnecessary exposure to danger, within the meaning of the clause in the certificate. This instruction was illustrated by, and referred to, the facts, as shown on the trial, and was enlarged upon by the court in its own language; and there could have been no mis-

understanding on the part of the jury as to what would constitute unnecessary exposure to danger, under the certificate, sufficient to defeat recovery. No prejudice resulted from the use by the court of the words "gross negligence."

5. Other assignments of error need not be specially discussed. Order affirmed.

VANDERBURGH, J., took no part.

DEAN v. ST. PAUL & D. R. CO.

(Supreme Court of Minnesota. June 16, 1893.)

DEBT—ASSIGNMENT OF PART INTEREST—ACTION BY ASSIGNEE.

1. An assignment of a part interest in a demand or obligation may be made, and the courts will recognize and protect the equitable interest of the assignee.

2. But a separate and independent action cannot be maintained by such assignee, to recover his share of the debt, where the debtor refuses to consent to, or recognize, the assignment.

3. An entire demand cannot be made the subject of several different actions. There can be but one suit, in which all persons interested must be made parties plaintiff or defendant. (Syllabus by the Court.)

Appeal from district court, Pine county; Crosby, Judge.

Action by Michael C. Dean against the St. Paul & Duluth Railroad Company on an order given by an employe of defendant. Judgment, from which defendant appeals. Reversed.

Lusk, Bunn & Hadley and J. D. Armstrong, for appellant. Robert O. Saunders, for respondent.

VANDERBURGH, J. One Peterson, who was in the employment of the defendant, was entitled to \$50, the amount of his wages for March, 1892. On the 1st day of that month he gave an order to plaintiff, upon the defendant, directing the payment to him of \$5, and to deduct the same from the amount of his wages for March. This order, after due presentation, the defendant refused to recognize or pay.

It was determined in *Canty v. Latterner*, 31 Minn. 242, 17 N. W. Rep. 385, in accordance with the weight of authority, that an assignment of a part interest in a demand or obligation may be made, and that the courts will recognize and protect the equitable interest of the assignee. But the court did not hold that, as against the debtor or obligor, a separate and independent action might be maintained by the assignee, to recover the amount of his interest, or that a single demand could be split up and enforced in that way by the assignee, severally, so as to subject the debtor to sundry different actions, where he has not consented to the assignment. No such burden can be imposed upon the maker of a single, entire contract. He cannot, against his consent, be compelled

to deal with a plurality of creditors, and be subject to be harassed by a multiplicity of suits. The case of *Risley v. Bank*, 83 N. Y. 318, does not hold a different doctrine. The court there say: "The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of a part of an entire demand might subject the creditor to several actions has much less force under a system which requires all parties in interest to be joined as parties to the action." There can be but one action upon a single demand. The parties interested must join as plaintiffs, or those not joined must be made defendants, in the action, so that the whole controversy may be determined in one suit, unless the creditor agrees to a severance, as by the acceptance of an order, or otherwise. The assignee of a part interest cannot be permitted to carve out of the entire demand the amount of his claim, leaving other parties to bring separate actions for their several interests. See *Field v. Mayor*, 6 N. Y. 188, and *Bank v. McLoon*, 73 Me. 510, where the questions involved herein are fully discussed. The case of bank checks is distinguishable, for manifest reasons.

The justice returned the evidence in the case, and certifies that the papers returned, and the transcript contain a full, correct, and complete statement of all the proceedings and the evidence in the case; and this is the record upon which the decision in the district court, sought to be reviewed here, was made. The record is sufficient to present the questions raised here. The pleadings show the nature of this action, and the certificate, by fair intendment, shows that all the evidence was returned. The justice having so returned the evidence, the record of it cannot now be objected to because it fails to show that there was no formal request made that it should be returned. *Smith v. Force*, 31 Minn. 121, 18 N. W. Rep. 704. Judgment reversed.

BOWEN v. HASKELL et al.

(Supreme Court of Minnesota. June 12, 1893.)

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—LIABILITY FOR RENT.

A surrender of a lease by operation of law may arise from any condition of facts, voluntarily assumed, incompatible with the existence of the relation of landlord and tenant between the parties; as, for instance, when a new tenant has, by agreement with the landlord, been substituted and accepted in place of the old.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Pond, Judge.

Action by Edward W. Bowen against William E. Haskell and others for the recovery of rent. Defendants had judgment, and plaintiff appeals. Affirmed.

J. L. Dobbin, for appellant. Ohas. G. Laybourn and Kellogg & Laybourn, for respondents.

COLLINS, J. We pass by several questions discussed by counsel, and come directly to the consideration of a finding of fact to the effect that after the lease had been assigned to the respondent Haskell by the original lessees, the lessors consenting, through their agent and attorney in fact, B. H. Hellen, said respondent sold and transferred all of his title and interest in the lease and in the leased premises to one Chambers, who then entered into possession; that said sale and transfer were duly and properly consented to by the lessors, again acting through their agent and attorney; that they accepted Chambers as their tenant under the lease, in the place of respondent Haskell; that they collected the stipulated rental from Chambers for several months; that respondent never thereafter occupied the premises, and was not called upon to pay rent thereon. This finding, and the sufficiency of the evidence to support it, is not questioned by any of appellant's assignments of error, although the admissibility of certain testimony relative to the sale and transfer by Haskell to Chambers is brought in question by the third assignment. But, even if the trial court erred in its rulings respecting the admissibility of this testimony,—and of that hereafter,—we fail to see how appellant could be benefited, or how he could escape from the conclusive effect of such a finding. When the original lessors voluntarily consented to an assignment of the lease by the original lessees to Haskell, the lessees were released, and the relation of landlord and tenant no longer existed between the parties. Again, when the original lessors consented to a sale and transfer of all rights and interest which Haskell had acquired under the lease,—an assignment of it, practically,—to Chambers, and accepted the latter as their tenant in lieu of Haskell, the relations which had theretofore existed between the latter and his landlords terminated. There was a surrender of the lease held by Haskell, by operation of law, arising from a condition of facts voluntarily assumed, incompatible with the existence of the relation of landlord and tenant between the parties. The landlords could not be permitted to hold both Haskell and Chambers as lessees; and the facts going to show that a lessor has given up a lessee, and had nothing more to do with him, and has treated a new occupant as his lessee, may be established by parol. *Levering v. Langley*, 8 Minn. 107, (Gil. 82;) *Woodf. Landl. & Ten.* 496, 498.

Appellant's counsel urges that because Haskell agreed, in writing, to pay the rent when the lease was assigned to him, he was something more than a tenant by assignment. When executing the writing, Haskell formally assumed the liability, as to the payment

of the agreed rental, of the original lessees; nothing more. He was in no sense a guarantor. No obligation rested upon the lessors to discharge and release either of these parties, but, having done so, they and this plaintiff, their assignee, are bound by their action.

The trial court did not err when making the rulings referred to in appellant's third assignment. There was no effort made by respondents' counsel to show by parol the contents of a written instrument. All of the questions objected to were propounded with a view of showing a fact only,—the fact that Haskell had assigned or transferred his leasehold interests. Order affirmed.

VANDEBURGH, J., took no part.

HOSMER v. HOSMER.

(Supreme Court of Minnesota. June 16, 1893.)

DIVORCE—EVIDENCE OF DESERTION.

A finding of fact that the charge of desertion made by plaintiff in his complaint for divorce was not established or proven on the trial held sustained by the record.

(Syllabus by the Court.)

Appeal from district court, Waseca county; Buckham, Judge.

Suit by Joseph W. Hosmer against Mary R. Hosmer for divorce. From a judgment refusing the divorce, plaintiff appeals. Affirmed.

A. J. O'Grady, for appellant. M. R. Everett and H. S. Gibson, for respondent.

VANDEBURGH, J. The plaintiff sues for divorce on the ground of desertion. The divorce was refused by the court for the reason that the charge was not satisfactorily proven. The desertion is alleged to have occurred on September 15, 1887, and the court finds that since that date the parties have lived separate and apart continuously, owing to a trifling quarrel at that time, and that neither of them has ever attempted to make up such quarrel, or become reconciled to the other, or to resume marital relations, but they have been mutually satisfied with existing relations, without making any serious charges of misconduct against each other. The appellant makes three assignments of error. The third is too general, leaving only the first two to be considered.

The first raises the question whether the findings of fact are justified by the issues made by the pleadings. The question of inconsistency in the defenses set up was not raised at the trial. The issue of desertion was fully and fairly tried on the merits, without objection, and this court would not now entertain the objection now made, even if it would have been available in the trial court. But there is really no inconsistency. The failure of the defendant to establish

her defense or counterclaim is not necessarily an admission of the plaintiff's case. The court was entitled to consider all the material evidence bearing upon the issue of desertion raised by the plaintiff, and to decide that issue upon the merits as it did do.

The second assignment is that the conclusions of law are not justified by the evidence. It is sufficient that the conclusions of law are justified by the findings of fact. But the question argued by both parties, and probably actually intended to be raised, is whether the latter are supported by the evidence. The record of the testimony is manifestly not complete in details. It was made up by counsel from memory after the trial, and purports merely to contain the substance of the evidence. The trial court was in much better position to pass upon the testimony elicited before it than this court can be upon this record. The defendant denies in her testimony, substantially, that she left plaintiff without his consent, and that she ever refused to live with him. On the contrary, she testifies that he told her to go; that she must not interfere in a certain matter; and that, if she could not refrain from doing so, she could leave. The evidence in the case is conflicting, and the defense is not very clear or satisfactory, perhaps, but upon the record before us we do not feel justified in disturbing the decision of the trial court. Judgment affirmed.

STATE ex rel. BARGE v. DISTRICT COURT OF HENNEPIN COUNTY et al.

(Supreme Court of Minnesota. June 12, 1893.)

ACTION FOR UNLAWFUL DETAINER—STAY OF RESTITUTION PENDING APPEAL.

The provisions in Gen. St. 1878, c. 84, as amended by Gen. Laws 1881, Ex. Sess., c. 9, (the forcible entry and unlawful detainer act,) that in actions for recovery of real property held under a written lease after the expiration of the time specified in the lease, restitution of the premises shall be made notwithstanding an appeal, have no application to actions originally brought in the district court.

(Syllabus by the Court.)

Original petition in the name of the state at the relation of Jacob Barge for mandamus to the district court of Hennepin county to compel the entry of a judgment for petitioner in an action in ejectment against one Schlek, pursuant to the findings therein, and for restitution. Writ denied.

Albert E. Clarke and Wilbur P. Booth, for relator. Grethen & McHugh, for respondents.

COLLINS, J. It must be conceded that the complaint in the action of Barge v. Schlek, which action, originally instituted in district court, was in ejectment, and also to recover damages for the unlawful withholding of possession of the real property in question, contained all of the allegations

necessary to constitute a cause of action under the provisions of the forcible entry and unlawful detainer act, (Gen. St. 1878, c. 84, §§ 11-14, inclusive, as amended by Gen. Laws 1881, Ex. Sess. c. 9), and that the district court, when ordering judgment for recovery of possession and for damages for withholding possession, found all of the facts required to entitle the plaintiff, Barge, to a writ of restitution had his action been brought and determined, as provided in said statute, in a court of a justice of the peace. In case it had been so brought and determined, there could have been no stay of proceedings which would have delayed the issuance of a writ of restitution, nor would an appeal by defendant, Schiek, have had that effect. A writ of restitution could have been issued, and the complainant put in immediate possession of the premises. So that the question now before us is whether the course of procedure prescribed for the conduct of actions in justices' courts, and under that statute, the complainant being successful, can be followed, and the very summary remedy known as the "writ of restitution" awarded and issued where the action has been instituted in district court in the nature of ejectment, all of the essential facts being present and found. The theory upon which counsel for the relator urge his right to have granted the relief sought by this proceeding is that, as the district courts of the state are courts of general jurisdiction, having original jurisdiction in all cases, except as otherwise provided by the constitution, such jurisdiction has not been exclusively conferred upon courts of justices of the peace in actions of forcible entry and of unlawful detainer; that the district courts also have jurisdiction; and that, as all of the facts required to maintain an action under section 11, c. 84, supra, were set forth in the complaint in *Barge v. Schiek*, and were found by the court, it was actually an action under that statute, in which Barge was entitled to every remedy provided therein. The action of forcible entry and unlawful detainer is a statutory proceeding, the practice and procedure being prescribed and regulated as for justices' courts. It is an expeditious and summary way of reaching persons who make forcible entry upon lands, or who, having entered peaceably, unlawfully hold over after their right so to do has expired. Upon justices' courts, and upon some municipal courts by later legislation, jurisdiction over the subject-matter, and in this particular form of action, has been conferred, but there is nothing in chapter 84 indicating an intention to permit this form of proceeding in district courts. In fact the various provisions of the statute relating to the procedure repel the idea of such an intent, and render it impossible to pursue the remedy in district courts. Such courts have jurisdiction, and exercised it in *Barge v. Schiek*, to try and determine the same ques-

tion, namely, a plaintiff's right to recover possession of demised premises, but, necessarily, in accordance with the practice and procedure in ordinary civil actions. That a court of inferior jurisdiction is empowered to proceed and to reach the same result in a more summary manner is no reason for asserting that a court of superior jurisdiction can use the same methods. Nor can it be said that by the provisions of chapter 84 jurisdiction in excess of that possessed by district courts has been conferred upon courts of justices of the peace, for it is not a question of jurisdiction at all. It is simply one of practice and procedure. The landlord from whom a tenant withholds possession of the leased premises after his term has expired may proceed in ejectment in district court, and, according to the course of practice in those courts, being permitted to recover possession and also damages for the withholding in the same action, or he may pursue the more summary method provided in chapter 84, in which case he waives, for the time being, his right to recover damages for the wrongful detention. The choice of tribunals and remedies is open to him, precisely as it is in certain actions for the recovery of money, or in replevin, where the sum claimed or the value of the property in controversy does not exceed \$100. If the plaintiff chooses, he may bring his action in justice's court, where the proceedings are simple, the trial speedy, and the entry of judgment cannot be stayed by mere order of the justice; or he may resort to the district court, where the procedure is much more formal, the trial not so quickly reached, and where the court may, within a reasonable discretion, exercise its power, and stay the entry of judgment and other proceedings. We agree with the court below, and are of the opinion that the section in chapter 84, supra, as amended, providing that in actions for the recovery of real property held under a written lease after the expiration of the term specified in the lease, restitution of the premises shall be made notwithstanding an appeal, does not apply to actions originally brought in district court. The order to show cause is discharged.

VANDEBURGH, J., absent, took no part herein.

BANK OF COMMERCE v. HART.

(Supreme Court of Nebraska. June 6, 1893.)

BANKS AND BANKING—POWERS OF OFFICERS—INVESTING IN STOCKS OF ANOTHER CORPORATION.

1. The cashier of a banking corporation has, by virtue of his office, no authority to accept in payment and discharge of a debt due the bank certificates of the capital stock of an insurance company.

2. A banking corporation organized under the laws of this state has no power to become a stockholder in an insurance company.

3. The acts of the directory of a banking corporation, in dealing with and investing the

funds of the stockholders to bind the bank, must be confined to the expressed purposes for which the bank was incorporated, and to purposes necessarily incidental thereto in the successful conduct of its legitimate business.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Doane, Judge.

Action on a promissory note by the Bank of Commerce against J. T. Hart. Defendant had judgment, and plaintiff brings error. Reversed.

John L. Webster, for plaintiff in error. J. M. Woolworth, for defendant in error.

RAGAN, C. The Bank of Commerce sued Hart on a note for \$20,000, executed and delivered by him to the bank. The defense of Hart, so far as the same is material here, was that on March 30, 1888, he paid on said note \$14,105.46, with which payment the bank has not credited him. Hart claims to have made this payment by the sale of certain shares of stock in an insurance company to the bank through one Johnson, its cashier, who promised at the time to credit the note when it should be returned from New York, where it then was. The bank claims that the sale of said stock, if made, was to Johnson individually, and not to the bank; that it had no interest or part in said sale; that the same, if made, was without its knowledge or consent; and the purchase of the stock by its cashier, if made for the bank, was in excess of his authority, and void. The jury, by its verdict, allowed Hart the credit he claimed, thus, in effect, finding that the purchase of the insurance stock was made by the bank. Assuming, for the purpose of this opinion, that the evidence in the record supports this finding, we then proceed to inquire whether the cashier exceeded his authority in using funds of the bank in the purchase of this stock. In *Sandy River Bank v. Merchants', etc., Bank*, 1 Biss. 146, the facts were: The cashier of the Mechanics' Bank settled an account of \$22,000 with the cashier of the Sandy River Bank by paying \$10,000 cash and giving \$12,000 private paper, which the cashier of the Sandy River Bank accepted in payment, and gave a receipt in full. The Sandy River Bank brought its action against the Merchants' & Mechanics' Bank on the account. The latter pleaded payment by the contract with the cashier. The question in the case was whether the cashier had authority to receive in payment anything but money. In the course of the opinion delivered the judge said: "A cashier of a bank is ordinarily the executive officer of the bank. He is the agent through whom third persons transact their business with the bank. * * * The bank holds him out to the world as having authority to act according to the general usage, practice, and course of business, and all acts done by him within the scope of such usage, practice, and course of business bind the bank as to third persons

who transact business with him on the faith of his official character; and perhaps it may be presumed without proof, and merely from his office, that he is authorized to receipt and discharge debts, deliver up securities on payment or discharge of the debt for which they are held. * * * But still his authority is a limited authority. When a party claims a discharge from a debt due the bank not by payment, but by giving other or different notes, bills, or securities which the cashier has agreed to take and release the debt, his authority, like that of any other agent, must be shown by proof. As a general rule, the jury have no right to infer that the cashier of a bank, as such, has authority to compromise and discharge debts without payment, or by taking other securities, but the authority from the bank must be shown expressly or by necessary implication, or it must be established by the particular usage, practice, or mode of doing business of the bank, or it must be ratified or acquiesced in by the bank, in order to be binding." In *U. S. v. City Bank of Columbus*, 21 How. 356, the facts were: The cashier of the Columbus bank gave to one of its directors, Miner, a letter to secretary of the treasury of the United States, to the effect that Miner had authority to contract in behalf of the bank for the transfer of money for the government. Relying upon this letter, the secretary of the treasury made a contract with Miner for him to transfer \$100,000 of the government's money from New York to New Orleans. Miner received the money, but never delivered it. The United States brought suit against the Columbus bank to recover the money. The supreme court of the United States decided that the action could not be successfully maintained, as the cashier of the Columbus bank had no authority to make such a contract, and there was no proof that the board of directors had authorized it. In the course of the opinion, Justice Wayne said: "The court defines a cashier of a bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred; and that his acts, to be binding upon the bank, must be done within the ordinary course of his duties. The term 'ordinary business,' with direct reference to the duties of a cashier of a bank, occurs frequently in * * * reports of decisions in our state courts, and in no one of them has it been judicially allowed to comprehend a contract made by its cashier without express delegation of power from the board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier can purchase or sell property, or create an agency of any kind, for a bank, which he had not been authorized to make by others to whom has been confided the power to manage its business, both ordinary and extraordinary."

The power of this bank to purchase stock in an insurance company, if it exists at all, is an extraordinary power, and one not committed to the cashier, but belonging to the directory. In *Bank v. Bailhache*, 65 Cal. 329, 4 Pac. Rep. 106, it is said: "The power to make a settlement of defalcation to a bank, and accept a deed of real estate in satisfaction and release, is the function of the board of directors, and not of any individual director or officer." It has also been decided that, in the absence of special authority, the cashier of a bank could not release the surety from a note owned by the bank, (*Bank v. Rudolf*, 5 Neb. 527; *Bank v. Haskell*, 51 N. H. 116;) that, in the absence of special authority or established usage, the cashier has no power to compromise claims due his bank, (*Bank v. Kohner*, 8 Daly, 530;) that he had no authority to bind his bank by issuing a certificate of deposit to himself, (*Lee v. Smith*, 84 Mo. 304;) nor bind the bank by any official indorsement of his own note, (*West St. Louis Sav. Bank v. Shawnee County Bank*, 96 U. S. 557.)

The cashier of the Bank of Commerce, then, as the executive officer of the bank, was clothed with authority to collect all debts due the bank, but this means collections in money. If a cashier may discharge the debts due his bank by exchanging the evidences of them for stocks of an insurance company or a gas company, then he can, under the name and charter of the bank, conduct an entirely different business, and use the funds of his stockholders for a purpose for which they were never subscribed, and in violation of the law of the bank's creation. The purposes for which the Bank of Commerce was organized, as expressed in its articles of incorporation, were to receive deposits of money, and pay the same out on proper vouchers, to loan money on personal security, to issue drafts or letters of credit, to buy and sell securities of every kind, and do a general banking business. Had this charter expressly provided that the corporation might invest its funds in stocks of insurance companies, and deal generally in stocks of other corporations, such a provision would have been contrary to the laws of the state, and void; but there is no provision in the bank's charter which by any reasonable construction can be construed into an authority to purchase and hold the stocks of any other corporation. True, it says "to purchase securities of every kind," but certificates of stock are not securities, within the meaning of this provision, nor such as the word imports in commercial or banking phraseology. "Securities," as here used, means notes, bills of exchange, and bonds; in other words, evidences of debt, promises to pay money. We conclude, therefore, that the cashier, by virtue of his office, had not the power to accept the stock of the insurance company in payment of the debt due the bank, but that power, if it

existed, was lodged in the directory, and, as it had not expressly authorized the cashier thereto, he exceeded his powers in agreeing to accept, on behalf of his principal, the insurance company, stock in payment of the debt due from Hart to the bank, and that the latter is not bound thereby.

The powers of the directory to ratify the purchase of the insurance company's stock, and bind the bank thereby. In *Mechanics' & Workingmen's Mut. Sav. Bank & Bldg. Ass'n v. Meriden Ag. Co.*, 24 Conn. 159, it is said: "The first question is whether the defendants, being a joint-stock corporation, organized for a specific purpose, had power to become a stockholder in the association of plaintiffs. The purpose for which the agency company united, as expressed in their articles of association, was to do a general insurance agency, commission, and brokerage business, and such other things as are incidental to and necessary to the management of that business. So far as that business was concerned, the proper officers of the company had power to act and bind the company, but, if they had departed from that business, and entered into contracts not authorized by the company, such contracts would not be binding. The subscription to the stock of a building association has no legitimate connection with the business of an insurance agent, commission merchant, or broker, and was not, therefore, authorized by the defendants' articles of association. But when the directors of the company subscribed for stock in a building association, whatever may have been their motive, * * * they transcended the powers conferred upon them, and departed from the legitimate business of the company." In *Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 43, it is said: "If a corporation can purchase any portion of the capital stock of another corporation, it can purchase the whole, and invest its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purpose for which it was created. A banking corporation can become a manufacturing corporation, and a manufacturing corporation can become a banking corporation. This the law will not allow, and it has been held that notes given by a manufacturing corporation for the purchase of shares in a bank are not collectible." In *Cook on Stock, Stockholders & Corporation Law*, (section 316.) it is said: "A banking corporation has at common law no power to purchase or invest in stocks of another corporation, whether that other corporation be itself a bank or of a different business. The bank is organized for the purpose of receiving deposits and loaning money, not for the purpose of dealing in stocks. Any attempt to engage in such transactions is a violation of its charter rights and of its duties towards the stockholders and the public." In *Bank v. Jones*, 95 N. Y. 115, Chief Justice Ruger said: "The question involved in this

case * * * is the right of a bank corporation, chartered under the laws of this state, to subscribe for the stock of a railroad corporation. It is clear that a bank corporation cannot enter into a contract of this character unless it has authority under its charter to become a subscriber for the stock of railroad corporations, and thereby assume the obligations to which such stockholders are subject. The plaintiff is a moneyed corporation, organized under chapter 260 of the Laws of 1838, and authorized by that statute to carry on the business of banking by discounting bills, notes, and other evidences of debts, by receiving deposits, by buying and selling gold and silver bullion, foreign coins, and bills of exchange, and by loaning money on real and personal property. The legislature intended by the act in question to inaugurate in this state an entirely new system of banking, and thereby undertook to provide for the establishment of moneyed corporations, which should furnish to the public a safe and reliable circulating medium for the transaction of its business, and secure solvent depositaries for the custody of such moneys as were needed for current use by business people. The language employed in the act * * * excludes by necessary implication the capacity to carry on any other business than that of banking, and the adoption of any other methods for the transaction of such business than those especially pointed out by the statute. The spirit of the law, as well as sound policy, forbids these institutions from risking moneys intrusted to their care in doubtful speculations or enterprises. For these reasons we are of the opinion that plaintiff was not only precluded by public policy, but was not authorized by the statute under which it was organized, to enter into any agreement as a stockholder in a railroad corporation."

The learned judge who presided at the trial below charged the jury as follows: "(a) In investigating the question as to how far, if at all, the bank was bound by the acts of Johnson in the premises, you will be governed entirely by the testimony which has been adduced before you on the trial. If you shall find from the testimony either that Johnson, in his negotiations with Hart, and his final agreement with him for the purchase of the shares of stock in the insurance company, was acting under authority conferred upon him in that behalf by the board of directors of the bank, or that subsequent to the transaction the directors approved of and ratified what has been done by Johnson, acting in his capacity as cashier of the bank, (if you shall find that in such transaction he did act as such cashier,) and accepted the fruits of such transaction, then, in that case, the bank would be estopped to deny the authority of Johnson in the premises, and would be bound by his acts in that behalf. (b) If, on the other hand, you shall find from the testimony

that Johnson did not have authority from the board of directors of the bank to negotiate for and purchase the shares of stock in the insurance company referred to in the testimony, and that the directors did not subsequently approve and ratify the acts of Johnson relating thereto, nor accept and retain the fruits of such negotiations and purchase, then, and in that case, the bank would not be bound by what Johnson did relating to such negotiation and purchase, and, in such case, the plaintiff would be entitled to your verdict for the amount of the note sued on, and interest." This charge proceeded upon the theory that, though the purchase of the insurance company's stock by the cashier was unauthorized, yet the board of directors could have afterwards ratified and adopted it, and bound the bank by it. We do not assent to this doctrine, as applied to this case. It is doubtless true that the bank could legally take the stock of another corporation as security for a debt previously contracted. Possibly it might make a loan on the strength of the stock as security at the time. On this point the authorities are not in harmony, and, as it is not material here, we do not decide. An emergency might arise when a bank's board of directors would be justified in taking the stock of another corporation in settlement, adjustment, or compromise of a doubtful claim or debt, acting in the honest belief that only by so doing could a serious loss to the bank be averted. None of these reasons, however, existed in the case at bar, or, if they did, the record before us does not disclose them. The cashier had no authority to bind the bank by buying the insurance company's stock. The board of directors had no authority to authorize him to do so; and, if the cashier bought such stock in behalf of the bank, the directors had no authority to ratify the purchase, and thus bind the bank. But, assuming that this charge states the law correctly, there is no evidence in this record that the board of directors ever authorized the cashier to purchase this insurance stock, and there is no evidence in this record that the board of directors ever ratified such a purchase, if made, or that the bank accepted the fruits of the transaction; and the jury could not, from the evidence, so find either. We conclude, then, that the powers of a directors of a bank in dealing with and investing the funds of the stockholders are limited to the purposes for which the bank was incorporated, and to purposes necessarily incidental thereto, in the successful conduct of its legitimate business. We are constrained to say that the verdict of the jury is not supported by the evidence, and that the judgment of the court is contrary to the law of the case. The judgment of the district court is therefore reversed, and the case remanded for further proceedings. The other commissioners concur.

STATE ex rel. BROCK v. MOORE, State Auditor.

(Supreme Court of Nebraska. June 6, 1893.)

CLAIMS AGAINST STATE—APPROPRIATIONS.

The title of house roll No. 207, passed and approved April 8, 1893, is as follows: "An act making appropriation for the current expenses of the state government for the years ending March 31st, 1894, and March 31st, 1895, and to pay miscellaneous items of indebtedness owing by the State of Nebraska." Section 1 of said act provides: "That the following sums of money, or so much thereof as may be necessary, are hereby appropriated out of any money in the treasury not otherwise appropriated, for the payment of the current expenses of the state government, for the years ending March 31st, 1894, and March 31st, 1895, and to pay miscellaneous items of indebtedness owing by the state of Nebraska: Miscellaneous: Arrest and return of fugitives from justice; rewards offered; officers' fees and mileage for conveying prisoners to and from the penitentiary, and juvenile offenders to the industrial schools at Kearney and Geneva,—\$20,000.00." *Held*, that no part of this sum was appropriated for the payment of indebtedness owing by the state for "arrest and return of fugitives, or for officers' fees and mileage for conveying prisoners to and from the penitentiary," unless such indebtedness was incurred after March 31, 1893.

(Syllabus by the Court.)

Commissioners' decision. Original application in the name of the state at the relation of one Brock for mandamus to Eugene Moore, state auditor. Writ denied.

Field & Holmes, for relator. W. S. Summers, Deputy and Acting Atty. Gen., for respondent.

RAGAN, C. This is an application for a writ of mandamus. The petition alleges "that one Boyd, the sheriff of Otoe county, on the 4th day of July, 1892, conveyed from Nebraska City certain named persons (who had been tried, convicted, and sentenced by the district court of said county) to the penitentiary at Lincoln; that in so doing said Boyd incurred \$53.30 expenses. (2) That one Eugene Hall was duly appointed to arrest and return one Pederson, a fugitive from justice, charged with a crime in Box Butte county, and that said Hall did arrest said Pederson in the state of South Dakota, and returned him to said Box Butte county, and in performing said arrest incurred expenses in the sum of \$49.75, the account for which had been duly presented to, approved and allowed by, the governor, and ordered paid out of the funds for the return of fugitives. That both said claims had been assigned to and are now owned by the relator. That the accounts had been presented to the auditor, the respondent, and demand made that he draw warrants for the same on the treasury; and his refusal so to do. That by an act of the legislature approved on the 8th day of April, 1893, there was appropriated by the legislature the sum of \$20,000 for the purpose of meeting and paying the claims of relator and others similarly situated; and that there

is now in the hands of the state treasurer ample and sufficient funds to pay all claims held by the relator. The act referred to is house roll No. 207, the title of which is as follows: "An act making appropriation for the current expenses of the state government for the years ending March 31, 1894, and March 31, 1895, and to pay miscellaneous items of indebtedness owing by the state of Nebraska." Section 1 of said act is as follows: "That the following sums of money, or so much thereof as may be necessary, are hereby appropriated out of any money in the treasury not otherwise appropriated for the payment of the current expenses of the state government for the years ending March 31, 1894, and March 31, 1895, and to pay miscellaneous items of indebtedness owing by the state of Nebraska." The purposes of this act, as expressed in its title, are: First, to pay the current expenses of the state government for the years ending March 31, 1894, and March 31, 1895; second, to pay miscellaneous items of indebtedness owing by the state.

It will be observed that the claim of relator is for indebtedness of the state contracted prior to April 1, 1893. The question, then, is whether the claim of relator is one of miscellaneous items of indebtedness provided for in the act. In said section 1, under the title "Miscellaneous," occurs this: "Arrest and return of fugitives from justice; rewards offered; officers' fees and mileage for conveying prisoners to and from the penitentiary, and juvenile offenders to the industrial schools at Kearney and Geneva,—\$20,000.00." It is claimed by the relator that this clause appropriates \$20,000 for the payment of any indebtedness owing by the state for the purposes therein mentioned, whether the same was incurred before or after April 1, 1893. We are unable to agree to this. Our construction is that no money was appropriated by this law to pay any items of miscellaneous indebtedness contracted prior to April 1, 1893, except such items as are specifically mentioned in the act. It is not claimed that there is any other appropriation in this act from which the claims of the relator can be paid, and, as the claim of relator is not one of the miscellaneous items specifically named for payment out of the appropriation, the writ must be denied. Judgment accordingly. The other commissioners concur.

SUN FIRE OFFICE OF LONDON v. AYERST.

(Supreme Court of Nebraska. June 6, 1893.)

INSURANCE—ACTION ON POLICY—INSTRUCTION—MEASURE OF DAMAGES—REVIEWING EVIDENCE ON APPEAL—IMPEACHING WITNESS.

1. The verdict of the jury will not be disturbed unless clearly against the preponderance of the evidence upon which the cause was tried.

2. In an action upon an insurance policy to recover damages caused by fire to insured household furniture and wearing apparel in actual use, it was not error to instruct the jury that of the property destroyed they should, if possible, find the fair market value; otherwise, that they should find the fair value from the evidence, and that such value was not what a junk shop or second-hand dealer would give for them, or what they would bring under extraordinary circumstances, or at a forced sale.

3. Where averments of the answer are met in the reply by matter of avoidance conjointly with a denial of such averments, the special finding of a jury, sustaining such denial, will not be set aside as foreign to the issues joined.

4. Evidence of the general reputation of a witness for truth and veracity, to be available for the impeachment of such witness, must have reference to such reputation at his present or recent place of residence. It should not relate to a residence which had ceased two and a half years before such witness testified.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Ferguson, Judge.

Action on an insurance policy by Edward A. Ayerst against the Sun Fire Office of London, England. Plaintiff had judgment, and defendant brings error. Affirmed.

John L. Webster and Brome, Andrews & Sheean, for plaintiff in error. Frank T. Ranson and Gurley & Marple, for defendant in error.

RYAN, C. The petition wherein Edward A. Ayerst was plaintiff, and the Sun Fire Office of London, England, was defendant, was filed in the office of the clerk of the district court of Douglas county on December 31, 1889. The averments thereof were, in substance, that on September 4, 1888, the said plaintiff was the owner of the personal property in Sioux Falls, Dak., upon which on that day he effected an insurance with said defendant for the premium of \$19.50, at the time duly paid. The policy issued by the defendant to plaintiff aforesaid insured against loss or damage by fire in the sum of \$3,000 on plaintiff's household furniture, useful and ornamental, kitchen furniture and utensils, family wearing apparel and family jewelry, printed books, plate and plated ware, pictures, paintings, and engravings, and their frames, (not to exceed cost price,) piano or organ, sewing machine, family supplies, and fuel. The defendant, by this policy, agreed that if said property, or any part thereof, should be destroyed or damaged by fire, at any time between noon of September 4, 1888, and the same hour of September 4, 1889, the said defendant would pay or make good all such immediate loss or damage, not exceeding, in respect of the several matters in the policy specified, the sum set opposite thereto respectively, not exceeding in the whole the sum of \$3,000. There were contained in said policy the minute details as to conditions avoiding the policy, proof of loss, etc., usually found in such instruments, of which those discussed in argument will

alone be considered, and these will, as necessary, be fully described in that connection. The petition further alleged that on January 10, 1889, plaintiff therein removed the said insured property from Sioux Falls, Dak., to Omaha, Neb., and placed it in a dwelling house and barn situated at 2119 Binney street, lot 10, block 8, Kountze Place addition to Omaha, and that thereupon said defendant, by its duly-authorized agents at Omaha, transferred and indorsed said policy in writing, and by said writing made said policy cover and insure the said property where it had been placed in Omaha. This alleged removal indorsement was as follows: "Removal Indorsement. Sun Fire Office Insurance Company, London, Eng. No. of policy, 3,710,250. No. of renewal, ---. Amount insured, \$3,000.00. Indorsement dated 1-11, 1889. Name of assured, E. A. Ayerst. Old rate, 65. New rate, ---. Expires Sep. 4-89. Old location, Sioux Falls, Dak. This policy is hereby transferred to cover on the same property while contained in the two-story frame shingle-roof building occupied as dwelling, and in barn adjacent, situated as follows: 2119 Binney St., lot 10, Bl'k 8, Kountze Place Addition to Omaha, Nebr.; the insurance as originally effected being discontinued, and all liability in the former location to cease from this date. Additional premium, \$---. Return premium, \$---. Comstock, Martin & Perfect, Agent at Omaha, Neb." The petition alleged that on January 12, 1889, all of the insured property situated in the said barn was burned and wholly destroyed by fire, the property so burned being of the value of \$5,000; that on February 2, 1889, the aforesaid plaintiff gave to said defendant due notice and proof of said fire and loss, and that on February 25, 1889, this, at defendant's request, was supplemented by further proof by the delivery to defendant of an inventory of the destroyed property aforesaid, giving a description of the quality, quantity, and cost of each piece thereof, as required by the said defendant; after which, on April 2d, following, upon defendant's requirement to that effect, plaintiff submitted fully to an examination on oath, as provided for in said policy. The plaintiff, in his petition, claimed that, notwithstanding the objections made as to the sufficiency of proof of loss, the above-recited proceedings constituted sufficient proof in that behalf; and, having alleged damage to the amount of \$3,000, the plaintiff prayed judgment against defendant for that amount, with 7 per cent. interest per annum from February 2, 1889, and costs of suit. In the record is contained a copy of the summons and of an alias summons, with the indorsements on each. These, in this case, are of no use whatever, and only serve to cumber the record. They should therefore have been omitted therefrom.

The defendant answered in the district court, denying each allegation of plaintiff's

petition not specifically admitted in said answer. The execution of the policy and payment of the premium, as stated in the petition, were admitted, as was also the destruction of a portion of the insured property on January 12, 1889. Specifically the answer denied that on January 11, 1889, the defendant, by its duly-authorized agents at Omaha, transferred and indorsed said policy in writing, and thereby made said policy cover and insure said property, or become responsible for loss or damage to the same in any manner whatever, or at any place except at the place and upon the premises where said property was located at the time of the issuance of the original policy. The answer denied that Comstock, Martin & Perfect were the duly-authorized agents of defendant at Omaha on January 11, 1889, or at any other time, and denied that said Comstock, Martin & Perfect had any authority at any time or in any manner whatever to make the so-called "removal indorsement" alleged in plaintiff's petition, but the said defendant averred and charged the fact to be that said Comstock, Martin & Perfect were not authorized on said January 11, 1889, or at any other time, to make any indorsement upon said policy, or to bind said defendant in any manner in respect thereto. The answer further charged that plaintiff had been guilty of fraud and misrepresentation, in omitting to make known facts material to the risk in and about procuring to be made by Comstock, Martin & Perfect on January 11, 1889, a pretended "removal indorsement," for that on or about December 7, 1888, and at divers times prior thereto after October 18, 1888, plaintiff was notified and advised by defendant through its agents at Sioux Falls, who had issued said policy, that defendant was unwilling longer to carry said risk, and desired to terminate the same, and refund the ratable proportion of the premium for the unexpired term of the policy, and on said date requested plaintiff to return said policy to said agents, with the cancellation recited thereon, properly signed as received from said agents for the ratable proportion of the premium for the unexpired term of the policy. The answer alleged further the complete failure of the plaintiff to comply with these requirements, and the procuring from Comstock, Martin & Perfect of said "removal indorsement" to be made by them, while they were in total ignorance of said facts, as was well known to the plaintiff at the time. The defendant, in the fifth paragraph of its answer, further alleged that plaintiff ought not to recover, for that, by the above policy, it was provided that "this policy shall become void unless consent in writing is indorsed thereon by and on behalf of the society [defendant] in each of the following cases: If the insured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the

property above mentioned, or any part thereof," whereas, as the defendant averred, at the time the above policy was issued to plaintiff said plaintiff had another policy of insurance covering the same property. The said prior policy, being for \$2,000, was issued by the Insurance Company of Dakota, and by its own provisions not terminating until November 1, 1888, and, as the defendant alleged, the existence of this prior insurance was fraudulently concealed from defendant's agents when they issued the policy sued on.

The reply averred that Comstock, Martin & Perfect were the duly-authorized agents of defendant on January 11, 1889, and both before and after that date; that the acts of said agents in respect to the policy sued on were well known to defendant, by whom no objection was made to said acts until the answer was made in this cause. The reply alleged the various matters stated in the petition as to the proofs required and the examination to which plaintiff was subjected, and stated that in each of these the object of defendant was solely to ascertain the value of the property insured, and that no question of the authority of the agents of defendant was touched upon in said examination; neither was the validity of said policy questioned by defendant, nor was any objection made to the "removal indorsement" placed upon said policy by the said Comstock, Martin & Perfect; whereby plaintiff insisted that all such objections were waived. The reply originally denied each averment made in the answer as to the existence of another policy of insurance, and the fraudulent concealment thereof from the defendant's agent who issued the policy sued on at the time of its issuance. After the argument, but before the final submission of the case to the jury, plaintiff withdrew the denials contained in the last sentence, and substituted the following amendment: "Replying to the fifth paragraph of defendant's answer, plaintiff alleges that the defendant at the time of the issuing of the policy mentioned in the petition knew of the prior insurance mentioned in defendant's answer, and knew that said prior insurance existed, and, knowing such fact at the time plaintiff applied for the policy mentioned in the petition, defendant issued the same notwithstanding said prior insurance; and, replying further to said paragraph, plaintiff denies each and every allegation therein contained."

On April 16, 1891, the trial having been concluded, the jury returned a general verdict in favor of plaintiff for \$3,369.25, at the same time returning answers to the special interrogatories submitted, as follows: "First. At the time the policy of insurance sued upon in this action was issued, did the plaintiff have a policy of insurance covering the same property by the Insurance Company of Dakota? Answer yes or no. Answer. No. Second. Where were the goods

claimed to have been destroyed at the time the removal indorsement was made upon the policy in suit by Comstock, Martin & Perfect? Answer. Omaha, Neb., at the depot. Third. At the time plaintiff applied to Comstock, Martin & Perfect, and asked that the removal indorsement be placed upon the policy in suit, had he been advised, or did he know, that the defendant had instructed its local agents at Sioux Falls to cancel the policy of insurance in suit? Answer yes or no. Answer. No." A motion for a new trial having been overruled, judgment was rendered for the amount found due by the general verdict. To reverse this judgment the cause is brought into this court by petition in error, in which the Sun Fire Office of London is plaintiff.

The errors alleged will be considered in the order in which they were presented in the brief of plaintiff in error. The matter first and at most length complained of is that the damages are excessive, the quality, quantity, and value of the insured property being out of all proportion to the circumstances of plaintiff, and indeed of any one else, and not capable of being crowded into the space where they were stowed; and because, from the length of time many of the articles had been in use, they must have been worn out, and therefore of little or no value. These considerations, however, are only addressed to the credibility of the testimony of defendant in error. His evidence was full and explicit as to the description and price of each article, though to plaintiff in error it was intrinsically improbable. He was not contradicted as to these matters; neither was any effort made in that direction, though F. W. Harrington, the agent who wrote the policy sued on, testified that when said policy was issued he examined the property insured. Under these circumstances, the argument as to the inherent improbabilities of the testimony of the defendant in error are not sufficiently controlling to overcome the presumptions which exist in favor of the correctness of the verdict of a jury.

2. The second matter argued is as to the refusal of the court to give instruction 8 requested by the plaintiff in error. It was as follows: "Number 8. The plaintiff in an action of this kind is entitled to recover, if entitled to recover at all, only the fair market value of the property actually destroyed; and the burden of proof is upon plaintiff, under the issues in this case, to establish such fair market value by a fair preponderance of the evidence." In the same connection, however, plaintiff in error insists that the court erred in giving instruction numbered 14½, which is in the following language: "Number 14½. The plaintiff in an action of this kind is entitled to recover, if entitled to recover at all, only the fair market value of the property destroyed; and the burden of the proof is on the plaintiff, under the issues in this case, to

establish such fair market value by a fair preponderance of evidence. The fair market value is not what a junk shop or a second-hand dealer would give, but it means a fair reasonable market value of said property in this city, and not what the property would bring under extraordinary circumstances or by a forced sale. You must ascertain their value from a fair and impartial consideration of all the evidence in this case." The first sentence in the instruction last copied is identical with the eighth instruction asked by the plaintiff in error. The matter added in the last two sentences in the last-quoted instruction, (14½) to the effect that the true value must be ascertained, not from what a junk shop or second-hand dealer would give, nor from what the property would bring under extraordinary circumstances or a forced sale, was correct. The terms of the policy were that the insurance company "will pay or make good all such immediate loss or damage if the property, during the term for which it was insured, should be damaged or destroyed by fire. In the policy there is no reference to payment of the market value of the goods, or any other special description of value. The contract was to pay or make good the immediate loss or damage caused. The agent of the insurance company had very properly examined the property when it was insured. The policy clearly described the class of property upon which thereby the insurance was effected. The parties could have had in contemplation no such standard of valuation as would obtain if the contract had been for the sale of merchandise. It was not a contract in that nature, but was one to indemnify the insured for whatever loss should be caused to the insured property by fire during the time fixed in the policy. This policy provided that, in case of damage to personal property, the insured should forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, etc. It would hardly be claimed, in view of these provisions, that if clothing was damaged by fire the inquiries upon a trial would be, first, what would have been the market value of the property before it was damaged, as fixed by a junk shop or a dealer in second-hand clothing? and then, what was the market value of such clothing after it was damaged, as fixed by the same class of authority, upon prices current? the damage to be ascertained by subtracting one of these items from the other. The policy itself discloses that the subject-matter was not marketable commodity, and it is not believed that in estimating the damage for which the insurer should answer that the element of value as fixed in the market ought alone to control. There is no necessity of resort to such a valuation to ascertain the immediate loss suffered. If the insured articles of clothing, furniture, bedding, etc., have been destroyed, the question for determina-

tion in finding the amount of the recovery is, what was the fair value of the property before it was destroyed? In this it is not to be understood that any fanciful notions of the value entertained by the owner of such articles are properly to be considered, but, rather, what would the destroyed goods have been worth for the use of such people as ordinarily use goods of that class, provided they were in need of them; this value, on the one hand, not to be swollen by a sentimental partiality of its owner, and, on the other, not to be subjected to the odium and suspicion generally incident to second-hand clothing or furniture. If any of the insured property was a marketable commodity, its value might by the jury be found from the prevailing market price; otherwise the simple fair value should govern. These suggestions embody the principle upon which the jury were instructed upon this subject, and fairly consider the objections and arguments made in criticism thereof by the plaintiff in error. The views above expressed are not without support in other adjudicated cases involving the same question. In *Gere v. Insurance Co.*, 67 Iowa, on page 276, 23 N. W. Rep. 137, and 25 N. W. Rep. 159, Adams, C. J., delivering the opinion of the court, said: "The court instructed the jury to allow the fair value of the property. The defendant assigns as error the giving of this instruction. In our opinion, there is no error in the instruction. If there had been evidence that the property had a distinctly recognized market value, it might have been better to have instructed the jury to allow the market value; but there was no such evidence, and the instruction to allow the fair value appears to us to be unobjectionable." In *Joy v. Insurance Co.*, 48 N. W. Rep. 1049, the supreme court of Iowa said: "The property in question consisted of old or second-hand furniture, the market price of which it is usually very difficult to establish. It cannot be said to have a fixed market value, and we think that the price for which it was offered by the owner is at least competent evidence to be considered by the jury. If such an offer was accepted, it would seem quite conclusive that the property was worth the amount of the offer. If not accepted, it would be evidence tending to show that the property was not worth more than that for which it was offered. It is not to be assumed, in the absence of proof, that the offer was 'dictated by pressing circumstances,' or for other reasons that might render the proof of such offer of no avail; but, if such circumstances exist, they may be shown, and thus give to the testimony the weight to which it is entitled." This subject is thus discussed in *Sutherland on Damages*, (volume 2, page 387:) "If the article in question has no market value, its value may be shown by proof of such elements of facts affecting the question as exist. Recourse may be had to the items of cost and its utility and use; and

opinions of witnesses properly informed on the subject may also be given in respect to its value." Under the circumstances of this case it is believed that there was sufficient evidence of a proper character upon which to submit to the jury the question of the amount of loss sustained, and that the rules to be observed in the consideration of that question were correctly stated by the court to the jury.

3. The plaintiff in error insists that the fifth paragraph of its answer, setting up the existence of an existing concealed insurance upon the same goods covered by the policy sued upon, was confessed by defendant in error's reply in respect thereto. The paragraph of the reply referred to has hereinbefore been copied in full, and by an inspection will be found to consist—First, of an averment of knowledge of the existence of said prior insurance when the policy sued upon was made; and, second, a denial of each and every allegation of the aforesaid fifth paragraph of the answer. Section 121 of the Code of Civil Procedure provides as follows: "In the construction of any pleading for the purpose of determining its effects its allegations shall be liberally construed, with a view to substantial justice between the parties." Thus considering the two parts of the reply, there is no difficulty in harmonizing them, each with the other, for, regarding one as a denial of the facts charged, the other may well be treated as though contingently, upon the plaintiff in error successfully establishing the existence of the prior insurance, the defendant had alleged a knowledge of such policy and waiver of objection thereto by the plaintiff in error. If these matters rendered this part of the reply so indefinite and uncertain that the precise nature of the charge or defense was not apparent, the court, upon motion, would undoubtedly have required it to be made more definite and certain. Section 125, Code Civil Proc. No objection was made for this reason, and it would manifestly be very unjust to deprive defendant in error of the benefit of his denial of the existence of a prior insurance, especially in view of the fact that the jury specially found that no such prior insurance existed.

4. There was refused the offer to prove the general reputation for truth and veracity of Mr. Ayerst in Sioux Falls. The residence of Mr. Ayerst in the place last mentioned was from 1884 to October, 1888, at which time he removed to Omaha, where he resided during the interim between said last-mentioned date and April, 1890, at which time he removed to Seattle, where he continued to reside until the date of the trial, which was in April, 1891. Between the termination of his residence at Sioux Falls and the date of the trial there was an interval of two years and six months. The decisions are not uniform as to the rule applicable to this form of impeachment, it is true, but in this state no

doubt can well exist. In *Long v. State*, 23 Neb. 34, 36 N. W. Rep. 310, the following language of Judge Brewer in *Fisher v. Conway*, 21 Kan. 25, was quoted with approval: "Impeaching testimony is for the purpose of discrediting a witness by showing that the community in which he lives does not believe what he says; that he is such a notorious liar that he is generally disbelieved. It is his present credibility that is to be attacked. Is he now to be believed? What do his neighbors think and say of him at the present time? not, what did they think and say months and years ago?" In *Marion v. State*, 20 Neb. 242, 29 N. W. Rep. 911, it was held that the general reputation to be proved must be confined to a time very near the date when the witness testified. From the above statement as to the residence of Mr. Ayerst it appears that of the 2½ years which had elapsed since his residence in Sioux Falls ceased he had resided 1½ years in Omaha, where the trial was then in progress. He certainly must have established a reputation for truthfulness, or the contrary, within that time; and proof of his reputation anterior at least to his residence in Omaha was too remote for the purpose of impeachment. The evidence offered for the purpose was therefore properly excluded. While some other propositions of fact were put in issue by the pleadings, none have been argued except such as have already received consideration and determination. The judgment of the district court is affirmed. The other commissioners concur.

STATE v. COMMERCIAL & SAV. BANK OF KEARNEY.

(Supreme Court of Nebraska. June 6, 1893.)

STATE BANKS — INSOLVENCY — ACTION TO WIND UP AFFAIRS — PARTIES — FINDINGS OF REFEREE — PRACTICE.

1. The findings of fact in the report of a referee will not be disturbed, unless manifestly contrary to the weight of the evidence.

2. In winding up the affairs of an insolvent bank under the statutes of this state, the receiver of such bank, when so authorized by this court, may take such steps as shall be necessary to enable him to secure possession of the assets of such bank, or their value.

3. It is not necessary, in proceedings to obtain possession of the assets of an insolvent bank, wrongfully withheld by one of its former officers, to join as parties to the proceedings other individuals, for whose benefit the misappropriation took place. Neither can such bank officer require the allowance of a set-off or counterclaim as a condition precedent to the delivery of the possession of such assets.

4. Where parties have, by the fraudulent conduct of themselves or their agents, obtained possession of the assets of an insolvent bank, and are unable to return to the receiver of such insolvent bank the said assets, in kind, such parties will be held to strict accountability for the value thereof.

(Syllabus by the Court.)

Commissioners' decision.

Original action by the state of Nebraska against the Commercial & Savings Bank of

Kearney. Heard on report of referee. Judgment for plaintiff.

Marston & Nevius, for complainant. W. L. Hand, for defendant.

RYAN, C. The Commercial & Savings Bank of Kearney was organized under the laws of this state in the fall of the year of 1889, and, as such bank, transacted business until and including January 30, 1892. On this last-named date, and for some time previous thereto, Sylvester S. St. John was president of said bank, at the same time being secretary of the Mutual Loan & Investment Company of Kearney, while John Barnd, contemporaneously, was cashier of the aforesaid bank. About half past 8 o'clock P. M. of January 30, 1892, (which was Saturday,) there was executed between the Mutual Loan & Investment Company, by Sylvester S. St. John, its secretary, and by Sylvester S. St. John in his individual capacity, as parties of the first part, and the Commercial & Savings Bank, by John Barnd, its cashier, and by John Barnd individually, as parties of the second part, a writing, of which the following is a copy: "Kearney, Neb., Jan'y 30th, 1892. Article of agreement made and entered into this day by and between the Mutual Loan & Investment Company and Sylvester S. St. John, of the one part, and the Commercial & Savings Bank and John Barnd, of the second part, witnesseth, that the said party of the first part hereby assumes and agrees to pay a certain note of five thousand (\$5,000) dollars given by John Barnd to the Mutual Loan & Investment Company, and by them discounted at Essex National Bank, Haverhill, Mass., in consideration of the said Commercial & Savings Bank paying a certain note of five thousand dollars (\$5,000) given by the said Mutual Loan & Investment Co. to the said Commercial & Savings Bank, and by them discounted at the Union National Bank of Chicago. In consideration of the payment in cash of two thousand (\$2,000) dollars the Commercial & Savings Bank hereby agrees to pay a certain note given by the Mutual Loan & Investment Co. to said bank, and by them discounted at the Lincoln National Bank, Lincoln, Neb., and they hereby agree to return certain notes for three thousand (\$3,000) dollars put up by the said the Mutual Loan & Investment Co. as collateral to said note of two thousand (\$2,000) dollars. The Commercial & Savings Bank also agrees to pay a certain draft to the Citizens' Savings & Trust Co., of Iowa City, Iowa, given in payment of a certain certificate of deposit issued by the said the Commercial & Savings Bank to A. C. Hinman, and by him discounted at the Citizens' Savings & Trust Co., of Iowa City, Iowa. Also, Syl. S. St. John agrees to turn over to said John Barnd stock number one, (1,) two, (2,) and four, (4,) and thirty-eight, (38,) of the Commercial & Savings Bank, being two hundred (200) shares

this day sold to said John Barnd, cashier, and the said John Barnd agrees to turn over to Syl. S. St. John number sixteen (16) and seventeen (17) of the Mutual Loan & Investment Co.'s stock, being seventy-five (75) shares this day sold to said Sylvester S. St. John. The Commercial & Savings Bank also agrees to return to the Mutual Loan & Investment Co. first mortgages on real estate, amounting to forty-nine hundred fifty (\$4,950) dollars, held by the Union National Bank of Chicago as collateral security; also, five thousand dollars, (\$5,000,) more or less, of first mortgages on real estate held by F. D. Updyke as collateral to the said Commercial & Savings Bank's note of five thousand (\$5,000) dollars, which the said Commercial & Savings Bank agrees to pay. In witness whereof, we have set our hands and seals this 30th day of January, 1892. The Mutual Loan & Inv. Co., by Syl. S. St. John, Sec'y. [Seal.] Sylvester S. St. John. [Seal.] The Commercial & Savings Bank, by John Barnd, Cashier. [Seal.] John Barnd. [Seal.] Witness: A. H. Bertrand, L. H. St. John." On Monday, February 1, 1892, a special meeting of the directors of said bank was held at 8 o'clock A. M., as shown by the bank records, at which meeting the following proceedings were had: "Special meeting of directors held at 8 A. M., Feb'y 1st, 1892. Meeting called to order by S. S. St. John, Pres't. Present: S. S. St. John, John Barnd, John Scott, O. P. Pearson, W. F. Pickering, T. N. Hartzell, and A. H. Bertrand. The following letter was read: 'Kearney, Neb., Jan'y 30th, 1892. To the Board of Directors of the Commercial & Savings Bank—Gentlemen: Having sold my stock, and disposed of all my interest, in the bank, I necessarily cease all of my connection with the same, and tender my resignation as director and president. Yours, most truly, Sylvester S. St. John.' The resignation of Mr. St. John was moved and carried, as director and president. On motion, the resignation of John Barnd, cashier of the bank, was carried and accepted. On motion, John Barnd was elected president of the bank. Carried. On motion, it was seconded and carried that the board of directors confirm the transfer of stock, notes, etc., made between S. S. St. John and the Mutual Loan & Investment Co., of the first part, and John Barnd and the Commercial & Savings Bank, of the second part, as appears on the records of the bank as having taken place Jan'y 30th, 1892. A statement was made by John Barnd that, owing to conditions and circumstances over which the bank had no control, the bank would possibly be compelled to close its doors and business, for want of funds; that this state of affairs was brought about by the general depression of financial matters for the last eighteen months, causing a shrinkage in the deposits of the bank, and inability to collect and realize upon its resources. On motion, the resignation of O.

P. Pearson, John Scott, T. N. Hartzell, and W. F. Pickering, as directors of the bank, were accepted, and their stock in said bank was purchased by the Commercial & Savings Bank. Moved and carried that the above transfer of bank stock be recorded on the stock ledger of the bank. On motion, adjourned. A. R. Bertrand, Asst. Cashier and Actg. Secy."

As developed by subsequent events, the bank was at that time hopelessly insolvent. Its stock had no value whatever. Under these circumstances, if there is charged against the Mutual Loan & Investment Company and Sylvester S. St. John, the parties of the first part to the above agreement, what they were to receive thereunder, and to the Commercial & Savings Bank and John Barnd, as parties of the second part, the items that said agreement entitled them to receive, such statement would stand as follows:

The Mutual Loan & Investment Company and Sylvester S. St. John, Dr.	
To agreement of Commercial & Savings Bank and John Barnd to pay note Mutual Loan & Investment Company	\$ 5,000
To agreement of Commercial & Savings Bank to pay note of above company to said bank, afterwards discounted at Lincoln National Bank..	2,000
To collaterals to above to be returned	3,000
To 75 shares, \$100 each, of stock Mutual Loan & Investment Company, at par value.....	7,500
To first mortgages on real estate, to be returned, held by Union National Bank, Chicago	4,950
To first mortgages held by Updyke as collateral	5,000
Total	\$27,450
The Commercial & Savings Bank and John Barnd, Dr.	
To Mutual Loan & Investment Company and S. S. St. John, agreement to pay John Barnd's note to said Mutual Loan & Investment Company	\$5,000
To cash paid to first parties to agreement	2,000
To 200 shares stock of said bank,—worthless	0,000
Total	\$7,000

The terms of this agreement, as above shown, entitled the parties of the first part to \$27,450, while the Commercial & Savings Bank and John Barnd, parties of the second part, received in all a consideration of \$7,000. Of this \$7,000, the note of John Barnd to the Mutual Loan & Investment Company for \$5,000 had been discounted by the Essex National Bank of Haverhill, Mass., presumably with the guaranty of said Mutual Loan & Investment Company, as the evidence for the defendant clearly shows that that was its usual course as to notes discounted by said loan and investment company. As to this note for \$5,000, this company assumed no new or independent liability; for, in the light of subsequent events, it is quite clear that Sylvester S. St. John then well knew

that neither the Commercial & Savings Bank nor John Barnd would be able to pay this note after becoming a party to this arrangement. It is therefore not unfair to charge upon this statement, compiled from said written contract, as having been received from the Mutual Loan & Investment Company and Sylvester S. St. John \$27,450, and as received by the bank and its cashier but \$2,000, being the cash recited as paid. This would leave a balance in favor of the Mutual Loan & Investment Company and its secretary, Sylvester S. St. John, parties of the first part, of \$25,450. As there was found in this bank but \$20.70 in cash, according to the evidence of John Barnd, its partner, as party of the first part in the above transaction, it would seem that the bank got nothing out of this deal, which, with something of grim irony, its president and cashier call an exchange. When, in considering this "exchange," it is remembered that the Commercial & Savings Bank was represented by its cashier, whose judgment was impaired by an insane delusion, and by a president whose interests were that the opposite party whose controlling officer he then was should profit at the bank's expense, there is nothing marvelous in the result. On behalf of the secretary of the Mutual Loan & Investment Company, who held the office of president of the insolvent bank until its utter ruin, and the robbery of its patrons, was an accomplished fact, nothing in extenuation can be urged. When he tendered his resignation as president of the bank at the meeting of the directors held at 8 o'clock in the forenoon of Monday, February 1, 1892, he was aware that the bank was insolvent,—rendered hopelessly so by his own betrayal of his trust. It is now urged on his behalf that there can be no order made in respect to the stock of the defunct bank held by the sons and brothers of this perfidious president, because they are not made parties to this proceeding. Under the facts in this case it is hoped that no necessity will exist for making these relatives such parties. The misconduct of Sylvester S. St. John, as president of the Commercial & Savings Bank, in becoming a party to the misappropriation of the assets of that bank, subjected him to a personal liability for the full value of those assets to the bank's creditors. It cannot be too strongly or too frequently impressed upon the minds of officers and managers of banks and other corporations that they are but agents, and as such they must loyally serve their principals. Banks are necessary concomitants of civilization. To them are intrusted the earnings of honest toil, the accumulations of intelligent enterprise; the trust funds of charity, orphanage, and helpless old age; and, as managers of such institutions, bank presidents, cashiers, and directors cannot be too strongly impressed with the responsibility of their official po-

sitions. As to this trust relation the law will especially tolerate no violation of the eighth commandment.

Sylvester S. St. John and the Mutual Loan & Investment Company question the powers of the receiver to institute this sort of proceedings as to them. A sufficient answer to this will be found by a reference to *State v. Commercial State Bank*, 28 Neb. 677, 44 N. W. Rep. 908, and *State v. Exchange Bank of Milligan*, 34 Neb. 198, 51 N. W. Rep. 765. The order in this case, appointing Henry Gibbons receiver, required the officers of the Commercial & Savings Bank to deliver to him all the property and effects of said bank, of what description soever, of which they had possession. In view of the fact that the evidence upon which the referee predicated his findings fully sustains each of said findings, the matters for which the Mutual Loan & Investment Company and Sylvester S. St. John shall be held accountable to the receiver aforesaid will be stated in accordance with said findings. It is alleged, however, that these findings fail to state the value of the separate items with which we must, of necessity, deal. Possibly it would have been better that the report had been a little fuller, so as to cover this suggestion, but as no motion was made for such change by the defendants this criticism can avail nothing. *State v. Lancaster Co.*, 20 Neb. 419, 30 N. W. Rep. 533. The report of the referee, however, with the evidence, to which reference will be briefly made, is amply sufficient for our purposes. By the testimony of Sylvester S. St. John it is established that in the so-called exchange the stock of the Mutual Loan & Investment Company was treated as of par value, and we shall act upon the same estimate. The evidence shows that the bank stock held by the Mutual Loan & Investment Company on January 30, 1892, was utterly worthless, as were also the notes of John Barnd. The finding of the referee as to the property received by Sylvester S. St. John and the Mutual Loan & Investment Company was as follows:

"Capital stock, Mutual Loan & Investment Company	\$27,500 00
Capital stock, Mutual Loan & Investment Company, of Barnd...	7,500 00
Notes of Mutual Loan & Investment Co.	2,000 00
Notes Mutual Loan & Investment Company	5,000 00
Cash deposited to Company.....	3,761 00
Note of S. S. St. John, and interest, \$69.00	1,025 63
Note of S. S. St. John.....	4,434 00
Note of L. N. St. John.....	2,087 24
Note of T. E. St. John.....	400 00

Total received by St. John and Mutual Loan & Investment Company \$53,707 87"

Against this, there was turned over to the bank and John Barnd the aforesaid worthless bank stock and equally worthless notes of John Barnd, with the following items:

Cash, check, \$2,780.40; notes of Mutual Loan & Investment Company, \$9,239; in all, \$12,019.40. From the statement of the property received by St. John and the Mutual Loan & Investment Company, as shown by the finding of the referee, there should be deducted the item of capital stock, Mutual Loan & Investment Company, of Barnd, \$7,500, which leaves on that score a total of \$46,207.87. Deducting from this the value of the property received by the bank and John Barnd, \$12,019.40, the difference, of \$34,188.47, represents the value of the property for which Sylvester S. St. John and the Mutual Loan & Investment Company should be held liable to account to the receiver of the aforesaid bank, with whatever interest and earnings since January 30, 1892, have accrued thereon. As this court has original jurisdiction to wind up the affairs of insolvent state banks, and as it has already assumed jurisdiction of this bank's affairs, it is not deemed advisable to subject the parties to the inconvenience and expense of unnecessary litigation. The Mutual Loan & Investment Company, aforesaid, and Sylvester S. St. John, are therefore required to deliver to the receiver of the Commercial & Savings Bank, aforesaid, the value of the stock of the Mutual Loan & Investment Company, of \$27,500, canceled by said Mutual Loan & Investment Company, and all the notes and other property received as aforesaid, being, in all, of the aggregate amount of \$34,188.47, with 7 per cent. interest thereon from January 30, 1892, within 30 days from the date on which this opinion is filed with the clerk of this court. If this requirement is not complied with, such further proceedings will be taken by this court as shall be found necessary to enforce such compliance. Judgment accordingly. The other commissioners concur.

HENRY & COATSWORTH CO. v. BOND et al.

(Supreme Court of Nebraska. June 6, 1893.)

ESTOPPEL—MECHANIC'S LIEN—PRIORITY TO MORTGAGE—PRIORITY OF LIENS—WHEN LIEN ATTACHES—PROCEEDINGS TO PERFECT—WAIVER OF CLAIM—ASSIGNMENT.

1. M. held a mortgage on certain city lots, on which the owner desired to negotiate a large loan for the purpose of building thereon an hotel, contracts for furnishing the material for which were held by H. & C., who promised M. in writing if he would release his mortgage they would pay him the amount thereof out of the payments made to them for material from time to time, as the building progressed. M. released. Payments for material were made to H. & C., but they paid nothing to M. In a suit by H. & C. to foreclose mechanics' liens on the lots and hotel, held, that the release by M. of his mortgage was a sufficient consideration for the promises of H. & C.; that they were estopped from claiming liens on the property prior to M.; and that their liens should be charged with the amount due M. on his mortgage.

2. Under the law of this state the lien of

a mechanic or laborer attaches at the commencement of the furnishing of material, or at the commencement of the performance of labor by him, and not from the beginning of the construction of the improvement on which he labors or for which he furnishes material.

3. A person commencing to furnish material for, or commencing to labor on, an improvement on real estate must at the time take notice of the interest and title in the premises of the person with whom he contracted, as shown by the public records, as his lien for labor and material, aside from the improvement itself, attaches only to such interest.

4. A party taking a mortgage on real estate is bound at the time to know whether material has been furnished or labor performed in the erection, reparation, or removal of improvements on the premises within the four prior months.

5. The lien of a mortgage on real estate, taken while a building is in process of erection thereon, is subject to the claims of material men and laborers for material already and thereafter furnished, and for labor already and thereafter performed in the erection of such building, when the commencement of such furnishing of material or the commencement of the performance of such labor was prior to the record of said mortgage.

6. Under the Nebraska statute there are no priorities among liens for material furnished or labor performed, but this rule of equality applies only to those lienors who commenced the furnishing of material or commenced the performance of labor on the faith of the same estate,—as, if A., B., and C. commence the furnishing of material for an improvement on certain real estate, and afterwards the owner mortgages to D., and thereafter E., F., and G. commence the performance of labor on the improvement, here the liens of A., B., and C. are prior to D.'s mortgage, and prorate among themselves, being of the same class, and attaching to the same estate; while the liens of E., F., and G. would be subject to D.'s mortgage, but would prorate among themselves, being of the same class, and attaching to the same estate.

7. The oath attached to the "account of the items" for material furnished, and for which a lien was claimed, was as follows: "J. A. B., being first duly sworn, * * * says * * * is a * * * correct * * * of material furnished by this affiant. * * * (Signed) Capital City Planing Mills. Per J. A. B., Sec'y." The account of the items was headed: "M. I. B., to Capital City Planing Mills, Dr." Held, to show that the lien was claimed by the Capital City Planing Mills, and not by J. A. B., and a substantial compliance with the statute.

8. The oath required by section 3, c. 54, Comp. St., may be made by the agent of the claimant of a lien, whether a person or corporation.

9. When more than four months intervene between items of an account for material furnished, a mechanic's lien will not attach for the items preceding the hiatus, unless it is made to appear by competent evidence that all the items were furnished pursuant to one contract; and the affidavit attached to the "account of the items" is not competent evidence to prove that fact.

10. A vendor of an elevator furnished for and put up in an hotel in process of erection by contract with the owner retained in himself the title until the fixture should be paid for, and reserved the right to retake possession thereof if default should be made in the payment for the same. Held not a waiver of the vendor's right to a material man's lien on the hotel and the land occupied by it.

11. The assignee of a mechanic's lien is subrogated to all the rights of his assignor; and

the taking of a mortgage by the assignee on the property affected by the lien, the consideration of which mortgage was used in the purchase of the lien, will not merge the latter in the mortgage, unless it appears such was the intention of the parties, and justice requires it. That intention may be established, not only from the acts and declarations of the assignee, but from a view of the situation as affecting his interests.

12. Where the agent of the obligee in an indemnity bond against mechanics' liens presented the obligation to H. and D., and requested them to sign it as sureties, promising them that A., S., and one Hughes, whose names were printed in the body of the bond as sureties, would also sign it, H. and D. signed on the agreement with the agent that, if the others named as sureties did not sign, the bond should be "invalid." None of the others named as sureties signed. The agent, without the knowledge of H. or D., erased the other sureties' names by drawing an ink line across them, and delivered the bond in this condition to her principal. *Held*, the delivery of the bond was unauthorized, and H. and D. were not liable thereon; and, *held* further, that H. and D., by afterwards taking security to protect themselves from loss, (being then ignorant of the fact that the other sureties had not signed,) did not thereby ratify the delivery of the bond, as the knowledge of the existence of a right or defense, and the intention to relinquish it, must concur in order to estop a party by waiver.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Lancaster county; Field, Judge.

Action to enforce a mechanic's lien by the Henry & Coatsworth Company against M. Isabel Bond, owner, Leonidas K. Holmes, contractor, and others, mortgagees and lienholders. From the decree entered, defendants Rudge & Norris and others appeal. Reversed.

Marquitt, Deweese & Hall, Trimble & Braley, E. E. Brown, Robert Ryan, F. I. Foss, Holmes, Cornish & Lamb, and Talbot & Bryan, for appellants. S. J. Tuttle, Webster, Rose & Fisherick, A. G. Wolfenbarger, Clark & Allen, and Leese & Stewart, for appellees.

RAGAN, C. In June, 1889, M. Isabel Bond owned lots C, D, E, and F, of Bigelow's subdivision of lots 11 and 12, block 27, in the city of Lincoln. On the 29th of this month she entered into an agreement with the appellee Holmes, in and by which he was to furnish the brick and perform the labor for the erection for Mrs. Bond of a four-story brick hotel on said property. At that time the appellant Marquette held a mortgage on these lots to secure a debt of \$2,200 and interest owing to him by Mrs. Bond. On the 18th day of July, this year, Mrs. Bond made application to the appellant the Missouri, Kansas & Texas Trust Company (hereinafter called the Trust Company) for a loan of \$34,000, to be secured by a mortgage on the above-described property, or, as the application expressed it, Mrs. Bond appointed the Trust Company her agent for procuring such loan. The appellant Drexel made a loan through the said trust company to Mrs. Bond on said property for \$30,000, and to

secure the same took a mortgage on said real estate, bearing date August 1, 1889, but not recorded until the 26th day of that month, and not executed until about that date. The payment of this mortgage was guaranteed to Drexel by the Trust Company. On the date of the mortgage Mrs. Bond and the Trust Company, as agent of Drexel, entered into an agreement in writing, in and by which, after reciting that Mrs. Bond had executed her obligation to Drexel for \$30,000, and secured the same by a mortgage on said property, it was provided that Mrs. Bond should at once erect a five-story stone and brick building on said lots, and that the Trust Company, as agent for Drexel, should pay the proceeds of said loan to Mrs. Bond as the erection of said building progressed. These payments were to be made upon the delivery to the Trust Company or its agents of receipted bills of an equal amount to the payments due for labor and materials entering into the construction of the building. Before the recording of the Drexel mortgage Mrs. Bond and the appellees Holmes and the Henry & Coatsworth Company) hereinafter called the Coatsworth Company) agreed in writing with the appellant Marquette that, if he would release his mortgage on said lots, Holmes would pay him thirty (30) and the Coatsworth Company forty (40) per cent. of the estimates or money that might become payable to them for materials furnished in the erection of the building on said lots; and, relying on said promises, the appellant Marquette did release his mortgage. Mrs. Bond as principal, and the appellees Holmes and Doolittle as sureties, executed to the appellant Drexel, on the 1st day of August, 1889, a bond in the sum of \$25,000, to protect and indemnify Drexel and his agents against all liens for labor or materials that might be filed against said lots and building. This bond recited that the time allowed by statute for filing of mechanics' liens had not expired; that Mrs. Bond should pay for all work done and all material furnished for said building, and keep the same clear from all liens on account therefor; that, in case she failed to perform her contract, Drexel or his agent, the Trust Company, might take possession of the building, and complete the same, and pay for the labor and materials from the funds remaining from the Drexel loan. On the 28th day of December, 1889, Mrs. Bond executed a mortgage to the appellees Holmes and Doolittle, sureties on her indemnity bond, the conditions of which mortgage were as follows: "This mortgage is given to indemnify said Doolittle and Holmes against loss that may accrue to them by reason of their having become sureties for said Bond in a certain indemnity to the Trust Company and Drexel for the completion and payment for material and labor in the construction of a building on said lots above described." On February 17, 1890, Mrs. Bond and the appellant the Trust Com-

pany entered into a written agreement, which, after reciting the ownership of the lots by Mrs. Bond; that she had begun the erection thereon of an hotel; that Drexel had a mortgage on the same for \$30,000, which was unpaid; that the appellees Doolittle and Holmes had executed a bond to Drexel to hold him harmless against any liens that might be filed against said hotel; that there were large sums of money owing and unpaid to certain persons who claimed to have performed labor and furnished material for said building,—provided that for the purpose of giving additional security for the fulfillment of said bond of indemnity, and for the purpose of raising money to pay for such labor and materials furnished, and to complete said building, Mrs. Bond should at once execute to the appellant Braley a mortgage upon the property to secure a note of \$30,000, due one year from February 17, 1890, and that said appellant should at once take possession of said hotel, and complete the same, and should from the proceeds of the new mortgage pay for such of the work done and material furnished as he should deem best. Braley was the agent of the Trust Company, and the Trust Company was the agent of Drexel. In pursuance of this agreement, and on the same date, Mrs. Bond executed and delivered to Braley a mortgage on all the above-described real estate and other property for \$30,000, due in one year, and surrendered possession of the hotel and lots on which the same is situate. The appellant Holmes began the furnishing of material and performing of labor under his contract on the 5th day of August, 1889. The Coatsworth Company began the furnishing of material under its contract on August 21, 1889. All the other lien claimants commenced the furnishing of material or the performance of labor after the 26th day of August, 1889.

A large number of mechanics' liens were filed against the property by the various parties to this suit. All of said liens were duly assigned to the Trust Company, except the following: Holmes, the Coatsworth Company, Baird Bros., the Capital City Planing Mill Company, H. B. Dodge & Co., the Crane Elevator Company, and the Reliance Wire-Works Company. Thus matters stood when the appellee the Coatsworth Company brought this action to foreclose its lien against the hotel and lots for material furnished by it in the erection of the hotel. A large number of persons were made defendants or interveners, all of whom, except four, filed answers or cross petitions, claiming liens on the building and lots. The appellants Drexel, the Trust Company, and Braley filed their answer and cross petition, setting out the Drexel mortgage, the mortgage made by Mrs. Bond to Braley, the indemnity bond given to Drexel by Mrs. Bond, Holmes, and Doolittle, and the failure of Mrs. Bond to keep the building free from mechanics'

liens. Appellant Marquette intervened in said action, and filed a cross petition, setting out the mortgage that he held upon said premises, and the release of the same at the request and on the strength of the promises made to him by Bond, Holmes, and the Coatsworth Company, and prayed to be subrogated to the rights of Holmes and the Coatsworth Company. The district court rendered a decree, in and by which it divided the liens into five classes, as follows: (a) The first lien was given to Holmes and the Coatsworth Company, prorating. (b) The second lien was given to Drexel on his mortgage. (c) The third lien was given to Baird Bros., the Capital City Planing Mill Company, H. B. Dodge & Co., the Crane Elevator Company, and the Reliance Wire-Works Company, prorating. (d) The fourth lien to the appellant Marquette. (e) The fifth lien was given to the Trust Company on the mortgage executed to Braley February 17, 1890. This lien was made up of the amount of various mechanics' liens purchased by and assigned to the Trust Company. (f) The court found and decreed that the appellants Holmes and Doolittle were not liable as sureties on their indemnity bond. All parties to the suit appeal except Holmes, Bond, Doolittle, and the Coatsworth Company.

We will first dispose of Marquette's appeal. The appellant Holmes and the Coatsworth Company promised Marquette in writing that, if he would release his mortgage upon the property of Mrs. Bond, Holmes would pay Marquette 30 per cent. and the Coatsworth Company 40 per cent. of their estimates on each story of the hotel until the full payment of Marquette's claim. Marquette relied upon these promises, and released his mortgage, and his debt remains wholly unpaid. Holmes and the Coatsworth Company received a valuable consideration for these promises, and they must be held to their performance. They are now estopped from claiming liens on this property prior to Marquette. To permit this would be unfair, inequitable, and unjust. Marquette is entitled to be subrogated to the extent of his claim to whatever lien Holmes and the Coatsworth Company may have upon this property, and their liens should have been charged with the amount due Marquette. The decree of the district court, in that it did not do this, was, in that respect, erroneous.

It is claimed by the appellants, and especially by the Trust Company, that the finding of the district court that Holmes had a balance of \$8,250 and interest due him from Mrs. Bond is incorrect. Holmes' entire claim amounted to \$12,100, which he had credited with \$3,850. On the trial there were put in evidence receipts signed by Holmes amounting to \$6,900, and it is contended that he should be bound by them, and thus increase his credits the difference

of \$6,900 and \$3,850. It appears from the record that the method by which this part of the business was conducted was as follows: As before stated, the Trust Company was to disburse the \$30,000 of the Drexel mortgage as the work on the hotel progressed, on orders from Mrs. Bond. Mrs. Bond would give Holmes an order for, say, \$2,000. He would take this to the Trust Company's agents, leave it with them with his receipt for \$2,000, and procure from the agents \$1,400 in money; and in this way Holmes receipted for \$6,900, when, as a matter of fact, he only received \$3,850 in money. The Trust Company's agents and Mrs. Bond were witnesses at the trial, and none of them claim that Holmes had actually received more money than \$3,850. We do not think that the district court was wrong in its finding as to the amount due Holmes.

The same objection is urged by the appellants against the amount found due the Coatsworth Company; but, as this claim is based on the same theory as the objection to Holmes' claim, and the method of conducting the business of the Coatsworth Company was substantially the same, the answer to the objection must be like the one to the objection of the Holmes claim, and the finding of the court as to the amount of the Coatsworth Company's claim approved.

The Trust Company, however, insists that the credits acknowledged by Holmes and the Coatsworth Company should be increased so as to equal the amount of their receipts, and this contention appears to be based on the assumption that the Trust Company was, by the orders and receipts, led into paying out on the orders of Mrs. Bond a greater sum of money to her than the work done amounted to. Now, whether or not the value of the work done at a given date was equal in amount to the orders given was a question of fact. Perhaps the burden was on the Trust Company to establish that it was not, and whether the Trust Company or its agents paid these orders in full without knowing the orders exceeded the work are questions of fact. We cannot say that the evidence is insufficient to sustain the court's finding in this respect.

It is also insisted by the appellant Drexel that his mortgage should have been made a first lien. Holmes and the Coatsworth Company both began the furnishing of materials for the building prior to August 26th, the date of the record of Drexel's mortgage, and by the statute a lien of a mechanic or laborer dates from the commencement of the furnishing of materials or from the commencement of performing labor. The appellants Holmes and the Coatsworth Company are therefore entitled to liens on this property prior to Drexel. A party taking a mortgage on real estate is bound to know whether material has been furnished or labor performed in the erection of improvements on the real estate within the four im-

mediate prior months. Drexel's mortgage was a lien only on the interest of Mrs. Bond in the mortgaged property. Her interest was the estate she conveyed to Drexel, less the amount due and to become due Holmes and the Coatsworth Company for labor or material, the commencement of the doing or the furnishing of which was prior to the date of the record of Drexel's mortgage. On the other hand, some of the appellants claim that Drexel's mortgage should have been postponed to the liens of all parties who furnished material or performed labor in the erection of the hotel. To sustain this it is argued (1) that there are no priorities among mechanics' liens for labor or material on the same improvement; (2) that the true meaning of our statute is that all parties performing labor or furnishing material for an improvement on real estate have a lien therefor from the commencement of the improvement; or, to state the second argument differently, after an improvement has been begun, a mortgage placed thereon is subject to a lien for labor done or material furnished, the commencement of which was subsequent to the record of the mortgage. In support of this, counsel cite *Phil. Mech. Liens*, § 216; *Nellson v. Railway Co.*, 44 Iowa, 71. An examination of the first authority shows that the statute on which the author is commenting provided that the building should be subject to the payment of debts of the mechanics, etc., "before any other liens which originated subsequently to the commencement of said house or building." In the Iowa case the syllabus is as follows: "A mechanic's lien attaches from the commencement of the building, and takes precedence over a mortgage executed after that time, although the particular work for which the lien is claimed was not commenced until after the execution of the mortgage." But it will be seen from an examination of the opinion that the conclusion reached was based upon the revision of the Iowa statute, which the court say "provides, in substance, that mechanics' liens shall have priority over a mortgage executed upon the land and building after the commencement of the building or improvement." These authorities, then, are not in point.

Section 3, c. 54, Comp. St. Neb., provides: "And shall from the commencement of such labor or the furnishing of such materials * * * operate as a lien." While this court has held that this statute is remedial, and should be liberally construed, it has never arrogated to itself the right—if it had the disposition—to put a construction on the law that would, to all intents and purposes, amount to an amendment of it. By the Nebraska statute, a party who performs labor or furnishes material for an improvement on real estate is given a lien thereon from the date he commences such labor or commences furnishing materials, but this lien attaches only to the interest of the

contract in the property on which the improvement is to be erected at the date of the commencement of the labor or the commencement of furnishing material. The material man or laborer furnishing material or performing labor for an improvement on real estate must then take notice of his contractee's title and interest in the property as shown by the public records at that date. In *Choteau v. Thompson*, 2 Ohio St. 114, it is said: "If A. and B. commence work or the furnishing of materials, and afterwards the owner mortgages the premises to C., and after this D. and E. begin to work or to furnish materials, here A. and B. have priority over C., and C. over D. and E. * * * In such a case A. and B. must receive what they would be entitled to if C.'s mortgage had no existence; the residue must be applied next to the satisfaction of the mortgage, and whatever may remain after that must be distributed to D. and E. pro rata." The statute considered in that case appears to have been substantially like the Nebraska statute. In *Crowell v. Gilmore*, 18 Cal. 370, it is said: "The mechanic making the first contract, or first commencing work on a building, has no priority over others commencing work subsequently. The statute places all claimants on an equality, and directs the property to be sold, and the proceeds to be applied to all without preference. This rule of equality would not apply if some mechanics began work before a mortgage was executed by the owner of the property and some afterwards. In such case the first lienholders would have priority over the mortgage. The first class would be paid in full before the mortgage, then the mortgage, then the last class; each lienholder having equal claims with the others of his class." An examination of the opinion in this case leads to the conclusion that the California statute on which the opinion is based is very similar to the Nebraska statute. In the case at bar all liens except those of Holmes and the Coatsworth Company were for labor performed or material furnished, the commencement of the doing and the furnishing which was after the recording of the Drexel mortgage. This mortgage was then correctly decreed by the court below a lien on the property prior to all liens except those of Holmes and the Coatsworth Company. The district court gave the third lien to only a part of those who claimed liens for material furnished for the improvement the commencement of which was after the Drexel mortgage, viz. Baird Bros., the Capital City Planing Mill Company, H. B. Dodge & Co., the Crane Elevator Company, and the Rellance Wire-Works Company. These were, by the decree, to prorate each with the other, but the court postponed to these liens the following, also for material furnished in the erection of the improvement, the commencement of

which furnishing was after the Drexel mortgage, viz. Korsmeyer & Company, Pomeroy Coal Company, W. H. Tyler, C. N. Deltz, Nicholls Roofing Company, S. E. Moore, the Adamant Wall & Plaster Company, C. E. Hedges, Rudge & Morris, the Lincoln Glass Company, G. Andrew, the Midland Electric Company, F. A. Nason & Co., William Galsner, William Robinson, A. F. Leming, R. S. Young, and J. H. O'Neill. All these postponed liens had been assigned to the appellant Trust Company, and it claimed, and claims now, it stood in the same situation as its assignors. It is clear from the authorities that all the liens for materials furnished or labor performed, the commencement of the doing or the furnishing which was after the recording of the Drexel mortgage, belonged to the same class, and are entitled to and do prorate with each other. Why, then, should not the assignee of some of these claims be allowed to prorate, if his assignor could? "Under our law the assignee [of a mechanic's lien] is subrogated to all the rights of the assignor." Chief Justice Maxwell, in *Rogers v. Hotel Co.*, 4 Neb. 59. The district court appears to have postponed these assigned liens on the theory that they were merged in the mortgage given by Mrs. Bond to the appellant Braley, agent of the Trust Company, on February 17, 1890, as the consideration for this mortgage was used in buying up these liens for and in the name of the Trust Company. But did the liens merge in the mortgage? In *Smith v. Roberts*, 91 N. Y. 470, it is said, (I quote from the syllabus:) "While a merger at law follows upon a union of a greater and a lesser estate in the same owner, it does not follow in equity, and estates will be kept separate where such is the intention of the parties, and justice requires it. That intention may be gathered not only from the acts and declarations of the party, but from a view of the situation as affecting his interests." Now, there is no direct evidence in this record that either the assignors or the assignee of these liens intended they should merge in the mortgage; and, if we turn our attention to the situation of the assignee, the Trust Company, it certainly was against its interests they should merge. We can almost say that, had the Trust Company expected them to merge, it would never have advanced the money for the purchase of the liens; and to apply the doctrine of merger here would be manifestly unfair and unjust. Had the Trust Company not bought these liens, they would have prorated with the others of their class; so that the others are not in the least prejudiced by their not merging, but the Trust Company is prejudiced if they are. We adopt the rule in the above case as both sensible and just, and conclude that the decree of the district court postponing the liens assigned to the Trust Company was erroneous.

Complaint is made by some of the numer-

ous appellants of the allowance by the court below of liens to certain parties, viz. the Capitol City Planing Mill Company. The objection to this lien is that the affidavit filed is not sufficient to entitle the claimant to a lien. The affidavit (omitting the formal parts) was as follows: "John A. Buckstaff, being first duly sworn, on his oath says * * * is a true and correct account * * * of materials * * * furnished by this affiant. * * *" It is signed "Capitol City Planing Mills, Badger Lumber Company, Owners. Per J. A. Buckstaff, Sec'y." The heading of the itemized statement to which the affidavit for a lien is attached is as follows: "Lincoln, Nebraska, Apr. 15, 1890. Mrs. M. Isabella Bond to Capitol City Planing Mills, Badger Lumber Company, Owners, Dr. * * *" Section 3, c. 54, Comp. St., provides: "Any person entitled to a lien under this chapter shall make an account in writing of the items, * * * and, after making oath thereto, * * *" etc. This affidavit is not within the letter of the statute. Is it within the spirit of the law? In *Rogers v. Hotel Co.*, 4 Neb. 58, Chief Justice Maxwell, speaking for this court, said: "The object of the law under consideration (mechanic's lien law) being to secure the claim of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions." This case is cited with approval in *Lumber Co. v. Russell*, 22 Neb. 126, 34 N. W. Rep. 104. In *Delehay v. Goldie*, 17 Kan. 263, it is said: "Under a mechanic's lien law, * * * the statement required to be filed may be verified by an agent of the claimant." This affidavit and account, as filed, sufficiently show that the Capital City Planing Mill Company had furnished material to Mrs. Bond for the erection of the hotel, and, while the affidavit bears on its face the evidence of carelessness, it sufficiently shows that Buckstaff was the agent of the claimant. We hold, therefore, that it sufficiently complied with the statute. See, also, *Phil. Mech. Liens*, § 366, and cases there cited.

The Crane Elevator Company: The objection to this lien is that by the contract between the elevator company and Mrs. Bond under which the fixture was delivered to her it was provided: "The title and possession of the elevator shall remain in the Crane Elevator Company until the final payment shall be made, and they shall have the right at all times, on the failure on your part to make all payments as provided, to remove the elevator, and retain possession of it, and also to retain all payments that have been made as liquidated damages for nonfulfillment of the contract." Section 1, c. 54, Comp. St., provides: "Any person who shall * * * furnish any fixture, * * *" The elevator, within the meaning of this law, is a fixture; and, uninfluenced by authority, and looking only to this statute, we would

say that to entitle a party to a lien for this fixture he must part with the possession, the right to the possession, and with the title to it. The contract between the elevator company and Mrs. Bond was and is good as between them, and as to all other persons except purchasers without notice and judgment creditors of Mrs. Bond. *Aultman v. Mallory*, 5 Neb. 178; *McCormick v. Stevenson*, 13 Neb. 70, 12 N. W. Rep. 828. In *Clark v. Moore*, 64 Ill. 279, one of the questions was whether the retention by the vendor of the right to the possession and title was a waiver of the vendor's right to a mechanic's lien. The court say: "It is also insisted that appellees waived their lien when they sold the property by reserving a lien upon it in the written contract; that they thereby received and held additional security, that operated to destroy any lien that would otherwise have attached. * * * In their effort to retain a lien on machinery furnished by appellees they took no collateral or independent security. * * * The lien attaches to and incumbers the property to improve which the material is furnished; and the efforts to acquire a more specific and exclusive lien thereon in no wise manifests an intention to release the property from all lien, and to look to other security for payment, but it shows the very opposite intention,—an intention to hold, if possible, the property furnished liable for the payment of their claim." In *Manufacturing Co. v. Smith*, 40 Fed. Rep. 339, it is said: "Retention by a seller of title to machinery placed on land until the price is paid, with a reservation of right, in case of default in payment, to take possession of and remove such machinery without process, is not a waiver of the lien given by Code Tenn. § 2739." The opinion cites enough of the Tennessee Code to show that it is not materially different from the Nebraska law. It also cites *Anthony v. Smith*, 9 Humph. 508, and *Fogg v. Rodgers*, 2 Cold. 290, as sustaining the doctrine laid down in the trial case. Following these authorities,—which we do with reluctance,—we have reached the conclusion that the finding and decree of the district court giving the Crane Elevator Company a lien must be sustained.

H. B. Dodge & Co.: There are two objections to this claim. The first is that the affidavit filed with the itemized account was made by H. B. Dodge, and that it recited that the materials were furnished by the affiant. The affidavit was signed by H. B. Dodge. An examination of the account attached to the affidavit, however, discloses the fact that the account was between H. B. Dodge & Co. and Mrs. Bond, and it sufficiently appears that the material was furnished by H. B. Dodge & Co. In view of what has been said above in reference to the affidavit of the Capital City Planing Mill Company, we think this affidavit sufficiently complies with the statute, and that the finding and decree of the district court giving Dodge & Co.

a lien was not erroneous, so far as the affidavit is concerned.

Second objection: The account attached to the lien in this case consisted of two items as follows: "May 9, 1890. To bill, Venetian blinds, as per contract, \$540.00. October 1, 1890. To bill, Venetian blinds, as per contract, \$12.96." It is here claimed that, as more than four months elapsed between the date of the furnishing of these two items, Dodge & Co. can have a lien for nothing more than the last item. The language of the affidavit attached to this lien is "that said materials were furnished by said affiant to the said M. Isabel Bond at the time stated in said account." Now, if we are limited to the date the account shows on its face, and to the affidavit in this case, then the contention of the appellants is correct. The solution of the question depends upon whether these two items are parts of one running account; or, in other words, whether they were both furnished under one contract, made prior to furnishing the first item. On looking into the evidence, we find that the two items were furnished pursuant to one contract made prior to the date of the first item, and that the second item was a completion of the contract. In *Fulton Iron Works v. North Center Creek Mining & Smelting Co.*, 80 Mo. 283, a question precisely like the one we are considering arose, and the court said: "A mechanic's lien is enforceable for all items of account furnished by the original contract * * * in the construction of the building * * * where it is inferable from the evidence that they were furnished under one contract." We approve the doctrine laid down in this case. It follows, therefore, that the decree of the district court in allowing the claim of H. B. Dodge & Co. was correct.

The finding and decree of the district court that Holmes and Doolittle, sureties on the undertaking given by Mrs. Bond to Drexel to indemnify him against liens on the property, were not liable on the bond, is assailed as erroneous. It appears from the evidence that an agent of the Trust Company or Drexel came to Lincoln, and informed Mrs. Bond that she would have to give Drexel an undertaking to protect him against mechanics' liens on the property on which he was about to lend her the \$30,000, represented by his mortgage, and inquired what sureties she could furnish. She named to him E. D. Appleget, George B. Skinner, L. K. Holmes, and William B. Hughes. The agent then investigated through a commercial agency the financial standing of these gentlemen, and found it satisfactory. He returned to Kansas City, and there had a bond prepared on a type-writing machine, with M. Isabel Bond as principal, E. D. Appleget, George B. Skinner, L. K. Holmes, and William B. Hughes as sureties. At the foot of the bond were left five spaces for signatures, opposite each of which the word

"Seal" was printed. The agent then sent this prepared undertaking to Mrs. Bond for execution by her and the parties named as sureties. Holmes signed the bond on the last space for signatures, and Doolittle signed below that. Appleget, Skinner, and Hughes neither signed the bond, and across their names an ink line with a pen was drawn, and the name of Doolittle was written above in the same line. In this condition the bond was returned by Mrs. Bond to the obligee thereof. There was evidence on the trial that Mrs. Bond promised Holmes that Appleget, Skinner, and Hughes would all sign, and that Holmes and Doolittle signed on the condition and understanding and agreement with her that if Appleget, Skinner, and Hughes did not sign, the bond was to be invalid, and returned to them, Holmes and Doolittle; that the names of Appleget, Skinner, and Hughes were not erased when Holmes and Doolittle signed. In *Cutler v. Roberts*, 7 Neb. 5, the present chief justice, speaking for this court, said: "Where a bond contains in the obligatory part the names of several persons as sureties, if a party signs the same with the understanding and on the condition that it is not to be delivered to the obligee until it is signed by all whose names appear in the obligatory part thereof as sureties, it will not be valid as to those that did sign until the condition is complied with." In *Hagler v. State*, 31 Neb. 144, 47 N. W. Rep. 692, Justice Norval, speaking for this court, said: "Where an official bond is altered after the same has been signed, but before it is delivered and approved, by an erasure of the name of one of the sureties thereon, and the alteration is plainly noticeable, all the sureties are released who had no knowledge of or did not consent to the alteration or ratify it." The finding and decree of the district court were within the principles of these cases. This undertaking was void from the beginning. It had never been valid, so far as these sureties were concerned; and Mrs. Bond's delivery of it to her principal was unauthorized. Appellants, however, insist that Holmes and Doolittle were liable on this bond, because Mrs. Bond executed to them a mortgage on the property to indemnify them from loss by reason of having signed it. In other words, the taking of the indemnity mortgage was a ratification by Holmes and Doolittle of the unauthorized delivery of the mechanics' lien bond. To this it is answered by the sureties that at the time they took the indemnity mortgage they had no knowledge that the mechanics' lien bond had not been signed by Appleget, Skinner, and Hughes; that on the 17th day of February, 1890, Drexel's agent, Braley, procured them to deliver to him the indemnity mortgage, (it had never been recorded,) on the promise that another loan would be made to Mrs. Bond by the Trust Company, and secured by a second mortgage on the property, and

out of the proceeds of this mortgage all of the mechanics' lien claims against the property would be paid. To sustain these allegations there is abundant evidence. Certain it is that Drexel and the Trust Company's agent, Braley, did get possession of the indemnity mortgage made to Holmes and Doolittle; that at about that date Mrs. Bond made a second mortgage to Braley for \$30,000 on this and other property, and surrendered possession of the hotel. Another significant circumstance is that across the face of this indemnity mortgage is written: "Canceled. M. Isabel Bond, February 17, 1890." This, it will be remembered, is the date of the second mortgage to Braley for the Trust Company. In *Livesey v. Hotel Co.*, 5 Neb. 50, the late and lamented Justice Gantt, speaking for this court, said: "Waiver is an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and the intention to relinquish it." The sureties brought themselves within the doctrine of this case, and the finding and decree of the district court that they had not waived their right to object to the unauthorized delivery of the mechanics' lien bond is supported by the evidence. There are in the arguments and proofs of counsel other grounds which answer the claim of ratification by the sureties,—grounds fully supported by the record,—but the foregoing are sufficient, and they will not be further noticed.

The decree of the district court is reversed, and judgment and decree rendered here as follows; the amount of judgments to draw interest from June 17, 1891:

1. In favor of Turner M. Marquette, against the estate of M. Isabel Bond, Leonidas K. Holmes, the Henry & Coatsworth Company, for \$2,560, with 7 per cent. interest; the same to be a first lien on lots C, D, E, and F, Bigelow's subdivision of lots 11 and 12, block 27, in the city of Lincoln, Lancaster county, Neb.

2. In favor of Leonidas K. Holmes against the estate of M. Isabel Bond for \$7,867.35, with interest at 7 per cent., and in favor of the Henry & Coatsworth Company against the estate of M. Isabel Bond for \$4,654.65, with 7 per cent. interest; the last two to be second liens on the above-described real estate, and to prorate one with the other.

3. In favor of Anthony J. Drexel against the estate of M. Isabel Bond for \$33,777, with 6 per cent. interest; the same to be a third lien upon said real estate.

4. In favor of Baird Bros. for \$91; in favor of Capital City Planing Mill Company for \$740; in favor of H. B. Dodge & Co. for \$585; in favor of Crane Elevator Company for \$3,212; in favor of Reliance Wire-Works Company for \$358; in favor of Missouri, Kansas & Texas Trust Company for \$21,905,—each of these judgments to be rendered against the estate of M. Isabel Bond, each to draw interest at the rate of 7 per cent.,

and to be fourth liens on the above-described real estate, and prorate each with the other.

5. Judgment in favor of Leonidas K. Holmes for \$1,392.65; judgment in favor of the Henry & Coatsworth Company for \$1,167.35,—both these judgments to be rendered against the estate of M. Isabel Bond, both to draw interest at the rate of 7 per cent., and to be fifth liens against the real estate above described, and to prorate one with the other.

6. Judgment releasing and discharging Leonidas K. Holmes and John Doolittle from liability as sureties on the mechanics' lien bond given by them to Anthony J. Drexel.

Judgment accordingly.

IRVINE, C., concurs. RYAN, C., having been of counsel in the case, took no part in the argument or the decision here.

LOBECK v. LEE et al.

(Supreme Court of Nebraska. June 6, 1893.)

PARTNERSHIP—RIGHTS OF SURVIVING PARTNERS—ESTOPPEL.

1. Upon the dissolution of a partnership firm by the death of one of its members the surviving partners may carry on the same line of business at the same place as was transacted the firm business, without liability to account to the legal representative of the deceased partner for the good will of said firm, in the absence of their own agreement to the contrary.

2. Where the legal representative of a deceased member of a partnership firm, as such, without words of limitation, joins in the sale of all the stock and fixtures of such firm to the surviving members thereof, such legal representative cannot maintain an action against such survivors for the good will of said firm, or for any portion thereof.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Douglas county; Wakeley, Judge.

Action by Otto Lobeck, administrator of the estate of C. A. Field, deceased, against Henry J. Lee and others. Defendants had judgment, and plaintiff appeals. Affirmed.

Gregory, Day & Day and Cowin & McHugh, for appellant. John L. Webster, for appellees.

RYAN, C. In the month of March, 1881, Henry J. Lee, C. A. Fried, E. M. Andreesen, and H. T. Clarke entered into a written agreement whereby they associated themselves as partners under the firm name of Lee, Fried & Co., for the purpose of dealing at wholesale in nails, hardware, and tinners' stock. This partnership business was to commence in March, 1881, and to expire January 1, 1883, probably upon the same terms as provided in said contract, though we find in the record no direct evidence of any agreement as to such continuance. The business was carried on by the firm of Lee, Fried & Co. until the death of C. A. Fried, which occurred August 16, 1887. Indeed, even then

matters continued as before, except that Otto Lobeck, having qualified as executor of the estate of C. A. Fried, acted in place of said decedent. On the 30th day of December, 1887, Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and one John T. Clarke entered into a written contract, to which said executor, as such, was a party, of which contract the following is a copy: "This contract, made on the 29th day of December, A. D. 1887, by and between the surviving partners of the firm known as Lee, Fried & Co., to wit, Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and Otto Lobeck, executor of the estate of C. A. Fried, deceased, parties of the first part, and Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and John T. Clarke, parties of the second part, witnesseth: That for and in consideration of the covenants hereinafter contained, to be kept and performed by the respective parties to this contract, the parties of the second part agree to form a corporation prior to January 2nd, A. D. 1888, to be known as Lee-Clarke-Andreesen Hardware Company, for the purpose of conducting a general hardware business. The said parties of the first part agree to sell to such corporation, when formed, and said parties of the second part, as such corporation, agree to buy, the stock, fixtures, and good will of the business owned and conducted by the former firm of Lee, Fried & Company at the market value thereof, as per inventory taken between December 26th and December 31st, A. D. 1887; said stock to be inventoried with freight added. The said parties of the second part, as such corporation, agree to pay, and the said parties of the first part agree to accept therefor, stock in said corporation at par value, or part cash, at the option of said corporation; said transfer to take place January 1 or 2, A. D. 1888. The said parties of the first part agree to pay all outstanding indebtedness of said firm. The said parties of the second part, as such corporation, agree to make collection of all outstanding accounts of said old firm without costs to said parties of the first part, unless for extraordinary expenses, such as attorneys' fees, court costs, etc.; said collections, when made, to be turned over to said parties of the first part, or an authorized representative, and to be used in paying the liabilities of the old firm of Lee, Fried & Co. And the parties of the first part agree among themselves that the stock in said corporation received in payment for the stock, fixtures, and good will of said partnership shall be apportioned and partitioned among the surviving members of said firm and the executor of C. A. Fried, deceased, according to their interests in the partnership, as the same may appear from the books of account of said partnership: provided, however, that if the said Otto Lobeck, executor of the estate of C. A. Fried, deceased, shall elect to receive money in lieu of said stock for the

interest of his decedent in said partnership, then the other members of said partnership, to wit, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen, shall purchase from said Lobeck the amount of stock in said corporation to which his decedent would be entitled as a member of said partnership, at its par value, each an equal one-third of said stock, to be paid for therefor in money. Witness our hands this 30th day of December, A. D. 1887. Lee, Fried & Company, Henry J. Lee, Lee, Fried & Co., Henry T. Clarke, Edward M. Andreesen, Otto Lobeck, administrator with will attached, parties of the first part. Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, John T. Clarke, parties of the second part."

Consistently with the terms of the above contract, the said Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and John T. Clarke organized a corporation under the name of Lee-Clarke-Andreesen Hardware Company, which took possession of the entire property involved as described in the aforesaid written agreement and the bill of sale, executed January 16, 1888, of which the following is a copy: "Know all men by these presents, that for a valuable consideration we, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen, surviving partners of the late firm of Lee, Fried & Company, have bargained and sold, and by these presents do bargain and sell, unto the Lee-Clarke-Andreesen Hardware Company the stock of hardware, warehouse, and fixtures of said late firm according to the inventory taken between December 26th and December 31st, 1887, amounting to \$198,436.75, together with the good will of the business of said late firm; to have and to hold the said property and good will unto the said Lee-Clarke-Andreesen Hardware Company, its successors and assigns, forever. This bill of sale being made in execution of said contract dated December 29th, 1887, for the sale of said property. Witness our hands this 16th day of January, 1888. Lee, Fried & Co. Edward M. Andreesen. H. T. Clarke. H. J. Lee"

It does not satisfactorily appear why the above bill of sale was not signed by Otto Lobeck, as the representative of C. A. Fried, for, while it purports to be made to carry into execution the written contract of date December 29, 1887, in which said Lobeck, in his representative capacity, appeared as one of the parties of the first part, he seems by common consent to have been omitted from even mention in the bill of sale. It might be inferable from the draft of date December 31, 1887, made by Otto Lobeck as administrator of C. A. Fried's estate, upon the firm of Fried & Co. in favor of C. O. Lobeck, for \$5,000, that, the said administrator had elected to, and had thereby in part consummated his said election to, withdraw from said firm. If this satisfactorily appeared, the determination of this appeal would be much simplified. As the evidence does not

explain the nonjoinder of Lobeck as administrator in the bill of sale, and as it does not point to sufficient certainty of intent to warrant placing great stress upon it, the bill of sale will be assumed to have been made in execution of the contract entered into on December 29, 1887, and upon that assumption the rights of the parties will be considered, without reference to said draft.

This action was brought in the district court of Douglas county by Otto Lobeck, as the representative of C. A. Fried, against the Lee-Clarke-Andreesen Hardware Company, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen. The prayer of the petition was that said defendants be required to make a just and fair inventory and valuation of the good will acquired as above described, and be required to account for the same, either by the issuance of stock or in money, as to the court should seem equitable and proper, and for such other and further relief as to the court might seem meet. The answer, in addition to other denials, which need not be detailed, denied that the good will was of any value, but alleged that it passed incidentally with the stock of goods purchased; that the invoice covered such good will; and that, by said executor having accepted payment on account of the interest of the estate of his decedent under the terms of said written agreement, he was estopped to make claim for the value of the good will of the firm of Lee, Fried & Co. There was a reply, which was in substance a denial of the various affirmative matters pleaded in the answer. On the 11th day of February, 1891, a trial was had to the court, upon which the court found for the defendants, and adjudged that the cause be dismissed for want of equity, and that said defendants recover their costs. During the trial of the case plaintiff offered to show the value of the good will of the firm of Lee, Fried & Co. as a fact independent of and in addition to the price paid for the merchandise of said firm purchased by the defendants. This offer of evidence was refused, and in various ways the questions which shall now be considered were properly presented for adjudication. These involve the construction of the contract between plaintiff and the other parties to the above contract, and the respective rights and remedies of such parties, with reference to the good will of the firm of Lee, Fried & Co. Only one member of the firm of Lee, Fried & Co. had died at the date of the above contract, and his executor, with the other members of said firm, constituted the parties of the first part. The parties of the second part were the surviving members of the firm of Lee, Fried & Co. and John T. Clarke. The subject-matter of this contract was "the stock, fixtures, and good will of the business owned and conducted by the former firm of Lee, Fried & Co." The price to be paid was the market value of the subject-matter of

the contract, to be determined as per inventory therein described; said stock to be inventoried with freight added. This contract, however, did not contemplate the purchase by the parties of the second part, as individuals, of the subject-matter thereof, but that such purchase should be made by them as a corporation to be formed thereafter, under the name of the Lee-Clarke-Andreesen Hardware Company. Another peculiarity of this contract was in the media of payment. The consideration recited was the keeping and performing of certain conditions, which were, payment either wholly or partly in stock of the corporation contemplated at its par value, and the balance in cash, at the option of said corporation, and the payment of all outstanding debts and the collection of all outstanding accounts of the firm of Lee, Fried & Co. After providing for payments and collections as above, the parties of the first part—Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and Otto Lobeck, executor of the estate of C. A. Fried—agreed among themselves that such stock as should be issued by the proposed corporation in payment for the stock, fixtures, and good will of said partnership should be apportioned and partitioned among the surviving members of said firm of Lee, Fried & Co. and the executor of C. A. Fried, deceased, according to the interest of each in the partnership as such interest appeared by the books thereof, provided, that if said executor elected to receive money in lieu of stock for the interest of C. A. Fried, then that Henry J. Lee, H. T. Clarke, and Edward M. Andreesen should purchase from said executor the share of stock to which, as such executor, he would be entitled at its par value.

From this synopsis it is evident (aside from paying the indebtedness of the firm of Lee, Fried & Co., and making collections of its outstanding accounts for that purpose) that each of the said first parties to said contract agreed to accept payment for the property inventoried in the stock of the proposed corporation, or partly in stock and the balance in money, at said proposed corporation's option. Among themselves, the parties of the first part further agreed that, in event payment should be made in the stock of said proposed corporation, it should be divided in a certain manner, with the proviso, however, that, if the executor of C. A. Fried should elect to receive money, rather than stock, each of the other parties of the first part would pay him in cash one-third of the par value of said stock. This action was brought against the Lee-Clarke-Andreesen Hardware Company, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen. There is no averment in the petition of any demand for the delivery to plaintiff of stock by the Lee-Clarke-Andreesen Hardware Company, nor of a refusal by that corporation to issue stock alone, or

make payment partly in its stock and partly in money, as provided in said agreement. The complaint of violations of the above contract is made solely as against Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen; the said hardware company being only incidentally mentioned as having ratified said contract, and assumed all the rights to and secured all the benefits thereof by taking possession of all the property, assets, and estate of the former firm of Lee, Fried & Co., by, through, and under said contract, and appropriating the stock, fixtures, good will, and certain leasehold interests and estates of said firm of Lee, Fried & Co. for the purpose of specially protecting and securing the full benefits of the good will of the last-mentioned firm, and as having appropriated the same to their own use and behoof exclusively. As the antecedent portion of the last paragraph had reference solely to the above corporation, it is probable that the closing sentence was intended to be limited in like manner, though it is spoken of in the plural number. However that may be, it is clear that the petition predicated plaintiff's rights upon the primary liability of the surviving members of the firm of Lee, Fried & Co., and as whatever liability may be found to exist as against the Lee-Clarke-Andreesen Hardware Company must in any event, under the averments of the petition, be secondary and only collateral to that of H. J. Lee, H. T. Clarke, and Edward M. Andreesen, the alleged liability of these three last-named parties to the estate of O. A. Fried must necessarily be the test of plaintiff's right of recovery. As the judgment prayed was for the value of the "good will" of the firm of Lee, Fried & Co., it may not be without profit to define that term. In *Dougherty v. Van Nostrand*, 1 Hoff. Ch. 69, it was said: "The good will of a trade is called by Lord Eldon the probability that the old customers will resort to the old place. *Crittwell v. Lye*, 17 Ves. 346." In *Parsons on Partnership*, on marginal page 262, the term "good will" is thus discussed: "It is a hope or expectation which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period, and been promoted by large expenditures of money. And it may be worth all the money it has cost, and a great deal more; but it is, after all, nothing more than a hope grounded upon a possibility." These definitions have reference to but one, though the generally employed, use of the term "good will." In *Lawson's Rights, Remedies & Practice*, (section 685,) the same form of good will is defined, in conjunction with which, however, is found another meaning, which must be taken into account as the sense of the term as treated of in one class of adjudicated cases, of which *Smith v. Walker*, 57 Mich. 456, 22 N. W. Rep. 267, 24 N. W. Rep. 830, and 28 N. W. Rep. 783, is

an example. This language (italicized to challenge attention to the superadded meaning) is employed in the section above referred to: "The good will of a business is defined as the benefit which arises from its having been carried on for some time in a particular house, or by a particular person or firm, or *from the use of a particular trade-mark or trade name*. Its value consists in the probability that the old customers will continue to be customers, notwithstanding a change in the firm name or place of business. It is a species of personal property." Still another meaning is sometimes included in the definition of the term "good will," as illustrated by the following language, quoted from *Collyer on Partnership*, as embodied in section 161: "The term 'good will' is used in two distinct senses. It is applied either to an advantage arising from the fact of sole ownership simply, without reference to other persons, or as an advantage arising from the fact of sole ownership, to the exclusion of other persons. The latter species of good will is founded on special contract, and is a commodity upon which a valuation may be fixed. Therefore the interest of an outgoing partner in such good will may be valued and assigned, with the rest of the effects, to the remaining partner. A good will of this kind, being a valuable addition to a trade, and arising, as it does, in contract, must be created by some appropriate words. It cannot be implied from the general words 'stock, effects,' etc. Therefore, where one partner had agreed to sell to his copartner 'his inheritance in their nursery for \$10,000,' and the other partner, in answer to the proposal, wrote as follows: 'I agree to give you \$10,000, as you mention, for your moiety of all your partnership premises, stock, business, and concern,'—Lord Eldon held that the purchaser had no right, according to his contract, to claim any good will in the trade, in addition to the partnership property which was the subject of it, except what was the necessary effect of his acquiring the sole ownership in the property; certainly not such as to preclude the seller from carrying on the same trade where and when and with whom he pleased." In section 99, *Story, Partn.*, the generally employed definition of this term is given, after which occurs the following language: "But the term 'good will' is sometimes applied to another case, where a retiring partner contracts not to carry on the same trade or business at all within a given distance. This is an interest which may be valued between the parties, and may therefore be assigned, with the premises and the rest of the effects, to the remaining partner, as an accompaniment of the ordinary good will of the establishment. Good will, in the former sense, is, therefore, an advantage arising from the mere fact of sole ownership of the

premises, stock, or establishment, without reference to other persons as rivals; and, in the latter sense, as an advantage arising from the fact of excluding the retiring partner from the same trade or business as a rival."

In the discussion of adjudicated cases, there has not always been kept in view, much less stated, what particular form of good will was under consideration. For instance, where it is the right to use the trade-mark adopted and made valuable by a firm or an individual, it is readily seen that it has something of the nature of tangible personal property, and, as such, independently might properly be subject to sale. This form of property is frequently protected by injunction, and in various ways is treated as one form of good will, having no analogy to that form under consideration in the case at bar. Again, the term is sometimes applied to the contract obligation to refrain from competition by a retiring partner as against the other members of the firm, either as measured by the extent of territory or duration of time. Such an advantage as this affords may be of great value, and, having its origin in contract, and being founded upon sufficient consideration, the courts recognize, protect, and enforce it. Of these forms of good will which imply a monopoly such as the courts will protect, it has been said that good will may, independently, be transferred. This distinction as to the use of the term "good will" is recognized in the above text, quoted from Story and from Collyer on Partnership. Speaking generally, it is believed it will be found that whatever confusion has arisen as to the right to transfer good will specifically and independently is referable simply to a failure to distinguish these different forms of good will. As to that form which must alone be considered in determining this case there is no confusion of interpretation nor conflict of authorities. Treating of it is the following language, quoted from Collyer on Partnership, (section 162:) "The former species of good will is clearly not founded in special contract, but in a combination of accidental circumstances, as the existence and celebrity of the house, the skill and affluence of the trader, or the prejudices or necessities of the customers. This, therefore, is not a tangible interest. It is not a commodity on which a specific value can be placed, or for which a definite allowance can be made. Therefore, upon the death of one partner, it is not stock of which the executor of a deceased partner can compel a division, unless he can also compel a sale of the whole premises and stock, as in the case of a partnership at will. Under these latter circumstances, however, the good will would accompany the rest of the stock, and might create some additional speculative value in the mind of a purchaser. Accordingly, a court of equity, in this and similar cases, would so treat it that its value should be felt and appreciated by all parties

interested in the concern; and therefore, in decreeing a sale of the entire partnership, would order the sale to be so adjusted as to give full effect to the value of the good will."

In the case of *Austen v. Boys*, 4 Jur. (N. S.) 719, where plaintiff sought to recover the value of his alleged good will in the firm of solicitors, the following language was used by Lord Chancellor Chelmsford: "Where a trade is established in a particular place, the good will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that 'good will' is something distinct from the profits of the business, although in determining its value the profits are necessarily taken into account, and it is usually estimated at so many years' purchase upon the amount of those profits. But the term 'good will' seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, dependent upon the trust and confidence which persons may rest in his integrity and ability to conduct their legal affairs. * * * But this term, however, as used in the agreement of 1846, appears to me to be capable of a definite meaning, and, if confined within the limits of the agreement, and as between the parties themselves, it becomes perfectly intelligible. It seems to have been intended to describe that interest which the retiring partner would have had if he had remained in the partnership, and which, by his retirement before its termination, he was willing to relinquish to the continuing partner. * * * But it is said that the stipulation as to not practicing within one hundred miles of the post office, being indefinite, and therefore extending to the whole period of the life of the retiring partner, is inconsistent with the notion of the term 'good will' having such a narrow and contracted meaning as would thus be assigned to it. But this argument is founded upon the entire disregard of the different offices of the two stipulations. The one is intended to provide for the sale of the interest in the partnership whenever either partner chooses to retire; the other is a general engagement, the consideration for which is not merely the benefit obtained on retirement, but the whole of the partnership agreement. * * * I am satisfied that the term 'good will,' associated as it is with the words 'shares and interest,' and being a matter of valuation between the partners themselves, must be confined within the limits of the partnership, and that Mr. Austen is not entitled to any supposed value for his shares beyond it."

In *Musselman's Appeal*, 62 Pa. St. 81, was considered the term "good will" as applicable under the following convocation of facts: A banking firm had dissolved, and appointed a partner to liquidate, who, immediately fol-

lowing the dissolution, commenced banking in the firm house on his own account, under the firm name, at the same time settling the firm business there. Thompson, C. J., for the court, said that there was no doubt that if, under these circumstances, this partner had sold the "good will," he would have been obliged to have accounted for the value received. This opinion discussed the liability of this partner in the following language: "Nor, at law, was there any obligation on him to pay for the good will. He did not agree to pay for it, and he did not sell it as such. Nor can I comprehend how it existed independently of the property. There was no relinquishment of business by the partners. Their business expired by its own limitation. They had no exclusive right in the business that existed for a moment after the firm dissolved, or any sole ownership of it as against any others; and these are the criteria of property in good will, according to the English rule. *Kennedy v. Lee*, 3 Mer. 441; *Colly. Partn.* 156; *Story, Partn.* 369. But, supposing the rule to be more extensive by usage with us, (and I think it is,) how can there be a good will in favor of the members of a firm where the firm has ceased by its own limitation, and no exclusive right to follow the business in that place belongs to them? In that case, as a distinct property, it is good. It then attaches to and enhances the reality, and the value of it is realized in selling or renting that."

On marginal page 262 of *Parsons on Partnership* occurs the following language: "The executor of a deceased partner can realize the share of the deceased in the good will only when he can compel a sale of the stock and premises, and then the good will goes with them; for, as a general rule, by the conveyance of a shop or store, the good will of the business carried on in it passes, although nothing is said about the good will. And if an executor cannot compel a sale of the premises, or, as it seems, if the premises are not in fact sold, the executor gets no advantage from the good will, for that remains entirely with the surviving partners who carry on the same business in the same place."

To a proper understanding of the language used by Sir John Romilly, M. R., in *Robertson v. Quiddington*, 28 Beav. 520, a brief statement of the facts of the case may not be unprofitable. John Morgan and N. A. Quiddington, in 1836, commenced carrying on a business as tailors, under the firm name of Morgan & Co. In this business Morgan had a two-thirds interest, and at his death, which occurred on the 8th day of January, 1860, John Robertson, by the terms of Morgan's will, became entitled to two-thirds of the interest held by the testator in the good will of the above-mentioned business. On the 23d day of June, 1860, Robertson filed a bill praying that said good will might be sold, and that plaintiff might be declared entitled

to four ninth parts of the proceeds of such sale, and for an accounting by Quiddington of all profits made or received by him from the good will of the business of Morgan & Co. since the decease of Morgan. A demurrer to the bill was sustained on the ground of want of equity. In the consideration of this demurrer the following language was employed: "I fully concur in the observations on both sides, not only that the good will is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew a case in which it has been so treated. I am of opinion that, even if the executors have assented to this bequest, (which I must assume on demurrer, because it is so stated upon the bill,) it is not competent for a legatee of two-thirds of a good will of a deceased partner to file a bill against the legatee of the remaining one-third and the surviving partner, who is entitled to all the rest of the good will, to have that bequest specifically made good."

From the above consideration of principles and citations from approved text writers, as well as adjudicated cases, it seems inevitably to result that the surviving partners of the firm of Lee, Fried & Co., in the absence of a restrictive agreement on their part, were entitled to carry on the same line of business as had been transacted by said firm, and at the same place, without accounting for the value of such of the good will of said firm as thereby accrued to them. It also seems equally clear that, by the purchase of the stock and fixtures of the firm of Lee, Fried & Co., the defendants, in the absence of an express reservation to the contrary, became entitled to whatever good will attached to the former business of said firm. It results, therefore, that the judgment of the district court is affirmed. The other commissioners concur.

ROSENSTIEL, County Commissioner, v.
MILLER et al.

(Supreme Court of Michigan. June 16, 1893.)

ESTABLISHMENT OF DRAINS—ASSESSMENT.

Laws 1885, Act No. 227, c. 3, § 1, provides that no drainage commissioner shall take action towards establishing a drain until there is filed with him an application signed by not less than five freeholders of the township; that the petitioners shall be jointly and severally liable for the costs if the commissioners decide that the same is not necessary, or if the proceedings be dismissed for other cause; that the commissioner may recover such expenses by suit at law if petitioners refuse to pay. *Held* that, where a petition was filed for the extension of a drain, and the proceedings were dismissed on the ground that the proposed drainage was unnecessary, the persons who filed such petition cannot, in order to defeat an action against them for costs, claim that it was impossible to determine the necessity of such drain because the line was not sufficiently described in the petition; it not being permissible for them to take advantage of defects in their own petition.

Error to circuit court, Lenawee county; Victor H. Lane, Judge.

Action by Jacob Rosenstiel, county commissioner of Lenawee county, against Charles R. Miller and others, to recover costs of proceedings had under a petition filed by defendants asking for the improvement and extension of a certain drain. There was judgment for plaintiff, and defendants bring error. Affirmed.

Salsbury & O'Mealey, for appellants. Fellows & Chandler, for appellee.

MONTGOMERY, J. The plaintiff, as drain commissioner of the county of Lenawee, sues the defendants, who filed with him a petition reciting that a certain drain existed in the townships of Rollin and Hudson, in Lenawee county, known as the "Posey Lake Outlet Drain." The petition states that said drain needs straightening and deepening from the point where said outlet crosses the south line of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 5, township 7 S., range 1 E., Michigan, owned by Artemus Cooper, and running thence northeast along the channel of said drain into the lower end of Posey lake, as follows, to be straightened as much as the lay of the land along the said outlet will permit, from the south line of said N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 5 to the highway between lands owned by A. Gowan, being part of N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of said section 5, and land owned by Artemus Cooper, being west part of N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 5; thence along the present channel of said Posey Lake outlet to the lower end of Posey lake. The petition concludes as follows: "And your petitioners do hereby make application and respectfully request that said Posey Lake drain be deepened four feet, and straightened in the best possible way, in accordance with the provisions of Act No. 227 of the Public Acts of 1885, as amended." The declaration avers that plaintiff proceeded to examine the route, and determine that it was necessary and conducive to the public health and welfare that said drain should be deepened and straightened in accordance with the application; and further avers that, for the purpose of determining the practicability of said proposed deepening and straightening of said drain, he caused a survey and measurement of the line of the proposed drain to be made by a competent surveyor, and that upon such survey he found that the proposed deepening and straightening were practicable, and he made his order of determination in writing in accordance with his finding, and did establish the commencement, route, and terminus of said drain; that afterwards he applied to the owners of land through which the drain passes for releases of right of way and damages, which were refused; that he then made application to the probate court for the county for the

appointment of special commissioners as provided by law; that one of the parties interested demanded a jury of 12 freeholders, and such jury was impaneled, and disagreed; that a second jury was impaneled, which determined that the straightening of the drain was not necessary or conducive to the public health, welfare, and convenience, which finding of the jury was confirmed by the probate court, and that thereupon the commissioner dismissed the proceedings at the cost of the petitioners; that demand was made upon petitioners for payment of the costs incurred, which was refused, and this action brought. Defendants demurred generally to the declaration, and insisted that they were not liable for the reason that the proceedings were without jurisdiction. The statute (section 1, c. 3, Act No. 227, Laws 1885) provides that before the commissioner shall take action towards establishing a drain there shall be filed with him an application, signed by not less than five freeholders of the township; and further provides that such petitioners shall be jointly and severally liable for all costs and expenses, in case the commissioner, upon examination, or upon examination and survey, shall determine that the same is unnecessary or impracticable, or in case the proceedings shall be dismissed for other cause; and provides, further, that, if the persons signing such application shall refuse to pay such costs and expenses, the commissioner shall bring suit in a court of competent jurisdiction, and collect such costs and expenses, with costs of suit. It is said that no determination has been made in this case that the drain is unnecessary, and hence the applicants are not liable for costs that accrued down to and including the survey, unless the proceedings were dismissed afterwards for some legal cause; that there is and has been no cause for such dismissal, because all the proceedings subsequent to the survey are absolutely without jurisdiction and void. It is contended that the line of the proposed drain was not sufficiently described, and that, therefore, it was impossible for the jury to find whether it was necessary to the public health and welfare that the drain should be constructed as described in the determination of the commissioner; for it is said the very ground upon which the jury may have proceeded is that the line was not sufficiently described. We cannot accept this view of the liability of the petitioners. They are actors in the proceedings, and the statute contemplates that they are the parties in the suit. It appears that the commissioner has in the proceedings followed the description contained in the petition. Indeed, he would be bound to do so if he proceeded at all. Having done so, and the jury having determined that there was no public necessity for the improvement, it is manifestly unjust that these petitioners should now attempt to shield themselves behind the alleged de-

fects in their own petition, and assert a want of jurisdiction. We think they were within the spirit and letter of the statute, and are responsible for the costs incurred. Judgment will be affirmed, with costs. The other justices concurred.

TENHOPEN v. WALKER.

(Supreme Court of Michigan. June 23, 1893.)

KILLING TRESPASSING DOG—JUSTIFICATION.

1. The fact that a dog wanders from a highway upon uninclosed land, and is about to destroy growing plants there, does not justify killing him, although the landowner may have been subjected also to repeated annoyances of the same sort from other dogs.

2. Whether such annoyances would entirely rebut malice, so that exemplary damages might not be awarded, was for the jury.

Error to circuit court, Kent county; William E. Grove, Judge.

Action by Margaret Tenhopen against Thomas Walker. Judgment for plaintiff. Defendant brings error. Affirmed.

Dunham & Preston, for appellant. Francis A. Stace, for appellee.

LONG, J. Plaintiff recovered judgment against the defendant for \$225, as damages in an action on the case for the malicious killing of her dog. It was shown on the trial that plaintiff's sons were walking along the highway. They were accompanied by the plaintiff's dog and two other dogs. When in front of defendant's premises, the dog of plaintiff turned into the defendant's grounds, just out of the highway, and approached a pond which was kept for illies, apparently with the intent to slake its thirst. Defendant, seeing it from the upper window of his house, went down into the lower hall, got his gun, and, returning above, shot the dog from the upper window. It is not claimed that this dog had done any damage there at that or at any other time. On the trial the court permitted the defendant to show that upon several previous occasions other dogs had wallowed in this pond, destroying some of the plants there growing, and upon one occasion the owner of the dog, when remonstrated with by defendant, had called him vile names, and otherwise insulted and abused him. There was no fence in front of the premises, and this pond laid open to the highway.

At the close of the testimony, counsel for defendant asked the court to instruct the jury: "(3) If the court shall hold that this action can be maintained upon the facts disclosed in the plaintiff's declaration, then we ask the court to charge the jury that, in order to recover in this action, the plaintiff must show to the satisfaction of the jury that the defendant was moved to kill the dog through malice, either towards the dog or towards the plaintiff herself; that this must be shown by declarations of the defend-

ant made before or at the time, showing a wicked and malicious purpose for such facts and circumstances as naturally and logically lead to the conclusion that the defendant was actuated by malice, by ill will, hatred, or a desire for revenge. (4) If the jury find from the evidence that the dog was committing a trespass upon the property of the defendant, and in shooting the dog the defendant was only seeking to prevent injury to his property, then there was no malice on his part, and plaintiff cannot recover. (5) If the jury find that the plaintiff is entitled to recover, then, in estimating the damages, they can only find the fair market value of the dog. (6) In examining and weighing the testimony of the witnesses as to the value of the dog, they should scrutinize it closely, and see upon what knowledge they base their opinion; that mere opinions, not based upon a knowledge of the character and qualities of the dog, are not evidence of his value; that statements of witnesses of the market value of the dog in question, or of such dogs, who have never dealt in such dogs, nor ever known personally of dealings by others ought not to be received, except with great caution." These instructions were refused, and the court directed the jury substantially that the plaintiff was entitled to recover actual damages, which would consist of the value of the dog at the time it was killed; and that, even if the dog was committing a trespass at the time it was killed, and, in the opinion of the defendant, was about to destroy some of his plants, it would not be a justification for the killing, or in any way mitigate actual damages, because the law affords a remedy for the destruction of property caused by the beasts of another. The court further directed the jury that there were but two questions for them to consider: (1) The value of the dog. (2) Was there malice? Upon the last proposition the court directed the jury: "If you find from the evidence that there was malice, and that these annoyances that I have mentioned did take place, you will consider these annoyances and those previous trespasses with a view of determining, in the first place, whether they fully rebut the claim of malice, whether they afforded an excuse or cause for killing the dog, to the extent that it would take away the malice; and, if you find in the negative upon that question, you are at liberty to consider them."

It was claimed on the part of the plaintiff that, if the jury found that the killing of the dog was willful and malicious, the plaintiff, in addition to actual damages, was entitled to recover exemplary damages. Upon this portion the court directed the jury substantially that, while actual damages could not be mitigated by the fact that defendant had theretofore been annoyed by other dogs, yet, if they found he had been so annoyed, or if he believed at the time that the plaintiff's dog was actually in the act of destroy-

ing some of his property, they might consider whether these facts could entirely rebut malice; and if, notwithstanding those facts might be found to exist, they believed that defendant was actuated by malice, they might even then award exemplary damages; for, if the defendant willfully and maliciously did the killing, exemplary damages would be recoverable. We see no error in the charge. The testimony tended to show that the dog was valuable. It was a "Gordon setter," eligible to registration, and some of the witnesses placed the value as high as \$250. It had never, so far as this record shows, trespassed upon the defendant's premises, nor had he in any manner been annoyed by it. On the day it was shot, it ran a few feet out of the highway to the edge of this lily pond, between which and the highway there was no fence, and, immediately as it reached the pond, defendant, without any warning to the boys who had it in charge, shot and killed it. The jury, under the charge as given, may or may not have found that the dog was killed willfully and maliciously, as the amount of the verdict is less than several of the witnesses placed its value; but there certainly was evidence which would have justified the jury in finding the act willful and malicious. The dog was not running at large, contrary to law, but was in the immediate charge of its keeper. It is settled in this state that dogs have value, and are the property of the owner as much as any other animal which one may have or keep. *Helsrodt v. Hackett*, 34 Mich. 283. Usually, where an act is done with design, and from willful and malicious motives, the law compels full compensation, and full compensation may not be awarded by the payment of the actual value. Damages in excess of the real injury are never appropriate where the injury has proceeded from misfortune, rather than from any blamable act; but, where the act or trespass complained of arises from willful and malicious conduct, exemplary damages are recoverable. These damages are not awarded as a punishment to the wrongdoer, but to compensate the injured party. *Wetherbee v. Green*, 22 Mich. 311.

All redress in damages partakes to some extent of a punitive character, and the line between "actual" and what are called "exemplary" damages cannot be drawn with much nicety. They are properly based upon all the circumstances of the aggravation attending it. The real purpose is to compensate the plaintiff for the injuries he has suffered. *Stilson v. Gibbs*, 53 Mich. 280, 18 N. W. Rep. 815; *Wilson v. Bowen*, 64 Mich. 133, 31 N. W. Rep. 81. It was said by Mr. Justice Cooley, in *Stilson v. Gibbs*, supra: "In some cases there may be a partial estimate of damages by a money standard; but the invasion of the plaintiff's rights has been accompanied by circumstances of peculiar aggravation, which are calculated

to vex and annoy the plaintiff, and cause him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. The compensation to the plaintiff is the purpose in view, and any instruction which is calculated to lead the jury to suppose that, besides compensating the plaintiff, they may punish the defendant, is erroneous." In the present case, the court below submitted to the jury the question whether the defendant was actuated by malice, and was guilty of willful conduct in shooting the dog. The rights of the defendant were fully protected, as all the circumstances prior to the commission of the act were permitted to be put in by the defendant, showing the annoyances he had had from other dogs, and the provoking and insolent conduct of the owners of the other dogs when remonstrated with by him. The jury found that these facts did not constitute an excuse for killing the plaintiff's dog, and, we think, very properly. In cases of malicious injury, it is not necessary that there should be actual enmity towards the person injured. *Brown v. State*, 26 Ohio St. 176. In *Wright v. Clark*, 50 Vt. 130, it appeared that plaintiff's dog drove a fox upon the land of defendant's father. Defendant came up and shot the dog. On the trial he claimed that he was shooting at the fox, and accidentally shot the dog. No enmity appeared to have existed between the parties. The court charged that, if the defendant intentionally and wantonly shot the dog, they might give exemplary damages. It was held that such intentional and wanton shooting implied malice, and that the instructions given were correct. Some other errors are claimed. We have examined them, and do not deem them of sufficient importance to notice, and they are overruled. Judgment affirmed, with costs. The other justices concurred.

McGREGOR v. ROSS' ESTATE.

(Supreme Court of Michigan. June 16, 1893.)

CONTRACTS—CONSTRUCTION—BREACH OF CONTRACT—WHAT CONSTITUTES—RIGHTS OF PARTIES IN CASE OF BREACH.

1. A contract under which plaintiff, a claimant against decedent's estate, was to cut and deliver a certain amount of timber for decedent, at the mouth of a designated river, during the driving season, provided that the cutting should be "under the direction of a scaler" furnished by decedent. Held to vest in the scaler authority merely to direct the manner in which the timber should be cut, and not to give him the right to stop the cutting when he should be of opinion that plaintiff could not get any more logs than he had already cut, to the river, in the time specified by contract.

2. Where such scaler directed plaintiff to stop work before the specified amount of tim-

ber was cut, and he did stop work, under protest, such fact would constitute a breach of the contract, which would entitle plaintiff to damages.

3. Though decedent first broke the contract, plaintiff could not go on, and perform only so much of it as he saw fit, and no more, and recover the value of the work he did; it being incumbent on him either to abandon work under the contract altogether, and sue for the price for work already done, and damages sustained under the breach, or to continue, under the contract, to do as much work as he was permitted to do, and recover damages for the interruption.

Error to circuit court, Marquette county; John W. Stone, Judge.

Petition by Alexander McGregor against the estate of James G. Ross for an allowance of a claim against the defendant for work and services rendered by plaintiff under a contract therefor, and to recover damages for such breach. There was a judgment of the circuit court affirming an allowance of such claim in the probate court, and defendant brings error. Reversed.

Clark & Pearl, for appellant. E. J. Mapes, for appellee.

MONTGOMERY, J. The plaintiff recovered below upon a claim originally presented before commissioners on claims appointed in the matter of the estate of Ross. The claim filed was for the price of cutting, putting in, and running a quantity of pine saw logs during the logging season of 1887-88, under a written contract. The contract provided for the putting in of the logs standing upon certain described lands, estimated to amount to about 5,000,000 feet. The agreement on the part of the plaintiff was to cut, skid, haul, and bank said timber upon a branch of the Escanaba river, and below the forks, on section 25, township 44 N., range 28 W., or above the forks on section 24, township 44 N., range 28 W. The timber was to be banked on or before the 1st of April, 1888, and was to be delivered by the plaintiff into the main jam at the mouth of said river during the driving season of that year, and with all diligence and dispatch. For the services to be performed by the claimant, Ross agreed to pay the sum of \$5.50 per 1,000 feet,—\$1.50 per 1,000 as the logs should be skidded in the woods, \$2.75 per 1,000 when the logs were banked at one of the places mentioned, and \$1.25 per 1,000 feet when the logs should be driven in the main jam at the mouth of the river. The contract contained this provision: "Said party of the second part, in consideration of the sum of \$5.50 per thousand feet, board measure, agrees to cut, log, skid, and haul to bank of branch of said Escanaba river, at the place before described, all the pine timber on said above-described lands, to be cut under the direction of a scaler furnished by said first party, being about five million feet." The contract also designated the length and manner of cutting the timber, and provided that the scaler was to scale the logs either in the woods or on the bank

of the river, at the option of Ross, by a scaler furnished by him. The claimant offered testimony tending to show that after the execution of this contract he entered upon the performance of the same; got in supplies, built his camp, and started to cut and skid, and make his logging roads; that he then cut the main roads leading from the banking ground to the timber, and completed the same between the middle and the last of January; that in building roads it was necessary first to cut out and grade them, ready to put on a snow plow when the snow came. Plaintiff commenced hauling on the 16th or 17th of January, and at this time had from 60 to 90 men at work, with 9 teams. A portion of this timber was standing upon lands detached from the main body, and this detached portion was the first cut and skidded, and was also the first timber hauled to the banking ground. On the 30th of January, plaintiff purchased 6 additional teams, which were at once placed by him upon the work. On the 14th of February he had banked, according to the report of the scaler, 1,879,477 feet. The plaintiff also introduced evidence tending to show that prior to this time the defendant's agent, Mr. Connolly, had told the plaintiff to stop cutting and skidding; that plaintiff refused to do so; that, while he was absent for a few days, Connolly peremptorily directed the work to cease. The testimony tended to show that Connolly told the plaintiff's foreman, the latter part of January, to quit skidding, and that Cameron, the scaler, also forbade him soon after, stating that such were his instructions from Mr. Connolly. Cameron testified: "I was satisfied that they could get in all the logs there was, but this particular time he [referring to Connolly] made them stop, so I stopped them." Plaintiff further introduced testimony tending to show that when he was stopped he let all his sawyers and swampers go. At the time the claimant was stopped from cutting, there remained upon the land from 800,000 to 1,100,000 feet, which was not cut subsequently by him.

1. The counsel for the estate contend that under the contract, giving the right to Ross, through the scaler, to direct the manner of cutting the timber, under the provision of the contract that the cutting of the timber shall be under the direction of the scaler furnished by the first party, (Ross,) he had the right to stop the cutting when the scaler should be of the opinion that the claimant would not be able to get out any more timber than was already cut. The learned circuit judge instructed the jury, in substance, that this provision did not confer this right upon Ross, but that the authority of the scaler only related to the manner of cutting; that under the contract the claimant had the right to proceed in his own time to cut the timber, he being bound by the provision of the contract to cut the timber out so as to run it during the season. We think this

the correct interpretation, and that there is no error here.

2. It is further contended by the counsel for the estate that there was in fact no breach of the contract by Ross, and that plaintiff could have proceeded to cut the timber had he seen fit to do so; that the direction to stop cutting did not amount to a prevention. The circuit judge instructed the jury, in substance, that if the statement made by the agent of the deceased to the claimant was in the nature of a request, and that the claimant acquiesced in such request, and stopped cutting, this would not amount to a breach of contract, but that, on the other hand, if the plaintiff was directed to stop work under his contract, and did stop work under protest, or objected to it, this would amount to a breach of the contract, entitling the plaintiff to recover damages for such breach. In this there was no error. See 3 Amer. & Eng. Enc. Law, p. 904, and cases cited.

3. The claimant, after the alleged breach of the contract, proceeded to cut a further quantity of logs, but, as the jury found, was unable to complete the entire cutting, because of the breach. He did, however, cut, haul, skid, and put in the stream some 4,000,000 feet. Some 500,000 feet of these logs were not run during the season, and the estate sought to recoup damages for the failure to run out these logs. The jury were instructed by the circuit judge that "if Ross first broke the contract, so that there was a breach of it on his part, the plaintiff had the right to go on, and perform so much as he saw fit, and no more, and recover what it was worth for what he did. He would not be bound even by the contract price there. So it all depends on who broke the contract in the first regard. It does not lie in the mouth of a defaulter to say that the contract is evidence of the true value of the labor performed." We think the court was in error in giving this instruction. When the deceased committed a breach the claimant was privileged to have adopted either one of two courses: He could have abandoned further work under the contract altogether, and have sued to recover the price of work already performed, and whatever damages he had already sustained because of being prevented from completing the contract, or he could continue, under the contract, to do so much of the work as he was permitted to do, and recover damages for the interruption. But in case he did so there is no reason why he should not be bound by the terms of the contract, so far as he did attempt its performance, and responsible for any breach of condition not dependent upon the neglected performance of the other. In other words, the law does not outlaw a party who has broken a contract in any particular, or deprive him of having the benefit of provisions inserted in such contract for his protection, in any case

where the other party proceeds under the contract, and where the breach may be compensated in damages, and where the neglect of performance by the plaintiff is not induced by the act of the one guilty of the first default. This does not militate against the rule that, where covenants or agreements are dependent, the one who has committed the first breach is ordinarily without remedy under the contract. In the present case the running of the logs already cut and hauled, and those which the plaintiff was, subsequent to the breach, permitted to cut and haul, was not dependent upon the putting in of that portion of the timber which the claimant was prevented from cutting by the wrongful act of Ross. In *Milldam Foundry v. Hovey*, 21 Pick. 417, there was an agreement, on the one hand, to furnish water power, and, upon the other hand, to manufacture certain articles. There was an interruption of the mill power, which was construed to be the breach of a condition precedent which would authorize the defendant to break off from his contract. Chief Justice Shaw, at page 444, lays down the following rules, which we think applicable to the present case: "Such breach of the condition could only excuse the defendant from such part of the contract requiring the use of mill power as remained to be performed when the breach of condition happened." Further: "Although such suspension or interruption of the mill power might be construed to be the breach of a condition precedent which would warrant the other party to break off, and excuse the further performance of the contract, yet it is at his option to do so, or to waive the breach and proceed with the contract; and if he continues in the performance of the contract until the impediment is removed, and the power re-established, this amounts to a waiver of the forfeiture, and the party will no longer be excused thereby from the further performance of the contract." In 2 Pars. Cont. 678, it is said: "Generally, where one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded, but not if he has been guilty of a default in his engagement, for he cannot take advantage of his own wrong to defeat the contract, nor if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed." In *Franklin v. Miller*, 4 Adol. & E. 590, it is said: "It is a clearly-recognized principle that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." See, also, *Boone v. Eyre*, 1 H. Bl. 273, note a. The judgment will be reversed, with costs, and a new trial ordered. The other justices concurred.

HUGHES et al. v. TANNER.

(Supreme Court of Michigan. June 16, 1893.)

LOGS AND LOGGING — MANUFACTURER'S LIEN ON LUMBER—REPLEVIN BY PURCHASER—CONTRACT FOR SAWING—QUESTION FOR JURY—WAIVER OF LIEN—DELIVERY—WHAT CONSTITUTES.

1. In replevin of lumber on which defendant claimed a lien for sawing for plaintiffs' vendor, the agent of the latter testified that defendant was to have a specified sum per 1,000 feet for sawing and piling it; that defendant was to cut all the vendor had, and the latter was to give him all he could cut; that he was to get in cash the amount of his pay roll every two weeks, which he thought would not amount to more than one-half of the bill, and the balance was to be settled in the fall with 60-day paper, on estimates. Defendant insisted that the fall settlement was to be in cash, and that, as the lumber was shipped, he was to be paid in full. *Held*, that the question as to what the contract was between defendant and plaintiffs' vendor was for the jury.

2. A person who saws a large quantity of lumber for another has a lien on any part of it for the entire bill for sawing.

3. The fact that the final balance, under such contract, was to be made on estimates, did not necessarily show that the parties contemplated the shipment of all the lumber before final settlement.

4. Though it was agreed that all the lumber was to remain on defendant's docks, in his possession, until the sawing bill was paid, such contract is not inconsistent with his right to claim a lien.

5. The fact that part of the lumber was shipped by plaintiffs' vendor and by purchasers without payment of the sawing bill, and without protest by defendant, does not preclude the latter from claiming a lien on what remained, in the absence of a right expressly reserved to ship before payment.

6. Nor does the fact that, as the lumber was sawed and piled, it was marked with certain initials, take it out of defendant's possession, where defendant had an additional duty yet to be performed respecting it, and neither party regarded the marking as having any significance as a delivery or transfer of possession.

7. It appeared that, before plaintiffs purchased, one of them visited defendant's mill, looked over the lumber, and afterwards communicated to their vendor their acceptance, and that no knowledge of such acceptance, the terms of the contract, or the time or place of delivery, was brought home to defendant. The only facts showing knowledge were that the initials of one of plaintiffs was placed on the piles of lumber sold, and that defendant saw him at the mill while the sale was being negotiated. *Held*, that there was no such transaction in defendant's presence as made it his duty to assert his lien, and he was not estopped from doing so in an action to replevy the lumber from him.

Error to circuit court, Iosco county; William H. Simpson, Judge.

Action of replevin by John W. Hughes and John S. Eck against Charles H. Tanner to recover possession of certain lumber. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

M. J. Connine, for appellants. O. E. Outcheon, for appellee.

McGRATH, J. Plaintiffs bring replevin for a quantity of lumber upon which defendant claims a lien for the saw bill. In the spring

of 1890, defendant, who was the owner of a sawmill and the docks at Oscoda, from which the lumber was replevied, entered into a verbal contract with the Potts Lumber Company to saw logs for the company for that season, at \$2.50 per thousand. The agent of the Potts Lumber Company testified that "the contract was that he was to have \$2.50 for sawing and piling it on the docks, where the boats could get it, and, if he was compelled to put any on the shore, he had to forward it at his own expense when we needed it. There was no particular quantity mentioned that he was to cut. He was to cut all we had, and we were to give him all he could cut. He was to get in cash whatever amount his pay roll would be every two weeks. He said he did not think it would amount to much more than half what the bill called for, and, with the balance, he did not need the money; that we could settle any time in the fall with 60-day paper. He was to have enough every two weeks to pay his expenses, and the balance was to be settled for in the fall with 60-day paper. It was proposed to reach the amount in the fall that he had cut, by estimate." The defendant insisted that the fall settlement was to be in cash, and that, as the lumber was shipped, he was to be paid in full for the saw bill. As these payments were made, they were credited to the Potts Lumber Company, and the saw bill was charged up as the lumber was shipped. Under this contract, defendant cut and piled about 9,000,000 feet of lumber during the season of 1890. About half of this lumber was shipped away. The lumber company failed in November, 1890. No settlement had been had between the parties. The total amount of the saw bill was upwards of \$22,000. Defendant had received \$7,247.05, and the further amount of \$4,000 in drafts which had not been paid, leaving a balance unpaid at the close of the year of \$14,774.77. This amount was reduced by payments by parties claiming interests in the lumber to \$3,861. As the lumber was cut, it was sorted and piled, as directed by the lumber company, and each pile, as completed, was marked by the lumber company with the date, and the initials "J. E. P." The payments made during the season were by 30 or 60 day drafts. In the latter part of July, 1890, plaintiffs claim to have purchased certain piles of this lumber, which were at the time estimated at between 1,200,000 and 1,300,000 feet. It was agreed that the mill culls were to be \$6 per thousand; the double X, including the 12-inch, was to be \$10 per thousand; and the wide was to be \$13 per thousand. It was to be inspected and delivered afterwards, and the price was agreed upon, subject to inspection as it was loaded. Three hundred thousand feet of this lumber was taken away. Plaintiffs gave their paper for the full amount that was claimed upon the estimate. One of the plaintiffs testified

that "they [the lumber company] wanted that amount of paper, and I advanced it. I did not intend to advance it. I did not intend to advance them any more than I believed there was in my judgment. If there had been any difference, I assumed that the difference was to be adjusted on inspection. They [the lumber company, before inspection] utterly abandoned the lumber." These piles of lumber, so claimed to have been sold to plaintiffs, were marked by the lumber company with the initials "J. W. H." One or more witnesses testified that the word "sold" was added, but others testified that it was not.

The question as to what the contract between defendant and the lumber company really was, was for the jury. The final balance was to be made upon estimates. This contract did not necessarily contemplate the shipment of all of the lumber before final settlement. If, as defendant claimed, the basis of the saw bill, prior to the final settlement at the close of the season, was to be the lumber scale upon shipment, it is immaterial whether all or any part of the lumber was to be shipped during the season; for, in any event, the saw bill as to the lumber shipped was to be paid as it was shipped. The contract stated by the company's agent makes no reference to the payment of the saw bill upon the lumber actually scaled and shipped. The defendant denies that any time was to be given at the close of the season. That question was for the jury. Upon defendant's theory, all of the lumber was to remain on his docks, in his possession, until the saw bill was paid. Such a contract was not inconsistent with the right to claim a lien. In the absence of a right expressly reserved to ship before payment of the saw bill, the fact that lumber was shipped away without protest would not take away the right to assert a lien upon what remained. The right to assert a lien upon what remained was not affected by the release of what was shipped. The contract was entire and continuing. It covered the whole season's cut. What lumber remained was subject to lien for the whole saw bill. As was said by Lord Ellenborough in *Blake v. Nicholson*, 3 Maule & S. 167: "I think the defendant has a lien for the whole balance, the work being an entire work, in the course of prosecution, upon the same principle that a tailor who is employed to make a suit of clothes has a lien for his whole price upon any part of them."

The fact that, as the lumber was piled, it was marked with the initials "J. E. P.," did not take it out of defendant's possession. The title to this lumber was in the lumber company. Defendant was sawing other lumber. Considerable of this very lumber was piled on the bank or on the docks at shallow water, and, under the contract, defendant had a duty yet to be performed respecting it. The lumber company gave directions how it was to be piled, but de-

fendant directed where it was to be piled. Neither party regarded the marking as having any significance as a delivery or transfer of possession.

The receipt of the dishonored paper would not operate to discharge the lien unless received as payment, (*Craddock v. Dwight*, 85 Mich. 587-591, 48 N. W. Rep. 644,) and then only pro tanto. Defendant claimed only \$2.50 per thousand upon plaintiffs' lumber, and, after deducting the amount of these unpaid drafts, the amount remaining due defendant exceeded the judgment.

Whether, as between the lumber company and plaintiffs, there was a transfer of the title even, may well be doubted, but there was clearly no such participation or knowledge on the part of defendant as would operate to estop him from asserting his lien. Plaintiffs were doing business at Toledo, Ohio. One of them visited the mill, looked over the lumber, returned to Toledo, and afterwards communicated their acceptance of the proposition made to the lumber company. No knowledge of their acceptance, of the terms of the contract, of the time or place of delivery, was brought home to defendant. The only undisputed testimony tending to bring the knowledge of the sale to defendant was the fact that the initials were placed upon these piles of lumber, and the further fact that defendant had seen one of the plaintiffs at the mill while the sale was being negotiated. There was no such sale, delivery, transfer of title, or payment in defendant's presence as made it his duty to assert his lien. Plaintiffs knew that the lumber was in defendant's possession, and was being sawed by him. Plaintiffs cannot be said to have been ignorant of defendant's rights. He had not misled them even by silence.

It is insisted that, inasmuch as the total amount paid by the lumber company, including the \$4,000 in paper which had not been paid, was sufficient to pay the saw bill for all lumber cut prior to August 1st, such payments should have been applied to liquidate that part of the saw bill first earned. The contract being entire, any part was subject to lien for work done on any other part. *Craddock v. Dwight*, supra. We find no prejudicial error in the record, and the judgment is affirmed. The other justices concurred.

ROBARDS v. WATERMAN.

(Supreme Court of Michigan. June 23, 1893.)

PARTNERSHIP—MORTGAGE OF FIRM PROPERTY.

1. One partner may execute a chattel mortgage in the firm name for the purpose of securing or paying firm debts.

2. Such mortgage is valid as against the exemptions provided in How. St. § 7684, though some of the partners may not have been aware of its execution.

Error to circuit court, Calhoun county; Frank A. Hooker, Judge.

Action of replevin by Sarah A. Robards against Lewis Waterman. Judgment for defendant. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

This case was tried before the court without a jury. The findings of fact are as follows: (1) Plaintiff and one David B. Swart were partners in trade, and owners, as such, of a stock of groceries, including the property mentioned in the writ of replevin issued in this cause; the plaintiff being a married woman, and her husband acting as her authorized agent in relation to the business. (2) On the 17th day of August, 1885, the said firm was indebted, for goods purchased, to two firms, and to secure said indebtedness the plaintiff, in the name of the firm, had delivered to said creditors two chattel mortgages upon the goods of the firm, including the articles in controversy, which mortgages were due and outstanding on said 17th day of August; foreclosure of one or both of them having been begun. (3) The partners were mutually distrustful, and David B. Swart, to protect his interest, and to prevent the sale upon the mortgage mentioned, borrowed the sum of \$400 from his brother, Tunis W. Swart, of Mt. Pleasant, giving him the firm's mortgage upon the goods for that sum, payable on demand. This loan was made upon the representation that the money was to be used for the payment of the debts of the firm, including the two mortgages, which mortgages were supposed to amount to the sum of \$360. The money, when received, was applied in payment of the mortgages, to the amount of \$361.64, and the balance, of \$38.36, was retained by David B. Swart. (4) The value of the property of the firm at this time was in the neighborhood of \$500, and was all covered by each of the mortgages mentioned. (5) On the 18th day of August, Tunis W. Swart commenced proceedings to foreclose his mortgage, by placing it in the hands of the defendant for that purpose, in furtherance of which the defendant at once took possession of the property, and advertised it for sale, in accordance with its terms. (6) November 16, 1885, the plaintiff sued out a writ of replevin, under which the property covered by said mortgage was taken from the possession of the defendant, and delivered to the plaintiff. (7) At the time of the replevin the property was worth the sum of \$450, having deteriorated in value \$50 while in the possession of the defendant. (8) Demand of payment of the amount secured by mortgage was duly made before steps were taken to foreclose the mortgage. (9) At no time during the time that the partners carried on business did the stock greatly, if any, exceed the amount of property exempt to the two partners under the eighth subdivision of the exemption law. (10) Defendant had a special interest in the

property by reason of his mortgage of \$400, amounting at this date to \$530. (11) Plaintiff on August 20th filed a bill in chancery to wind up the affairs of the partnership, making defendant and Tunis W. Swart defendants, and enjoining the sale under the mortgage, which she alleged to be fraudulent. That suit is yet pending. A receiver was appointed, who never qualified, and on November 8th the preliminary injunction was dissolved.

L. B. Tompkins, (R. S. Lockton, of counsel,) for appellant. A. M. & A. Culver, for appellee.

GRANT, J., (after stating the facts.) No exceptions were taken to the finding either of facts or of law. Assignments of error based thereon will not now be considered. The only question for determination, therefore, is, do the findings of fact support the judgment? This has been so often held by this court that a citation of the cases is unnecessary. The judgment is correct, for the following reasons:

1. One partner possesses the right to execute a chattel mortgage in the firm name for the purpose of securing or paying partnership debts. *Harrison v. Sterry*, 5 Cranch, 289; *Bohler v. Tappan*, 1 Fed. Rep. 469; *Gates v. Bennett*, 33 Ark. 475; *Nelson v. Wheelock*, 46 Ill. 25; *Patch v. Wheatband*, 8 Allen, 102; *Walker v. White*, 60 Mich. 427, 27 N. W. Rep. 554; *Jones, Chat. Mortg.* § 46.

2. It is settled in this state that such mortgage is valid as against the exemptions provided by How. St. § 7683, though some of the partners may not be aware of its execution. *Harvey v. Ford*, 83 Mich. 506, 47 N. W. Rep. 242. Judgment affirmed.

HOOKEE, C. J., did not sit. The other justices concurred.

PEIRCE et al. v. CLOSTERHOUSE.

(Supreme Court of Michigan. June 16, 1893.)

ASSUMPSIT — ACTION BY ASSIGNEE OF CONTRACT.

Where one, in his own name, and upon his own responsibility, enters into a contract to deliver goods, and afterwards arranges with a third person to deliver the same, such third person cannot maintain an action under the contract for the price of the goods.

Error to circuit court, Kent county; Allen O. Adsit, Judge.

Action by Thomas M. Peirce and others against John W. Closterhouse to recover the amount of a bill of lumber. Judgment was rendered for plaintiffs, and defendant brings error. Reversed.

C. O. Smedley, for appellant. J. M. Jamison, for appellees.

McGRATH, J. Plaintiffs bring assumpsit on the common counts for a bill of lumber used in the construction of a house owned

by defendant. The house was built under a contract with one Cultice, who agreed to furnish all the materials. Some time prior to the letting of the contract, one Quackenbush, who had been in the lumber business on his own account, met defendant in the street, and asked him if he intended to build any houses during that summer. Defendant replied that he did, whereupon Quackenbush asked if he could not furnish him the lumber. The conversation was then interrupted. At another interview, Quackenbush called upon defendant, and asked if he was ready to place that lumber order, and defendant replied that he had not yet let the lumber contract. Quackenbush testifies that: "He said he would let the contracts for the buildings, and I would have to figure with the contractor, and if I could figure low enough, which he hoped I could, he would be glad to have me get it. He said—well, in the beginning, he said he let the contracts, and, as the lumber was being delivered, where the contractor O. K.'d the bills, he paid them." Afterwards, Quackenbush called again, and defendant told him that Harry Cultice had the contract, and he said: "'I would figure it reasonable,' because he was a good fellow,—a hard worker; and I told him, if I could not figure it as low or lower than anybody else, I did not propose to have any preference over any one else. If I could begin it as cheap, I would like to have him use his influence to let me have the job." Quackenbush then found Cultice, got from him a bill of the lumber, gave to Cultice a figure for it, and Cultice awarded the contract to Quackenbush. "Question, (to Quackenbush.) What did Mr. Closterhouse say about the payment of this lumber? Answer. He said, as fast as the lumber was being delivered there, and the contractor O. K.'d the bills, he would pay them. Q. When was that? A. That was when I first saw him; that is, not when I first saw him, but before that,—this talk." Quackenbush further testifies that he went over to plaintiffs, handed the bill to one of the firm, and asked him what he would furnish that bill for, and "he told me he would figure it or furnish it for so many dollars and cents, and I told him that is just what I agreed to. Question. Who were you working for at the time you came in the office, and talked with Mr. Closterhouse? Answer. Well, I was working for different lumber firms, and I was also working for myself. Q. And then you figured on it, and handed in your bid? A. Yes, sir. Q. Who did you hand your bid in to? A. Mr. Cultice. Q. Did you tell him where you were going to get the lumber at that time? A. No, I did not. Q. Didn't you state to him that you were going to get the lumber from Muskegon? A. I said I could get it in Muskegon, I could get it in Cadillac, and get it from the lumber firms here in the city. Q. Who were you working for at that time?

Were you working for Peirce & Co. at that time? A. I placed the order— Q. Just answer my question. Were you working for Peirce & Co. at that time? A. Why, certainly, I supposed I was. Q. Weren't you doing a commission business,—taking orders, and placing them with different people,—either in Cadillac or Muskegon or Grand Rapids, wherever you could do the best, and make the most money? Is not that a fact? Weren't you working for yourself? A. I suppose I was working for myself. That same time I had an understanding with Peirce & Co. Q. Was it not your intention to get it from Muskegon, and he was in such a hurry that you had not time? A. Yes. Q. You told Mr. Cultice you were going to send to Muskegon and get this, didn't you? A. When I first talked with him,—Muskegon or Cadillac. I would not say that I said Muskegon, particularly. I might have mentioned Muskegon, and I might have said Muskegon alone." Neither Quackenbush nor plaintiffs had any further conversation with defendant until after the lumber was furnished, and a bill therefor was sent to defendant in May following, when defendant at once repudiated it.

1. Plaintiffs could not recover as assignees of Quackenbush, under the declaration. *Blackwood v. Brown*, 32 Mich. 104; *Rose v. Jackson*, 40 Mich. 29; *Cilley v. Van Patten*, 58 Mich. 404, 25 N. W. Rep. 326.

2. Quackenbush cannot be said to have made the contract in behalf of, or as the agent of, plaintiffs. He made the proposition to Cultice in his own name, and not for plaintiffs. He had no authority to make a contract which would bind plaintiffs. He fixed the rates, and after he had made the contract with Cultice he went to plaintiffs, and inquired what they would furnish the bill for. In any view, he was only to receive commissions on such orders as plaintiffs accepted. They were not bound by his rates. When he closed the contract with Cultice he intended, as he says, to get the lumber at Muskegon or Cadillac. He had the option to place the order or get the lumber wherever he chose. He was under no obligation to get it from plaintiffs. If he had afterwards refused to perform, neither Cultice nor defendant could have looked beyond him. The judgment is reversed, and a new trial granted.

MONTGOMERY, J., took no part in the decision. The other justices concurred.

NAYLOR v. MINOCK.

(Supreme Court of Michigan. June 23, 1893.)

MORTGAGE BY MARRIED WOMAN—VALIDITY— AFTER-ACQUIRED TITLE.

1. A mortgage given by a wife, alone, to secure the debt of her husband, on land which they owned as tenants in common, is void.

2. The fact that the debt was for neces-

saries furnished to the husband—an insane person—does not render the mortgage valid.

3. The mortgage, being void in its inception, did not estop the wife or her heirs from asserting the interest in the land afterwards acquired by her on the death of her husband; and How. St. § 8506, providing that, after the time of redemption from foreclosure sale, after-acquired title by the mortgagor shall inure to the purchaser at foreclosure, does not apply.

Appeal from circuit court, Wayne county, in chancery; George S. Hosmer, Judge.

Bill by Jerusha Naylor against John Minock to enjoin the foreclosure of a mortgage. From a decree for complainant, defendant appeals. Affirmed.

F. A. Baker, for appellant. John D. Conely, for appellee.

MONTGOMERY, J. A bill was filed in the Wayne circuit to restrain the foreclosure of a mortgage. The relief prayed for was granted, and the defendant appeals. James Minock and Bridget Minock were husband and wife. The land in question was conveyed to them on the 8th of June, 1846, by a deed in which they are named as grantees, as "James Minock and Bridget Minock, his wife." On the 15th of March, 1882, James Minock had been adjudged insane, and the defendant, his son, had become liable to pay the expenses to be incurred in his defense on a criminal charge, and for maintaining him at the asylum. With the expressed purpose of securing to defendant the repayment of these advances, Bridget Minock, on the 15th of March, 1882, executed the mortgage in question, which recites a consideration of \$1,000 to the party of the first part, and provides: "The party of the first part has granted, bargained, sold, remised, released, enfeoffed, and confirmed, and by these presents does grant, bargain, sell, remise, release, enfeoff, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all those certain pieces or parcels of land," (a description of which follows,) "together with the hereditaments and appurtenances thereunto belonging, or in any wise appertaining. To have and to hold, the above-bargained premises, unto the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever." This grant is followed by the usual defeasance and power of sale, containing the further provision that, on such sale, "to make and execute to the purchaser or purchasers, his, her, or their heirs or assigns forever, good, ample, and sufficient deeds of conveyance in law, pursuant to the statute in such case made and provided."

1. It will be seen that the mortgage does not purport to be given for the debt of the wife, but is given to secure obligations primarily those of her husband, nor was the mortgage given upon what was, at the time of its execution, her separate estate. She and her husband were tenants in the entirety,

and neither could convey without the other joining in the conveyance. *Fisher v. Provin*, 25 Mich. 347; *Insurance Co. v. Reah*, 40 Mich. 241; *Manwaring v. Powell*, Id. 371; *Allen v. Allen*, 47 Mich. 74, 10 N. W. Rep. 113; *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. Rep. 40; *Lewis' Appeal*, 85 Mich. 340, 48 N. W. Rep. 580.

2. It is contended, however, that the mortgage debt was wholly for necessities furnished to James Minock, an insane person, for which his estate, or his right of survivorship, in this farm, were clearly liable, and the giving of the mortgage by Bridget Minock bound her interest or right of survivorship, so that the mortgage was, from the beginning, a perfectly valid security. We do not think this contention can be allowed. The validity of the instrument as a conveyance of an interest in land cannot depend upon the question of whether the moral obligation of the husband to pay or secure the payment is greater or less.

3. It is next contended that, the mortgage evidencing an intent to convey the title to the property described subject to the defeasance, Mrs. Minock and her heirs are estopped from asserting an after-acquired title, and hence that when, on her husband's death, the full title vested in her, the mortgage from that moment bound the estate. This contention is based both on the claim that such is the common-law doctrine of estoppel by deed, and also that the statute (section 8506, How. St.) is effectual to estop Mrs. Minock and her heirs. This section, so far as is material to the question here, is as follows: "Unless the premises described in such deed [referring to deed on foreclosure] shall be redeemed within the time limited for such redemption, as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, or interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled as hereinafter provided." In *Brayton v. Merithew*, 56 Mich. 166, 22 N. W. Rep. 259, this statute was construed, and it was held that, as to one not under disability, the execution of a mortgage with this statute in force operated to pass, not only the estate actually owned by the mortgagor at the time, but an after-acquired title; or, in effect, that the statute is to be read into the mortgage, as a part of the contract. It is unnecessary, therefore, to determine what the rule would be in the absence of this statute. If this mortgage was, at its inception, such a contract as a married woman is entitled to enter into in this state, it must be held effectual to pass the title which vested in her at her husband's death. But herein lies the difficulty. As already stated, neither the husband nor the wife could convey the estate vested in them

in the entirety, unless both joined, and any instrument by which either attempted to make such conveyance would be void. See 2 Bl. Comm. 182, and cases above cited. The wife's power to make contracts is not general, but is statutory, and cannot be extended beyond the statutory limits. In the present case, as we have already pointed out, the attempt to convey the title which she held at the time in this property was ineffectual. Had she, in terms, contracted to bind an after-acquired estate, there is no authority, either at the common law or by the statute, by which she could have done so, for a consideration passing to another person. It has been repeatedly held that the statute of 1855 confers upon the wife power only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract, or in consideration of it. See *Johnson v. Sutherland*, 39 Mich. 579; *Insurance Co. v. McClellan*, 43 Mich. 564, 6 N. W. Rep. 88; *Reed v. Buys*, 44 Mich. 82, 6 N. W. Rep. 111. See, also, as bearing indirectly upon the subject, *Hovey v. Smith*, 22 Mich. 172; *Kitchell v. Mudgett*, 37 Mich. 81; *Carley v. Fox*, 38 Mich. 389.

It follows, from the views expressed—First, that the mortgage was not valid, in its inception, to convey any estate; second, that it could not be effectual to pass an after-acquired title, because of the incapacity of the mortgagor. The decree below was right, and will be affirmed, with costs. The other justices concurred.

HEALEY v. NEWTON et al.

(Supreme Court of Michigan. June 23, 1893.)

BOND ON APPEAL—CONSTRUCTION—CONCLUSIVE- NESS OF RECITALS.

1. After judgment in proceedings to enforce a logging lien, defendant obtained an order to extend the time for settlement of a bill of exceptions on filing a bond according to the statute. Defendant filed a bond providing that, if he "shall prosecute his said writ of error to effect, and shall pay," etc. The bill of exceptions was filed, but no further proceedings were taken. *Held*, that the bond was enforceable as a common-law bond, it being, in effect, a contract to prosecute the writ of error.

2. Where a bond on appeal recites a judgment against the principal obligor, the recital is conclusive between the parties.

Error to circuit court, Mackinac county; Charles J. Pallthorp, Judge.

Action on an appeal bond by Cornelius Healey against Wilson Newton, Abadiah Newton, and John W. McGinn, administrator of Archibald P. Newton. Judgment for defendants. Plaintiff brings error. Reversed.

James McNamara, for appellant. P. N. Packard and Oscar Adams, for appellees.

McGRATH, J. Plaintiff commenced proceedings under Act No. 229, Laws 1887,

known as the "Log Lien Law," and on June 17, 1889, recovered judgment against the principal defendant for \$325 and costs, and gave the plaintiff a lien on the products. The judgment entry is entitled "*Cornelius Healey v. James Healey, Defendant, and Archibald P. Newton, Special Defendant.*" and recites that, the default of the principal defendant in said cause "having been duly entered, and the same having become absolute, and Archibald P. Newton having claimed to be the owner and interested in the products seized, * * * and having filed his application in said cause, and served the same upon the plaintiff's attorneys, * * * and said plaintiff and Archibald P. Newton being in court, by their respective attorneys, ready for trial, and the court having heard the proofs and allegations of the parties," etc. On the rendition of the judgment the owner of the logs obtained an order extending the time for the preparation and presentation for settlement of a bill of exceptions for the period of 60 days, and staying all proceedings except the taxation of costs, upon condition that said owner file a bond within 30 days, pursuant to the provisions of the statute in such case made and provided. On June 26th said owner filed a bond in the sum of \$650, which was approved by the clerk, containing the following recitation and condition: "Whereas, judgment has been rendered in the circuit court for the county of Mackinac in favor of said Cornelius Healey and against said Archibald P. Newton for the sum of \$325 damages and the cost of suit, in which judgment and proceeding the said Archibald P. Newton complains that there is error in substance, and to be relieved therefrom had obtained a stay of proceedings in said court to settle a bill of exceptions and remove the same to the supreme court by writ of error, to the end and that the error made therein may be corrected: Now, therefore, the condition of this obligation is such that, if said Archibald P. Newton shall prosecute his said writ of error to effect, and shall pay and satisfy such judgment as shall be rendered against him upon said writ of error in said supreme court, then this obligation to be void; otherwise to remain in full force and virtue." Afterwards the attorney for plaintiff applied to the clerk for an execution, but the clerk refused to issue the same, giving as a reason that a bond had been filed, and a stay of proceedings had been entered. The time for preparing a bill of exceptions was extended from time to time until December 16, 1889, when the same was duly settled. The principal in said bond took "no further proceedings to take said cause to the supreme court on writ of error than the settlement of said bill of exceptions, and never sued out a writ of error in said cause, and did not prosecute said writ of error to effect." Plaintiff sues upon the bond, and the court finds the facts, and as a conclusion of law "that the plaintiff has not made out

such a case as entitles him to judgment," and rendered judgment for defendant. No other reasons are assigned, except as they may be inferred from the motion for judgment made by counsel for defendants, who asked the court to find as a matter of law that the bond declared upon, being a bond given in a legal proceeding, and not by the acquiescence of the plaintiff in the case, is void, and not binding on the defendants, for the reason that it is not authorized by any law of this state; that it does not comply with the statute in reference to bonds given upon a stay of proceedings ordered by the circuit court; that it is void as a bond for a stay of proceedings upon a writ of error; that no writ of error was ever issued in this case; that the bond is without consideration; and that, no damages growing out of the breach alleged having been set forth in the declaration, and no proof, the plaintiff is entitled to nominal damages only. The bond is in the form prescribed by How. St. § 8679. An order staying proceedings for 60 days had been entered at the instance of the principal obligor, conditioned upon the execution within 20 days of a bond. The bond was filed and acquiesced in by plaintiff, who relied upon Newton's expressed intention to take out a writ of error. For six months thereafter Newton pursued a course indicating an intention to take the case to this court. In *Howard v. Hess*, 63 Mich. 725, 30 N. W. Rep. 333, there was no finding that the bond was ever delivered by defendants to the clerk, or meant to operate as a stay of proceedings, and it did not become effective by operation of the statute. Here the bond was delivered and filed, evidently in pursuance of the order staying proceedings, and was acquiesced in as such. The bond must be held valid as a common-law bond, independent of the statute. *Hester v. Keith*, 1 Ala. 316; *Lane v. Kasey*, 1 Metc. (Ky.) 410; *State v. Thompson*, 49 Mo. 188; *Williams v. Shelby*, 2 Or. 144; *Burroughs v. Lowder*, 8 Mass. 373; *Winthrop v. Dockendorff*, 3 Greenl. 150; *Kimm v. Steketee*, 44 Mich. 527, 7 N. W. Rep. 237. In *Hester v. Keith* it was held that, though the condition of a bond for the prosecution of a supersedeas does not conform to the statute, yet, as the bond was effectual to delay the collection of the execution, upon discharging the supersedeas it becomes absolute, and may be prosecuted as an obligation at common law. A bond for money, to be void upon the doing of a certain thing, is held to be, in legal effect, a contract to do that thing. *Waynick v. Richmond*, 11 Kan. 488. A bond under seal imports a consideration. *Page v. Trufant*, 2 Mass. 159; *Harrell v. Watson*, 63 N. O. 454; *Harris v. Harris*, 23 Grat. 737; *Collins v. Blanter*, 1 Smith, Lead. Cas. 636. It is urged that there was no judgment in fact against the principal obligor in the bond. The judgment was a lien upon his property. It is a sufficient answer, however, that the

bond recited a judgment against him. A recital in a bond concludes the parties as an admission of the facts recited. 2 Amer. & Eng. Enc. Law, 464. The declaration properly follows the bond. Plaintiff, after the execution and delivery of the bond, had one of two courses open to him, to wit, move to have the order staying the proceedings set aside, or acquiesce and rely upon the bond. Under the facts found in the present case, he will be presumed to have elected to take the latter course. The breach complained of is the failure to take out and prosecute the writ to effect. The court has found such breach, and the measure of plaintiff's damages is the amount of the judgment recited in the bond, with costs and interest.

Pending the consideration of the case by the court below, the principal obligor died, and an order was entered reviving the case as to decedent in the name of the administrator. The statute (How. St. § 7401) provides that upon the death of one of several defendants the action shall proceed against the survivors. No objection seems to have been made to this order by counsel for either defendant, and it affirmatively appears by the judgment entry that the "attorney for the administrator of the estate," etc., joined in the motion for judgment. The writ of error will be dismissed as to said administrator, and the judgment below reversed, and judgment entered here for plaintiff and against the surviving defendants for \$449.93, with costs of both courts to plaintiff.

GRANT, J., did not sit. The other justices concurred.

CLARK et al. v. KELLOGG.

(Supreme Court of Michigan. June 23, 1893.)

GUARANTY—COLLECTION OF NOTES—DUE DILIGENCE—PLEADING.

1. Defendant sold plaintiffs a stock of goods and certain notes and accounts, giving a guaranty that a certain amount should be realized thereon, which was less than the face of the accounts, the contract providing that plaintiffs should "use due diligence in their collections." Held, that the contract was a guaranty of each individual account, requiring resort to legal process to collect each before recourse on the guarantor, and that no showing of diligence was sufficient which did not include proof that the accounts had been put in judgment, and execution taken out, and returned unsatisfied.

2. An averment in the declaration that plaintiff had used due diligence amounted, in effect, to an averment that he had pursued the course which the law imposed on him in order to charge the guarantor, and he could not show that defendant had by any subsequent or independent agreement waived this degree of diligence without counting on the basis of such waiver in his declaration.

Error to circuit court, Jackson county; Rollin H. Person, Judge.

Action by Myron W. Clark and others against Henry Kellogg for breach of con-

tract. Judgment was rendered in favor of defendant, and plaintiffs bring error. Affirmed.

Thomas A. Wilson, for appellants. Blair & Wilson and Parkinson & Day, for appellee.

MONTGOMERY, J. The plaintiffs sued the defendant, counting upon a breach of an agreement given on the occasion, and in consideration, of the purchase by the plaintiffs from the defendant of a stock of goods and a quantity of notes and accounts. That portion of the agreement material to be considered in determining the questions involved reads as follows: "The said party of the first part * * * does covenant and agree * * * that the annexed invoice is a true statement of the amount and value of stock, merchandise, and property, and also guaranty, represent, and warrant that there is in said stock goods to the value of \$14,708.68, and also that the amount of \$29,702.54 net shall be realized, without charging for the personal services of the parties of the second part, nor other charges of second parties, except incurred in suits by the parties of the second part upon the accounts and notes herein conveyed. The parties of the second part shall use due diligence in their collections." The declaration counted upon this agreement, and sets out no subsequent modification or waiver of its terms. On the trial the plaintiff sought to recover by showing that he had dealt with the accounts as men of ordinary business judgment would, and also sought to show that the defendant had, as to a large portion of the accounts, directed the plaintiff as to what he would require as evidence of due diligence, and that the plaintiff had complied with the demands of the defendant in this regard.

1. The circuit judge construed the original contract as amounting to a guaranty of collection, and held that no showing of diligence was sufficient which did not include proof that the accounts had each been put in judgment, and execution had been taken out, and returned unsatisfied. This ruling was unquestionably right, if the proper construction was placed on the contract. *Bosman v. Akeley*, 39 Mich. 711; *Schermerhorn v. Conner*, 41 Mich. 374, 1 N. W. Rep. 955. It is contended, however, that the contract in question should not be construed as a guaranty of collection of each individual account, requiring resort to legal process in the collection of each, but amounted to a warranty and representation that there should be realized \$29,702.54 from the total of the accounts; and that the fact that the amount guaranteed to be realized was much less than the face of the accounts negatives the idea that resort should be had to suit upon each account. The infirmity of this construction is that it ignores the subsequent language, "The parties of the second part shall use due

diligence in their collection," or accords to this language a meaning at variance with the settled significance of the terms employed. What constitutes due diligence is settled by the cases of *Bosman v. Akeley* and *Schermerhorn v. Conner*, *supra*. In the case of *Ralph v. Eldredge*, 58 Hun, 203, 11 N. Y. Supp. 840, a similar question was presented. Plaintiff and defendant were copartners. Defendant conveyed his interest to the plaintiff in notes, accounts, and demands owing to the firm. The defendant at the same time executed to the plaintiff a bond with the condition that defendant should pay to the plaintiff one-half of the notes, accounts, and claims of the late firm assigned by Eldredge to plaintiff that should prove to be uncollectible, if any such there be. The court say: "It seems to be settled in this state that a guaranty of collection is an undertaking to pay the sum of money guaranteed, provided the principal debtor is prosecuted to judgment and execution with due diligence, and the same cannot be collected of him. The plaintiff urges that the bond does not guaranty the collection of these claims, but is only a contract to pay plaintiff one-half of the amount of those which turn out bad. But the bond uses the word 'uncollectible,' and the question must be, what is the legal meaning of that word? The word has a definite meaning, as decided in the cases above cited; and that meaning should be enforced here." The legal signification of the term "due diligence," as applied to a guaranteed note or account, is well understood, and the parties must be assumed to have contracted with reference to that meaning.

2. The court rightly held that the alleged subsequent waiver could not be shown under the pleadings in this cause. The contract itself having fixed upon the plaintiff a specific duty, the averment in the declaration that the plaintiff did use due diligence amounted, in effect, to an averment that he had pursued the course which the law imposes upon him in order to charge the guarantor. If he relied on any excuse for failing to use due diligence, this should have been counted upon in the declaration. *Aldrich v. Chubb*, 85 Mich. 359. Judgment affirmed, with costs. The other justices concurred.

McCAHILL v. DETROIT CITY RAILWAY. (Supreme Court of Michigan. June 23, 1893.)

NEGLIGENCE—DEATH OF CHILD—DAMAGES—INSTRUCTIONS.

1. In an action against a street-railroad company for alleged negligence causing the death of plaintiff's infant child, who had gotten on defendant's car without permission, plaintiff testified that he had warned the child to keep off the cars, and had punished him on finding that he did get on the cars, but there was no evidence that plaintiff explained the danger to the child. *Held*, that it was error to charge that, if "the boy knew what his father meant when he warned him not to go on the

cars, then he was not entitled to the same degree of care as an innocent child who goes upon a car without warning."

2. In an action for negligently causing the death of plaintiff's child the court said, during the trial: "I don't see what damages the parents would suffer for the death of a child 6 years of age. You are entitled to their services until they are 21, but it costs a great deal more to raise them than they can suffer." *Held*, that such remark was reversible error, as the value of the child's services, less his care and support, was a question for the jury.

Error to circuit court, Wayne county; Cornellus J. Reilly, Judge.

Action by John K. McCahill, administrator of the estate of James R. McCahill, deceased, against the Detroit City Railway. There was a judgment for defendant, and plaintiff brings error. Reversed.

William Look and H. F. Chipman, for appellant. Sidney T. Miller, (John C. Donnelly, of counsel,) for appellee.

McGRATH, J. Plaintiff's intestate, a boy 6 years, 11 months, and 10 days old, was run over and killed by one of defendant's cars. Defendant operated a street railway on Trumbull, Howard, Seventh, and Congress streets, in the city of Detroit. A one-horse car was being driven east on Howard street, between Eighth and Seventh streets. The Seventh street track is used in common by the Baker street line. The driver stopped his car before reaching Seventh, and ran forward to see if there was a Baker street car coming north, and, finding none, returned to his car, and found the boy on the front platform of the car. The driver started his car, turned south on Seventh, and the boy was run over just south of Lafayette avenue, a little over one block from Howard street. The driver, upon his direct examination, stated that when he returned to his car, on Howard street, he told the boy to get off; that the boy said he would get off when he got around the curve, meaning the curve at the corner of Howard and Seventh; that the boy did not get off when the car had passed the curve; that when the car reached the south crossing he slackened the car very near a stop, and told the boy to get off, but the boy made no move, and "when I got over the crossing, a little ways, I stopped the car to a dead, and told him he must get off. At that he stepped off. I started the car off, letting the brake off, and it didn't go more than four feet before I felt a jar, or the car going over something. I stopped immediately, and the boy was under it. I don't think I was over a car length, or a car and a half, over the Lafayette crossing, when I stopped the car." On cross-examination the attention of the witness was called to his testimony taken at the coroner's inquest, in which he stated that: "He didn't get off that time, and waited until I got over the crossing, and I slackened down again, going very slow; and I told him he would have to get off, or get me into trouble. So I

stopped the car, but he got off before I could stop it. The car was then going very slow, nearly at a stop, when he got off, and got on his feet backwards, and let go." Other testimony tended to show that Fort street was considerably lower than Lafayette; that the accident occurred near the alley south of Lafayette, or about 60 feet south of Lafayette. A passenger upon the car testified that the car did not stop after leaving Howard street, until after the accident; that he saw the boy get off the car; that just after the boy stepped off the car he noticed the car going over something; that he heard "them speaking" just as the boy got off, but could not tell what was said. Another witness stated that she saw the accident; that she heard the driver tell the boy to get off; that the car was going at the time he told the boy to get off, and when the boy got off.

The boy did not fall off because allowed to remain on the platform. There was no evidence tending to show that he was merely permitted to get off the car, or that the driver was guilty of only a careless disregard of the boy's presence on the car. Even if it were true that the driver was applying the brake to stop the car so as to allow the boy to get off, and the boy, without being ordered so to do, and without waiting for the car to stop, jumped off, the driver having no reason to expect that he would do so, it does not follow that the driver was guilty of negligence. The same result might have followed if he had been riding in the car box. This boy was less than seven years of age. He had not jumped upon the car while it was in motion. He was on the front platform of the car, beside the driver, to the driver's knowledge, when the car started. He had been permitted to ride for some distance. Having permitted him to remain upon the car, the driver had no right to expect him to get off, or to compel him to get off, or to order him to get off, without giving him an opportunity so to do with safety. Even the refusal of an adult to pay his fare would not authorize the conductor to eject him from a moving car. Here, the permission extended to a mere child must be held equivalent to an invitation, so far as the degree of care which defendant was bound to exercise was concerned. As is said in *Powers v. Harlow*, 58 Mich. 507-515, 19 N. W. Rep. 257: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with a duty of care and caution towards them, must calculate upon this, and take precautions accordingly." Even upon the driver's own testimony, he had ordered the boy from the car three times: First, before the car started, when the boy told him he would "jump off" after the car passed the curve; second, at the south side of Lafayette, while the car was moving; and, third, at the time that the boy did jump off. There was testimony tending to show that when he was

ordered off the third time the car was at a standstill; but a passenger upon the car, and a witness who was upon the sidewalk, and who saw the boy, and heard the driver order him off, say that the car was moving. The question of merely permitting the boy to get off was not the negligence which plaintiff's proofs tended to disclose. The second count of the declaration alleged that the boy had been put off, or ordered off, while the car was in motion, and there was proof tending to establish that allegation. The jury should have been directed to that question. The charge of the court that, "if the boy knew what his father meant when he warned him not to go on the car, then he was not entitled to the same degree of care as an innocent child, who gets onto a car without any warning," was clearly erroneous. The father of the boy testified that he had "warned the boy not to be jumping on the cars; to keep off the cars, and away from them; and that he punished him when he found that he did go there." There was no testimony tending to show that he explained the danger and risk to the boy. He simply threatened to punish him if he did it, and he probably meant what he said. It was a question for the jury whether the driver was negligent if he ordered the boy to get off while the car was in motion, or whether he should have first stopped the car, and then ordered the boy to get off.

While plaintiff was upon the stand the court said: "I don't see what damages the parents would suffer for the death of a child six years of age. You are entitled to their services until they are 21, but it costs a great deal more to raise them than they can suffer." The questions of plaintiff's damage, and the value of decedent's services less the expenses of care and support, were questions for the jury, and not for the court.

It was suggested upon the hearing that judgment had not been entered when the writ of error was sued out. The writ issued February 24, 1892, returnable March 29, 1892. The bill of exceptions was settled in March. Judgment was entered April 8, 1892. The time for the return to the writ of error was extended to May 5, 1892, and the return was filed here April 21, 1892. Two full terms had intervened before the hearing, and no motion to dismiss was made. The objection comes too late. The judgment affected is that appearing in the return. The judgment is reversed, and a new trial awarded. The other justices concurred.

BUTLER v. IRON CLIFFS CO.

(Supreme Court of Michigan. June 16, 1893.)

SPECIFIC PERFORMANCE—PAROL EVIDENCE OF CONTRACT.

Complainant wrote defendant iron company, asking the price of certain land. Defendant replied, stating certain prices, which were accepted. Prior to this correspondence,

defendant had written that, if a sale was effected, the usual mineral rights would be reserved. There had been, also, several conversations with defendant's president, in which the same statement had been made, and in which complainant's attention had been called to the form of deeds used by defendant. Complainant did not deny these conversations, but insisted that nothing was said about including stone in the reserved rights. The deed handed complainant, however, contained such reservation. Complainant, instead of having it altered, gave his check for the amount, and said merely that he would write defendant about it. *Held*, that the letters and evidence as to the conversations were properly admissible in an action to compel the making of a deed without the reservations.

Cross appeals from circuit court, Marquette county, in chancery; John W. Stone, Judge.

Bill by William O. Butler against the Iron Cliffs Company for specific performance. Decree, from which both parties appeal. Reversed.

The other facts fully appear in the following statement by LONG, J.:

It is alleged in the bill of complaint: (1) That the defendant was the owner of certain lands situate in Marquette county, and, being disposed to sell the same, addressed a written communication to complainant, September 19, 1891, containing a proposition to sell the same, specifying the price per acre. (2) That the complainant, on October 17th, following, accepted such proposition by writing, and on October 19th, he received a telegram from the president of defendant company, saying: "Will send deed to-morrow." (3) That the aggregate purchase price specified in the proposition was \$28,200, which was paid to defendant. Complainant therefore charges in the bill that by these means a contract of sale was made and concluded between the parties for the land. The answer admits the letter of September 19th, the answer thereto, and telegrams, but avers that this letter was but one of a series of letters passing between Mr. Butler and Mr. Mather, president of the defendant company, on the subject in question; that the letters themselves had been preceded by three conversations between the parties relating to the same subject; that the purpose of the September 19th letter was only to fix a price, the fact that any deed, if given, would contain the reservations mentioned, being fully understood between the parties; that all the letters and conversations must be taken together to ascertain the meaning of the transaction; that complainant Butler well knew this fact, and construed the letter of September 19th accordingly. (2) That it was expressly understood, both in these prior conversations and letters between Mr. Butler and Mr. Mather, that any deed, given by the defendant, of the land in question must contain reservations saving and reserving to defendant forever all metals, ore, and minerals, and all slate, sandstone, limestone, granite, marble, and other rock or stone valuable for building purposes.

with the right to dig, mine, and quarry the same, etc., and to use so much of the land for that purpose as was necessary, and also a reservation of a right of way for railroads across the premises; and that the letter of September 19th, counted upon by the bill as a proposition of sale, was written by Mr. Mather with this distinct understanding. (3) That, in the conversation referred to in the letters, Mr. Mather carefully and fully explained to Mr. Butler the nature of the reservations which would be included in any deed made by the company as above set forth, and that these reservations were the usual reservations contained in deeds given by the Iron Cliffs Company in the form used by it; that Butler expressly stated in such conversation that he understood that any conveyance made by the company would contain these reservations, and all of them, and he further stated that he would purchase the lands subject to such reservations; that the letter of September 19th was itself a reply to a letter written by Butler, dated September 3d, regarding the same subject, and containing a request for an offer of the lands in question at some price for which the defendant company would be willing to sell the lands, and in which last-mentioned letter, also, the factor of price was the only one discussed; that this letter of September 3d written by Mr. Butler was of itself a reply to the letter written by Mather, of August 31st, in which the reference was again made by Mr. Mather to reservations, and that no exceptions were taken by Butler, in any of the correspondence previous to the payment of the money and the tender of the deed, to the reservations proposed by Mr. Mather, and mentioned in the August 31st letter; that, before Butler delivered his certified check for the purchase price, he was shown the form of deed which he would receive, which form was the usual form used by the Iron Cliffs Company; and contained all the reservations mentioned, and, after having examined this form of deed, Butler thereupon handed to the messenger the check for the purchase price. (4) The answer positively denies the making of any such contract as that alleged in the bill and the power of Mather to make the same, and denies the making, or the power to make, any other contract for sale than one containing the reservations mentioned. The proofs were taken in open court, and a decree entered finding the contract between the parties did not reserve the rock and stone or the railroad right of way, and directing that the defendant execute and deliver to complainant a deed containing the usual covenants of warranty, conveying to complainant the lands mentioned, excepting and reserving to the defendant forever all metals, ores, and minerals in or upon said land, together with the continuous right to enter said lands and explore for, mine, smelt, and refine all such

ores and minerals, and to remove and dispose of the same. Complainant was awarded costs. From this decree both parties appeal.

Ball & Hanacom, for complainant. Sherman, Hoyt & Dustin and Hayden & Young, (James H. Hoyt and George Hayden, of counsel,) for defendant.

LONG, J., (after stating the facts.) The court below, while admitting the oral testimony on the hearing, refused to consider it in determining what the contract between the parties was. From the testimony of Mr. Mather, president of the defendant company, it appears that some time in August, 1891, complainant called upon him at his office in Cleveland, and wanted to buy these lands, and was advised that the company did not want to sell them. Butler called again the next day, and renewed the conversation, when he was advised by Mather that he was not prepared to take the matter up, but would consult with his people about it. That soon after, and during the same month, he met the complainant at Marquette, when he again asked if the defendant would sell the land, and wanted to know if the company would consider a proposition of \$10 per acre, and was advised that, on returning home, Mr. Mather would consult his people, and write him. During some of these conversations Mr. Mather advised complainant that all the company's deeds of these lands contained mineral reservations, and that, if a deed was executed, "it would contain our usual mineral reservations, which included all stone." Mr. Mather further testified that the form of their deeds for many years had contained the reservations contained in the deed to complainant, except right of way to railroads, and that he told complainant that this was the usual form of their deeds, and that, in addition to this form, the company had recently decided to also insert a reservation giving defendant the privilege to grant rights of way to railroads, and that complainant then said he understood that; that he then advised complainant he had better look at the form of the deeds and examine them. Mr. Mather further testified that he never had any authority from the company to make a deed of the lands except upon the form contained in the deed in question. This deed contains this reservation: "Saving and reserving, however, unto the said party of the first part, and to its successors and assigns, forever, all ores and minerals, and all slate, sandstone, limestone, granite, marble, and other stone or rock valuable for building or other purposes on or beneath the surface of said lands, or any portion thereof, together with the right of way to enter upon said lands, and to explore therefor, and to mine, smelt, and refine such ores and minerals, and to quarry and dress such stone or rock, to remove the same, and for that purpose to erect or construct

or maintain all such buildings, machinery, roads or railroads, sink such shafts, remove such soil, occupy as much of said lands, and use and direct such streams or ponds or water thereon, as may be necessary or adequate to the successful prosecution of such business." It appears that a subsequent clause in reference to the use of the lands for railroad purposes and the right of way over the lands for those purposes was contemplated to be inserted in those deeds, but was not in the form of deeds in use at that time. This latter reservation is not important, however, in this controversy, as it is agreed that that clause is not now insisted upon. Complainant denied that in these conversations with Mr. Mather anything was said about some of these reservations in the deed. He states that "nothing was said about the stone that I remember of. I don't think the word 'stone' ever passed between us. Mr. Mather's statement of the whole proceeding was correct, except as to that one thing in regard to stone and railroads." He was asked what his understanding was in reference to the written proposition of Mr. Mather, and, if he accepted it, what reservations there were of the stone, and answered: "My understanding of it was—in fact, I had really two interpretations in my mind—I thought perhaps Mr. Mather had decided to sell me the land without any reservation, or I thought he proposed to sell the land with mineral reservation, as we had talked before. I thought it might be one way or the other. I was willing to accept it upon the basis of the proposition." It appears that complainant wrote Mr. Mather on September 8, 1891, asking prices of certain lands which he described. This was answered by Mr. Mather on the 19th, giving him prices on certain sections, as follows: "In reference to our lands in Marquette county, our people are not willing to give an option on them to you, but they will place the following prices at which they are willing to sell them for cash. We will not change those prices during the next thirty days, and during that time we will give you the first chance at them. We will sell our lands in sec. 32 at \$10 an acre; in sec. 33 at \$100 an acre,—town 49, range 25. In sec. 10 at \$40 an acre; in sec. 15 at \$50 an acre,—town 48, range 25. Iron Cliffs Company. By Wm. G. Mather, President." This was answered on October 5th by complainant, and in which he expressed surprise at the prices, but asked that he might have time to secure other lands to combine with them to bring the average price lower. On the 13th he again wrote Mather, accepting the proposition of September 19th, stating: "I will take all the lands described in that letter, and at the prices named therein. Please make warranty deed or deeds conveying said lands to Wm. O. Butler, Marquette, Mich., and forward same to J. M. Wilkinson Bank, at this city, together with draft on me

for amount of purchase price," etc. He also wired acceptance of the proposition, to which Mr. Mather wired back: "Telegram received; will send deed to-morrow." Prior to any of these written communications, and after the talk between the parties in reference to these lands, in compliance with Mr. Butler's request, Mr. Mather wrote him under date of August 31, 1891, that later, talking with his people, he found them quite indifferent to selling, especially at the price talked. In this letter Mr. Mather stated: "You understand, of course, that in all our sales we always reserve the usual mineral rights." It appears after the telegram and letter of acceptance from Mr. Butler of the terms offered, and on October 20th, Mr. Mather forwarded the deed of conveyance to the bank at Marquette, at the same time writing Mr. Butler that he had done so. In this letter he advised Mr. Butler about the reservations contained in the deed, as follows: "The reservations contained in the deed are as I told you they would be,—the reservation of all stone and minerals, and the right to explore and mine; also the reservation of the right to grant rights of way to railroads." A copy of the deed was sent Mr. Gibbs, agent of the defendant company, to show Mr. Butler. He met Mr. Butler, showed him the form of the deed, and Butler said that it was a little different from what he had talked with Mr. Mather, but he would write Mr. Mather about it. He then made out his check for the amount of the purchase, \$28,200, and gave it to Mr. Gibbs for the company, and taking the deed. It appears that Mr. Butler then wrote Mr. Mather, claiming that the reservations in the deed as to the stone should be stricken out, and a new deed given, not including the reservation of the stone and right of way for railroads. The defendant company agreed upon striking out the reservation in reference to the right of way for railroad purposes, but refused to strike out the ones in reference to the stone, claiming and insisting that these reservations had been agreed upon.

We think the court below was in error in refusing to consider the oral testimony in the case. The contract, if any was made in reference to the sale of the lands, was made up of these conversations, and the letters and telegrams passing between the parties. It is evident that Mr. Mather, in these several conversations, meant to convey the idea to complainant that the company, if they made a sale, would reserve all minerals that had been usual to reserve in their deeds. He called especial attention to the form of deeds which the company used, and advised complainant it would be well for him to look into these forms and examine them. Mr. Butler does not deny that this conversation was had, but says nothing was said about the reservations of stone. When examining the copy of deed handed him by Mr. Gibbs, he saw that there was a reservation in ref-

erence to stone, and yet gave his check, certified by the bank, for the whole amount of the purchase. From these conversations, and the letters and telegrams passing between the parties, and the conduct of Mr. Butler in receiving the deed, and paying for the lands, before the alterations were made which he claims, it appears to us that the only construction which can be given to the contract is that the stone was a part of the intended reservation, and so understood by the parties to the transaction, and that the form of the deed given met all the requirements of the contract, except was is conceded in reference to the railroad right of way. The letter of August 31st apprised the complainant that there would be a reservation of the usual mineral rights. This had been explained by Mr. Mather in the conversations at Cleveland and Marquette, and he had called the attention of complainant to the form of deeds used. These deeds had always contained these reservations, and Mather advised complainant to examine their form. It has been repeatedly held in this court that, where the contract is made by correspondence, the intent of the parties must be gathered from the whole of the correspondence. *Francis v. Barry*, 69 Mich. 313, 37 N. W. Rep. 353. The letters alone in this case did not contain the whole understanding of the parties, which must be interpreted with the aid of the oral testimony. The letter of August 31st is a part of the correspondence, and the expression of the "usual mineral rights," which were to be reserved, could only be explained by what had gone before in the oral conversations in reference to the form of deeds used. These rules have long been settled in this state. *Loud v. Campbell*, 26 Mich. 239; *Richards v. Fuller*, 37 Mich. 161; *Phelps v. Whitaker*, 37 Mich. 73; *Bailey v. Cornell*, 66 Mich. 107, 33 N. W. Rep. 50. This rule is stated by Jones on the Construction of Commercial and Trade Contracts (section 134) as follows: "The test of the completeness of the writing proposed as a contract is the writing itself. If this bears evidence of careful preparation,—of a deliberate regard for the many questions which would naturally arise out of the subject-matter of the contract,—and if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract. In every case, therefore, the writing must be critically examined in the light of its surrounding circumstances, with a view of determining whether it is a memorial of the transaction." In this view of the case we need not discuss the question of the power of Mr. Mather to make a deed other than in the usual form used by the

company of which he was president. It is admitted that he had power to make the usual form of deed, and it was so made. We are satisfied that, taking the whole transaction as shown by the oral testimony and the letters, it was clearly understood what the reservations were to be, and that they are properly set out in the deed tendered by the defendant company. The bill is filed for specific performance of contract, and, it appearing that the deed tendered meets what the parties had agreed upon, the bill should be dismissed with costs. The decree of the court below must be reversed, and a decree entered here in accordance with these views. The other justices concurred.

CARLISLE v. CARLISLE.

(Supreme Court of Michigan. June 16, 1893.)
DECREE OF DIVORCE — PROCEEDINGS TO VACATE
AFTER MARRIAGE OF COMPLAINANT — NOTICE TO
SECOND WIFE.

Where, after obtaining a decree of divorce by default, complainant remarries, and defendant has knowledge of that fact, to entitle the latter to institute proceedings to vacate the decree because of a misnomer of defendant it is proper to require notice of such proceedings to be given the second wife.

Appeal from circuit court, Wayne county, in chancery; George S. Hosmer, Judge.

Bill for divorce by William N. Carlisle against Ella Carlisle. Complainant had decree, which was subsequently set aside. Anna E. Carlisle, the second wife, intervened, and on her petition the order vacating the decree was set aside, and from this order defendant appeals. Affirmed.

Ervin Palmer, for appellant. Sylvester Larned, for complainant. E. H. Sellers and Alfred Lucking, for executor of estate of Anna E. Carlisle.

MCGRATH, J. A divorce was granted in the Wayne circuit court in chancery between the parties, February 26, 1887. In May, 1891, defendant filed her petition to set aside the decree, alleging as the sole ground that the proceedings were commenced, and the order for appearance published, and the decree entered, against Ellen Carlisle, whereas defendant's name is Ella Carlisle. No opposition was made to the application, and, in June following, an order was entered vacating the decree. In August following, by stipulation the proceedings were discontinued. In January, 1892, Anna E. Carlisle appeared before the court, and set forth that in March, 1887, she had married the complainant, and had lived with him as his wife until November, 1890; that at that time they separated; that in December, 1890, William N. Carlisle had filed a bill for divorce in the Wayne circuit court in chancery against her, and that the proceeding for divorce was still pending. The court then made an order requiring complainant and defendant to appear on a day

named, and show cause why the order vacating the decree should not be set aside, and the stipulation stricken from the files. After a full hearing the court made an order restoring the decree, and striking the stipulation from the files, but ordered, also, that said defendant have leave, if she so elect, to bring her petition for leave to answer to a hearing upon first giving 20 days' notice to Anna E. Carlisle to come in and answer said petition, and show cause why the prayer thereof should not be granted. From this order defendant appeals.

It appears from the record that for four years defendant had known of the granting of the divorce, and of complainant's intermarriage with Anna E. Carlisle. Complainant and defendant had separated in 1886. She had gone west, taking with her a son, the issue of the marriage. In August, 1888, she was in Detroit, and an order to show cause why she should not deliver the boy over to the custody of complainant, in accordance with the decree, was served upon her, and she made an agreement with complainant with reference to the boy. The order served upon her ran against her as Ellen Carlisle. It is also apparent from the record that the proceedings to vacate the decree was instituted at the instigation of complainant. In the divorce proceeding instituted by William N. Carlisle against Anna E. Carlisle, an adjustment of the question of alimony had been made. William N. had conveyed to Anna E. the homestead and certain personal property. Defendant resided in Wisconsin. Her petition to set aside the decree and her answer to the order to show cause are sworn to in that state. She did not appear in person at either hearing, nor does it appear that, since the vacation of the decree, complainant and defendant have lived together. The solicitor who appeared for complainant when the decree was vacated appeared for defendant in the subsequent proceeding, and appears here for appellant. Although for four years defendant had known of the remarriage of complainant, she omitted all reference to it in her petition, and to that petition no answer was filed. Within two months after the decree was set aside, although grave charges were made against her in the testimony upon which the divorce was granted, a stipulation was filed, discontinuing the divorce case. There is no longer any doubt of the power of a court of equity to set aside its own decree of divorce for fraud in its procurement, or for want of jurisdiction, on the application of the party against whom the decree was obtained; and this, although the other party may have remarried, and children may have been begotten. *Edson v. Edson*, 108 Mass. 590; *True v. True*, 6 Minn. 458, (Gil. 315); *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Adams v. Adams*, 51 N. H. 388; *Everett v. Everett*, 60 Wis. 200, 18 N. W. Rep. 637; *Caswell v. Caswell*, 24 Ill. App. 548; *Allen v. Maclellan*, 12 Pa.

St. 328; *Stephens v. Stephens*, 62 Tex. 337. But the decree cannot be avoïded by the party guilty of the fraud, (*Simons v. Simons*, 47 Mich. 253, 10 N. W. Rep. 360); nor at the instance of third parties, (*Baugh v. Baugh*, 37 Mich. 59); nor can a party who obtains the divorce, and accept its benefits, afterwards question the jurisdiction of the court granting it, (*Ellis v. White*, 61 Iowa, 644, 17 N. W. Rep. 28; *Kile v. Yellowhead*, 80 Ill. 208; *Morriss v. Garland*, 78 Va. 215; *Embry v. Palmer*, 107 U. S. 8, 2 Sup. Ct. Rep. 25.) This is not, however, an application by a third party to set aside a decree of divorce. The order appealed from was an order setting aside an order obtained upon a petition filed evidently by collusion with complainant, and which concealed from the court a fact of which the court should have been advised; an order which made Anna E. Carlisle an adulteress, and affected, and was probably calculated to cut off, rights of property. Ordinarily the rights of the second wife are fully protected by the husband, who appears and makes known the remarriage. Here the husband made no defense. To hold that in such a case the second wife, who had in good faith relied upon the decree sought to be set aside, was not entitled to notice, and had no right to intervene, would be rank injustice. In *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. Rep. 341, plaintiff brought an action to annul a decree of divorce rendered in 1879, between herself and husband, who died in 1885, and it was held that Pauline Ganner, who married the deceased immediately after the decree of divorce, was a proper party defendant. The case of *Zoellner v. Zoellner*, 46 Mich. 511, 9 N. W. Rep. 831, was a proceeding of like character, where the petition was filed after the death of the husband, and eight years after the decree was made. Mr. Justice Graves, speaking for the court in that case, says: "Nothing is now involved except property. The sole motive of the petitioner in assailing the judicial proceeding which purported to sever her connection with the deceased complainant is to get, through a kind of post mortem adjudication, a share of the property he left. The defects in the proceedings which are now set up were open to detection by the least attention to facts which must have been obvious to her, and the notice from her husband, and the surrounding circumstances with which she was intimate, were urgent calls upon her to look into the proceedings. In short, if her present explanations are correct, the facts of which she had full knowledge implied conclusively that the decree was a fraud, and there is no reason to suppose that she was not then as eligibly situated to take action as she is now. The proceeding is consequently subject to the proposition that the public peace and good order are concerned in withholding the assistance of equity from those who grossly neglect to take care of their own rights." This is not an attempt to comp-

a husband and wife to live together, but it is the right of a party who, relying upon the decree of a court of equity, has in good faith entered the marriage relation, and has acquired rights of property, to be heard in a proceeding instituted in the name of the party who had for four years known of the divorce and of the remarriage, and made no sign, who does not excuse the delay, and whose skirts are tainted with a strong suspicion of collusion with the party procuring the divorce, who cannot be heard to question the proceeding. The right of a court of equity to purge its own records of an order obtained by a fraud upon it is involved here. This order was entered upon an ex parte affidavit to a petition, the only ground being the use of the name "Ellen," instead of "Ella," in proceedings instituted by the husband, who had lived with her for 16 years, and must be supposed to have known by what Christian name she was known. A hearing should have been had upon that question before a subsequent marriage should have been invalidated.

It is urged here, however, that the order for appearance fixed the time at five months, whereas proof of publication was filed, and the order pro confesso entered, after four months, and twenty-four days before the expiration of the time named. This point was not made in the court below. Here, again, are we confronted with peculiar circumstances. Although this is the second petition filed by defendant, in neither was the question raised. The statute provides that in such case the order shall require the defendant to appear and answer "in not less than four months." The order was published for the required time, and proof of publication duly made. The order pro confesso was upon a three-months printed blank. The printed word "three" was twice stricken out, and the word "four" written in in each instance. The order as published, a printed copy of which appears attached to the affidavit of publication, fixes the time at five months, but, by reference to the original order for appearance signed by the circuit judge, it appears that the order was originally written "four months," but at some time the word "four" has been converted into the word "five," evidently with a different pen and ink, if not by a different hand. Whether this was done before the publication, or after the discovery of an error in the publication, does not appear. The situation suggests the most careful examination before an order is made vacating the decree. In any case where a petition is filed after such a lapse of time, it should affirmatively appear what change, if any, has taken place in the status of the parties, and, when a decree has been followed by the marriage of one of the parties, the court should see to it that interests of the innocent third party are fully protected, and, when no opposition is made by the party to the record, the court should give

to such third party an opportunity to be heard. The order of the court below was right, and is therefore affirmed.

MONTGOMERY, J., concurred in the result. The other justices concurred with MCGRATH, J.

PEOPLE v. MILLER.

(Supreme Court of Michigan. June 16, 1893.)

RAPE—EVIDENCE—ASSAULT WITH INTENT.

1. Where a person is charged with the crime of rape, and the evidence shows a complete sexual intercourse, a conviction of assault with intent to commit rape is not inconsistent with the charge, as such assault is a necessary incident to the commission of the crime.

2. The word "child," as used in 3 How. Ann. St. § 9004, which provides that if any person shall unlawfully and carnally know and abuse any female child under the age of 14 years he shall be punished, includes every female child under the age of 14 years, whether or not she has reached a state of puberty.

Error to circuit court, Clare county; Henry Hart, Judge.

Warren Miller was convicted of assault with intent to commit rape, and brings error. Affirmed.

Geo. J. Cummins, (W. W. Green, of counsel,) for appellant. A. A. Ellis, Atty. Gen., and W. A. Burritt, Pros. Atty., for the People.

HOOVER, C. J. The defendant was convicted of assault with intent to commit rape upon a girl of less than 14 years of age. The proof consisted of testimony from the girl, who unequivocally testified to the completed act of sexual intercourse, testimony from a physician, showing an examination and rupture of the membrane, testimony of one or two witnesses to admissions on the part of defendant to the effect that he had intercourse with the girl on the occasion charged, and testimony that she was at the time below the age of 14 years, and that she had been subject to menstrual periods for a year. The defendant was sworn, and denied seeing the girl upon the occasion charged. The errors relied on are as follows: (1) That the court charged the jury that the defendant might be convicted of rape, of assault with intent to commit rape, or of simple assault; (2) that, defendant having denied the transaction, the jury should have been charged that there must be some testimony corroborating that of the girl, or the verdict must be not guilty; (3) that the jury should have been charged that if the girl had reached the age of puberty, although under 14 years of age, she was no longer a "child," within the meaning of the statute; (4) that the jury should have been directed to return a verdict for the defendant because the girl had reached the age of puberty. It is true that upon this record the proof upon one side shows the completed act of sexual intercourse with a girl under

the age of 14 years, while upon the other a denial of any offense is made. Under such proof it cannot be denied that a verdict of assault with intent to rape is illogical. But an assault with intent to commit rape is necessarily included in every rape. The defendant's counsel are alleging, not an injurious error, but one which, if it could be called an error, has resulted in defendant's advantage. In the case of *Hall v. People*, (Mich.) 11 N. W. Rep. 414, this question was passed upon, and the omission to charge the jury that the defendant might be found guilty of the lesser offense was held to be error, in just such a case as this. See, also, *State v. Shepard*, 7 Conn. 56; *Com. v. Cooper*, 15 Mass. 187. The case of *People v. Partridge*, 86 Mich. 243, 49 N. W. Rep. 149, cited by counsel, differs from this case in this: That the offense of assault "without intending to commit the crime of rape" could not be said to be included in the offense of rape, but, on the contrary, was at variance with such offenses. The charge of the court is not given, and we have no means of determining what, if anything, was said to the jury upon the subject of corroboration, and, while the request of defendant's counsel was refused, we cannot assume that the subject was not properly treated in the charge. We do not intend to imply that the court should have given the request in substance, for we are not prepared to say that convictions in rape cases cannot be based upon the uncorroborated testimony of the woman assaulted. We see no reason for holding that the rule of the common law is changed by permitting the defendant to testify, and believe that the question of credibility can be safely left to the jury. As a matter of fact there were corroborating circumstances in the case.

The remaining question is without merit. The statute (3 How. St. § 9094) provides that, "if any person shall unlawfully and carnally know and abuse any female child under the age of fourteen years, he shall be punished," etc. It is contended that the victim must not only be under the age of 14 years, but must be a child, i. e. must not have reached the age of puberty. We cannot assent to such a doctrine. The legislators who voted for this law must have known that puberty in females is common before the age of 14. There is nothing to indicate that the age of puberty was intended to have any bearing upon the subject. We find no error in the record, and the judgment will be affirmed. The other justices concurred.

DUTCHER v. BUCK.

(Supreme Court of Michigan, June 23, 1893.)

PARTNERSHIP—EVIDENCE.

Defendant entered into a contract with one L. by which L. was to go on defendant's

land, cut logs and bolts, market the same, receive the proceeds, pay the expenses of the undertaking, and pay defendant \$1 per 1,000 stumpage, and 25 cents per cord for bolts. L. was to have \$20 a month for his services, and his wife was to have \$3 a week for boarding the men. The balance of the proceeds of sales were to be divided equally between defendant and L. as profits. *Held*, that defendant and L. were partners in such undertaking, and that defendant was liable for debts incurred by L. in its performance. *Montgomery and Hooker, JJ.*, dissenting.

Error to circuit court, Kent county; William E. Grove, Judge.

Assumpsit by George W. Dutcher against Eli S. Buck. There was a judgment for defendant, and plaintiff brings error. Reversed.

Earle & Hyde, for appellant. Birney Hoyt, for appellee.

McGRATH, J. This is assumpsit, originally brought in justice's court, for work and labor. The court below made the following findings: "In the spring of 1889 the defendant was the owner of 840 acres of land in Charlevoix county, in this state. About the 6th of March, 1889, he made the following agreement with one Arthur Leclear: The said Leclear was to go on the defendant's land, and cut logs and bolts, and market and sell and receive payment for the same. He was to pay the expenses of the job, pay the defendant \$1.00 a thousand stumpage for logs, and 25 cts. a cord for bolts. He was to furnish the use of a team, and defendant was to furnish the use of a team. Leclear was to have \$20 a month for his services, and his wife was to have \$3 a week for her services in boarding the men, and what was left was to be divided equally between defendant and Leclear as profits. The stumpage was to be paid first, and then the expenses of the job, including the pay of the men, were to be paid by Leclear; after that he and his wife to receive above amounts, and balance, if any, divided as above. It was agreed at any time when Leclear could not, from the proceeds of the logs and bolts, pay expenses, he should cease further work under the contract. In the month of December, 1889, the defendant, who lives in the township of Paris, Kent county, Michigan, went to Charlevoix county, and, by a subsequent agreement then made between himself and Leclear, he sold the logs and bolts thereafter for that winter, and collected the pay for the same, and paid all the expenses of the job, including the men, out of such money, (the subsequent agreement modified the original agreement only as stated;) and on the 6th of March, 1890, gave orders to the men upon the railroad station agent for the balance of their wages then due for the winter's work, signing the orders with his own name. In May, 1889, the plaintiff, who lives in Byron, Kent county, Michigan, and whose sister was the wife of said Arthur Leclear, went to Charlevoix

county, and was employed by Leclear to work on the job. The plaintiff is a deaf-mute of the age of twenty-six years. He was told by Leclear that he was to pay him, and that the money to pay his wages was to come from Buck. He worked from that time on until the next March. He was paid by defendant, under the said subsequent agreement, for his work from the time that defendant went to Charlevoix in December, 1889, but his work for the previous summer and fall was not paid for. Defendant did not know that plaintiff was not paid for his summer's work until after his final settlement with Leclear. Leclear received, for logs and bolts sold prior to December, 1889, about \$2,000, none of which were paid to defendant except about \$16 in money, \$20 in road work, and a house, for which Buck allowed Leclear \$300, and a barn, \$25. Buck paid \$104 for supplies for the job at Leclear's request, and this sum, together with the stumpage for the logs and bolts, exceeded the amount received by Buck, as above stated. Said defendant did not, on the 8th of March, A. D. 1890, or at any other time, promise or agree to pay plaintiff for said labor, or any part thereof. I find that there was no partnership in fact between Arthur Leclear and defendant. Said plaintiff was not employed to do said work and labor by the said defendant or for him, but said plaintiff was employed by one Arthur Leclear, and said work and labor was done for said Arthur Leclear. Said Leclear had no authority to hire or employ any person for defendant. Said Arthur Leclear and defendant were not partners in any business, and they did not hold themselves out to the plaintiff, or to the public, or to any one, as partners. I find, as a conclusion of law, that defendant is not liable in this action to pay plaintiff's claim herein, or any part thereof."

Much controversy has arisen over the conclusiveness of profit sharing as to the liability to third persons of such profit sharer. The authorities upon that question are not harmonious, even in our own state. All, however, agree that profit sharing is evidence tending to show partnership. It was held in *Beecher v. Bush*, 45 Mich. 188, 7 N. W. Rep. 785, and in *Colwell v. Britton*, 59 Mich. 350, 26 N. W. Rep. 538, that merely sharing in profits, where third persons have not been legitimately led to believe there was a partnership, does not create one as to them, unless there was one in fact. In both of those cases, however, the party sought to be charged as a partner received a percentage of the proceeds as a measure of compensation,—the one as rental, and the other as commission. Both come within the generally recognized exception to the rule laid down by a large number of authorities, that, as to third persons, profit sharing is conclusive as to liability. *Smith v. Bodine*, 74 N. Y. 30; *Leggett v. Hyde*, 58 N. Y. 278; *Haas v. Roat*, 16 Hun, 527; *Green-*

wood v. Brink, 1 Hun, 227; *Beudel v. Hettrick*, 45 How. Pr. 198; *Vanderburgh v. Hull*, 20 Wend. 70; *Helmsstreet v. Howland*, 5 Denio, 68; *Everett v. Coe*, Id. 180; *Burnett v. Snyder*, 81 N. Y. 550; *Richardson v. Hughitt*, 76 N. Y. 55; *Eager v. Crawford*, Id. 97; *Ford v. Smith*, 27 Wis. 261; *Nicholaus v. Thielges*, 50 Wis. 491, 7 N. W. Rep. 341; *Smith v. Knight*, 71 Ill. 148; *Niehoff v. Dudley*, 40 Ill. 406; *Meserve v. Andrews*, 104 Mass. 360; *Haskins v. Burr*, 106 Mass. 48; *Mollwo v. Court of Wards*, 4 Moak Eng. R. 121; *Ross v. Parkyns*, 13 Moak Eng. R. 834, note, 839; *Ex parte Tenant*, 22 Moak Eng. R. 831; *Colly. Partn.* §§ 170-172; *Story, Partn.* § 27; *Smith v. Watson*, 2 Barn. & C. 401; *Heran v. Hall*, 1 B. Mon. 159; *Bartlett v. Jones*, 2 Strob. 471; *Whitcomb v. Converse*, 119 Mass. 43; *Harvey v. Childs*, 28 Ohio St. 319. It is not necessary to rest the present case upon this naked rule. The court below, undoubtedly recognizing the rule laid down in *Beecher v. Bush*, that the test of partnership as between the parties is their intent, found there was no partnership in fact between Leclear and defendant; but in *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 152-158, 34 N. W. Rep. 556, it is held that as to third persons the liability of a partner is frequently imposed, though it was not the intention of the party sought to be charged to become one, and even though a partnership cannot have been made. Numerous authorities might be cited in favor of this proposition. It is held in *Eastman v. Clark*, 53 N. H. 276, that sharing profits in any other sense than sharing them in the capacity of a principal is not an absolute test of one's liability; that his liability depends upon whether he is a principal, bound by a contract made by himself, or his agent acting by his authority. Justice Bellows died pending consideration of the case, and extracts from his notes are printed with the opinions filed in the case. He said that the recognized test had been announced in various forms as "a community of interest in the profits;" "a participation in the net profits;" "a participation in the profits as profits;" "a specific interest in the profits with the right to an account;" that to constitute a communion of profits the interest in the profit must be mutual,—"there must be a common interest in them as a principal trader, and as distinguished from a right as a creditor to receive a sum of money out of the profits, or a sum proportioned to the quantum of profits, or even a share of the profits as compensation." In *Loomis v. Marshall*, 12 Conn. 69, *Huntington, J.*, says: "This community of profits is the test to determine whether the contract be one of partnership; and, to constitute it, a partner must not only share in the profits, but share them as principal." In *Cox v. Hickman*, 8 H. L. Cas. 268-306, *Lord Cranworth* says: "It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless

in contemplation of law a partner, is whether he is entitled to participate in the profits. This is no doubt in general a sufficiently accurate test, for a right to participate in profits affords cogent—often conclusive—evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When that is the case, he is liable on the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf; i. e. that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." The doctrine of these cases is the groundwork of the opinion of Mr. Justice Cooley in *Beecher v. Bush*, where it is said that the elements of partnership are "community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent, even, of making one the sole agent of the others and of the business." In the present case the agreement was that both parties should be compensated, the one for the timber, and the other for services; each supplied a team of horses; help was to be employed, and the wife was to be paid a certain amount for the board of such help; the timber was to be converted into logs and bolts; Leclear was to market and sell the logs and bolts, and pay the expenses, not only the stumpage and his own wages, and the board of the men, but all the expenses, including the wages of the men. The manner in which the business was to be conducted was regulated by the agreement. Leclear was left no option except such as might be exercised by a mere foreman. In December the only modification made in the agreement was that defendant, instead of Leclear, should market and sell the products, collect the proceeds, pay the expenses, and account for the balance. The character of the venture was not changed. Leclear was none the less agent of both when he was paying out their moneys for labor expended upon their logs and bolts, than was defendant after December. Although the agreement provided that Leclear should pay the expenses, it is evident that such expenses were to be paid out of the proceeds, and the contract provided that, at any time when

Leclear could not from such proceeds pay the expenses, he should cease to work. The only provision lacking in this arrangement is one with reference to joint participation in losses. As between themselves the inference is, if any losses were sustained by an excess of expenses over proceeds, that Leclear should pay such loss. But to constitute one a partner as to third persons, it is not at all necessary that he should agree to share in the losses of the business. *Sager v. Tupper*, 38 Mich. 258-265. It is clear that these operations were carried on in behalf and for the benefit of both Leclear and defendant. When the timber was converted into logs and bolts, such products became the property of both. The labor was expended, reducing the timber to that condition, for the benefit of both, in order that profit might be realized. Upon the sale of the products the proceeds belonged to both. In *Beecher v. Bush* it is said: "If either had failed to perform, the remedy of the other would not have been a suit at law, but a bill for an accounting;" but, in the present case, defendant would certainly have been compelled to resort to the latter remedy. Here were all the indicia of partnership relations, except, perhaps, that defendant was not to share in losses. The business was in no sense Leclear's independent business, carried on by him in his own way. The conduct of the business was restricted and regulated by the agreement. There was community of property, community of interest, and community of profits. The venture was one launched for the benefit of both parties. Both were principals, and what was done for their mutual benefit must be deemed to have been done by authority of both. *Corey v. Cadwell*, 86 Mich. 570, 49 N. W. Rep. 611; *Purvis v. Butler*, 87 Mich. 256, 49 N. W. Rep. 564. The judgment below is therefore reversed, and judgment entered here for the amount of the judgment in the justice's court, with interest from the date of said judgment, and costs of both courts.

LONG and GRANT, JJ., concurred.

MONTGOMERY, J., (dissenting.) The sole question in this case is whether the defendant was, as to the transactions out of which the claim of plaintiff arose, a partner of one Leclear. Among the findings of fact by the circuit judge are the following: "I find that there was no partnership in fact between Arthur Leclear and defendant. Said plaintiff was not employed to do said work and labor by the said defendant, or for him, but said plaintiff was employed by one Arthur Leclear, and said work and labor was done for said Arthur Leclear. Said Leclear had no authority to hire or employ any person for defendant. Said Arthur Leclear and defendant were not partners in any business, and they did not hold themselves out to the public, or to any one, as

partners." The evidence is not returned, and no attempt has been made to present the question of whether the evidence supports the findings. It is insisted, however, that the court may look into the other findings of the facts and circumstances, with a view to ascertaining whether the facts specifically found are conclusively inconsistent with the finding that there was no partnership in fact. The facts so found are the following: "The defendant was the owner of 840 acres of land in Charlevoix county, both the defendant and Leclear being residents of Kent county. An agreement was made in March, 1889, between Leclear and defendant, by the terms of which it was agreed that Leclear was to go on the defendant's land, and cut logs and bolts, and market and sell and receive payment for the same. He was to pay the expenses of the job, pay the defendant one dollar a thousand for stumpage for logs, and 25 cents a cord for bolts. He was to furnish the use of a team, and defendant was to furnish the use of a team. Leclear was to have \$20 a month for his services, and his wife was to have \$3 a week for her services in boarding the men, and what was left was to be divided equally between defendant and Leclear as profits. The stumpage was to be paid first, and then the expenses of the job, including the pay of the men, were to be paid by Leclear. After that, he and his wife were to receive the above amounts, and balance, if any, divided as above. It was agreed that at any time when Leclear could not, from the proceeds of the logs and bolts, pay the expenses, he should cease further work under the contract." This was found to be the agreement under which the operations were proceeding at the time the liability to plaintiff arose. I do not think that this finding is conclusively inconsistent with the finding that there was no partnership in fact between Leclear and the defendant. If the terms of the agreement between the parties are to control the transaction, under no circumstances could Leclear, without violating the agreement, incur expenses which should become chargeable to the parties to the contract as partners. It was specifically agreed that, when Leclear could not pay the expenses, he should cease further work under the contract. The expenses of the job were to be paid by Leclear individually, and by the order of payment the stumpage was to be first paid, and his own and his wife's wages were to be paid only in case there was a surplus after paying the workmen. The general finding imports that the parties did not intend a partnership, and it must be assumed that there was evidence to support this finding.

It is stated in Lindl. Partn. p. 10: "Whether an agreement creates a partnership or not depends on the real intention of the parties to it." See Pollard v. Stanton, 7 Ala. 761; Gray v. Gibson, 6 Mich. 300; Beech-

er v. Bush, 45 Mich. 188, 7 N. W. Rep. 785. It is said, however, that, if parties have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agreement; but a specific agreement negating a partnership may throw light on other clauses, and rebut inferences which might be drawn from them alone. Lindl. Partn. p. 12. Generally, profit sharing is prima facie evidence of an agreement of a partnership, and, in cases where the contrary intention does not appear, undoubtedly evidence of profit sharing is sufficient to constitute the parties copartners. The same author further says: "Indeed, it has often been said that community of profit is the test of partnership. This, however, is not accurate. Whether persons are really partners or not is a question of intention, to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made to turn on one or two only of the clauses in it." In the well-considered case of Beecher v. Bush, it was said: "If parties intend no partnership, the courts should give effect to their intent, unless somebody has been deceived by their acting, or assuming to act, as partners; and any such case must stand upon its peculiar facts, and upon special equities. It is nevertheless possible for parties to intend no partnership, and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise, we should 'carry the doctrine of constructive partnership so far as to render it a trap to the unwary.'" And again, at page 200, 45 Mich., and page 789, 7 N. W. Rep., it is said: "In so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearance of partnership when none exists, he is never to be charged as a partner, unless by contract and intent he has formed a relation in which the elements of partnership are to be found." Partnership is a species of agency, and, where the parties to a contract do not themselves intend a partnership, it would seem, on principle, that the one who is unknown to those who deal with the others should be held only on the same ground that an undisclosed principal would be bound. This would preclude recovery in the present case, or in any case where the right of an ostensible principal to contract

on behalf of the other is negatived by the very terms of the contract; and cases are numerous in which this test has been applied. *Cox v. Hickman*, 8 H. L. Cas. 268; *Eastman v. Clark*, 53 N. H. 276; *Dwinel v. Stone*, 30 Me. 384; *Clifton v. Howard*, 89 Mo. 102, 1 S. W. Rep. 26; *Newberger v. Friede*, 23 Mo. App. 631. See, also, *Morrison v. Cole*, 30 Mich. 102; *Runnels v. Moffat*, 73 Mich. 202, 41 N. W. Rep. 224; *Murphy v. Craig*, 76 Mich. 155, 42 N. W. Rep. 1097. See, also, *St. Denis v. Saunders*, 36 Mich. 370. In the present case the profits, over and above the stumpage and expenses of putting in the timber, were to be divided between defendant and Leclear; but it is distinctly found as a fact by the circuit judge that Leclear did not represent the defendant in doing this work, and the special facts found are not necessarily in conflict with this finding. The whole control of the work was with Leclear. He was to collect all the proceeds of the sales. he was to pay all expenses, must cease work when he was unable to do this, and the facts are entirely consistent with an intent on the part of the parties that the division of the excess was as a measure of compensation for the stumpage value of the timber. I think the finding below should be sustained, and the judgment affirmed.

HOOKER, C. J., concurred with MONTGOMERY, J.

PENFOLD v. WARNER et al.

(Supreme Court of Michigan. June 23, 1893.)

POWER OF ATTORNEY—CONSTRUCTION—SALE OF LAND—HUSBAND AND WIFE.

A husband and wife executed a power of attorney to sell "all real estate belonging to us, or either of us." Afterwards the husband quitclaimed to the wife his title to the land in question, in which the wife before had only an inchoate right of dower. After the husband's death the land was sold under the power of attorney. *Held*, that the conveyance did not pass title, for the attorney was authorized by the wife to convey only such title as she had at the time of the execution of the power, and when she received the deed from her husband, and became owner of the fee, the inchoate dower was extinguished by merger, and there was nothing on which the power of attorney could operate.

Error to circuit court, Benzle county; Fred H. Aldrich, Judge.

Ejectment by Jonathan Penfold against D. G. N. Warner. Judgment was entered in favor of defendant, and plaintiff brings error. Affirmed.

Manly O. Dodge, (Smurthwaite & Higgins, of counsel,) for appellant. D. G. F. Warner, (Pratt & Davis, of counsel,) for appellees.

HOOKER, C. J. John W. Zimmerman, being the owner of a parcel of land in Frankfort, Benzle county, Mich., joined

with his wife, Barbara E. Zimmerman, in a power of attorney to their son, Morris M. Zimmerman. This was duly acknowledged and recorded. In 1888, John W. Zimmerman quitclaimed the premises to his wife, Barbara, and, shortly after, died. In 1890, Morris W. Zimmerman, as attorney for Barbara Zimmerman, conveyed the premises, except the west 100 feet, to the plaintiff, for a valuable consideration, by warranty deed. In September, 1891, Barbara E. Zimmerman quitclaimed the premises, except the west 50 feet, to the defendant. Plaintiff brought ejectment. Judgment being rendered in favor of the defendant, the plaintiff appealed.

This power of attorney was given by husband and wife at the time when the title to the real estate in question was vested in him, and his wife had no title to any lands, aside from her inchoate right of dower in this parcel. Counsel argue from these facts that the language of the power should be construed to cover lands subsequently acquired, while on the other hand it is contended that this power of attorney conferred no greater authority than to convey her right of dower in a deed whereby her husband's title should be conveyed. We are impressed by the importance of certainty in instruments authorizing the conveyance of lands, and by the serious consequences likely to arise if it be determined that a power of attorney may mean one thing or another, as the tints of surrounding circumstances resting on parol testimony may vary. When placed upon record, as under our recording laws it may be, there should be no uncertainty in its meaning, and strangers should not be required to look beyond the language used. We are aware that there are authorities which appear to attach importance to surrounding circumstances, but, beyond such as may be deemed to create an estoppel, we cannot approve them; and, inasmuch as titles to land cannot in Michigan be maintained upon an estoppel, we cannot recognize the authority of such cases. Eliminating extrinsic circumstances from the question, its solution is comparatively easy. No doctrine is better settled than that these "powers of attorney" are strictly construed, and cannot be enlarged by construction." *Wood v. Goodridge*, 8 Cush. 117; *Morrell v. Frith*, 3 Mees. & W. 402; *Nelson v. Hartford*, 8 Mees. & W. 806; *Withington v. Herring*, 5 Bing. 442; *Rosster v. Rosster*, 8 Wend. 494; *Jeffrey v. Hursh*, 49 Mich. 31, 12 N. W. Rep. 898; *Id.*, 58 Mich. 246, 25 N. W. Rep. 176, and 27 N. W. Rep. 7. The legislature has signified its approbation of this doctrine by restricting powers by statute. See How. St. c. 215; *Id.* §§ 5625, 5629. Recurring to the instrument in question, we find the language to be as follows: "John W. Zimmerman and Barbara, his wife, * * * do

make, constitute, and appoint Morris W. Zimmerman our true and lawful attorney for us, and in our name, place, and stead, and in the name, place, and stead of either of us, to bargain, sell, or mortgage any and all real estate belonging to us, or either of us, in any real estate in the county of Benzle," etc. The plain import of this language limits the power to lands then owned by the parties. *Weare v. Williams*, (Iowa,) 52 N. W. Rep. 325. As the title then stood, plaintiff had no title in the premises. She had an inchoate right of dower, which she might release by joining with her husband in a deed of the premises, or by her conveyance to the holder of the title. *Rhoades v. Davis*, 51 Mich. 306, 16 N. W. Rep. 659. It was not an interest that could be conveyed by her so long as the husband held the title to the fee. But when she received a deed from her husband, and became owner of the fee, the inchoate right of dower was extinguished by the merger, and there was nothing left for it to operate upon, so far as that parcel of land was concerned, unless we are to extend the power by construction, which, as we have seen, the courts do not favor. This land did not belong to her when the power of attorney was executed. Some other questions are raised upon the record, but, as the case must hinge upon the power of attorney, we think it unnecessary to pass upon them. The judgment will be affirmed. The other justices concurred.

TOUSIGNANT v. SHAFER IRON CO.

(Supreme Court of Michigan. June 16, 1893.)

ACTION FOR WAGES—CHANGE OF MASTERS WITHOUT NOTICE TO SERVANT—LIABILITY OF FIRST MASTER—EVIDENCE—INDEMNITY.

1. Where plaintiff was employed by defendant for an indefinite time through the latter's manager, and continued his services after the manager himself assumed control of the work, as principal, defendant is liable for his wages if plaintiff had no notice of the change in the employment.

2. In an action for wages it appeared that plaintiff had been employed by defendant company through the latter's manager; that after a certain date the manager assumed control of the work; that plaintiff was again employed at the same work as before, but there was no evidence as to the re-employment, except the manager's testimony that after the date given he made no contracts in defendant's name. *Held*, that plaintiff could not recover in the absence of evidence to rebut the inference that the re-employment was by the manager instead of by defendant.

3. In an action to recover an amount due for boarding employes, against a corporation which had been operating a mine in its own name, but on a certain date turned the work over to a contractor, it appeared that by arrangement the board bills had been reported to defendant, who deducted the amounts from the employes' wages, and credited same to plaintiff, that plaintiff had no notice of the change in the employment, and that such arrangement continued after such change. *Held*, that plaintiff should recover.

4. In an action against a corporation for wages accruing after defendant's manager assumed control of the works as contractor, where plaintiff alleges want of notice of any change in the employment, evidence of the method of paying the men prior to the date of the change is admissible, as well as the method after such date.

Error to circuit court, Iron county; John W. Stone, Judge.

Action by David Tousignant, for himself and others, against the Shafer Iron Company. Plaintiff had judgment, and defendant brings error. Reversed.

E. E. Osborn, for appellant. Cook & Pelham, (Dan H. Ball, of counsel,) for appellee.

McGRATH, J. Plaintiff sues in behalf of himself and some 40 others to recover for labor performed in mining at the Shafer iron mine in June, July, and August, 1891, and for certain board furnished the men, as hereinafter explained. Defendant began operating the mine in 1889, and continued the mining operations until January 1, 1891, when they let the contract to take out the ore to one Jennings, who had up to that time been its superintendent, and from that time forward Jennings carried on the business of getting out the ore in his own behalf, and paid the men for the months of January to April, both inclusive. For the month of May defendant paid the men on Jennings' account. Prior to January, 1891, a time slip or check was given to each employe on or about the 1st of each month. These slips were made out on printed blanks having the following caption: "Monthly pay-roll account. Shafer Mine, No. —, —, in account with the Shafer Iron Co. for the month of —, 18—." Each slip was filled out with the number of days worked, the per diem, and the aggregate earnings, from which was deducted the amount for rent, board, doctor, etc., and the balance due the employe was brought down. These checks were given to the men, who kept them until pay day, which was about the 20th of the month. They were paid, sometimes by Chicago checks, signed by the Shafer Iron Company, at other times by local checks, signed by Jennings, and at other times in currency. No notice was given by the company to the men of any change. Defendant's general manager, one Himrod, and its agent, one Biggars, remained at the mine, and occupied the company's offices. There was in fact no change made in the manner of conducting the business, except that the men were afterwards paid in checks signed by Jennings, or in currency. There was no visible change about the mine, except that at one of the skips a red cardboard, 12 by 20 inches in size, upon which was printed in large black letters the following: "Employes are positively forbidden to ride in the skip. Use ladders. Shafer Iron Co.,"—had been tacked up, and some time after January 1, 1891, several lead-pencil lines had been drawn across the words

"Shafer Iron Co.," and the words "E. P. Jennings, Contractor," had been written in pencil underneath. Jennings testified that after January 1, 1891, he had carried on the business of mining the ore in his own name; had opened an account with a bank, and with one or two material men, in his own name; that he had never pretended from that time forth to do business for the Shafer Iron Company; never made a contract, or tried to make a contract, in the name of the Shafer Iron Company; and that whatever he did he did in his own name. The plaintiff and his assignors had all worked for the company up to January 1, 1891, and most of them continually, until some time in August. A few had not been employed continuously after January 1st. Time checks were issued to the men as before, upon the same blanks, and it was upon these checks that defendant, in June, paid the men for May. Jennings was the only witness called for plaintiff. The court instructed the jury as follows: "I think the rule of law is, gentlemen, that a person employed by an authorized agent, and set to work, as it is conceded these men were, by the undisputed evidence in this case, had a right to suppose that the same condition of things continued to exist after the employment as existed at the time of the employment, unless they had notice to the contrary, or unless there was something in the circumstances surrounding the matter that was equivalent to them of notice. In other words, it seems to the court that the defendant corporation here owed these men who were in its employ at the time it made this contract with Mr. Jennings,—which we will term the change in the way of doing business there,—that at the time the defendant owed its employees there in the mine a duty; that it was the duty of the defendant to have carried particular notice to them; to have brought notice home to them of this change. In other words, the rule, as I understand it, is this, (and it is said to be in the books a familiar principle of law:) That where one had constituted and accredited another as his agent to carry on business, the authority of the agent to bind his principal continues even after actual revocation of such authority, until notice of the revocation is given, and, as to persons who have been accustomed to deal with such agent, until notice of the revocation is brought home to them. And it is said that the case of such an agency is analogous to that of partnership, and the notice of revocation of the agency is governed by the same rules as notice of dissolution of partnership; that is, as to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditors, or at least that the credit should have been given under circumstances from which notice can be inferred. When notice is sought to be inferred as a fact from circumstances, it becomes a question for the jury.

The court here thinks this is a question of fact, and submits it to you, and the question is submitted to you as matter of fact, whether this labor for which this suit is brought was done and performed under such circumstances as would operate as notice, or under such circumstances that it can be said that notice can be inferred on the part of these claimants of this change. If these parties had notice of this change, they cannot recover here, for it is undisputed that a change took place; that the authority of Jennings was revoked, and he entered into an independent contract; and the question here is, did these claimants have notice, or, under the circumstances surrounding them, can you infer from this evidence legitimately that they received notice? So, I say the question is submitted to you as a matter of fact, whether the defendant gave such notice as a prudent man should have given. Something has been said here, and evidence has been given, with reference to some board bills. It is claimed on the part of the claimants here that it had been a custom or universal practice at that mine, and it is claimed that there is some evidence to support it, that certain boarding-house keepers had been in the habit of boarding men, and at the end of the month the amounts due to the boarding-house keeper from these several men he had boarded was reported to the superintendent or officers of the mine, and these amounts were deducted from the amounts due the men, and were by the mine paid over to the boarding-house keeper. It is claimed that such was the practice; that it was generally acquiesced in by the men. It is claimed that this continued, after this change, to be done in the same way it was done before. The court submits that matter to you. Was there a custom or general, universal practice as to the boarding of the men by which the boarding-house keeper had received from the defendant the board of the men,—that is, during the time that this defendant was operating the mine,—and was such course acquiesced in by the defendant and the miners, the men who owed for the board? And it is submitted to you whether the boarding-house keeper, this having been the practice, had the boarding-house keeper, or any persons whose claims are represented in this suit, received any notice of the change in this business, such as would have led a prudent man to have acted differently? If there had been such custom or universal practice, and no notice had come to the knowledge of the boarding-house keepers, then I think they should recover for the boarding-house claims in this case; but if there had been such a universal practice, or if you shall find that there had been such practice, but that they had received notice of the change, or under the circumstances had notice of the change, then you should not allow these claims." It is claimed that four men (named) had not worked at the mine during January, Febru-

ary, March, or April, 1891, and one (named) had not worked in January, 1891. "As I understand it, there is uncontradicted evidence in the case that they were old employees under the prior management, had ceased to work for two or three months there during the time I have mentioned, or three or four months, as the case may be, and came back and resumed work at the time under Mr. Jennings. Now, should the defendant in this case pay for these men's labor? Counsel for defendant insists that they should not, because they had broken their relations; they had gone away, and claims that they came back like new men. I have deemed it my duty, gentlemen, to submit that question to you as to these men, and ask you, as matter of fact, whether, under all the circumstances of the case, these men, having worked there before, having entered the employment again, whether, considering the lapse of time between the prior labor and entering into the work again, considering the time between which the former labor ceased and the change took place between Jennings and the defendant corporation,—I leave it to you to determine whether the prior dealings between the parties, under the circumstances, were such as to warrant the laborers in believing in the continued existence of the authority of the agent or the superintendent to hire them; as to whether that authority was existing there at the time; whether the same authority was existing as at the time of the former hiring. If you shall say that they were warranted, under all the circumstances surrounding the case, the lapse of time being taken into consideration, and everything there that the evidence shows that they saw and did there,—that they were warranted in supposing that Jennings continued with the same authority there as agent of this defendant,—then I think you should allow these claims; otherwise, not; they should be rejected." As to the parties who had been employed by the company, and therefore continued at work at the mine without cessation, the learned judge was undoubtedly correct. These men had been employed by defendant for an indefinite time. No new or other contract of employment was shown to have been made with them. The question was not as to whether Jennings had apparent authority to employ them. As to them, a prima facie case was made when they showed an employment by defendant at a given rate; that they continued at work in the same employment; that they had been paid in part; and that a balance was yet unpaid. The burden was then upon defendant to show that it had been in some way released and discharged. The case does not differ from any other case of an executory contract not terminated at the time of the revocation of the agency.

The case is different respecting the operatives who did not continue under the same engagement. The general rule undoubtedly

is, as stated by the trial judge, that a former general agent within the scope of his original authority, notwithstanding its revocation, continues to bind the former principal as to those parties who have been, and are still, dealing with him in good faith, in reliance upon his former authority, until they have notice of its revocation. Mechem, Ag. § 224. The case is said to be analogous to that of the dissolution of a partnership, and is governed by the same rules. To all persons who have actual dealings with the agent, actual notice must be given, or such notice of the fact must be brought home to them as would be sufficient to put an ordinarily prudent man upon inquiry. Mechem, Ag. § 228. The reason for the rule in the case of a partnership is well stated by Butler, J., in *Lyon v. Johnson*, 28 Conn. 1, 4. A partnership "once existing, and publicly known to exist, the continuance of the connection will be presumed by the public until the contrary appears." It is contended by plaintiff that the burden of proof is upon the partner seeking to escape liability to show knowledge or notice. But this rule does not relieve plaintiff of the necessity of any showing on the part of the parties who were re-employed, as to the circumstances of their re-employment, the character of the new contract, and their good faith. The language of the books is: Persons "dealing in good faith;" "relying upon the agent's former authority;" "supposing that they were employed by defendant;" "who gave the credit to the agent for defendant;" "who believed that such agency continued;" "dealing with one partner in ignorance of the dissolution;" "supposing them still to be in partnership;" "giving credit to the partnership." As Lord Kenyon, in one of the cases, observes: "It would be the hardest measure imaginable upon the creditor were the law otherwise,—if, while he supposed he was giving credit to a man having sufficient to satisfy the whole of his demands, he might be trusting a beggar." Did these parties deal in good faith? Did they rely, assume, suppose, believe? To whom did they in fact extend credit? With whom did they contract? These are pertinent inquiries. Plaintiff must recover, if at all, upon the theory that the employment was in fact continuous, or, if there was in fact a re-employment, that these parties were employed in the name of the defendant, or under such circumstances, and in such a manner, as to justify the assumption that they were employed for defendant, and that they in fact did so suppose, and extended the credit to the defendant. There must be sufficient evidence to bring these parties within one of these propositions. Until they are so brought there is nothing to start with; nothing to cast any burden upon the defendant. Defendant is not liable upon all contracts made by Jennings, but only upon such as have been made in reliance upon his ap-

parent authority to act for it. It cannot be assumed or presumed that any new contracts were made in its name, or for it, or that credit was extended to it. In the partnership cases the contracts were entered into on the faith of the partnership with one of the partners, in the name, and ostensibly for the benefit, of the partnership. In *Hall v. Heck*, 92 Mich. 458, 52 N. W. Rep. 749, the note was executed in the firm name. In *Uhl v. Harvey*, 78 Ind. 26, the evidence tended to show that plaintiff acted upon the belief that defendant was still a member of the firm. In *Uhl v. Bingham*, Id. 365, 369, the court say: "There can be no doubt that the general burden of the issue was, as the court instructed, on the plaintiff; but, in order to show his right to recover against the appellant, it was only necessary to show that the appellant had been a member of the firm; that, knowing the appellant's connection, he had dealt with the bank; that the business had been carried on without change in the name of the firm, and was being so conducted at the time he made the deposit, when the action was brought to recover. He was not bound to offer evidence of the negative fact that he had not received notice of the appellant's withdrawal." In *Ketcham v. Clark*, 6 Johns. 144, the order was accepted by one member of the firm in the firm name. In the leading case of *Clafin v. Lenheim*, 66 N. Y. 301, defendant had been carrying on business in two different cities, and plaintiff had been furnishing goods in both. Defendant's brother, as agent, managed the business in one of the places, and ordered the goods in the name of defendant, as he had been doing, and the credit was given to defendant. In *Ulrich v. McCormick*, 66 Ind. 243, money had been paid upon the note to a former agent of the payee. Held that, if the appellee paid the note in question to the agent in good faith, without notice, the payment was a satisfaction of the note. But the court say: "The question still remains, was the payment bona fide?" In *Newcomet v. Brotzman*, 69 Pa. St. 185, defendant had turned the business over to his son, who had formerly assisted in the management. Plaintiff testified that he had been misled; that he had supposed that he was dealing with the father. In *Rolling-Mill Co. v. Hyland*, 94 Ind. 448, the court say: "It is admitted by the appellant that \$60.25 of the recovery was correct. But it is insisted that for the residue, being for work done after April 1, 1882, the appellant was not liable. The work prior to that time, about which there is no dispute, was performed by the appellee for the appellant, at its coke works. The works were operated by the appellant's agent, John J. Enders, who, as such agent, employed and paid the workmen, the appellee among the others. Enders, having leased the works of the appellant, operated them upon his own responsibility, but in the appellant's name, without its con-

sent, during the period for which the appellant disclaims liability to the appellee. The evidence tends to show that up to May 16, 1882, the time to which the finding was in appellee's favor, he had no notice of the change in the management of the coke works, but supposed that he was working for the appellant under the employment of Enders as its agent. We cannot say that the facts and circumstances did not justify this impression, and, this being the case, we are of opinion that the appellant was liable."

In the present case there was testimony tending to show a re-employment of these men, but there was absolutely no testimony respecting the nature of that re-employment, except that of Jennings, who said that after January 1, 1891, he made no contract in the name of the company. In view of this testimony there should have been some evidence to repel the natural inference that Jennings made the new contract in his own name, and to show that these parties supposed, at least, that they were dealing with the defendant, or that they relied upon the apparent authority of Jennings, and gave credit to defendant. If the language of the employment did not suggest the person employing, then it should appear that these parties supposed, at least, that they were being employed for the defendant.

Respecting the claims for board, the men to whom these amounts were payable were operatives in the mine. Irrespective of any custom or arrangement, these men, as assignees, would have the same right of recovery as their assignors. But the arrangement was that the amounts of these bills should be furnished by the keepers, and, in the time slips that were given, these amounts were charged up against the operative, and credited to the keeper, who relied upon this method, rather than upon the individual responsibility of the boarders. The keepers were dealers with the defendant company, and are within the rule. No notice appears to have been given to them, and there was no error in the court's instruction to the jury.

It was competent to show the method of paying the men prior to January 1, 1891, as well as that followed after that date. The November and December, 1890, pay rolls were competent for the purpose of showing that the operatives were in the defendant's employ during those months. Judgment is therefore reversed, and a new trial ordered. The other justices concurred.

JONES v. SHAFER IRON CO.

(Supreme Court of Michigan. June 16, 1893.)

ACTION FOR WAGES—CHANGE OF MASTERS—NOTICE OF TO SERVANT—QUESTION FOR JURY.

1. In an action for wages accruing after defendant had turned the work over to its former manager, as contractor, the question whether plaintiff had notice of the change of employment is for the jury.

2. In such case, actual knowledge by plaintiff of the change of employers, however acquired, is sufficient to release defendant.

Error to circuit court, Iron county; John W. Stone, Judge.

Action by William Jones, for himself and others, against the Shafer Iron Company. Plaintiff had judgment, and defendant brings error. Reversed.

E. E. Osborn, for appellant. Moriarty & Abbott, (Dan H. Ball, of counsel,) for appellee.

McGRATH, J. This case is in most respects similar to the case of *Tousignant v. Iron Co.*, (Mich.) 55 N. W. Rep. 681, and is ruled thereby. There was some testimony tending to show that plaintiff and one of the other persons in whose behalf suit was brought had actual knowledge of the change in employers. The question of notice or knowledge is one of fact for the jury. Actual knowledge, however acquired, dispenses with the necessity for notice. 17 Amer. & Eng. Enc. Law, 1121; *Davis v. Keyes*, 38 N. Y. 94; *Dickinson v. Dickinson*, 25 Gratt. 321; *Ennis v. Williams*, 30 Ga. 691. Such facts must be made to appear as will warrant a jury in believing that the party had actual knowledge. 17 Amer. & Eng. Enc. Law, 1122. The court instructed the jury that, if any of the men received notice or knowledge in any way that Jennings was the man they were working for, and not the Shafer Iron Company, they could not recover. We think that that question was fairly submitted. The judgment is reversed, and a new trial granted. The other justices concurred.

MCLEOD v. FREE et al.

(Supreme Court of Michigan. June 16, 1893.)

REFORMATION OF NOTE.

In an action to reform a note made to the order of a husband and wife, by limiting the interest of the wife therein to a life estate, and to enjoin the administrator of the wife from taking possession of the note, it appeared that the husband sold land owned by him, and took the note for a portion of the purchase price; that before the sale he had made a will devising to his wife a life estate in the land sold, and that two days after the sale he made another will, by which he bequeathed his residuary estate, including the note in question, to his executors, in trust to convert the same into money, and pay the income to his wife during her life; that the will was admitted to probate, and that the widow up to the time of her death received the income from the note, and never claimed to own it; that the husband during his lifetime dealt with the note as his own, and that the note was not drawn in accordance with the intention of the parties. *Held*, that the note was equitably a part of the estate of the husband, and should be reformed accordingly. *Montgomery, J.*, dissenting.

Appeal from circuit court, Kalamazoo county, in chancery; George M. Buck, Judge.

Action by Mary McLeod, personally and as executrix of the last will and testament of Stephen W. Frank, deceased, and Emory S.

Frank, against John W. Free, as administrator of the estate of Abagail Frank, deceased, and Henry Frank, impleaded with Marshall Cole, Fannine O'Dell, Jessie Close, William Stewart, Edwin Roberts, Ada Cole, Emory Cole, David H. Lull, Fidelia Lull, Mary Lewis, and Stephen Frank, to reform a note, and to enjoin defendant Free from taking possession thereof. Judgment was rendered for plaintiffs, and defendants Free and Henry Frank appeal. Affirmed.

E. M. Irish, for appellants.

The well-known rule of survivorship of interests in deeds made to husband and wife has been enforced in the following Michigan cases: *Fisher v. Provin*, 25 Mich. 347; *Insurance Co. v. Resh*, 40 Mich. 241; *Manwaring v. Powell*, Id. 371; *Jacobs v. Miller*, 50 Mich. 120, 15 N. W. Rep. 42; *Vinton v. Beamer*, 55 Mich. 559, 22 N. W. Rep. 40; *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. Rep. 225.

Osborn & Mills, for appellees.

LONG, J. Stephen W. Frank and Abagail Frank, both deceased, were husband and wife. On December 28, 1889, Stephen sold all his real estate, with the exception of a village lot, to William Stewart and Edwin Roberts, his wife joining in the deeds. To secure a portion of the purchase money, notes and mortgages were taken from Roberts, and an assignment of a mortgage and notes accompanying from Stewart. The notes and mortgages and assignment were all drawn payable to Stephen and Abagail Frank. By the bill filed in this case it is claimed (1) that the notes, mortgages, and assignment were not prepared in accordance with the intention and understanding of the parties, but that all that Stephen W. Frank intended was to have them so drawn that the income should go to his wife during her life in case she survived him, and that a mistake was made by the scrivener in making them payable to the parties jointly; (2) that, if no mistake was made, then that the transaction was intended as a testamentary disposition of the property, which was revoked by the last will and testament of Stephen, prepared and executed a few days after these conveyances. The bill prays that the mortgages, notes, and assignment may be corrected in accordance with the intent of the parties, or that such instruments may be decreed to have been made as a testamentary disposition of the property; and that Mr. Free, as administrator of the estate of Abagail Frank, be enjoined from taking possession of such securities from the complainant, as executor of the estate of Stephen Frank. On the hearing below the court found that it was not intended by Stephen or understood by Abagail that she should take by such instruments more than a life interest in these securities, and that all

she did take was a life estate; and that such securities are now a part of the estate of Stephen, and in the possession of Mary McLeod, as such executrix. By this decree the defendants were perpetually enjoined from taking any proceedings at law or otherwise to obtain possession of these securities, and the complainant authorized and directed to collect the same as a part of the assets of Stephen's estate, and dispose of the proceeds in accordance with the terms of his will. The defendants John W. Free, as administrator, and Henry Frank, alone appeal. The bill was taken as confessed by all the defendants, except those now appealing.

The contention on the part of the complainants is that the proofs abundantly sustain their position. It appears that on May 2, 1889, Stephen made a will. This was prior to the sale of the real estate. By the will he devised the use of substantially all the real estate to his wife during her natural life. Within a few days after he sold the real estate he directed a new will to be made. It revokes all former wills. At the time of its execution he had a small amount of personal property,—a village lot, which he willed to his daughter Mrs. McLeod,—and the securities above described. He gave his wife a life interest in the village lot, all his furniture, etc., and bequeathed to his executors in trust the remainder of his estate, to sell and convey and convert into money, the income of which was to be paid annually to his wife so long as she lived. His son Henry C., upon the death of his mother, was to be paid \$100 in addition to the \$2,000 or \$3,000 he had already given him. Certain of his grandchildren living at his decease were each to receive \$100 and his son Emery S. the sum of \$2,000; and the residue, after paying the funeral expenses, for tombstones, etc., he gave to his daughter Mrs. McLeod and his son Emery S. He made his wife and his daughter Mrs. McLeod executrices of his will. On February 12, 1890, Stephen Frank died. On the 27th of that month Mrs. Abagail Frank filed a petition in the probate court for probate of the will, and, she refusing to act as executrix, the trust was assumed by the daughter Mrs. McLeod. The son Henry receipted for all that was his due under the will. On June 27th following Abagail receipted for all she claimed of the personal estate under the will, which amounted to \$315.10. After this time the widow received the income from these securities, and, so far as appears by this record, never made any claim that they or any part of them belonged to her. She died December 26, 1890. These securities were found among the papers of Stephen W., and passed into the hands of Mrs. McLeod, as executrix, and were treated as a part of the estate of Stephen until after the death of his widow. In 1891, Henry Frank filed a petition in the probate court for the appointment of an administrator of the estate of his mother, and

Mr. Free was so appointed. This proceeding was then commenced to declare these securities as belonging to the estate of Abagail, claiming that she took the absolute title to them as survivor of herself and her husband, to whom they were jointly made. There is no controversy in the case except such as grows out of these securities, and, so far as appears, no rights of creditors are concerned. The naked question is, did the wife take these securities at the death of the husband?

The husband was the owner of the land out of which the securities grew. After they were taken, they were treated as his individual property during his lifetime. He dealt with them as such, and at his death disposed of them by his will. His wife, as it appears, always regarded them as his property during his lifetime, and after his death acquiesced in their being inventoried and treated as a part of his estate, taking and receipting for her share and interest in the estate as given her by the will, and was apparently satisfied to have the securities treated as a part of her husband's estate up to and at the time of her death. No one raised any question about it, until after her death, when the son Henry C., who was given only \$100 by his father's will, made the claim that the securities belonged to his mother's estate. Counsel for defendant cites cases in his brief where it has been held by this court that a joint deed to husband and wife conveyed the estate to them by entirety, and that the right of survivorship exists in such cases, so that where one dies the other is vested with the whole estate. But this doctrine has not been applied to mortgage securities with such strictness. In *Walt v. Bovee*, 35 Mich. 425, it was said: "The drift of policy and opinion, as shown by legislative and judicial decisions, is strongly adverse to the doctrine of taking by mere right of survivorship, except in a few special cases; and it should not be applied except where the law in its favor is clear." In the above case the husband and wife were each possessed of considerable means, and made investments jointly, each supplying half of the funds. On the death of the husband the wife claimed the whole of the securities by right of survivorship. This right was denied, and it was said: "Our own decisions relative to the rights of husband and wife in case of united holdings of real estate afford no argument here." It is evident from the testimony given by the complainant in the present case that the scrivener in drafting the mortgage, notes, and assignment did not make them in accordance with the understanding of the parties. It is also evident from the testimony of the witnesses that Abagail never understood that she had any more right in these securities than she had in the real estate out of which they grew. The will was made within two days after they were taken, and by the will she was given a life in-

terest in them. Equitably they were a part of the estate of the husband, and, being so treated by the parties themselves, and so understood by them, they must now be so treated, and reformed accordingly. In any event, only one-half could go to the estate of the wife under the rule in *Wait v. Bovee*, supra; but, under the facts shown, the whole securities must be treated as belonging to the estate of the husband. The decree of the court below must be affirmed, with costs.

HOOKER, C. J., and McGRATH and GRANT, JJ., concurred.

MONTGOMERY, J., (dissenting.) I do not think that the evidence justifies the conclusion that there was any mistake in drafting the note and mortgage.

LAMONT v. LA FEVRE et al.

(Supreme Court of Michigan. June 23, 1893.)

CONTRACT OF SALE—MECHANIC'S LIEN—STATEMENT—NOTICE—HOMESTEAD.

1. A contract of sale is valid though no time of payment is agreed on, the law implying payment on delivery.

2. A lien is not lost where by an honest mistake too much was claimed in the statement, or where there is a failure of proof as to the entire amount claimed.

3. Where the contract to furnish materials is made with the owner, no notice of lien is required.

4. Where material is furnished for a building erected on two lots, and is used on both, the lien attaches to both lots.

5. Where defendants purchased and moved on the premises before the materials were bought, with the design of making it their home, they thereby made it their homestead, and the fact that the building erected on the land was an hotel made no difference.

Appeal from circuit court, Bay county, in chancery; George P. Cobb, Judge.

Bill by Matthew Lamont against Frank La Fevre and wife and Michael Daily to enforce a mechanic's lien. Decree for complainant. Defendants appeal. Affirmed.

McDonell & Hall, for appellants. Hatch & Cooley, for appellee.

HOOKER, C. J. Complainant, a material man, filed the bill in this cause against Frank La Fevre and Almira La Fevre, husband and wife, and Michael Daily, to enforce a mechanic's lien for material furnished for an hotel erected upon premises owned by Frank La Fevre. A contract to furnish material, erect and complete said hotel, was let by La Fevre to a firm of builders named Willis & Grant, who in turn sublet a portion to one Thompson. Thompson failed to perform, and negotiations were had whereby complainant furnished material which Thompson should have furnished. The principal dispute, so far as the facts are concerned, is over the question of defendant Frank La Fevre's liability to complainant for this ma-

terial, the complainant asserting that it was furnished upon the request of La Fevre, accompanied by a promise to pay for the same the amount of complainant's bid. The defendants deny that La Fevre promised to pay for the material, and allege further that, if he did, the promise, being oral, would come within the statute of frauds as a promise to pay the debt of Willis & Grant, who were under contract obligations with Frank La Fevre to furnish the material. Upon the question of fact it is sufficient to say that we agree with the circuit judge that the complainant established the contract alleged, and that it was an original promise, and valid. It was not within the statute, for complainant did not sell to Willis & Grant, nor did they purchase the material from him.

A number of legal questions arise. It is contended that there was no meeting of minds, because no time appears to have been specified when the amount agreed upon for the material should be paid, but the rule of construction in such cases is that payment upon delivery is contemplated. The statement filed with the register of deeds was to the effect that the materials were furnished "in pursuance of a certain contract with Frank La Fevre," and that there was \$220 due, and a copy of this statement, with notice of filing, was served on Frank La Fevre only. The bill alleges two contracts,—one made on or about July 26, 1890, for \$400; and another, "that complainant should furnish for the building such materials as La Fevre might order from time to time, for which he (La Fevre) would pay, under which arrangement complainant furnished materials to the amount of \$20." This sum of \$20 was rejected by the circuit judge, and, as complainant did not appeal, cannot be allowed here. It is mentioned because the defendants assert that it is the occasion of a variance between the statement, which mentions one contract, and the bill and proofs, which mention two; and it is contended further that the statement is excessive by this amount, and that the lien is therefore lost. It appears that the only reason for denying complainant any portion of his claim was the fact that in his statement of lien he did not say two certain contracts instead of one. By a mere technicality he is deprived of his security for \$20, although an honest claim. The case differs from those cited by counsel for defendants where persons wrongfully clouding debtors' titles with excessive liens are denied the benefit of the statute. The case of *Gibbs v. Hanchette*, (Mich.) 51 N. W. Rep. 691, carefully distinguishes between such cases and those where, through an honest mistake, too much has been claimed in the statement of lien, or by reason of a failure of proof the claimant was denied the entire amount claimed. We think this case is of the latter description. Under his pleading the court below declined to consider the \$20 item, and for reasons given we cannot

allow him the amount here, if we should find the statement filed would permit it, about which we find it unnecessary to express an opinion.

A point is made over the matter of notice, defendant Almina La Fevre not having been served with notice. The object of a notice is to prevent the owner from paying the principal contractor, (Laws 1885, p. 297, § 5,) and in this case, as the contract was made with the owner, there was no necessity for a notice. The validity of a lien does not depend upon the notice. *Kirkwood v. Hoxie*, (Mich.) 54 N. W. Rep. 721. The building for which this material was furnished was an hotel, with a wing; the latter, used for a barber shop, being entirely on the west half of lot 11, while the former was on the west half of lot 12, of block 19, in Bay City. The proof shows that the timber was used in both, which were being erected together, and it is not an unreasonable assumption that both were contemplated when the contract was made. We think they should be treated as one parcel, as defendant evidently treated them, and that the lien attached to both.

The remaining question pertains to the homestead rights of Mrs. La Fevre. The defendants purchased the premises for a homestead before contracting, and moved upon them before the statement of lien was filed, with the design of making it their home. They thereby made it a homestead, and the fact that the building erected and in which they reside is an hotel made no difference. *Mills v. Hobbs*, 76 Mich. 122; *King v. Welborn*, 83 Mich. 199, 47 N. W. Rep. 108. To the amount of \$1,500 it was exempt from this lien. Beyond that sum the lien attaches, and, as the premises cannot be divided, a sale affords the only means of reaching the excess. To hold that it could not be reached because indivisible would be to do violence to the plain intent of the statute, which, while it aims to afford every one a shelter, was not designed to enable him to defeat creditors by so constructing valuable property as to make it difficult to divide it. The decree of the circuit court will be affirmed, with costs. The other justices concurred.

WHEELER et al. v. MEYER et al.

(Supreme Court of Michigan. June 28, 1893.)

BOND FOR COSTS — JUDGMENT AGAINST SURETIES.

Where a judgment for a nonresident plaintiff is reversed, and a new trial ordered, defendant is not entitled to a judgment in the appellate court against the sureties on plaintiff's bond for costs. *Ortmann v. Bank*, 4 N. W. Rep. 167, 42 Mich. 464, followed.

Action by Russell Wheeler and Frank B. Wheeler against Louisa Meyer and John F. Guillou. On motion to amend judgment so

as to run against plaintiff's sureties for costs. Motion denied.

Albert J. Chapman, for the motion. Corliss, Andrus & Leete, opposed.

PER CURIAM. On March 28, 1893, the defendants' costs were taxed at \$236 by the clerk of this court, upon a judgment of this court theretofore rendered against the defendants, reversing the judgment of the circuit court for the county of Wayne, and ordering a new trial. Plaintiffs, being non-residents, were required to give security for costs, which, on May 15, 1893, they did, in compliance with an order of the Wayne circuit court. An execution having been issued for the collection of said judgment was returned unsatisfied on the 6th day of June, 1893, and the next day defendants' counsel filed a certified copy of the undertaking, and moved this court for an amendment of the judgment, so that it should include and run against the sureties for costs. The case is governed by *Ortmann v. Bank*, 42 Mich. 464, 4 N. W. Rep. 167.

The motion will be denied, with costs.

MAYERS v. KAISER et al.

(Supreme Court of Wisconsin. May 23, 1893.)

CREDITOR'S BILL — TRANSFER OF BUSINESS TO WIFE — EVIDENCE — RIGHT OF HUSBAND'S CREDITORS TO WIFE'S PROPERTY.

1. In a suit to reach land, the title to which was in the wife of the judgment debtor, and a stock of goods and business carried on in the name of his sons, it appeared that when the debtor became indebted to plaintiff he was doing business in his own name; that he had borrowed money of his wife, giving his note therefor; that she obtained judgment on the note, and on a sale of the debtor's goods on execution on this, and judgments obtained by other creditors, the wife and two other creditors purchased sufficient of the goods to satisfy their joint claims; that the wife then purchased his share of the goods of one of the creditors, giving her note therefor, and by agreement with the other creditor they continued the business, employing the debtor as a clerk; that after such creditor had been paid all his claim, except \$500, the wife purchased his interest, and continued the business in her name, employing the debtor as manager, at an agreed salary; that the wife paid her indebtedness to the two creditors, and afterwards sold the business to her sons for a valuable consideration; that the real estate which was in the wife's name was her home, and was heavily mortgaged. *Held*, that plaintiff could not recover, as there was no fraud shown in any of the transactions.

2. Where a wife engages in business, employing her husband as agent and manager, the latter's creditors are not entitled to receive payment of their claims out of the property accumulated, beyond the present needs of his family, by his skill and industry in conducting the business.

Appeal from circuit court, Dane county; R. G. Siebecker, Judge.

Action by Charles G. Mayers, as receiver, against M. Kaiser and others. Defendants had judgment, and plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

The plaintiff, as receiver of the goods and property of the defendant M. Kaiser, appointed in proceedings supplementary to execution on a judgment for \$504.67, recovered against him by one Talcott, August 21, 1883, in the circuit court for Dane county, brings this action, in the nature of a creditor's suit, against the said M. Kaiser; Jennie Kaiser, his wife; Joseph and Julius Kaiser, his sons; and Samuel Spiegel,—to reach, and subject to the payment of said judgment, certain real estate, the legal title to which is vested in his said wife, and a stock of goods and business of a store in Madison called "The Fair," carried on in her name, but in reality, as alleged, for and upon the credit of said judgment debtor, which stock of goods had been sold and transferred to his said two sons and his son-in-law, and it was alleged that said business had been carried on by said judgment debtor, pretending to act as his wife's agent, under some arrangement with his wife, for the purpose of cheating and defrauding his creditors, including said Talcott; that she did not in good faith engage in business with her separate property, and did not in good faith employ her said husband to conduct such business for her as her agent; that she had never actively participated in the conduct of the business, and had little or no knowledge concerning it; that her husband had in all respects conducted it as his own, with the single exception that in doing so he had pretended to act as the agent of his wife. It was charged that the real estate held by the wife had been purchased with the proceeds of such business, which, it was alleged, had been large and profitable, and that said stock of goods and business had been fraudulently transferred to the said sons and son-in-law, who had previously been employed therein as clerks, with intent to defraud the creditors of the said judgment debtor. It was charged that the business and stock in trade of the said judgment debtor with which he had carried on business in Chicago until October, 1883, had been sold out upon judgments by confession,—one in favor of his wife, on a note of \$1,500 she held against him, and one in favor of one Althelmer, his brother-in-law,—and had been purchased by one Wolf, as assignee of such judgments, in fact for the benefit of the judgment debtor; that the said notes were given, judgments entered, and sales made, for the purpose of covering up the property of the judgment debtor, and to prevent creditors from levying on it, and as a part of a scheme for defrauding his creditors, and that said Talcott was one of his creditors at the time; that these goods, and others purchased on his credit, were sent to Madison, and with them the business of the Fair was opened, and carried on, in the name of his wife. The answers of the judgment debtor and his wife

insist that the notes to her and Samuel Althelmer were given for an actual indebtedness for those sums, respectively, and deny that they were given or used for any fraudulent or improper purpose, and deny, generally and specifically, all the charges of fraud stated in the complaint, and allege that the purchase of said goods was for the benefit of said Wolf, and that they were afterwards sold to the wife of the judgment debtor, and placed in the store where, ever since November, 1883, or thereabouts, she had carried on business. It is denied that any goods therefor were bought on the credit of her husband, and stated that all the goods had been purchased in the name and for the benefit of his wife, and the business carried on entirely with her means, and for her benefit; that the connection of the judgment debtor therewith was solely as her agent, and not for his benefit in any way, he working for her upon a regular salary; that the stock of goods in the Fair store did not exceed in value the sum of \$5,000, and that the real estate which stood in the name of the wife was her home, and was heavily mortgaged; that the facts relative to said business, and to the manner in which judgments in favor of the wife and Samuel Althelmer were obtained, were fully investigated and known to Talcott in 1883, and the six-years statute of limitations was relied upon as a bar; that it was agreed that the goods purchased at said sale should be managed and sold out by Wolf for the common profit of him and Althelmer, and it was finally sold to the wife of the judgment debtor, she giving her note for what it had cost him; that the stock in trade and business was sold out by her February 15, 1892, for \$5,368.23. The answers denied all fraud in said sale. The defendants Joseph Kaiser and Samuel Spiegel set up the circumstances of their purchase, averring that it was for a valuable consideration, and in good faith, without any intent to defraud the creditors of said Kaiser. The examination of the judgment debtor on supplemental proceedings was given in evidence, and also of his wife, in relation to the allegations of the complaint, from which it appeared that the judgment debtor was in business in Chicago from 1867 to 1883, and was in the wholesale business in 1880, doing a large business; that his merchandise was sold at sheriff's sale, and he did not buy in any, nor did his wife; that he owed about \$14,000, and he had it reduced to about \$6,000; that Marshall Field & Co. closed him up; that the business in Madison had been her business, and he managed it for her, buying most all of the goods on credit; that the bank accounts were kept in his wife's name; that he was her employe, and never put in any money there, or into the property that belonged to his wife; that the money that built the houses came out of the business; that the \$1,500 on which she obtained her judgment had been owing her since 1881.

and was for a present made to her by her uncles when she was married. The wife of the judgment debtor also testified on the trial to the effect that she purchased Mr. Althelmer's interest in the goods sold at Chicago, and gave him a note for \$900. Simon Wolf also testified in regard to the transaction quite fully, and an agreement was produced in evidence between him and Mrs. Kaiser, dated October 15, 1883, in regard to the sale and disposition of said goods, by which Mayer Kaiser, the judgment debtor, was to be engaged as a clerk during a sale thereof at a salary of \$25 a week. It appeared that Wolf received his full pay of Mrs. Kaiser December 29, 1884. Kaiser testified that when the business was continued in Madison he took \$5 a week for his own use and support; that there was no agreement about salary; that the \$25 a week was never paid him. Evidence was given to show that the debt to Althelmer was paid in 1885. Mercantile agency reports were put in evidence regarding the financial standing of J. Kaiser, J. Kaiser & Co., and Kaiser Bros. & Spiegel, covering a period from October 6, 1884, to February 24, 1892, in which the stock was variously stated at from \$10,000 to \$35,000, and the amount of yearly sales at \$50,000 and upwards, net annual gains, \$5,000 and upwards, and in which it was stated that the business was conducted by Mayer Kaiser. Kaiser made some of the reports for his wife.

The finding of the circuit court as to the bona fides of the business conducted in the name of Jennie Kaiser, the wife of the judgment debtor, was to the effect that at the time of their marriage she received \$1,500, marriage portion. That her husband was in business in Chicago, and lost considerable property in the great fire, after which she loaned her husband part of her marriage portion, which was used in business. That he was owing her \$1,500, on account of said loans, October 1, 1883, and the judgment was given on a note for that money. That he was indebted to Marshall Field & Co. in about \$3,600, and to S. Althelmer in about \$4,700, and to various other creditors. That Field & Co. recovered two judgments against him for their debt, upon which executions were issued, and levied on his property, together with an execution on the judgment in favor of his wife. That the latter judgment was for a full consideration, and was not obtained for the purpose of hindering or delaying the creditors of the defendant M. Kaiser. That more than six years had passed since judgment upon the note in favor of Talcott was rendered, and that the facts concerning its entry were fully known to him, or his agent, immediately after the entry thereof. That the judgment in favor of Althelmer was for a valid, existing indebtedness, and an execution, in like manner, was levied upon Kaiser's property subsequent to the judgments and executions of

Field & Co. and Jennie Kaiser. That the agent of Talcott was present at the sale, which was fairly conducted, at public auction, by the sheriff of Cook county. That Wolf purchased and became the owner of the judgment of Field & Co. That there was no surplus after said execution sales. Wolf, Mrs. Kaiser, and Althelmer entered into an agreement in respect to purchasing goods at the sale, to the effect that whatever goods were purchased should be put together, and sold in the name of S. Wolf & Co., and that when Wolf should receive back his money, expenses, etc., fixed at \$4,379.95, his interest in them should cease; that the expense of selling the goods should be deducted from the money received; and that Kaiser should be employed as a clerk, at a salary of \$25 a week. Wolf bid in at the sheriff's sale goods enough to cover the judgments of Field & Co. owned by him, and, as agent for Mrs. Kaiser, he bid in enough of the stock to cover the amount of her judgment, and Althelmer bid in enough to amount to the sum of \$897.85. That the goods were moved into a store in Chicago, Mrs. Kaiser purchasing from Althelmer the goods he had bought, for which she gave her individual note. That the business was continued in Chicago under the name of S. Wolf & Co., Kaiser working under the contract at \$25 a week, and he and his wife and family all lived in the same building. That the goods were moved to Madison, and the Fair store opened and operated by S. Wolf & Co. under the contract until December 29, 1884, when Wolf had about \$500 still in the business, and he then sold out to the defendant Jennie Kaiser, took her note for the amount, which was afterwards paid by her, as was also the \$900 to Althelmer. That the business and all the property from that time on were owned by the defendant Jennie Kaiser, and were managed by the defendant Mayer Kaiser as her agent. That the children of the parties worked in the store, and all lived together. That M. Kaiser was thereafter employed by the defendant Jennie at a salary of \$5 a week, and they were all supported out of the proceeds of the business, which seems to have been reasonably profitable. That on the 13th of February, 1892, an inventory was taken, at which time the amount of stock was \$5,368.23, and there were outstanding mercantile accounts against it to the amount of \$2,741.63. That the defendant Jennie Kaiser then sold the stock of goods to Kaiser Bros. & Spiegel for \$5,368.23, receiving \$2,100 in cash from them, their note for \$500, and they assuming the mercantile indebtedness. That the sale was made in good faith, and for a full consideration, and not for the purpose of hindering or delaying creditors of the said judgment debtor, or any other person. That the sum paid by Kaiser Bros. & Spiegel was all the stock was worth, and they had no notice or information whatever that

he had any right or interest therein,—and, as a conclusion of law, that the defendant Jennie Kaiser was the absolute owner of the property up to the time of the sale to Kaiser Bros. & Spiegel, when they became, and now are, the owners thereof, and that none of the property could be subjected to the debts of said judgment debtor. The action was dismissed, with costs against the receiver, as such, but no personal judgment was given against him, from which he appealed.

Bashford, O'Connor & Polleys, for appellant. Bushnell, Rogers & Hall and H. W. Chynoweth, for respondents.

PINNEY, J., (after stating the facts.) 1. The evidence shows that the judgments upon which the stock of Mayer Kaiser, the judgment debtor, was sold out in Chicago in October, 1883, were for honest debts which he then owed; and there is nothing in the evidence, so far as we are able to see, to show that there was anything improper or unfair in the manner in which the title to the stock purchased became vested in Mrs. Kaiser, Simon Wolf, and Althelmer, October 15, 1883, or in the agreement which they made for its management and sale by Wolf and Mrs. Kaiser for the benefit of the purchasers. The agreement of that date is a plain and reasonable business arrangement, and the facts which it recites are sustained by the evidence. There is nothing to show that the husband and judgment debtor had or used any funds or means of his own to enable his wife ultimately to become the sole owner of the business conducted at the Fair, established in the first instance by Wolf and Mrs. Kaiser under said agreement. The note for \$1,500, upon which the judgment against Kaiser, in favor of his wife, was rendered, was given for money which she testifies she loaned her husband, and the greater part of it but a short time before his failure; and his testimony tends to show that the money was loaned, and was not a gift. There is no evidence to the contrary, and the finding of the circuit court that it was a loan is sustained, we think, by the evidence. If the money was a bona fide loan, and not a gift, there is no reason why the wife should not be protected, in like manner as other creditors. She purchased Wolf's interest, and made full payment therefor, December 20, 1884, and bought out and paid Althelmer for his interest. Mrs. Kaiser's husband, the judgment debtor, was employed in the mean time in the business, at \$25 per week; and he managed the business, and rendered his personal services, which were thereafter continued at the rate of \$5 per week. It seems clear that the title to the goods and business was until the sale thereof, February 15, 1892, to her codefendants, her sons and son-in-law, in Mrs. Kaiser, and there is no reason whatever for questioning its validity as to her

husband's creditors, unless the fact that he gave his personal time, attention, and services to the management and conduct of the business for about nine years is ground for impeaching her title, as being for that reason fraudulent as against his creditors, and who were such at the time of the execution sales, in October, 1883. It may be conceded that there are some statements in the testimony of the judgment debtor calculated to create suspicion, and particularly in respect to the extent of the business, amount of profits, and value of the stock; but these appear, upon the whole, to have been grossly exaggerated. The circuit court found that the sale of the stock, of February 15, 1892, was for its fair value, and the real estate, the home of the family, appears to be incumbered. While the court should carefully scrutinize all cases of alleged fraud against creditors, wherein members of the family of the debtor make claim to important or valuable interests, as against creditors, yet judgment cannot go upon mere suspicion. Fraud cannot be presumed, and the burden of showing it is on him who alleges it.

2. As the business established at Madison in the Fair store was the business of Mrs. Kaiser, as against her husband's creditors, she might lawfully employ her husband, with or without hire, to manage it, and assist her in carrying it on. The evidence does not sustain, we think, the charge that what he did in this respect was in pursuance of any plan or scheme to defraud his creditors. The business was not only her own, and transacted in all respects in her own name, but it does not appear that any claim was ever made to the contrary until this proceeding was instituted, nor that she ever made any concession, or her husband any claim, to the contrary, or that he has, during a period of eight or nine years, used any of the proceeds, beyond his five dollars per week, as his own, or claimed the right to do so. We are unable to say that his employment and management of the business was not in good faith, or that it shows that he was the real owner, and the title of his wife was merely nominal or colorable. Mrs. Kaiser had a right to deal with her separate property in all respects as a feme sole, and had a right to employ agents to assist her in managing her property, and carrying on her business; and she had a right to employ or avail herself of the services of her husband, without subjecting her separate estate to the claims of his creditors. "With respect to her separate property the statute has placed her upon the same footing as to all the world, her husband included, as if she were, in the words of the statute, 'a single female.' But she may not enter into partnership with him. Fuller & Fuller Co. v. McHenry, (Wis.) 53 N. W. Rep. 896. As a negotiation or dealing, therefore, with respect to her separate estate, the transaction

is to be looked upon as if the debtor was not her husband, but a stranger. The marriage relation is to be disregarded, except where the question of fraud arises; and there it will be considered, and the transaction more closely scrutinized, on account of the greater inducements offered, and facilities afforded, for the commission of fraud." *Beard v. De-dolph*, 29 Wis. 140; *Hoxie v. Price*, 31 Wis. 82; *Abbey v. Deyo*, 44 N. Y. 348; *Gage v. Dauchy*, 34 N. Y. 297.

3. The proposition most strongly pressed at the argument was that the creditors of Kaiser, the husband, were entitled to receive payment of their claims out of the property accumulated, beyond the present needs of his family, by his skill, industry, and ability in managing and conducting the business of the Fair, as the agent of his wife; and the cases of *Glidden v. Taylor*, 16 Ohio St. 509, and *Feller v. Alden*, 23 Wis. 301, among others, were cited in support of the position. This contention is contrary to the case of *Dayton v. Walsh*, 47 Wis. 113, 2 N. W. Rep. 65, wherein it was held that where a married woman, having at the time no separate estate, purchased a farm of a stranger entirely upon credit, giving her notes for the price, secured by a mortgage on the property, and her husband lived with her on the farm, and controlled the farm labor, carrying on the business in her name, and as her agent, without any agreement as to his compensation for such services, the purchase by her having been made in good faith, and not as a means of fraudulently placing the husband's property beyond the reach of his creditors, the crops raised on the farm by their joint labor and management belonged to the wife, and that they were not subject to sale for the husband's debts. This conclusion was considered to be in accordance with the case of *Feller v. Alden*, 23 Wis. 301, relied on by the appellant. In *Feller v. Alden* it was held that, where the wife owned land as her separate estate, she might cultivate it by means of the labor of her husband and their minor children, and that the legal title to the products and proceeds would be in her, so that they could not be levied upon under an execution against her husband; that the mere fact that the wife employed the husband's services in cultivating her land was not proof of an attempt to defraud his creditors. It was questioned in that case, upon the authority of *Glidden v. Taylor*, 16 Ohio St. 509, whether a court of equity, upon a proper application of the husband's creditors, would not make an apportionment of the products, as between the fair rent and use of the capital of the wife, and the value of the personal services of the husband, so as to give the creditors the benefit of his industry, but the question was not decided. The case of *Glidden v. Taylor*, *supra*, is materially different from this case, in respect to the fact that in this the husband had a compensation for his services, and none of his prop-

erty was used in the business, and none of the profits applied to his use. *Penn v. Whitehead*, 17 Grat. 503, seems to hold that in such a case as *Glidden v. Taylor* the wife would not be entitled to any share of the profits. It is stated in some of the text-books, and held by many well-considered cases, that the time, talents, and industry of a debtor are at his own disposal, and that his creditors have no claim thereto; that he may bestow them gratuitously upon whom he will, and upon his wife as well as another, and that he cannot be compelled to labor for the benefit or advantage of his creditors; that, while the law does not require the wife to support the husband, it does not prohibit her from using her own means for that purpose, or for the support of his children. 2 *Bish. Mar. Wom.* § 453; *Kelly*, Cont. 149; *Abbey v. Deyo*, 44 N. Y. 344; *Gage v. Dauchy*, 34 N. Y. 293; *Buckley v. Wells*, 33 N. Y. 518; *Foster v. Persch*, 68 N. Y. 400; *Bank v. Guenther*, 123 N. Y. 568, 25 N. E. Rep. 986. In *Spering v. Laughlin*, 113 Pa. St. 209, 213, 6 Atl. Rep. 54, it was held that, if a married woman's separate right to property is found to exist, her husband may not only act as her agent, but he has the legal right to give his wife his labor and skill in conducting her business, and his creditors cannot sell her property, produced by his labor and skill with her original property. *Baxter v. Maxwell*, 115 Pa. St. 473, 8 Atl. Rep. 581. The entire question, in all such cases, would seem to be whether the property and business in question is really that of the wife, or whether it is that of the husband, and her claim to it a mere cover to protect it from his creditors. We are unable to understand how the husband's creditors can be said to be defrauded, when they cannot compel him to labor for their benefit, if he voluntarily bestows on others, or on his wife, that which, under the law, they cannot reach for the satisfaction of their demands. The cases of *Wortman v. Price*, 47 Ill. 22, and *Wilson v. Loomis*, 55 Ill. 352, while differing in some respects from the present, are not in accord with our own cases, or those cited above; and *Hallowell v. Horter*, 35 Pa. St. 375, was a case of confusion of property, and the whole was held liable for the husband's debts. The cases that hold or intimate an opinion that, in a court of equity, an apportionment of profits or division of property may be had, at the suit of the husband's creditors, will be found to rest upon the ground of community or blending of the money or property of the husband, as well as his labor, with the property of the wife, in some business venture or enterprise, in which there is a common participation in or use of the profits; and we have met with no case in which the bare fact that the time, skill, and labor of the husband, devoted to the business of the wife, has been held to give rise to such an equity. It is difficult to see how such an equity could

arise where the husband has already been paid for his services, as agreed, by the wife. We think that the plaintiff's contention in this respect cannot be sustained. We think that the evidence sustains the findings of the circuit court, and it is therefore not necessary to consider the question whether the action was barred by the statute of limitations, or by laches on the part of the creditor instituting the action. We do not find any error in the record. The judgment of the circuit court is affirmed.

VALLEY IRON-WORKS MANUF'G CO. v. GRAND RAPIDS FLOURING-MILL CO.

(Supreme Court of Wisconsin. May 23, 1893.)

**SALU—ACTION FOR PRICE—EVIDENCE—ARGUMENTS
OF COUNSEL—REVIEW ON APPEAL.**

1. Where the evidence is conflicting, a verdict of a jury will not be disturbed for alleged insufficiency of evidence to support it.

2. Where, in an action for the price of a wheel, the issue is whether or not defendant accepted the wheel after taking it on trial, evidence is competent, as showing an acceptance, that defendant gave plaintiff a note for the price and several times renewed such note, even though, on giving the first note, defendant reserved the question of acceptance for further consideration.

3. It is competent for plaintiff's counsel, in argument, to comment on the fact, proven in evidence, that defendant had sold the wheel after the commencement of the action, as showing an acceptance before the institution of the action.

4. It is competent to show, by a witness to whom defendant had sold the wheel, the manner in which it operated after his purchase of it, it appearing that all material conditions remained substantially as they did at the time of purchase.

5. Where, in an action for the price of a wheel, defendant counterclaims for damages resulting from an alleged defect in the wheel, the exclusion of evidence of such damage is harmless, where the jury found for plaintiff.

Appeal from circuit court, Fond du Lac county; N. S. Gilson, Judge.

Action by the Valley Iron-Works Manufacturing Company against the Grand Rapids Flouring-Mill Company for the price of a wheel sold defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

This action was brought to recover the purchase price of a water wheel and fixtures, and for the amount of which the plaintiff had a verdict and judgment, and the defendant appealed. The price of the wheel was \$700, and for that amount notes were given by the defendant. The complaint counts—First, on the sale and delivery of the wheel; second, on the notes for the price; and, third, upon the sale and delivery of certain fixtures for \$84. The defendant insisted that the notes were not executed in such a manner as to bind, and become the notes of, the corporation defendant; that they were given to the plaintiff without consideration, and solely as accommodation paper, and not in payment

for the wheel; that the plaintiff warranted the wheel to be of sufficient horse power, under the head that existed at defendant's mill, to carry the machinery of the flouring mill to its full capacity, when the wheel to the feed mill was operating the feed mill, and agreed that the wheel should operate satisfactorily to the defendant; that the wheel furnished was and is utterly worthless for the purposes for which it was required and warranted to perform; that the plaintiff failed and refused to take it away, and to replace it with a wheel such as was required by its agreement. The defendant, by counterclaim, claimed damages by reason of the insufficiency of the wheel, in that with it the mill would not manufacture more than 75 barrels of flour per day, while its full capacity, with a proper wheel, was 110 barrels per day. It appeared that the wheel was furnished under an order from the defendant to the plaintiff given October 21, 1887, requesting it to deliver to the defendant, "on cars at Grand Rapids, Wis., one sixty-five inch special Elmer wheel, to run with the sun, * * * to be delivered within thirty days, or sooner, if possible. The above wheel we agree to place within our flume and test it ninety days from date; and if wheel proves satisfactory, and gives the power and speed it is represented to give, we agree to pay for said wheel as follows: One note for \$350, payable nine months from November 1, 1887, and one note for \$350, less freight on wheel, payable fifteen months from November, 1887; all drawing seven per cent. interest until paid." The wheel was received by the defendant early in December, 1887, and was put in the mill a few weeks thereafter, and was used in operating the mill until some time in the spring of 1889, when the mill was shut down. This suit was commenced October 5, 1889. The mill, including the wheel, was sold by the defendant in April, 1891. The defendant, by letters directed to the plaintiff, from June 16, 1888, to January 11, 1889, complained of the wheel that it was not satisfactory. On the 12th of May, 1888, the defendant's secretary and general manager sent plaintiff a note for \$350, the execution of which was not authorized by any formal action of the company, saying that it did "not consider the giving it as an acceptance of the wheel, unless it proves perfectly satisfactory in test agreed on with Mr. Burns." This note was several times renewed, and another note was in like manner given, and sent to the plaintiff, for the remaining \$350. These notes went to protest in the fall of 1889. The defendant did not at any time do anything towards getting any other wheel to run its mill, and did not at any time offer to return the wheel, or ask the plaintiff to remove it. It was the only wheel used to operate its flour mill from the time it was put in, December, 1887, until it sold its mill, in April, 1891. Various plans or propositions

were made, and some of them adopted, to obviate the objections which the defendant claimed existed to the wheel, and it was at one time proposed to put in a new wheel in its place. Mr. Byrnes, on behalf of the plaintiff, called on the officers of the defendant in the latter part of 1888, and had an interview with its secretary and general manager, and testified that he told him, "I either wanted him to settle for the wheel, or take it out, and return it;" that "he said he would not do it;" he said "he did not want to take it out at that time; he hadn't another wheel to take its place, and he still seemed to want to hang onto the old wheel." This was when the plaintiff proposed to put in new buckets. "He said, if he only had a little more power, he thought the wheel was all right." The secretary and general manager denied that Byrnes ever demanded that the defendant should surrender the wheel, or pay for it. In respect to the representations in respect to the power and speed of the wheel there was a conflict of testimony. There was testimony given tending to show that the wheel was in all respects as proposed, and testimony to show that it was not. It appeared that the plaintiff sent mechanics to examine it, and to remove or obviate the objections made to it by the defendant. The court admitted the notes referred to in evidence, not as binding obligations on the defendant, but as evidence bearing on the question of the acceptance of the wheel, to be considered with the letters and other testimony in the case, and this was objected to by the defendant. The testimony was quite extended, and fairly presented the question whether or not the dissatisfaction expressed by the defendant with the wheel was an honest one, or not, and whether the wheel was a fair compliance with the contract. The case was submitted to the jury, under instructions not excepted to, to find a special verdict in answer to four questions. The defendant did not ask to have any other matters, and the jury found, in substance: (1) The wheel in question had the speed and power which was represented it would have at the time it was ordered; (2) the wheel was reasonably fit for the use for which it was ordered by the defendant; (3) the defendant accepted said wheel before this action was commenced, October 5, 1889; (4) the wheel, shafting, and couplings were reasonably worth, at the time the same were delivered to the defendant, \$700. There was a motion for a new trial, on various grounds, and it was denied.

O. W. Briggs, for appellant. John Botteusek, for respondent.

PINNEY, J., (after stating the facts.) 1. The contract of sale of the wheel in question was for a sale upon trial and acceptance, and not of a present sale with warranty. The main question in the case is

whether the defendant accepted the wheel, or not, after the stipulated trial, or such as it chose to make, before the action was commenced; and this was wholly a question of fact, for the jury to determine, under the evidence produced. The instructions of the circuit court were full and clear on this and all other material issues, and that court was satisfied with the findings of the jury. There was evidence sufficient to support the verdict, and the court cannot interfere to grant a new trial, under such circumstances, on the claim that the verdict is contrary to the evidence.

2. There was no error in admitting in evidence the notes given for the wheel, although, in one of the letters in which one of them was inclosed, the defendant reserved the question of the acceptance of the wheel for further consideration. These notes, and the fact of their renewal, and the letters in relation to them, were competent evidence, with all the other evidence in the case bearing upon the question of acceptance. There is nothing in the case to show or suggest that they were given as accommodation paper, or for any other consideration than the wheel and its fixtures. They were not admitted as binding obligations of the corporation defendant, for want of previous action or authority of its directors; and it is reasonable to suppose that when the secretary and general manager signed them it was supposed that all the defects in the wheel, if any, would be removed, so that the defendant felt warranted in giving notes for the purchase price. Certainly, these facts were proper for the consideration of the jury on the question of acceptance of the wheel, under the order. It is to be borne in mind that nearly two years had elapsed from the time the wheel was received by the defendant until the commencement of this action. The defendant had abundant time to make trial of the wheel. The period named in the order for that purpose was only 90 days. If it was not satisfied with the wheel, it was its duty to request the plaintiff to take it away. There is nothing to show that any such notice was ever given, and there is evidence from which the jury might properly find that it refused to let the wheel be taken out in the fall of 1889, when called on to settle for it. The evidence tends to show that the defendant was making an unreasonable use of its right to accept or reject the wheel. There is considerable evidence to show that the wheel was in compliance with the order, and the jury may have arrived at the conclusion that the alleged dissatisfaction of the defendant with it was whimsical and ill founded, or simulated.

3. After this action had been commenced, in October, 1889, the defendant retained the wheel until April, 1891, when it sold it, with its mill, to other parties. This was proved without objection, but defendant's counsel

objected, at the argument before the jury, against the counsel for the plaintiff commenting on this evidence of sale as showing an acceptance of the wheel; but the court ruled that it could only be referred to, if it had any bearing, on the question whether or not there had been any acceptance of the wheel before the action was commenced. As thus limited, and in connection with the other facts in evidence, we think the proof was competent, and the comment of counsel for that purpose proper.

4. The evidence of the witness Nash as to the manner in which the wheel had operated after he and his partner purchased the mill was properly received. His testimony shows that all material conditions remained substantially as when they purchased the mill, so far as the operation of the wheel would be likely to be affected, and, this being the case, his testimony as to its operation was properly received.

5. The question of exclusion of the evidence offered, under the defendant's counterclaim, to show what damages the defendant had suffered by reason of the premises, does not require notice or discussion, for the reason that the verdict of the jury shows that the counterclaim was not sustained, and the exclusion of evidence of damages under it did not operate to the prejudice of the defendant. There was no claim that any false or fraudulent representations were made as to the power, speed, or capacity of the wheel, and, as already observed, it was a case of a sale upon trial. "The above wheel we agree to place within our flume, and test it ninety days; and if wheel proves satisfactory, and gives the power and speed it is represented to give, we agree to pay for said wheel," etc. Here is no warranty. The representations made before the delivery of the wheel would not constitute a warranty, for the plain reason that the acceptance of the wheel is not to be, and was not, in reliance on them, but the defendant stipulates for a period of 90 days within which to test the truth of the representations. *Barnes v. Burns*, 81 Wis. 235, 51 N. W. Rep. 419, and cases there cited.

There were some other points raised at the trial, but none of them merit particular notice. We are unable to see that any error occurred, to the prejudice of the defendant. The judgment of the circuit court is affirmed.

COLEMAN v. WARD et al.

(Supreme Court of Wisconsin. May 23, 1893.)

ACTION ON NOTE — LIMITATIONS — PART PAYMENT — EVIDENCE.

1. In an action against the maker and surety of a note the defense was the statute of limitations. Plaintiff sought to recover on the ground that the note was taken out of the statute by the indorsement of a payment made by the maker at the request or by the direction of the surety, but he was unable to show whether a conversation with the surety, relied on to

support his position, took place before or after the payment in question. His testimony tended to show that the indorsement was on the note when the conversation took place. *Held*, that the evidence justified the direction of a verdict for defendants, under Rev. St. § 4248, providing that, "if there are two or more joint contractors * * * no one of them shall lose the benefit of the provision of the statute of limitations, so as to be chargeable, by reason only of any payments made by any other or others of them."

2. Where a joint debtor, on demand of payment, refers the creditor to his codebtor, it amounts to a direction to the latter to make payment for him, and, if he does so, the payment will continue the debt from that date as to both.

Appeal from circuit court, Crawford county; George Clementson, Judge.

Action by Martin Coleman against George Ward, impleaded with Henry Barrette, on a promissory note. Judgment for defendants. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

This is an action on a promissory note given by the defendants to the plaintiff for the sum of \$200, the defendant Ward having signed the same as surety. The note matured January 13, 1883. Two payments of interest were indorsed on it, the last dated January 10, 1884, and there was an indorsement of payment of \$79.35, May 2, 1885. The defendants relied on the statute of limitations, and the plaintiff sought to recover on the ground that the note was taken out of the statute by the indorsement of the last payment. This payment was made by the defendant Barrette, and the question was whether the payment was made at the request or by the direction of the defendant Ward, so as to take the case out of the statute as to him. It appears that Barrette left the country, and the plaintiff testifies that, when he was going away, he and the defendant Ward met the plaintiff, and had an understanding about the note. That Ward did not want the note to go out of his hands, to make costs on it. "They both said that, and I said I would keep the note, and give Barrette a chance to pay it, and not put Ward to expense, because he was security. That was the understanding four or five years ago." That Ward used to ask him how Barrette was getting along, and how much he was paying him, "and I used to tell him." In reply to a question as to what was said about the payment of \$79.35 in interview above mentioned, he answered, "Well, we knew that." Mr. Webster, as a witness, testified to the note being left with him for collection, and to calling on Ward for payment, and he said he was a mere surety, and had no benefit from it; that he asked him if he knew of these payments, and he answered in the affirmative; that he read the indorsements to him, and asked him if there had been any extension of time granted, and he said there had not; that the plaintiff had told him of the payments, and he had told

him that that was right, and urged him to procure money as fast as possible from Barrette, but not to sue on it, to keep the note, and not sell it; that he thought Barrette would pay it. The conversations of witness with Ward were about two years after the date of the last indorsement. The action was commenced April 8, 1891. The plaintiff further testified that he went to Ward for pay on one occasion when he was husking corn; that he did not know what time it was; that he met him several times on the road, and used to talk about the note; the conversations were both before and after the note was due; that there had been two indorsements upon it at the time; that he told Ward he needed the money, and Ward said he would like it if he would collect it of Henry Barrette; that he thought this was before the last indorsement. He did not go to Barrette after that. The payments were all made to plaintiff at his house. He thought the last payment was after the conversation in the field, and before the last indorsement, as near as he could remember. On cross-examination he testified that the interview in the field was after Barrette had gone out of the state. Being asked in respect to this conversation the question, "Are you positive whether it was before or after this last payment?" he answered that it was after the last payment; that he (Barrette) went out of the state; that he was not certain whether this conversation was before or after the last payment; that, as to whether it was before or after, he could not say; that they had conversations about it after Barrette had gone away. Plaintiff's counsel moved the court on the testimony to direct a verdict for the plaintiff. This motion was overruled, and the court directed a verdict for the defendants. Plaintiff appealed.

D. Webster, for appellant. C. S. Fuller, for respondents.

PINNEY, J., (after stating the facts.) The statute is that, "If there are two or more joint contractors, * * * no one of them shall lose the benefit of the provisions of the statute of limitations, so as to be chargeable, by reason only of any payment made by any other or others of them." Rev. St. § 4248. This action was certainly barred unless taken out of the statute by the payment of \$79.35, May 2, 1885, and it was made by and at the direction or request of the defendant Ward. The fact that the payment was made by Barrette of his own volition, and without the request or direction of Ward, is made of no avail by the statute. It seems that if a joint debtor, on being called on for payment, refers the person calling on him to his codebtor for payment, this amounts to a direction to the latter to make payment for him, and, if he does so, the payment will be held to continue the debt from that date as to both. *Cleveland v. Harrison*, 15 Wis. 670; *Bank v.*

Cotton, 53 Wis. 81, 9 N. W. Rep. 926. The plaintiff's evidence does not tend to show that the particular payment relied on was made at the request or direction of the defendant Ward. The plaintiff, in his testimony, is unable to say whether the conversation between him and Ward relied on took place before or after the payment in question was made. He says that the conversation occurred after Barrette had left the state, and his testimony tends to show that the last indorsement was on the note when the interview took place between the plaintiff, Barrette, and defendant, in Prairie du Chien, when Barrette was going away. The evidence was not sufficient to take the case to the jury on this question, and the direction of a verdict for the defendants was correct.

The judgment of the circuit court is affirmed.

SALLADAY v. TOWN OF DODGEVILLE.

(Supreme Court of Wisconsin. May 23, 1893.)

HIGHWAYS—DEFECTS—PERSONAL INJURIES—NOTICE—SUFFICIENCY—EVIDENCE—INSTRUCTIONS—MARRIED WOMAN—PREGNANCY AFTER INJURY—EFFECT.

1. *Sanb. & B. Ann. St. § 1339*, requires as a condition precedent to an action for damages caused by a defective highway that within 90 days after the injury a notice in writing by such person shall be given a supervisor of the town against which damages are claimed, stating the place where such damages occurred, and describing "generally" the defect which occasioned it. *Held*, that a notice which recited that, while traveling on the road from D. past the F. schoolhouse in defendant town, the undersigned was injured by reason of the insufficiency of such highway, "at a point about 100 yards east of the residence of F., and somewhere near the line of sections 20 and 29, in town 7 north, range 3 east" in such town, and that such defect was "the general bad condition of said highway, and also some loose stones lying in the traveled track," was sufficient where, before it was served, the precise defect was pointed out to defendant's supervisor, who examined the entire road through the rocky point mentioned, and in the absence of evidence showing any other practicable method of describing the locus in quo by its surroundings.

2. The fact that such notice recited that the injury was caused by loose stones, and the evidence showed that it was caused by a stone partly imbedded in the road, does not render the notice insufficient, since the variance is immaterial.

3. In an action against the town to recover damages for personal injuries caused by such obstruction in the highway in July of a certain year, it is not error to permit a witness to testify to the condition of the road at the point in question two weeks after the accident, and during the spring and summer of such year, where the evidence tends to show that its condition remained practically the same during all such time.

4. Where the jury views the premises, and defendant attempts to show that there had been no material change in the road down to the time of trial, it is proper to permit plaintiff to show in rebuttal that in the fall before the trial earth was plowed on the bank and thrown in on the track, materially changing its condition.

5. By agreement of the parties, and on re-

quest of the jury, the latter were brought into court for the purpose of hearing the evidence of three certain witnesses read as to a certain point. After the evidence of one of such witnesses had been read, the court stated the substance of the evidence of the other two on the point in question. *Held*, that this was not such an abuse of discretion as warranted a reversal.

6. Where the undisputed testimony is that there was a stone or stones in the traveled track, it is not error for the court to state to the jury the substance of the testimony on both sides as to the size and situation of the stone, and say that "there is no question at all under the testimony that there was a stone there. Its size and character and location you are to determine."

7. Where a married woman is injured by an obstruction in a highway, and her medical advisor does not caution her to avoid pregnancy, and there is no evidence that she knew that her injury was such that it was not prudent for her to do so, her pregnancy, occurring eight weeks after the accident, is not necessarily and as a matter of law sufficient ground to justify a reduction of damages, though the results of the injury may be thereby prolonged or her recovery delayed.

8. In such case the question as to whether or not plaintiff was negligent by her conduct subsequent to the injury is for the jury.

Appeal from circuit court, Iowa county; George Clementson, Judge.

Action by Ella M. Salladay against the town of Dodgeville to recover damages for personal injuries caused by a defective highway. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

The notice served by plaintiff on defendant, and referred to in the opinion, is as follows: "You will please take notice that on the 11th day of July, 1891, while traveling along the highway leading from the city of Dodgeville past the Floyd schoolhouse, in said town, the undersigned, Ella M. Salladay, was severely injured by reason of the insufficiency and want of repair of the said highway, at a point about one hundred yards east of the residence of Mrs. Freeman, and somewhere near the line of sections twenty and twenty-nine, town seven, range three east, in the county of Iowa, and in said town; that the said insufficiency and want of repair which caused the said injury was the general bad condition of the said highway, and also some loose stones lying in the traveled track of said highway; that the said Ella M. Salladay was then and there thrown violently from the buggy in which she was riding, and severely and permanently injured, and that satisfaction therefor is claimed of the said town."

The other facts fully appear in the following statement by PINNEY, J.:

Action to recover damages for injuries sustained July 11, 1891, by the plaintiff while traveling on a certain highway of the defendant town, alleged to be insufficient and out of repair, in that at the point in question it was in a "general bad condition, and some loose stones were lying in the traveled track of the said highway, which passes the Floyd schoolhouse in said town, at a point therein

about one hundred yards east of the residence of Mrs. Freeman, and somewhere near the line of sections twenty and twenty-nine, town seven north, range three east, in the county of Iowa, and in said town;" and the complaint alleged that while lawfully traveling along said highway, exercising ordinary care, and without fault or negligence on her part, she was thrown violently out of the carriage in which she was riding upon the ground, and was thereby severely and permanently injured and disabled; that her head was badly bruised, and she received great injury to her spine, from which she suffered, and still suffers, great pain, whereby she was permanently injured and disabled, and alleged the giving within the specified time, of notice to one of the supervisors of the town, stating the place where such damage occurred, and describing generally the insufficiency and want of repair which occasioned it, and that satisfaction therefor was claimed of the defendant town, and the filing of a claim therefor. The answer admitted that on the 12th day of September, 1891, the plaintiff caused a notice in writing to be delivered to Luke Elam, one of the supervisors of the town, which was filed in the office of the town clerk March 26, 1892, and the presentation and disallowance of the plaintiff's claim, and the answer denied all allegations except those specifically admitted. At the trial the plaintiff gave evidence on her part as to the circumstances of the injury, in substance, that it occurred at a rocky point in the highway; that the plaintiff was seated, with her child in her arms, in an open buggy, driven by her son, and they were driving at a walk, when, without warning, the wheel struck a rock, and she was thrown out on the ground, with her child in her arms, falling on her back in a very rocky place; that her head was cut and bruised, and her back badly injured, and she was unconscious for about half an hour; that the rock was in the wheel track, lying partly on its edge, and was partly imbedded in the ground, the part above ground being about six or seven inches square and three or four inches thick, and there were other larger ones lying beside it. The evidence in respect to the rocks in question took quite a wide range. Many witnesses were examined on each side in respect to it, and the jury viewed the premises. The witnesses described the place as a rocky one, or patch of rocks in a cut, and about two rods long. Mr. Persons, a witness for the plaintiff, who had driven over the place about two weeks after the accident, was asked by the plaintiff's counsel to describe the highway at that point during the spring and summer of 1891. Objection to this question by defendant's counsel was overruled, and he answered: "Well, it was principally rocks. And the way I remember it, there was a small gully through the center of the road, and the patch of rocks I should think would be in the neighborhood of two rods

long; and the piece of road west of it was smooth and nice, and there was only one rock that I noticed particularly after I heard of the accident; that was about a foot square. This was the first time I went by after the accident; might be a couple of weeks." The answer was objected to, and the court ruled that he might tell the condition of the road the first time he went over it after the accident. He further testified that the "rocky place had been in the same condition that I have described all that season,—that is, whenever I traveled over it;" that there was "quite a considerable travel over it all the time. The width of the traveled portion at this rocky point was just a wheel track for the horses and wagon. I don't think it was wide enough so two teams could pass in that place." Evidence was given tending to show that the road had continued to be as it was in July up to the time of the trial, and there was evidence tending to show that it was repaired somewhat in October of the same year. There was some conflict of evidence on this point, namely, as to whether repairs had been made. The court allowed a witness for the plaintiff, Mr. Pollard, to testify in rebuttal, against the objection of the defendant, that in October of that year Mr. Collingwood and Mr. Shields and other men had been upon the bank, and plowed it all along, and scraped it down, and covered the main road at the rocky point. Witness had some difficulty in getting across there with a load of wheat, and noticed the change when he went back in the evening. This was before the trial and view by the jury. The plaintiff in making out her cause offered in evidence the notice served on the supervisors mentioned in the pleadings, and objection was made to its reception in evidence as an insufficient description and designation of the cause, character, and kind of injury, and for that the proof showed that the injury was not received from loose rock, but by a rock fast in the track. The court overruled the objection. The substance of the notice has already been stated. Dr. Pearce testified as to the character and extent of the injuries to the plaintiff; that she had two cuts on the back of her head, extending to the bone, and they had bled considerably; that there were bruises on the back, just between the shoulders and just above the lower portion of the spine; that she complained of the pain most just above the lower part of the spine, on each side of it; that he saw her from time to time for several weeks, and had attended her for trouble in her back and spine ever since that time occasionally; that the condition of the back is that there is a point of tenderness at the junction of the sacrum with the last lumbar vertebra, and another between the third and fourth dorsal vertebrae between the shoulders; that she complains of pain radiating from those points; that the nature and cause of it is spinal concussion; that a trouble that has

lasted thus far, and as active as this, with the tenderness and pain, would probably continue through life; that during the period of treatment there had been a pregnancy, occurring about eight weeks after the injury, and during that there had not been a chance of making as active treatment as there would have been otherwise; that there was an improvement in her condition for the first five or six weeks, but the last six months he discovered no improvement; that he thought she might have received benefit from treatment in the earlier stages that she could not receive after she became pregnant; that there had been an attempt made to cure her for the first four or five weeks, not since; that since that time he had done nothing except to relieve her pain; that he could have continued to blister the lower part of the spine, but there would have been danger of causing a miscarriage, and this was the reason he discontinued treatment. The circuit court charged the jury: "If the after-pregnancy of the plaintiff may have prolonged the injury or delayed her recovery, the damages which she is entitled to recover in this action, if you find that she is entitled to recover, are not to be reduced by you because of such pregnancy." The court charged the jury, at the request of the defendant, that "It was the duty of the plaintiff, after the accident, to take reasonable care of herself, and to avoid, so far as was reasonably possible, doing anything which would tend to increase, prolong, or render permanent her injuries, sufferings, or disability." The defendant requested the court to charge that if they found from the evidence "that the injuries, sufferings, or disability of the plaintiff were increased or rendered permanent by any want of such ordinary care on her part, or by reason of her becoming pregnant after the accident, and such pregnancy prevented proper medical treatment of her injuries, and such want of treatment resulted in increased prolongation or permanency of her injuries, sufferings, or disability, which would not otherwise have resulted, she cannot recover from the defendant for any increased prolongation or permanency of her injuries, suffering, or disability resulting from such want of care, if you find there was such want of care, or from such pregnancy, if you find there was such pregnancy." This latter instruction the court refused. The jury, having been out some time, returned into court, stating that they differed on what some of the witnesses testified to as to the condition of the road at the time it was repaired and after, and desired to have the testimony of John Pollard, James Smith, and William Smith read to them again by the reporter. This counsel for both parties agreed might be done. The testimony of Pollard was read. The court stated to them the drift and substance of such testimony of James and William Smith and other witnesses, and an exception was taken because the testimony of the Smiths was not read,

The court remarked on this subject: "As it is called to my attention by counsel for the defendant, I state to you that the substance of the testimony of Smith was that there was no change made in this highway in October." The jury found a verdict in favor of the plaintiff for \$550, and, after a motion for a new trial for various reasons had been overruled, judgment was rendered upon the verdict, from which the defendant appeals.

Reese & Carter and W. E. Carter, for appellant. J. T. Smelker and Aldro Jenks, for respondent.

PINNEY, J., (after stating the facts.)

1. The statute requires (Sanb. & B. St. § 1339) as a condition of maintaining an action for damages sustained by any person by reason of the insufficiency or want of repairs of any highway, that within 90 days after the happening of such event notice in writing signed by the party, his agent or attorney, shall be given to a supervisor of the town against which damages are claimed, "stating the place where such damage occurred, and describing generally the insufficiency or want of repair which occasioned it." The object of the notice is "that the town authorities may investigate and ascertain the fact, both as to the defect in the highway and of the injury occasioned by it." *Plum v. City of Fond du Lac*, 51 Wis. 393, 8 N. W. Rep. 283. Reasonable certainty is all that is required. "The notice should point as directly and plainly to the place of the injury as is reasonably practicable, having regard to its character and surroundings." *White v. Stowe*, 54 Vt. 510. And this rule this court has held in *Weber v. Town of Greenfield*, 74 Wis. 238, 42 N. W. Rep. 101, to be founded in good sense, and may be easily complied with. The notice in *Weber v. Town of Greenfield*, supra, was held defective because misleading, in that it not only wrongly described the place of the injury, but was inaccurate in other respects, as fully stated in the opinion of the court. 74 Wis. 236, 237, 42 N. W. Rep. 101. In this case the road is described as the one leading from the city of Dodgeville past the Floyd schoolhouse in the said town, and the particular place and the particular point is designated as being about 100 yards east of the residence of Mrs. Freeman, and somewhere near the line of sections 20 and 29, in township 7 N., range 3 E. in said town; and the insufficiency and want of repair, which in this case served to locate the place of injury, was the general bad condition of the highway and some loose stones lying in the traveled track of said highway. The evidence does not disclose any other practicable method of describing the locus in quo by its surroundings, and shows also that before it was served the plaintiff's husband visited the place with the supervisors, and pointed out the precise defect complained of, and that the supervisors

examined the entire road through the rocky point mentioned. The notice was signed by both the plaintiff and her husband, the latter being also a claimant for satisfaction for damages sustained by the same cause. We think that from the notice itself and the objects and points described in it, there could be no difficulty experienced in finding the place of the injury, notwithstanding it may have been inaccurate in stating that the injury was caused by loose stones in the traveled track, instead of a stone partly imbedded in the road, as the evidence showed to be the fact, (*Fopper v. Town of Wheatland*, 59 Wis. 623, 18 N. W. Rep. 514,) and meets the requirements of the rule stated in *Weber v. Town of Greenfield*, supra. As a mere question of variance in respect to the stone being partly imbedded in the road, instead of being loose stones, we think, in view of the condition of the road at this rocky point, it could not have misled the town officers. Such a variance between an allegation in a pleading and proof would be properly disregarded. The circumstance that the stone which caused the injury was described as loose, when in fact it was fastened or imbedded in the track, was, we think, immaterial, if either in a loose or imbedded condition it constituted an insufficiency or want of repair, as the jury have found to be the fact.

2. There was no error in admitting the evidence of the witness Parsons describing the condition of the road at the point in question two weeks after the accident, and during the spring and summer of 1891. There was no evidence to show that any repairs had been made within that time, and the evidence tended to show that its condition had remained during all this time practically unchanged, down to the 7th of October. As we understand the testimony, it was attempted to be shown on the part of the town that there had been no material change down to the time of the trial. As the jury had visited or were about to visit and view the place, it was competent to show by the witness Pollard that earth had been plowed upon the banks and thrown in upon the track, materially changing the situation. As this evidence was offered in rebuttal of the defendant's claim, there can be no doubt that it was properly received.

3. The objection that it was error for the court not to read to the jury the evidence of the two Smiths who were witnesses at the trial, as well as that of Mr. Pollard, when they came into court asking that the testimony of these witnesses might be read to them, cannot be maintained. We do not understand that the court refused to have the testimony of the Smiths read, but that, after the testimony of the witness Pollard had been read, the court stated the substance of their evidence on the point in question. How much of the evidence and what parts of it may be stated anew or read to

the jury under such circumstances is a question within the discretion of the presiding judge, under section 2855, Rev. St., and error can be assigned in this respect only in case of a clear abuse of such discretion. *Byrne v. Smith*, 24 Wis. 68.

4. Error is assigned that when the jury came into court to hear some of the testimony read, the presiding judge stated that "there is no question at all, under the testimony, that there was a stone there, [in the traveled track.] Its size and character and exact location you are to determine." He stated also, in substance, the testimony of the witnesses on both sides as to its size and situation, and added that "you will have to determine these matters. There is a conflict of testimony, and you will have to try and reconcile this testimony, and arrive at some conclusion." We do not think there was any error in this respect. We think the undisputed testimony of all witnesses having any definite knowledge on the subject is that there was a stone or stones in the traveled track. The court left the question of their size, character, and location to the jury to find whether they constituted a defect or want of repair which caused the plaintiff's injury.

5. The instructions of the court in respect to the effect of the after-pregnancy of the plaintiff upon the question of damages, we think were correct. If the plaintiff had rendered the consequences of the wrongful act of the defendant more severe or injurious to herself by some voluntary act which it was her duty to refrain from, or if by her neglect to exert herself reasonably to limit the injury and prevent the damages, in the cases in which the law imposes that duty, and thereby she suffered additional injury from the defendant's act, evidence is admissible in mitigation of damages to ascertain to what extent the damages claimed are to be attributed to such acts or omissions of the plaintiff. It is a question of negligence, and the measure of duty is ordinary care and diligence in the adoption of such measures of care or prevention as the case required and were within her knowledge or power. 1 *Suth. Dam.* § 155, *ut supra*. It does not appear that her medical adviser gave her any caution to avoid sexual intercourse, or even pregnancy, nor is there any evidence to show that she knew or understood that the nature of her injury was such that it was not prudent that she should do so. The mere fact that eight weeks after the injury pregnancy occurred, and when no caution in that respect appears to have been given by her medical adviser, is not necessarily and as a matter of law sufficient ground to justify a reduction of damages for the injury caused by the defendant's negligence, although the results of the injury may have been thereby prolonged, or her recovery delayed. The instructions given were correct in view of the testimony, and the one asked

by the defendant was properly refused. The doing of any act which prevented or retarded her recovery is not of itself a ground for reduction of damages. To have that effect it must have been a negligent act, and whether an act is or is not negligent is a question for the jury, and not of law for the court, if different minds may properly draw different inferences, even from the same established facts. The instructions asked entirely ignored this material consideration, whether the plaintiff was negligent or at fault for what occurred after her injury. A considerable number of witnesses were examined on each side, and in many respects the evidence is conflicting. The circuit court was satisfied with the findings of the jury, and denied—as we think, very properly—a motion to set aside the verdict as being contrary to the evidence. The verdict is a small one in view of the evidence as to the character of the plaintiff's injuries. We find no error justifying a reversal of the judgment of the circuit court. The judgment of the circuit court is affirmed.

RAMASH et al. v. SCHEUER et al.
(Supreme Court of Wisconsin. May 23, 1893.)
**FRAUDULENT CONVEYANCES—CONSIDERATION—
NONSUIT.**

1. Defendant, having obtained from his father-in-law \$900 to aid in the purchase of land, gave a bond to the latter, conditioned for his support during life, and a mortgage on the land to secure a note for \$900, payable on breach of the bond. Later the father-in-law certified on the margin of the record that the mortgage was fully paid, but he did not give up the bond and mortgage, nor was the \$900 in fact returned. The father-in-law was an ignorant man, unable to speak English, and it appeared that he intended, not to discharge the debt or agreement for support, but merely to facilitate the sale by defendant of part of the land to avoid foreclosure. All but two acres of the land was sold, and this two acres defendant conveyed to the father-in-law. *Held*, that there was a sufficient consideration as against creditors for the conveyance by defendant to his father-in-law.

2. In an action to foreclose a land contract and remove the lien of an attachment levied on land, where it was charged that two of defendants were colluding together, and pretending that the attachment lien was valid, in order to compel the payment of the attaching creditor's claim, the fact that the collusion did not appear on the trial did not entitle the attaching creditor to a nonsuit after he had taken issue and tried the case on its merits.

Appeal from circuit court, Manitowoc county; N. S. Gilson, Judge.

Action by Wenzel Ramash and Rosa Lamach against John G. Scheuer, impleaded with George Bartleme and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action to foreclose a land contract and remove the lien of an attachment levied upon the land. The substance of the complaint

is stated in *Ramash v. Scheuer*, 81 Wis. 209, 51 N. W. Rep. 330, where this court affirmed an order overruling Scheuer's demurrer to the complaint. It is sufficient to say here that the action was brought to foreclose a land contract by which the plaintiffs agreed to convey two acres of land to the defendant George Bartleme for a specified consideration, and further the complaint prayed for the removal of the apparent lien of a writ of attachment thereon, sued out by the defendant Scheuer in an action against the defendant John Lamach. The complaint charged that the attachment affidavit was false, and that the defendants Scheuer and Bartleme were colluding together, and pretending that the attachment lien was a valid lien, to harass and annoy plaintiffs, and to compel them to pay Scheuer's claim. Before the decision of this court upon the demurrer, the defendant Scheuer answered the complaint, admitting the making of the land contract, and the possession of the land by Bartleme, and alleging that the land in fact was the property of John Lamach, and that he had fraudulently conveyed the same to the plaintiffs; denying all fraud or collusion on his part, and setting forth at length his attachment proceedings, and claiming a valid lien thereby on said lands, and praying that such lien be adjudged by the court. The plaintiffs, Wenzel Ramash and Rosa Lamach, are father and daughter. Rosa is the wife of the defendant John Lamach. It appeared on the trial that in January, 1884, John Lamach purchased 40 acres of land for \$2,250, paying down \$300 of his own money and \$800 furnished him by his father-in-law, Ramash, and giving a purchase-money mortgage for the balance. A second mortgage was given by Lamach to Ramash in consideration of the \$800 so contributed, to secure the performance of a bond conditioned for the support of Ramash during his life, by furnishing certain specified amounts of money, food, etc., and, in addition to the bond, a note was executed by John and Rosa as follows: "\$800.00. Gibson, January 9, 1884. In time of disregard of certain bond of maintenance, we promise to pay to the order of Wenzel Ramash eight hundred dollars, (\$800.) This note is secured by mortgage of even date herewith. Value received, with interest at no per cent." John became heavily in debt, and to avoid foreclosure of the first mortgage sold first 20 acres and afterwards 18 acres of the 40, retaining but 2 acres. To facilitate these sales, Ramash consented to and did release the 20 acres first sold from the lien of the mortgage, and at the time of the second sale signed a certificate that the mortgage was fully paid on the margin of the record. The bond and mortgage, however, were never given up. At about the time of the second sale, in January, 1888, Lamach left the two acres of land, which had been his homestead, and went to Two Rivers to live, giving Ramash

a life lease thereof. On the 15th day of August, 1890, Lamach and wife deeded the two acres to Ramash in consideration of the \$800 previously advanced, and on the same day Ramash deeded the land to his daughter, Rosa, the deed containing a clause that it was not to take effect until the death of Ramash. On the 13th day of October, Ramash and Rosa entered into the land contract with defendant Bartleme, which is being foreclosed in this action, and Bartleme went into possession of the premises under it, and still is in possession thereof. The contract called for payment of the purchase price November 10, 1890, and on that day a sufficient deed was duly tendered, but Bartleme refused to accept it on account of the attachment levied on the land at the suit of Scheuer, on the 17th day of October, 1891, in an action upon a promissory note against John Lamach. Scheuer has always insisted that his lien was a valid lien, and still does so, and refuses to release it, and Bartleme still refuses to carry out his contract, because he claims said attachment levy creates a lien on the lands. The trial court found the facts substantially as above stated, and concluded that the deeds from Lamach and wife to Ramash, and from Ramash to Rosa Lamach, were not fraudulent, but executed for a sufficient consideration; that the plaintiffs were entitled to judgment of foreclosure, and for the relief prayed for in their complaint, giving Bartleme 90 days' time within which to pay the purchase money and interest. Also that plaintiffs recover costs against both Bartleme and Scheuer. Judgment was entered in accordance with the findings, and defendant Scheuer appeals from those parts of the judgment awarding costs against him and adjudging that his attachment levy created no lien on the premises.

F. E. Manseau, Isaac Craite, and G. G. Sedgwick, for appellants. Nash & Nash, for respondents.

WINSLOW, J., (after stating the facts.) If the deed from Lamach to his father-in-law was executed in good faith and for a sufficient consideration, as the trial court found, then it is manifest that Scheuer's attachment levy would not constitute any lien upon the land. This is the crucial question in the case. It is said that there was no consideration, because Ramash had discharged the mortgage upon the margin, and certified that the same was paid. Ramash was an ignorant man, not able to speak English. The evidence clearly shows he understood little of the precise character of the numerous papers which were from time to time executed. The evidence also clearly shows that he never delivered up his bond or note; that he never received back the money which he advanced to Lamach; and it is a fair conclusion from the whole case that he never in-

tended to discharge the debt or the agreement for support, but simply intended to release the lien of the mortgage, in order to facilitate his son-in-law's sale of the 38 acres. This seems to have been the conclusion of the circuit court, and we think it justified by the evidence. If this was so, there was clearly a sufficient consideration for Lamach's deed to Ramash, and, the transaction being in good faith, the creditors of Lamach can thereafter acquire no lien on the land by attachment.

There is no question of homestead necessary to be discussed here, as the circuit court found, in accordance with defendant's contention, that the Lamachs had abandoned their homestead rights before the deed was made to Ramash. A motion for a nonsuit as to defendant Scheuer was made at the close of the plaintiff's case, and overruled. It is now contended that the action cannot be maintained as against Scheuer, even if his attachment was ineffective, because no collusion was shown or found between him and Bartleme. The allegation of collusion may have been necessary in the complaint, but it does not necessarily follow that the defendant is entitled to be discharged because it did not appear upon the trial. With all the parties before the court, "equity delights to do justice, and that not by halves." In this case the issue has been fully made and tried between the proper parties as to the validity of the deeds and the effect of the levy, and equity will not at this stage stay its hand for a reason so purely technical as the one urged. The defendant Scheuer might have disclaimed any interest, and retired from the litigation, but he chose to take issue, and try the questions on the merits. We see no good reason why costs should not follow the judgment. Judgment affirmed.

TABOR et al. v. TABOR et al.

(Supreme Court of Wisconsin. May 23, 1893.)

CONSTRUCTION OF WILL—PRECATORY TRUST.

A devise of all testator's land to his wife, "to have to hold * * * in fee simple," was followed by an expression of trust and confidence that the wife would provide by last will for equitable distribution among their children, with a further provision that "this expression of trust and confidence is not to be interpreted as limiting her right of ownership or power of distribution." *Held*, that the wife took an estate in fee simple.

Appeal from circuit court, La Fayette county; George Clementson, Judge.

Action by George W. Tabor and others against John Tabor, Elizabeth Tabor, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action for the construction of the will of Charles Tabor, and to set aside a deed of certain real estate of said deceased, made by

Elizabeth Tabor, his widow, to the defendant John. Charles Tabor died March 14, 1880, testate, leaving a widow, the defendant Elizabeth, and six adult children, four of whom are plaintiffs in this action, and two of whom, John and Luke, with their mother, are defendants. The deceased left a small homestead in Darlington, and a farm of 160 acres, which farm is the subject of this litigation. His will was duly probated, and, omitting formal parts, is as follows: "I give, devise, and bequeath to my wife, Elizabeth Tabor, all and singular my property and estate, whether real or personal, to have and to hold the same, the real estate in fee simple, and the personal estate by a like absolute ownership. I do this in full trust and confidence that she will provide for the distribution of the same, by her last will and testament, among our children, Luke, George, Charles, John, Mary, and Anna, in such proportions as shall be just and right; but this expression of trust and confidence is not to be interpreted as limiting her right of ownership or power of distribution." Elizabeth claimed under the will to own the farm in fee, and in December, 1890, conveyed the same to the defendant John in fee, a simultaneous contract being made by John to convey one-half thereof to Luke. The plaintiffs bring this action to set aside said deed, claiming that under the will Elizabeth took a life estate only in the land, with a fee in trust to distribute among her children, and that the children are vested with the remainder in fee, subject to the widow's life estate, and the exercise of the power of distribution. The complaint also charges that the deed was made under undue influence exercised by John and Luke over the mind of their mother, and that she was mentally incapable of transacting business. Upon the trial the circuit court limited the proofs to "such testimony as will have a bearing on the construction to be placed upon the will, with the understanding that, if the court should decide that question in favor of the plaintiffs, further testimony shall be taken, in order that the court may render a proper decree." The circuit court found that the will vested a fee-simple title of the lands in question in Elizabeth, and that the words of the will, expressive of trust and confidence, were simply advisory, and conveyed no estate, legal or equitable, to the children, and entered judgment dismissing the complaint on the merits, from which judgment plaintiffs appealed.

Orton & Osborn, for appellants. P. H. Conley, G. A. Marshall, and Rose & Bell, for respondents.

WINSLOW, J., (after stating the facts.) The controlling question presented is whether the words of the will create a precatory trust, so that, notwithstanding the absolute devise of a fee to the widow in the first

part of the will, she must be held to take only a life estate, coupled with a trust as to the remainder in favor of the children. The subject of precatory trusts was very fully investigated by this court in *Knox v. Knox*, 59 Wis. 172, 18 N. W. Rep. 155. It was there said by the late Mr. Justice Taylor that the two important questions to be considered in such a case are: "First, has the testator, in his expressed request, clearly pointed out the persons whom he desired should be the recipients of his bounty, and has he clearly defined the part of the estate which he desired they should receive? And, second, does the language used by him clearly show that he intended it to be obligatory upon his wife, to whom he had devised all his property in fee, and not merely advisory?" Accepting these questions as the tests to be applied in deciding whether a precatory trust is created by this will, it would seem quite difficult to say that the testator has in this will clearly defined the part of the estate which he desired his children to receive; but we do not decide this question, because our conclusion as to the proper solution of the second question renders it unnecessary. We think it very clear that the words of the will clearly show that the testator intended his expressions to be merely advisory, and not in any respect obligatory. The will was drawn by a lawyer. After devising all his estate to his wife, "the real estate in fee simple, and the personal estate by a like absolute ownership," he proceeds: "I do this in full trust and confidence that she will provide for the distribution of the same by her last will and testament among our children, Luke, George, Charles, John, Mary, and Anna, in such proportions as shall be just and right." Had he stopped here, the argument would be very strong that he intended these words to be obligatory upon his wife, notwithstanding the previous devise of a fee, and the case would be in this respect very like the *Knox* Case, above referred to; but he proceeded to say in the same sentence: "But this expression of trust and confidence is not to be interpreted as limiting her right of ownership or power of distribution." This language can have but one reasonable meaning. The widow's right of ownership, by the specific terms of the will, was an absolute fee simple. The testator says that his expression of trust and confidence is not to be construed as limiting this right. How, then, can a court so construe it? It seems to us that, if we were so to construe it, we should be making a new will for the testator, against his positive declaration. The *Knox* will contained no similar words. *Lewin, Trusts*, (7th Ed.) p. 122.

It is objected that the judgment does not in terms construe the will. The findings construe the will, and the judgment dismisses the complaint on the merits. This is sufficient. Judgment affirmed.

LARSON v. COOK et al.

(Supreme Court of Wisconsin. June 21, 1893.)

BREACH OF CONTRACT—ACTION BY ASSIGNEE—CONSTRUCTION OF CONTRACT—DAMAGES.

1. Where defendants sold certain standing timber to one G., who agreed to transfer the contract to plaintiff on payment of the advances made by G., plaintiff, on transfer of the contract, had a right of action against defendants, on the breach of the contract.

2. Defendants had the right to cut timber on certain land up to April 23, 1883. They sold such timber to plaintiff's assignor under a contract providing: "Said timber to be removed in the years 1882 and 1883; more time to be allowed" if more time was allowed them. Held an express agreement that plaintiff's assignor should have the whole of the years 1882 and 1883 to remove the timber.

3. The owner of the land having prevented plaintiff from removing timber after April 23, 1883, the measure of his damages against defendants was such fractional part of the price paid as the value at the time of the purchase of the part to which title falls bears to the value of the whole purchase, with interest during the time plaintiff was deprived of such fractional part.

Appeal from circuit court, Barron county; R. D. Marshall, Judge.

Action by Ole Larson against S. G. Cook and another for breach of contract. Judgment for plaintiff, from which defendant Cook appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action for damages for breach of contract. Plaintiff is the assignee of the cause of action, from one L. O. Larson, for value. In February, 1882, the defendants Cook and Huntington owned the right to cut and remove, for their own use, all the timber upon certain tracts of land, provided they cut and removed the same by the 23d of April, 1883, but did not own the land, nor had they any right to enter thereon after said last-named date. On February 2, 1882, L. O. Larson negotiated with Cook and Huntington for the purchase of said timber; they representing that they had the right to cut and remove said timber during the whole of the years 1882 and 1883, and Larson relying on such representation, and not knowing to the contrary. The negotiations resulted in the purchase of the timber by Larson for the agreed price of \$2,000; but Larson, not being able to pay the purchase price, procured one Gribben to give his note therefor, which he did, and the following written contract was made and signed by Cook and Huntington: "In consideration of the sum of \$2,000 paid by three months' note to S. G. Cook, we hereby transfer and sell to J. P. Gribben all the standing and down pine now being on, [here follows a description of the lands;] said timber to be removed in the years 1882 and 1883; more time to be allowed in removing timber if more time is allowed to Cook and Huntington." Thereafter, Larson entered on the land, cut timber and manufactured the same into shingles. He paid Gribben for his ad-

vances prior to April 23, 1883, in shingles manufactured from the timber, and did not know, up to that time, that Cook and Huntington's right expired on that date. On said 23d day of April, 1883, 218,169 feet of timber remained standing and uncut on said land. It does not directly appear how much timber was on the land at the time of Larson's purchase, but he testified that the timber was bought at the rate of \$3 per 1,000 feet. May 1, 1883, Larson and Gribben had an accounting, and it was found that Gribben had been fully paid for his advances; and at that time Gribben indorsed on the contract, for the purpose of passing his rights thereunder to Larson, the following assignment, and delivered it to Larson: "I hereby assign to L. O. Larson all my right, title, and interest to and in the within-described timber. J. P. Gribben." In December, 1883, Larson cut and skidded 70,000 feet of the remaining timber, and had time prior to June 1, 1884, to cut and remove it all, but was prevented by the owner of the land, on the 13th day of December, 1883, from removing any more timber, and said owner recovered said 70,000 feet of skidded logs from Larson in a replevin action. The value of the standing timber remaining was \$4 per 1,000, and of the skidded logs, \$5.25 per 1,000. The above facts, with others not necessary to mention, appeared from the evidence introduced by plaintiff. The defendant Cook, who appeared and answered separately, moved that a verdict for defendants be directed, which being overruled, he offered no evidence; and thereupon the parties stipulated to waive the jury, and the case was submitted to the court to make findings of fact and conclusions of law upon the evidence already introduced. The circuit judge made findings of fact substantially as above recited, and concluded that the clause in the contract providing that the timber was to be removed in the years 1882 and 1883, and that more time was to be allowed in case more time was allowed to Cook and Huntington, should be construed as an express agreement on the part of defendants that the purchaser should have the years 1882 and 1883 within which to cut and remove the timber, and that the same formed a substantial part of the consideration for the purchase; that Larson lost, without fault on his part, 218,169 feet of timber, by reason of the fact that defendants had no right to remove timber after April 23, 1883; that the facts established are sufficient to constitute a cause of action in plaintiff for breach of defendants' said agreement; that the property conveyed, being standing timber, was an interest in land; that the damages must be governed by the law applicable to breaches of covenant without fraud; and that the measure of damages is such part of the whole consideration paid as the timber lost formed of the whole amount purchased, with interest. Judgment was or-

dered and rendered for plaintiff for \$854.36, with interest, from which defendant Cook appeals.

Jenkins & Jenkins, for appellant. James Wickham, for respondent.

WINSLOW, J., (after stating the facts.) We entirely agree with the conclusion of the circuit judge that L. O. Larson acquired rights under this contract which he could enforce by action. It is settled in this state that "when one person, for a valuable consideration, engages with another (whether by simple contract, or by covenant under seal) to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the engagement." *Grant v. Lock Co.*, 77 Wis. 72, 45 N. W. Rep. 951, and cases there cited. In the present case, Cook and Huntington contracted nominally with Gribben, for the benefit of Larson. True, Gribben had an incidental interest in the contract, to the extent of his advances, but no further. The contract was made and understood by all parties to be made for the primary benefit of Larson, and the fact of Gribben's interest, by way of security only, can make no difference. Under the rule above quoted there can be no doubt of Larson's right to maintain an action for breach of this contract.

We also fully agree with the circuit judge in his construction of that clause of the contract providing for removal of the timber. The clause under consideration is: "Said timber to be removed in the years 1882 and 1883; more time to be allowed in removing timber, if more time is allowed Cook and Huntington." Plainly, this is not a provision for the benefit of Cook and Huntington. It could make little, if any, difference to them when the timber was removed, because they did not own the real estate. Whether the timber was ever removed, so long as they received their pay therefor, would seem to be a matter of no moment to them. On the contrary, it obviously was a matter of great importance to Gribben and Larson that they should have a sufficient time to remove the timber which they had bought, and that they should know positively what time they were to have; and the last clause, providing for the allowance of more time, is entirely conclusive to our minds that, by the previous clause, Cook and Huntington are allowing time to Gribben and Larson. Indeed, it is difficult to see how the whole clause can be construed in any reasonable way, except as an express agreement by Cook and Huntington that Gribben and Larson are to have the whole of the years 1882 and 1883 within which to remove the timber, and we so construe it.

This agreement having been confessedly broken, no further question remains, except

the question of the measure of damages. A contract for the sale of standing timber is a contract for the sale of an interest in lands. *Lille v. Dunbar*, 62 Wis. 193, 22 N. W. Rep. 467. Title to a part of the lands failed. The rule of damages laid down in *Semple v. Whorton*, 68 Wis. 626, 32 N. W. Rep. 690, applies. Under that rule the damages are such fractional part of the whole consideration paid as the value at the time of the purchase of the part to which the title fails bears to the value of the whole piece purchased, and interest during the time plaintiff has been deprived of the use of the fractional part, not exceeding six years. To state it under the form of the rule of three, the proposition is: The value of the whole at the time of the purchase is to the value at the same time of the part to which title fails as the whole consideration is to X, or the damages. It is plain that in order to find the unknown element in the problem, i. e. the amount of the damages, we must know from the evidence the other three elements of the problem. Here is the difficulty. The evidence fails to show the value at the time of the purchase of the part to which title failed, and there is no evidence of the value of the whole at the time of the purchase, save the fact that \$2,000 was paid for it. Granting that this may be sufficient, *prima facie*, in the absence of other evidence, to warrant a finding that the value of the whole was \$2,000, we are still entirely without the means of determining the value of the part to which title failed at the time of the purchase. There must be further proof before an assessment of damages can be made in accordance with the rule settled in this court. No new trial upon the merits will be necessary, but further evidence upon the question of damages, in accordance with the rule laid down, must be taken, and for this purpose a reversal is necessary. Judgment reversed, and cause remanded for further proceedings in accordance with the opinion.

McQUAID v. ROSS et al.

(Supreme Court of Wisconsin. June 21, 1893.)

SALE—IMPLIED WARRANTY.

Where plaintiff purchases a bull of defendants for breeding purposes, to the knowledge of defendants, paying full price therefor, and there was no misrepresentation or fraud, and no express warranty, and the bull proves impotent, no warranty can be implied.

Appeal from circuit court, Columbia county; R. G. Slebecker, Judge.

Action by Patrick F. McQuaid against William Ross and others for breach of warranty. Plaintiff was nonsuited, and appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

This case was before this court on a former appeal, (77 Wis. 470, 46 N. W. Rep. 892, v. 55 N. W. no. 8—45

where the claims of the plaintiff are stated. Upon the new trial awarded the plaintiff sought to maintain that there was an implied warranty upon the sale by the defendants to the plaintiff of the bull in question, that he was in all respects fit, suitable, and competent to perform the service for which he was purchased, namely, to generate his kind; and the plaintiff produced evidence to show that when he bought the bull he desired him for breeding purposes; that the defendants were breeders of short horn Durham cattle, and knew the purpose for which the plaintiff desired and bought the animal; that he paid the full price of such an animal for breeding purposes, \$125, and examined him at the time of the purchase; that, except for such purposes, the animal would not be worth to exceed \$30. The plaintiff ascertained afterwards and in course of time that the bull was incompetent, impotent, and unable to generate his kind, and was useless for the purposes for which he was purchased, and he returned the bull to the defendants at their farm for this reason; but there was no proof tending to show that they accepted him. Evidence was given to show the plaintiff's damages. The circuit court held that there was no implied warranty of the procreative powers of the bull, and granted a judgment of nonsuit against the plaintiff, from which he appealed.

W. J. Hooper and Spensley & McIlleon, for appellant. Orton & Osborn and J. M. Smith, for respondents.

PINNEY, J., (after stating the facts.) There is no ground for contending that the plaintiff in purchasing the animal in question either asked the opinion or judgment of the vendors in respect to its procreative capacity, nor is there any reasonable or rational ground for imputing to them any information or knowledge on that subject not possessed by the plaintiff, although they had raised the bull, and were stock breeders. The plaintiff saw and inspected the animal before he made the purchase, and it was of the kind he desired to purchase. It is a well-understood principle of the common law in England, and almost universal in this country, that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity or thing sold, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the thing he sells, the maxim *caveat emptor* applies. This is the rule laid down in *Benj. Sales*, § 644; *Barnard v. Kellogg*, 10 Wall. 388; *Jones v. Just*, L. R. 3 Q. B. 202. In *Eagen v. Call*, 34 Pa. St. 236, it was held that where the buyer has had opportunity of examining the thing sold there is no implied warranty by the seller against latent defects unknown alike to himself and to the purchaser. The doctrine of implied warranty appears to be

founded on an actual or presumed knowledge by the vendor, as manufacturer, grower, or producer, of the qualities and fitness of the thing sold for the purpose for which it was intended or is desired, so far as such knowledge is reasonably attainable. The rule must be held to have a rational foundation, and to be not of a purely arbitrary character. It does not impute to the seller knowledge as to qualities or fitness which no human foresight or skill can attain, and raise an implied warranty in respect to them, when the vendor and purchaser are in equal condition as to the means of knowledge, or the latter must have understood from the nature of the case that the information, experience, and knowledge of the vendor are not superior to his own. The case we are considering is not one where the buyer can be said necessarily or at all to have trusted to the judgment or skill of the manufacturer, grower, producer, or dealer, instead of his own. *Jones v. Just*, L. R. 3 Q. B. 202. Because the defendants raised the bull they sold to the plaintiff they are not chargeable with any knowledge, or opinion even, in respect to a matter beyond the reasonable scope of human knowledge, namely, whether the bull would prove impotent, and to be wholly destitute of the power of procreating his kind; and hence the ground of presumed or reasonably imputed knowledge as a foundation in this case of an implied warranty wholly falls. In the case of *White v. Miller*, 71 N. Y. 118, 131, it is said in relation to the case of a manufacturer that the rule of implied warranty "is based on the presumed superior knowledge of the vendor," and that, in the case of a producer or grower of seeds, there seems to be the same reason for implying a warranty on a sale of seeds by the grower that they are not defective from improper cultivation as to imply a warranty of freedom of defects in manufacture on a sale by a manufacturer of the article made by him. "The grower of seeds must be presumed to be cognizant of any omissions or negligence in cultivation, whereby they have been deteriorated or rendered unfit for use;" as, in the case cited, in relation to a sale of cabbage seed which had been crossed with other varieties, and rendered impure by being raised in close proximity with them. In *Van Wyck v. Allen*, 69 N. Y. 61, cited by appellant's counsel, the article sold was represented to be of a particular kind, when it was not, and there was, therefore, an express warranty. In *Flick v. Wetherbee*, 20 Wis. 412, the decision went not upon the ground of implied warranty, but that the defendant covenanted to supply all the seed corn for the year's cultivation, which it was held required him to furnish good seed corn, and there was, besides, evidence of an express warranty. The case of *Scott v. Rennick*, 1 B. Mon. 63, in which it was held that the law implies no warranty, in a sale of a Durham cow, that she will prove suitable for breed-

ing purposes, although the price paid for her indicated that it was for that purpose she was bought; and this is in accord with what was said in *White v. Stelloh*, 74 Wis. 435, 439, 43 N. W. Rep. 99, on the subject of implied warranty in a similar case. *Barnes v. Burns*, 81 Wis. 235, 51 N. W. Rep. 419. If the plaintiff desired to guard against loss from the contingency which occurred, he should have exacted an express warranty as a condition of his purchase. Where, as in this case, both parties were alike destitute of knowledge or the means of forming an intelligent judgment whether the bull would be able or not to generate his kind, and there was no misrepresentation or fraud, and no express warranty, we think no warranty can be implied in that respect merely because a full price was paid for a bull for breeding purposes, and the seller knew he was being purchased for that purpose. The plaintiff was rightly nonsuited. The judgment of the circuit court is affirmed.

GOEBEL et al. v. THIEME.

(Supreme Court of Wisconsin. May 23, 1893.)

TESTAMENTARY POWERS—SALE—RESCISSION.

1. Testator devised certain land to his wife so long as she should live, but without privilege to sell. After her death the land was to be sold, and proceeds divided between a son and daughter. In case, however, the wife and said son and daughter should agree together upon a sale, then the wife might sell and divide the proceeds according to above conditions. *Held*, that the wife, or wife and daughter alone, could not sell without the son.

2. The question being one of power, it was immaterial, in an action to set aside a deed given by the wife and daughter, whether the deed was executed with knowledge of its contents, or for valuable consideration, or whether the son had, prior thereto, received the sum intended by the testator.

Appeal from circuit court, Sheboygan county; N. S. Gilson, Judge.

Action by Rosina Goebel and Ernestine Thieme against Fred W. Thieme to set aside a certain deed and mortgages. Judgment for defendant. Plaintiffs appeal. Reversed.

The other facts fully appear in the following statement by CASSODAY, J.:

It appears from the record that December 17, 1872, Henry Goebel, husband of the plaintiff Rosina, and father of the plaintiff Ernestine, died, leaving a will executed by him April 11, 1872, and which will was admitted to probate January 27, 1873, and, omitting the formal parts, was as follows, to wit: "I give and bequeath unto my beloved wife, Rosine Goebel, all my real estate and land lying and being in the county of Sheboygan, to have and to hold the same to her own use and benefit as long as she shall live, but without the privilege to sell the land; and I also give and bequeath to her all my personal property, money and credits, goods and chattels, of what

kind and nature soever, to have and to hold the same to her own, and as her own property, forever. And I also further hereby order that after the death of my said beloved wife, Rosine Goebel, the said land shall be sold, and, out of the money received therefor, my son, August Goebel, shall receive the sum of \$200, and the remainder of the purchase money for said land shall be paid to my beloved daughter, Ernestine Thieme, formerly Ernestine Goebel; and I do hereby appoint my beloved wife, Rosine, sole executrix of this, my last will and testament, hereby revoking all former wills by me made. I do further order that in case my beloved wife, and my said beloved son and daughter, shall agree together upon the sale of the said land, then my wife shall have the right to sell, and pay the above sums, according to the above conditions, out of the money what she shall get for the same." That October 27, 1884, the said Rosine mortgaged a part of said land to one Zimmerman for \$200, borrowed money, and which mortgage was then recorded. That May 1, 1886, the said Rosine and Ernestine, together, mortgaged all of said land to said Zimmerman for \$400, borrowed money, and the same was recorded. That some time prior to September 7, 1888, the said Zimmerman commenced the foreclosure of said mortgages, and on said last-mentioned day the defendant, who was the husband of the said Ernestine, paid said Zimmerman on said mortgages about \$800, and took an assignment of both of said mortgages, which assignment was thereupon recorded. That at the same time and place the said Rosine and the said Ernestine conveyed by quitclaim deed, to the defendant, the said real estate, consisting of 35 acres, without any consideration except the money so paid by him to said Zimmerman. That said 35 acres of land were at that time worth \$100 per acre, or in the aggregate the sum of \$3,500. That January 18, 1891, the plaintiffs commenced this action to set aside said mortgages, and the assignments thereof to the defendant, and to have said quitclaim deed from the plaintiffs to the defendant set aside, and adjudged to be null and void, and alleged, in effect, the facts stated. The defendant answered, and, in effect, admitted most of the facts stated. On the trial of the cause the court found, as matters of fact, in effect, that the quitclaim deed from the plaintiffs to the defendant was made and executed by the plaintiffs with full knowledge and information as to the contents and purport thereof, and for a valuable consideration, to wit, the payment of the said mortgages; that the provision or legacy in favor of said August Goebel, under the will, was paid and satisfied by the plaintiffs prior to said conveyance to the defendant. And as conclusions of law the court found, in effect, that the defendant was and is entitled to have

the complaint herein dismissed, but without prejudice to any right of action on the part of the plaintiffs to have the said deed to the defendant declared an equitable mortgage, and for redemption therefrom, if the plaintiffs should be so advised, and that the defendant have judgment against the plaintiffs for his cost and disbursements of this action; and judgment was entered thereon accordingly. From the judgment so entered the plaintiffs bring this appeal.

George W. Foster, for appellants. Seaman & Williams, for respondent.

CASSODAY, J., (after stating the facts.) The will devised to the widow only a life estate in the lands in question. She was, by the express terms of the will, prohibited from selling the land at all, except upon the condition precedent that she and her son, August, and her daughter, Ernestine, should, together, agree upon the sale of the land. The defendant claims title to the land by virtue of the quitclaim deed from the plaintiffs. There is no evidence that August ever agreed with his mother and sister that such deed should be made. Without such agreement, no valid deed of the land could be made during the life of the widow. She could only lawfully convey by virtue of the power given to her by the will. As the defendant claims under the deed, the burden was upon him to prove the performance of such condition precedent; that is to say, that such agreement was made by the three, altogether, and that the deed was made in pursuance of such agreement. No such proof was made. We must assume, therefore, that the three never so agreed. It follows that the deed was executed without authority, and contrary to the express terms of the will, and hence must be regarded as a nullity. What has been said respecting the deed applies equally to the mortgages. They were, in legal effect, conveyances given without authority, and contrary to the express provisions of the will, and hence must be regarded as null and void. *Rowell v. Williams*, 54 Wis. 636, 12 N. W. Rep. 86. The question involved being one of power, it is immaterial whether the deed was executed by the plaintiffs, or either of them, with knowledge of its contents, or for a valuable consideration, and the same is true in respect to the respective mortgages. For the same reason it is immaterial whether, prior to such conveyance, August had been paid \$200, or any other sum. The manifest purpose of the will was to furnish a sure and permanent home for the widow during her life, and "after" her death to have the land sold, and the proceeds thereof distributed as therein directed, except that the land might be sold prior to her death upon the single condition precedent named. Besides, after a careful examination of the

evidence, we are convinced that the mortgages were given for money borrowed to pay expenses and support the defendant's family, and hence were given for his benefit. This being so, the payment of the mortgages by him was, in equity, simply a payment of his own indebtedness. The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment in favor of the plaintiffs, in accordance with the prayer of the complaint.

WHITMORE et al. v. HAY.

(Supreme Court of Wisconsin. May 23, 1893.)

HOMESTEAD—CONVEYANCE—SPECIFIC PERFORMANCE—REFORMATION OF DEED.

1. A married man deeded land, including his homestead, to a son; the consideration being money, and an agreement for life support of himself and wife. The wife, however, did not sign. *Held*, that the deed was, after full performance by the son, enforceable, notwithstanding the declaration in Rev. St. § 2203, that no mortgage or other alienation of a homestead should be valid without the signature of the wife.

2. Where a married woman fails to join her husband in a deed, through the ill advice of a notary,—that it is not necessary, to effect the purpose of the parties,—the deed may be reformed.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by Irene J. Whitmore (formerly Irene J. Connor) and Edith H. Connor against Joseph Hay. Judgment for plaintiffs. Defendant appeals. Reversed.

The other facts fully appear in the following statement by CASSODAY, J.:

This is an action of ejectment, commenced November 24, 1891. The complaint is in the statutory form. The answer consists, first, of a general denial; and for a second and separate defense it alleges, in effect, that June 24, 1876, the defendant entered into the possession of the premises described under claim of title, exclusive of any other right, founding such claim on a deed or written instrument made by one Thomas Hay, Sr., to the defendant, and that the defendant had continued in the open and exclusive occupation and possession of said premises, under said deed, for more than 10 years before the commencement of this action; and as a third and separate defense, and by way of an equitable counterclaim, the answer alleges, in effect, that January 15, 1866, the defendant entered into a parol agreement with his father, the said Thomas Hay, Sr., and his mother, Mary Hay, whereby he promised and agreed to purchase said premises from them, and to pay them in consideration therefor \$1,100, to wit, \$500 in cash, and for the balance thereof he was thereafter to give his promissory note for the further sum of \$600 for a conveyance of said premises, and that this defendant further agreed to maintain and support his said father and mother

during their natural lives; that the defendant did pay in cash the \$500 mentioned at the time of making said parol agreement; that June 24, 1876, in pursuance of said agreement, the defendant made and executed his promissory note, in writing, for said \$600, payable to said Thomas Hay, Sr., on demand, and delivered the same to him as a part of such consideration; that thereupon, and on June 24, 1876, the said Thomas Hay, Sr., and Mary Hay, and this defendant went to a notary public for the purpose of having said deed executed and acknowledged; that they were advised by said notary that the agreement for such maintenance and support would be best assured to them by permitting the said Mary to retain her inchoate dower and homestead interest in and to said premises during her natural life, and that the same would cease at her death, and the absolute fee title therein would then vest in this defendant without any other deed, except the deed executed by the said Thomas Hay, Sr.; that in pursuance of said advice, and of the parol contract or agreement, the said Thomas Hay, Sr., duly executed a deed of said premises to the defendant without the signature of his said wife, and delivered the same to him on the day and year last mentioned; that said parol contract or agreement was never reduced to writing, but was expressly agreed to by both his father and mother, and that the defendant had been in the possession of the premises under said deed ever since its execution; that the defendant had fully and faithfully performed his part of said parol contract; that he had cared for and supported his father and mother during their respective lives; that his father's last sickness continued for more than two years, during which time he was helpless; that he died October 18, 1878; that his mother died February 16, 1890; that her last sickness extended over a period of 12 years, during the whole of which time she suffered with paralysis, requiring much care and attention; that his said mother expressly agreed to sign her name to said conveyance in such a way as to vest said title in the defendant; that in 1863 his father paid to his daughter, Jane Hay, the mother of the two plaintiffs, and a half-sister of the defendant, the sum of \$400 in cash as and for her share of his estate, and that the same was accepted by said Jane in full payment and satisfaction of her share of her father's estate. Wherefore the defendant demanded judgment that the complaint be dismissed, and that the title to said real estate be adjudged to be in him. To such equitable counterclaim the plaintiff replied, in effect, alleging that the premises in question were the homestead of the said Thomas Hay, Sr., and his wife, at the time of the execution of said deed, and continued to be until the time of their deaths. Thereupon a jury in said cause was waived by the parties, and the issues therein, by their consent, were tried by the

court, and at the close of such trial the court found, as matters of fact, as follows, to wit: (1) That said Thomas Hay, Sr., is the common source of the title of said premises. (2) That he died intestate, October 18, 1878. (3) That he left, him surviving, a widow, the said Mary Hay; his son, this defendant; and another son, Thomas Hay, Jr.; and the two plaintiffs, Irene J. Whitmore and Edith H. Connor, children of his deceased daughter, the said Jane, as his only heirs at law. (4) That the said widow died February 16, 1890. (5) That June 24, 1876, the land in question constituted the legal homestead and place of residence of the said Thomas Hay, Sr., and his family. (6) That June 24, 1876, and for a long time prior thereto and thereafter, until the date of his death, the said Thomas Hay, Sr., was a married man, and living with his wife on the premises in question. (7) That said Thomas Hay, Sr., was a man of refinement and education, which enabled him to instruct his children without other school or training facilities, to that extent that at least one of them was enabled to secure a certificate as a teacher in the public schools, and to become a competent teacher. (8) That in connection with the land in question the said Thomas Hay, Sr., immediately prior to June 24, 1876, was the owner of other contiguous land, and occupied with the lands described in the complaint as one farm, and containing in all 120 acres, or thereabouts. (9) That June 17, 1876, the said Thomas Hay, Sr., prepared two deeds of conveyance, covering separate portions of said farm, both written by himself, the one a warranty deed, in which he and his said wife, Mary, were named as grantors, and one Meyer was named as grantee, purporting to convey 20 acres of said farm outside of the homestead; that the other was a quitclaim deed, in which the said Thomas Hay, Sr., was named as grantor, and this defendant, Joseph Hay, as grantee, purporting to convey to the defendant all the right, title, and interest of the grantor in and to the remainder of said farm, including the homestead. (10) That June 24, 1876, the said Thomas Hay, Sr., and the said Mary Hay and this defendant, Joseph Hay, visited the office of a notary public for the purpose of signing and acknowledging the deeds referred to in the ninth finding of fact herein, and for the purpose of securing the signature by Joseph Hay of a contract binding him to care for and support his parents as long as they might live. (11) That the deed to Meyer was signed and acknowledged by the said Thomas Hay, Sr., and Mary Hay, and the quitclaim deed referred to was signed and acknowledged by Thomas Hay, Sr., alone; that said notary public advised the parties that, if Mary Hay would retain her inchoate right of homestead and dower in the premises described in the complaint, it would best secure the care and support of her hus-

band and herself during life; that accordingly the signature of the said Mary Hay, with the knowledge and consent of the defendant, was withheld from said deed, and no written contract for support was made by the defendant. (12) That prior and subsequent to June 24, 1876, the defendant, Joseph Hay, with his family, and the said Thomas Hay, Sr., and his said wife, Mary Hay, all occupied the same house on the homestead 40 described in the complaint herein; that subsequently to the making of the deed to Joseph Hay the defendant cultivated, paid taxes upon, and controlled the farm described in the deed, including the homestead, and that said Thomas Hay, Sr., and Mary Hay continued to reside on said land until the time of their deaths, respectively. (13) That the defendant has made no permanent and valuable improvements, and has paid no taxes, on said lands, while holding such lands adversely; that he has not at any time during the lifetime of his father or mother held such lands adversely by color of title asserted in good faith, founded on descent or any written instrument. (14) That the defendant has wholly denied the title of the plaintiffs in and to the lands described. As conclusions of law therefrom it is found, in effect: (1) That the plaintiffs are the owners in fee simple, each, of an undivided one-sixth interest of the lands described; (2) and entitled to the possession thereof; (3) that the defendant unlawfully withholds the possession of their interests in and to said land, to their damage in the sum of six cents; (4) that the accounting of mesne profits, if maintainable, is not in issue, or is not determined or affected hereby; (5) that the plaintiffs are entitled to judgment in accordance with these findings, and for costs, and the same was ordered accordingly. From the judgment entered upon said findings in favor of the plaintiffs, the defendant brings this appeal.

E. G. Comstock and Kate H. Pier, for appellant. Thomas M. Kearney, for respondents.

CASSODAY, J., (after stating the facts.) It appears from the record that Thomas Hay, Sr., had three children,—Jane, Thomas, Jr., and the defendant, Joseph. Jane died in 1868, and before her father. She was the mother of the plaintiffs, and appears to have received a respectable advancement from her father. Thomas, Jr., is not a party to this action, and apparently makes no claim to any portion of the property in question. On the contrary, he appears to have left home and reached the conclusion as early as September 19, 1877, not "to take anything more from the old farm, unless in case of necessity;" and he then, accordingly, returned, in a letter to his brother, the defendant, a note he held against him, and which he had received as a portion of his father's estate. This was

manifestly done with the understanding alleged in the counterclaim, to the effect that the defendant should have the farm for taking care of his father and mother during their respective lives; for he said in the same letter: "Endeavor to save money, and make life as agreeable as possible, and be kind, patient, and forbearing to father and mother, as they used to be to you, and do all you can to make their last days happy. This I know you will do, and it is all I want." The defendant, Joseph, appears to have reached his majority in 1858 or 1859. Instead of leaving home, he remained with his father and mother, and worked on his father's farm, consisting of 120 acres. In 1865, and when he was nearly 28 years of age, he got married, and, with his wife, commenced living in an addition to their father's house, built for that purpose. Thereupon, he seems to have worked the farm under some parol agreement or understanding with his father, whereby each had a certain portion of the produce. In June, 1876, the father became sick, and continued to be sick and helpless most of the time up to his death, October 18, 1878. The mother was an invalid during the last 10 or 12 years of her life. About the time the father so became sick he appears to have reached the conclusion that he would make a final disposition of his property, or the most of it. Accordingly, he sold and conveyed 20 acres of the farm outside of the homestead to Meyer, as mentioned in the foregoing statement. In pursuance of the same purpose he drew the quitclaim deed from himself to the defendant for the conveyance of the balance of the farm, consisting of 100 acres, including the homestead, at his home, June 17, 1876; and then, June 24, 1876, he and his wife and the defendant went to a notary public, some miles distant, in order that he and his wife might execute and acknowledge the deed, and have a contract drawn by the notary, and executed by the defendant, binding him to care for and support his father and mother as long as they might, respectively, live; that by the advice of the notary, to the effect that such purpose could be better secured by omitting such written contract altogether, and by the father executing the deed alone, without the signature of his wife, such contract was omitted, and the father executed the deed alone, and delivered the same to the defendant, as mentioned in said statement. The trial court held, in effect, that the deed, having been executed by the father alone, without the signature of his wife, was absolutely void as to the 40 acres constituting the homestead, and hence that the plaintiffs, together, were entitled to recover one-third thereof in this action of ejectment. The statute declares that "no mortgage or other alienation by a married man, of his homestead, exempt by law from execution, shall be valid, or of any effect, as to such home-

stead, without the signature of his wife to the same." Section 2203, Rev. St. Under this statute it has been held that where such deed is executed by the husband, and is signed by the wife, it is valid without her acknowledgment. *Godfrey v. Thornton*, 46 Wis. 677, 1 N. W. Rep. 362; *Allen v. Perry*, 56 Wis. 178, 14 N. W. Rep. 3. The theory upon which the court so held is that the statute "does not vest any estate in the wife, living the husband, in the homestead, but operates only as a disability of the husband, living the wife, to alienate his homestead without her consent, evinced by her signature to his alienation." *Id.* In *Ferguson v. Mason*, 60 Wis. 377, 19 N. W. Rep. 420, it was held that "a conveyance of a homestead, reserving to the grantor the sole, free, and absolute use and control thereof so long as he and his wife, or either of them, may live, conveys only a future estate, to be enjoyed after the homestead right shall cease, and is valid without the signature of the wife." In *Conrad v. Schwamb*, 53 Wis. 372, 10 N. W. Rep. 395, it was held that "a deed executed by husband and wife, which, though otherwise complete, falls, through a misdescription, to convey the land intended, being the grantor's homestead, must be treated as an executory contract by the husband to convey, which equity will enforce after the homestead right ceases, against the husband or against his heirs after his death intestate, though not against the widow." That a deed based upon a good and valuable consideration, but defectively executed, may be treated in equity as an executory contract to convey, is abundantly established in that case, and the authorities there cited by the present chief justice. Our statutes provide that "when the owner of any homestead shall die, not having lawfully devised the same, such homestead shall descend," etc., and that "every devise of land in any will shall be construed to convey all the estate of the devisor therein, which he could lawfully devise," etc., and that, "when any homestead shall have been disposed of by the last will and testament of the owner thereof, the devisee shall take the same fee," etc. Sections 2271, 2278, 2280. Under these statutes, and the decisions of this court, there can be no question but what the father had power, without the consent of his wife, to lawfully devise his homestead to the defendant. *Ferguson v. Mason*, supra; *Albright v. Albright*, 70 Wis. 535, 36 N. W. Rep. 254. It is equally clear that the father had power, without the consent of his wife, to convey his homestead to the defendant, reserving to himself the absolute use and control thereof so long as he and his wife, or either of them, might live. Had the parol understanding between the father and the defendant been reduced to writing, and executed by the father alone, with the requisite formalities, but

without consideration, it probably might have been admitted to probate as a will, and vested the title in the defendant accordingly. *Wellborn v. Weaver*, 17 Ga. 267, 63 Amer. Dec. 235; *Babb v. Harrison*, 9 Rich. Eq. 111, 70 Amer. Dec. 203; *Burlington University v. Barrett*, 22 Iowa, 60, 92 Amer. Dec. 376; *Carlton v. Cameron*, 54 Tex. 72, 38 Amer. Rep. 620. See, also, cases cited in the notes to these several cases. The same would be the result, according to some of these cases, if the deed in question had been executed without consideration, but not delivered, so as to take effect, until the death of the father. See, also, *Turner v. Scott*, 51 Pa. St. 126; *Kelleher v. Kernan*, 60 Md. 440. But the deed in question was based upon a good and valuable consideration, consisting not only of services rendered and to be rendered, as agreed in the parol contract mentioned, but also in money; and upon the authorities cited, and others to be cited, we are constrained to hold that the defendant is entitled to a specific performance of the same, as against the heirs at law of the grantor. *Thrall v. Thrall*, 60 Wis. 503; *Cable v. Cable*, 146 Pa. St. 451, 22 Atl. Rep. 223; *Book v. Book*, 104 Pa. St. 240; *Dreischbach v. Serfass*, 126 Pa. St. 32, 17 Atl. Rep. 513. In this last case, one, by deed inter partes, in consideration of a nominal sum, and covenants to be performed, conveyed land to another, the former reserving a residence, and the latter covenanting to supply him with food, lodging, clothing, and all other necessities during his lifetime, to be charged upon the premises until the covenants were performed; and it was held that such deed was not a testamentary instrument, because it contemplated an immediate possession taken by the grantee, nor was it an absolute conveyance to the grantee in fee, but merely an executory contract vesting an equitable estate in the grantee, the legal title remaining in the grantor during his lifetime. Of course, it follows that, upon the performance by such grantee of all the covenants on his part, he was entitled to a specific performance of such executory contract. In the case at bar the defendant fully performed the parol agreement on his part. The case, therefore, is very much stronger in favor of the defendant than *Jones v. Jones*, 6 Conn. 111, which went to the extreme of holding that if a parent, in consideration of love and affection, makes a voluntary deed to his family, by way of settlement, which is inoperative for want of delivery in his lifetime, equity will aid the grantees, and secure to them the legal title.

Thus far we have considered the question presented as though the defendant and his father were the only parties to the parol agreement. There is another view to be taken of this case, equally favorable to the defendant. The deed was, of course, void,

as a conveyance of the homestead, by reason of the failure of the wife to sign the same. As already indicated, by the oral agreement she was to sign the deed with her husband, and the defendant was to give the written contract for their maintenance and support, as mentioned. They all three went to the notary to have that purpose carried into execution. They were prevented from doing so by reason of the ill advice of the notary. By his advice, and through his influence, and their own ignorance of the effect of the transaction, the wife refrained from signing the deed, and the defendant entirely omitted to give the written contract, because they were all induced to believe that they would better secure the purpose of the parol agreement by the father executing the deed alone, and delivering the same to the defendant. The facts seem to bring the case squarely within the well-established rule that courts of equity will interfere, and grant equitable relief, where, in making the contract, "the minds of the parties did not meet, or where, in the case of a written contract, they did not meet on the terms expressed in the writing, but did meet on other terms, not there appearing." This rule is abundantly supported by the authorities cited by Mr. Melville M. Bigelow in an article entitled "Mistake of Law as a Ground of Equitable Relief," in 1 Law Rev. Quar. 298. The proposition quoted has been sanctioned by this court, and fully considered upon reason and authority, English and American, in an opinion by Mr. Justice Orton in *Canal Co. v. Hewitt*, 62 Wis. 316, 21 N. W. Rep. 216, and 22 N. W. Rep. 534. That case and that proposition were reaffirmed in *Silbar v. Ryder*, 63 Wis. 106, 23 N. W. Rep. 106, where it was held that "a lease which, by reason of the ignorance and mistake of the scrivener, fails to conform to the oral agreement made by the parties will be reformed, if the evidence clearly shows what that agreement was." See, also, *Lusted v. Railway Co.*, 71 Wis. 396, 36 N. W. Rep. 857; *Hagenah v. Geffert*, 73 Wis. 641, 41 N. W. Rep. 367. Upon the whole case we are forced to the conclusion that the defendant, upon his equitable counterclaim, is entitled to the relief demanded in his answer. The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment in favor of the defendant, in accordance with this opinion.

C. AULTMAN & CO. v. SILHA et al.
(Supreme Court of Wisconsin. May 23, 1893.)

ABSOLUTE SALE—WHEAT CONSTITUTES.

Where the purchaser of a threshing machine at the time of the delivery of the machine gives the seller his note for the purchase price, and mortgages on the machine and other property to secure the note, containing covenants to pay the deficiency, should there be one, on

their foreclosure, such sale is an absolute one, with a mortgage back, even though the note provided that the title was to remain in the seller until payment was made.

Appeal from circuit court, Monroe county; A. W. Newman, Judge.

Action by C. Aultman & Co. against John Silha and another to foreclose a mortgage. From a judgment dismissing the complaint, plaintiff appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action to foreclose a real-estate mortgage given by John Silha to appellant September 24, 1888, to secure his notes, aggregating \$1,500. The facts are as follows: On the 14th of September, 1888, John Silha gave to appellant a written order for an engine and thresher, to be shipped to him from Canton, Ohio, in care of the company's agent at La Crosse, "as quick as possible," in consideration of which Silha agreed in the order to receive the machinery on its arrival, give his notes therefor, aggregating \$1,500, and give as security for the notes a first mortgage on said machinery and on 80 acres of land, which land is stated, in a property statement attached, to be owned by him, in Monroe county, and unincumbered. The order also contains a stipulation that the machine is to be warranted by the company. The machinery was received by Silha under the order, and on the 24th of September, 1888, he gave three notes for the purchase price,—two of \$700 each, and one of \$100,—which notes each specified that they were given for "value received in one Star engine and New Model separator," and contained the following condition: "The express condition of the sale and purchase of * * *, for which this note is given, is such that the title, ownership, or possession does not pass from the said C. Aultman & Co. until this note and interest is paid in full. And the said C. Aultman & Co., or their authorized agents, are hereby fully authorized and empowered to proceed to collect the same at any time they may reasonably deem themselves insecure, even before the maturity thereof, and may take possession of said machinery, sell the same, and apply the proceeds towards the payment of this note, after paying all costs and necessary expenses." At the same time Silha gave a chattel mortgage on the machinery to secure payment of said notes, which contained, among other things, the following statement: "And I, the mortgagor, in order to induce C. Aultman & Co. to accept this mortgage, now represent that I, the mortgagor, am the actual owner of the property described in this mortgage, and that it is free from all incumbrance." The mortgage also contained very full and sweeping conditions authorizing the company to take possession of the property in case of any default in payment of principal or interest, or in case of waste, misuse, or secretion of the property, and sell

the same, applying the net proceeds upon the notes; and, in case the whole debt and expenses should not be satisfied, there was a covenant to pay the deficiency. This mortgage was properly filed on the 26th of September following. At the same time, and to secure payment of the same notes, John Silha executed and delivered a mortgage upon 80 acres of land, which contained the usual provisions, and is the mortgage in suit in this action. At the time this mortgage was executed the only interest which John Silha had in the real estate mortgaged was an equitable title to an undivided one-sixth thereof as one of the heirs at law of Wenzel Silha, Sr., deceased, and the legal title to the whole thereof, and the equitable title to the undivided five-sixths thereof, was in the defendant Wenzel Silha. On the 2d day of February, 1889, defendant Wenzel conveyed to John the legal title to said land, and received back a mortgage on the land for \$100, being a portion of the purchase price, which mortgage was properly recorded, and no part thereof has been paid. The defendant John used the machinery for threshing in the fall of 1888, and in October paid \$50 on the \$100 note. He made many complaints of defects in both engine and separator, and finally, in July, 1889, he made a settlement with the plaintiff's agent, and executed a release of damages, of which the controlling part is as follows: "Portland Center, Wis., July 26, 1889. Received of A. D. Pratt my note, dated September 24, 1888, for \$100, payable to C. Aultman & Co., and due December 23, 1888, C. Aultman & Co. number being 153-605. The receiving of the above note is in full satisfaction of all claims for damages of any nature whatsoever against the said C. Aultman & Co. arising out of the purchase of an engine and separator from the said C. Aultman & Co." No further payments were made on the machinery. The defendant John used it during the fall of 1889. In February, 1890, the plaintiff seized the machinery and sold it at public sale. The defendant John being present at the sale. On this sale the net proceeds were \$260, which plaintiff credited on the notes and chattel mortgage. This action is to foreclose the real-estate mortgage for the balance due on the notes, and Wenzel Silha is joined as a defendant as a subsequent incumbrancer. The defendant John claimed that by retaking the machinery there had been an entire failure of consideration for the notes, and he also counterclaimed for damages for breach of warranties under which the same were sold. Wenzel answered, setting up the facts as to his mortgage, and claiming priority for his mortgage, and praying foreclosure thereof. The circuit court found that plaintiff reserved the title to the machinery in itself until the notes were paid, and that, upon retaking said machinery, the consideration for the notes failed, and plaintiff could recover nothing thereon; and judgment was ordered and rendered dismissing

the complaint, canceling plaintiff's mortgage, and foreclosing defendant Wenzel's mortgage. Plaintiff appeals.

Jones & Button and Frank W. Babcock, for appellant. Bleekman & Bloomingdale and Morrow & Masters, for respondents.

WINSLOW, J., (after stating the facts.) The trial court found that the transactions in question amounted simply to a conditional sale of the machinery, that the title remained in the plaintiff, and that upon retaking the same the consideration for the notes entirely failed. If the premises of the court are right, the conclusion probably follows. *Hine v. Roberts*, 48 Conn. 267; *Bailey v. Hervey*, 135 Mass. 172. It is claimed by plaintiff, on the other hand, that title to the machinery passed to the defendant John, and that the plaintiff's interest therein was simply that of mortgagee. If this last contention be correct, it is manifest that the trial court erred in its disposition of the case. The legal effect of the transactions between the parties is, then, the question to be decided. Was it a conditional sale simply, or a sale absolute with a mortgage back for security? Where this question is at all doubtful, the courts are inclined to hold the transaction a mortgage. The real nature of the transactions, as disclosed by the written documents and all the surrounding circumstances, is sought to be ascertained. *Rockwell v. Humphrey*, 57 Wis. 410, 15 N. W. Rep. 394. The courts do not favor a conditional sale. In viewing this transaction, and ascertaining its legal effect, all the contemporaneous documents executed between the parties are to be considered. There is, first, the order, which plainly contemplates an absolute sale, and expressly provides for the execution of a first mortgage on the machinery; second, the notes, which contain a provision that the title of the machinery shall not pass until the notes are paid in full, but which also contain a clause authorizing sale of the property, and application of the proceeds on the notes, which clause is inappropriate to anything but a mortgage; third, the chattel mortgage, which expressly recognizes and asserts and warrants that the title of the machinery is in Silha, and contains elaborate and full provisions for foreclosure and sale in case of default, and covenants that, in case the proceeds of the sale are insufficient to pay the debt, Silha will pay the deficiency; fourth, the real-estate mortgage. Consideration of all of these documents forces our minds to the conclusion that the transaction was an absolute sale, with mortgage back. The stipulations and agreements which indicate this intent are numerous, while there is only one which points to a conditional sale, and that is coupled with a provision only suitable to a chattel mortgage. The acts and conduct of the parties also point to the same conclusion. The giving of mortgages upon the ma-

chinery and other property to secure the payment of the notes, with stipulations to pay the balance remaining after foreclosure, is utterly inconsistent with the idea of a conditional sale. *Mining Co. v. Lowry*, (Mont.) 12 Pac. Rep. 652. We must hold that the title to the machinery passed to Silha, subject only to the lien of purchase-money mortgage. This being so, the debt to the plaintiff still existed after the seizure and sale of the machinery, and the real-estate mortgage could be foreclosed for the balance left after applying the net proceeds realized on the chattel mortgage sale. No question arises upon the counterclaim, as the defendant John, for a consideration, has effectually released all claims for damages arising out of the purchase. The real-estate mortgage, however, is a first lien upon the undivided one-sixth of the real estate only. As to the remaining five-sixths, it is subject to the purchase-money mortgage held by the defendant Wenzel. 19 Amer. & Eng. Enc. Law, p. 579, § 3, and note. Judgment reversed, and cause remanded, with directions to render judgment of foreclosure in accordance with this opinion.

BAUMGART et al. v. MODERN WOODMEN OF AMERICA.

(Supreme Court of Wisconsin. June 21, 1893.)

LIFE INSURANCE—APPLICATION—FALSE REPRESENTATIONS—COSTS ON APPEAL.

1. An applicant for insurance stipulated that his answers and statements should be taken as warranties, and the certificate of insurance contained a clause that it should be null and void if any of the statements in the application were false. The applicant falsely stated in his application that he had never had piles. *Held*, that there could be no recovery on the certificate, although his death did not result from the piles, and although he was ignorant that he had them.

2. Where a printed case on appeal contains 174 pages, when 75 pages would have been sufficient, much immaterial matter being contained in it, and there being seemingly no attempt to condense, costs will be taxed for printing 75 pages only.

Appeal from circuit court, Rock county; John R. Bennett, Judge.

Action by Cynthia Baumgart and others against the Modern Woodmen of America. From a judgment for plaintiffs, defendant appeals. Reversed.

Silas W. Menzies, (O. T. Heydecker and J. C. Johnson, of counsel,) for appellant. J. G. Wickhem, J. B. Dow, and Smith & Pierce, for respondents.

LYON, C. J. This action is upon a benefit certificate for \$2,000, alleged to have been issued by the defendant corporation (a benevolent fraternity) upon the life of one August Baumgart, payable at his death to his widow and children, who are the plaintiffs in this action. He joined the defendant fraternity January 13, 1891; was taken

sick two days later; and died February 7, 1891, of pneumonia. The cause was tried before the court without a jury. Plaintiffs recovered, and defendant appealed from the judgment against it for the sum specified in the certificate.

The performance by the deceased, August Baumgart, of conditions precedent to the right of plaintiffs to recover is denied in the answer of the defendant, and facts are alleged therein which, if true, render such benefit certificate invalid for several reasons. Only one of these allegations requires notice, for such allegation is conclusively proved, and, for reasons which will be briefly stated, is fatal to a recovery in the action. None of the other grounds upon which the validity of the certificate is challenged will be determined. The foundation of the alleged contract of insurance sought to be enforced in this action is an application in writing by the deceased, Baumgart, for membership in the defendant corporation and fraternity, and for benefits upon his life, payable to the plaintiffs. Such application is written on a blank prescribed and furnished by the fraternity in accordance with its authorized rules and regulations, and contains the following question: "Have you ever had any of the following disorders or diseases? If so, state when. Give name of physician who treated you for same." Then follows a list of 37 diseases. Among them is piles. The deceased answered the above questions categorically, as to each one of the diseases named, "No;" that is to say, he expressly and positively represented and stated to defendant that he never had piles, or any other of the 37 diseases named. He also stipulated with defendant, in writing, in respect to such application and answers, as follows: "I agree that said answers and statements form the exclusive and only basis of my application for a benefit certificate, and I agree that the truth of said answers and statements, and each of them, is material to the issuance and validity of said benefit certificate, hereby meaning and intending that said answers and statements, and each of them, are and shall be taken and construed to be strict warranties." Moreover, the contract of insurance indorsed upon the benefit certificate contains this clause: "If any of the statements or declarations in the application for membership, and upon the faith of which this certificate is issued, shall be found in any respect untrue, then, in every such case, this certificate shall be null and void and of no effect, and all moneys which shall have been paid, and all rights and benefits which may have accrued on account of this certificate, shall be absolutely forfeited." Hence we have here a strict warranty, as distinguished from a mere representation, that the deceased never had piles. The distinction between these is fundamental in the law of insurance, and was stated by this court in *Blumer v. Insurance Co.*, 45 Wis. 622. It requires no

further elucidation here. It was there held that a substantial breach of any warranty, whether material to the risk or not, will defeat the policy.

It was competent for the parties to contract as they did. The defendant might lawfully refuse to insure Baumgart except upon condition that he disclosed truly whether he ever had any of the specified diseases, and that his statements and disclosures should be strict warranties, which, if not true, should invalidate the insurance. The defendant imposed these conditions upon the applicant, who accepted them, as it was lawful for him to do, and the contract of insurance was closed on that basis.

Now for the facts. It was conclusively proved on the trial that four months before he applied for membership in defendant fraternity Baumgart had an attack of piles and diarrhea, and was treated therefor by a physician, who made him several visits. How soon thereafter he recovered, if he did recover, does not appear. Of course, this is a substantial breach of the warranty that he never had piles, and it is quite immaterial that his death resulted from other causes. It is also immaterial, if it be true, (as the learned circuit judge found,) that Baumgart never knew he had the piles. It may be observed, however, that his alleged ignorance in this respect seems incredible, and, were the finding material, it would be difficult to approve it. For these reasons it is impossible to sustain this judgment without violating fundamental principles in the law of insurance, which this court has heretofore steadily upheld and enforced.

A printed case, which contains 174 pages, has been furnished the court. Much immaterial matter is contained in it, and in its preparation there has seemingly been no attempt to condense. A proper abstract of the record would not fill more than 75 pages. The clerk will only allow in the taxation of costs for printing that number of pages. The judgment is reversed, and the cause will be remanded, with directions to the circuit court to dismiss the complaint on the merits.

CHICAGO & N. W. RY. CO. et al. v. GROH et al., (two cases.)

(Supreme Court of Wisconsin. June 21, 1893.)

ADVERSE POSSESSION—CLAIM OF TITLE—RIGHT TO ACCRETION.

1. The words "under claim of title," as used in the statute defining adverse possession, do not require that the disseisor should think that the land belongs to him before entry, but it is sufficient if the entry be hostile to all the world, and he intend to hold the land as his own, and does hold it for the statutory period.

2. Where a disseisor enters upon land bordering upon navigable water, which he inclosed with a fence, and holds by adverse possession, title to the shore includes title to the accretion, and it is not necessary that he continually extend his fence to the water's edge.

Appeal from circuit court, Sheboygan county; John Goodland, Judge.

Ejectment by the Chicago & Northwestern Railway Company, Alfred Gilman, Olivia Drew, Helen G. Tuttle, and Caroline Scammon against George M. Groh, George Groh, Ellse Groh, and William Groh. Plaintiffs and defendants appeal from the judgment. On the appeal of plaintiffs, judgment is affirmed. On the appeal of defendants, the portion of the judgment appealed from is reversed.

The other facts fully appear in the following statement by LYON, C. J.:

This is an action of ejectment, commenced in November, 1889, to recover a tract of land in the city of Sheboygan, lying south of the harbor in that city, bounded on the east by Lake Michigan, on the south by a direct line running from Lake Michigan west to the Sheboygan river, and on the west and north by irregular lines, sufficiently described in the complaint. For convenience or accuracy of description three tracts of land are described in the complaint, each by metes and bounds, but these adjoin each other, and together constitute but one parcel of land. The complaint is in the usual form. The answer contains a denial of plaintiffs' title to the land claimed, and alleges adverse possession thereof by the defendants for more than 30 years, under section 4214, Rev. St. It appeared in proof that defendant George Groh had been in the actual possession of some portion of the land described in the complaint continuously ever since 1848, he having resided thereon all that time, and that the other defendants claim under him. On the trial the circuit court held as matter of law that the plaintiffs had established their title to all the land claimed in the action, unless such title had been divested by adverse possession of defendants. The jury found specially that defendant George Groh entered upon a portion of the land described in the verdict by metes and bounds under claim of title exclusive of any other right; that he protected the same by a substantial inclosure; and that he, and those claiming under him, had been in the continuous, actual, visible, and adverse possession of the land so inclosed, hostile to plaintiffs and their grantors, for more than 20 years before this action was commenced. It appeared also that the east line of such inclosure originally abutted Lake Michigan, but that afterwards, by the action of the elements, and perhaps other causes, a considerable accretion of land formed between the east side of such inclosure and the waters of the lake, outside of such inclosure. The jury also negatived the claim of plaintiffs that defendant George Groh ever held the land in controversy as tenant of certain grantors of plaintiffs named in the verdict. Plaintiffs moved for a new trial; also for judgment on the verdict for all the land claimed; and defendants moved for judgment on the verdict for the land

formed by accretion, as well as for that contained in the inclosure. All these motions were denied, and on the evidence and verdict the circuit court gave judgment for defendants, without costs, for the land actually within the inclosure as described in the verdict; and for the plaintiffs, with costs, for the residue of the land claimed. The judgment for plaintiffs includes a quantity of land west and north of such inclosure, adjoining the same, and the accretion on the east thereof. The plaintiffs appeal from that part of the judgment which awards to defendants the land contained in the inclosure, and the defendants appeal from that part thereof which denies them costs, and awards the plaintiffs the land between such inclosure and the waters of Lake Michigan, thus formed by accretion, with costs.

Seaman & Williams and Rietbrock & Halsey, for plaintiffs. Turner & Timlin and C. H. Maynard, for defendants.

LYON, C. J., (after stating the facts.) A careful examination of the testimony satisfies us that the court ruled correctly that the plaintiffs had established their title to all the land in controversy, except in so far as their title to a portion thereof might be divested by the alleged adverse possession of defendant George Groh and those claiming under him.

I. The appeal of plaintiffs will first be considered. The errors chiefly relied upon by them for a reversal of so much of the judgment as awards defendants the land included in the inclosure are that the testimony does not support the finding of such adverse possession, and that the court gave erroneous instructions as to the character of the entry which would justify the finding of adverse possession. The substance of the instructions excepted to is contained in an instruction construing the statute defining adverse possession, as follows: "The words 'under claim of title' are not to be taken to mean that it is necessary that Groh should have thought the land belonged to him before he entered, but, if he went onto it with the intention to claim it, and keep it as his, without knowing or caring who else claimed to own it, that would be an entry under claim of title." On behalf of plaintiffs it is claimed there should also have been some color of title or right to enter to constitute "claim of title" within the meaning of that term as employed in the statute. The real controversy here is whether, in order to render the entry of George Groh adverse, he should have made the same in good faith, believing he had the right to enter. Whatever may have been said on this subject in some of the older cases, we think the decisions of this court, which it is believed are in accord with the general course of later adjudications, have established the rule in this state that good faith on the part of the person making entry

upon land is not essential to render such entry and the possession held under it adverse. It is a sufficient claim of title that the entry of the disseisor is hostile to all the world, and he intends to hold the land as his own, and does so hold it for the statutory period of limitation. See *Hacker v. Horlemus*, 69 Wis. 280, 34 N. W. Rep. 125, and the cases cited in the opinion by the late Mr. Justice Taylor.

As to the sufficiency of the proofs of adverse entry and possession, George Groh testified as follows: "When I inclosed that land for my home, I did not know who owned it. I took it for my own. Nobody afterwards claimed it. * * * Nobody asked me for something. When some men came there and asked me, 'Is that land yours?' I said, 'Yes.' That is all I told them. No man ever came there and tried to get me to sign a lease." This testimony covers a period of more than 30 years, and if the jury believed it,—as it was competent for them to do, and as they doubtless did,—it is sufficient to support the verdict that the entry and possession of the inclosure in question by George Groh was "under claim of title exclusive of any other right," within the meaning of the statute. There is also abundant evidence that such adverse possession was continuous for more than 20 years before this action was commenced. It follows that the portion of the judgment which establishes defendants' title to the land within the inclosure should not be disturbed. On the appeal of plaintiffs, the judgment of the circuit court must be affirmed.

II. The succession of plaintiffs to the title of the original owners being established, the appeal of defendants raises the single question as to who owns the land between the east side of the inclosure and the waters of the lake, made by accretion after George Groh built his fence along the margin of the lake. The judgment awards the same to the plaintiffs. The adverse possession of George Groh and those claiming under him, which has ripened into a title, extended in its inception to the waters of the lake. Hence the disseisin was of the shore of the lake, and it necessarily included all riparian rights pertaining to the ownership of the shore. By virtue of these the accretion becomes, so to speak, an increment of the shore, and included in the disseisin, because essential to the enjoyment of riparian rights appurtenant to the shore. In this view it seems immaterial that George Groh did not constantly keep his east fence extended to the waters of the lake, for when he disseised the grantors of plaintiffs of the shore, such disseisin, not only in its inception, but during its whole duration until it ripened into a title, included riparian rights, and for the enjoyment of these necessarily included the accretion in controversy. The rule which gives accretions to the owner of the shore is also based, to some extent, on the fact that the ac-

tion of the water is as liable to make inroads upon the shore as to deposit accretion against it. Thus the rule includes the idea of compensation to, as well as the preservation of riparian rights of, the owner of the shore. Moreover, there is nothing permanent in the continuance of mere accretion. Unprotected, it is always subject to the changing action of the water, which may be produced by many causes. During one period it forms accretion against the shore, thus extending the shore to a line formerly covered by water. Again, the same result follows a receding of the water without accretion. And during another period the water sweeps away the accretion, and often much of the original shore with it, to the great loss of the riparian owner. Thus, in the present case, the removal or extension of harbor piers or other breakwaters at Sheboygan might so affect the action of the water as to result in a few years in sweeping into the lake, not only the accretion, but all the land in controversy. The same results might follow a protracted period of high water and winds, without the aid of artificial causes. Should the accretion be thus swept away,—restoring the original shore line,—and then should it again form against such original shore, we do not doubt it would belong to the defendants by virtue of their ownership of such original shore line established by the judgment. If so, why are destruction and restoration of the accretion essential to defendants' title thereto? Is it not reasonable and logical to hold that from the beginning the accretion was but an increment of the shore, and that whatever right the defendants ever had in the shore they necessarily had the same right in the increment as inseparable from the shore? In this view, adverse possession of the shore was like possession of the accretion, and title to the shore, acquired by adverse possession, carries with it title to the accretion. It must be admitted that the question is not free of doubt, or entirely easy of solution, but, after giving it much consideration, we are constrained to think the better rule is that the accretion, whether actually inclosed or not, belongs to the owner of the shore, whether his title to the shore rests in actual grant or upon adverse possession thereof for the statutory period of limitation, which, it is sometimes said in the books, implies a grant. We think the cases cited on behalf of defendants, although not directly in point, perhaps, are in that direction, and indicate the more reasonable rule. The case most directly in point is that of *Campbell v. Gaslight Co.*, 84 Mo. 352, in which it was held (quoting a headnote, which correctly states the decision) that "a riparian proprietor is entitled to the accretions made to his land by the river, and the statute of limitations, in its application to such accretions, relates back to the time it began to run in favor of the riparian owner as to the main bank. The accretions, in becoming a part of the

land to which they are joined, take the title and condition of that land just as it exists at the time of their formation. If the riparian owner is barred, or partially barred, by the statute of limitations, as to the bank, he will be barred as to the accretions in like manner, although they may have been deposited but a year or a day." The court says: "The accretion grows, as it were, gradually into the soil and title of the riparian proprietor." On the appeal of defendants, the portion of the judgment appealed from must be reversed.

III. The action has been twice tried. The record shows that before the last trial the defendants served upon plaintiffs a written offer of judgment for the recovery, if we understand the offer correctly, of the land which they will recover under this decision. The plaintiffs did not accept the offer. If the scope of the offer is as we understand it to be, the defendants must have costs in the circuit court from the time it was made. Rev. St. § 2780. We perceive no legal objection to allowing plaintiffs their costs in the circuit court accruing before such offer.

As above stated, on the appeal of plaintiffs, the judgment of the circuit court is affirmed. On the appeal of defendants, the portion of the judgment appealed from is reversed. The cause will be remanded, with directions to that court to render judgment in accordance with this opinion.

SMITH v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of South Dakota. June 26, 1893.)

RAILROAD—FIRES—DEFECTIVE ENGINE—EVIDENCE OF OTHER FIRES—PLEADING—CONTRIBUTORY NEGLIGENCE.

1. A special finding of a jury that the negligence of the defendant which caused the damage to the plaintiff was the condition of its locomotive engine is within the allegations of the complaint, alleging that "the defendant carelessly and negligently ran an engine along its line of railway, which engine then and there was so negligently and insufficiently constructed and equipped, and then and there was so negligently and carelessly operated by the defendant, that it emitted and threw out large sparks of fire."

2. An allegation in plaintiff's complaint that the defendant's engine "was so negligently, carelessly, and insufficiently constructed and equipped" as to emit and throw out large sparks of fire properly included the condition of such engine for arresting sparks, whether its defects in that respect resulted from its original construction, or from defects caused by use, wear, or injury to its parts.

3. Evidence tending to prove that a locomotive engine which caused a fire destroying plaintiff's property also set two other fires about the same time is not necessarily overcome by evidence that the engine was properly equipped with the best known appliances for arresting sparks, was in good condition, and managed by a competent and trustworthy engineer, as a matter of law. Such evidence tends to raise a conflict in the evidence as to the negligence of the defendant, which must be determined by the jury, and this court cannot say that the jury, from such evidence, were not justified

in finding that the engine was not in good condition.

4. Whether or not evidence tending to prove the setting of two other fires about the same time by the engine that caused the destruction of plaintiff's property is admissible as tending to prove negligence on the part of the defendant is a question of law, for the court; and an instruction by the court to the jury that such evidence was admissible for the purpose stated is proper, and the fact that this instruction is repeated in an instruction given upon the request of plaintiff's counsel does not constitute error.

5. The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant, unless the plaintiff, in making out his case, prove, or give evidence tending to prove, that he was guilty of such contributory negligence; and when there is no evidence upon the subject it is the duty of the court to assume that the plaintiff was not guilty of such contributory negligence, and so instruct the jury.

(Syllabus by the Court.)

Appeal from circuit court, Bon Homme county; E. G. Smith, Judge.

Action by Fen Smith against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

R. B. Tripp, (H. H. Field, of counsel,) for appellant. French & Orvis, for respondent.

CORSON, J. This was an action to recover damages alleged to have been sustained by the plaintiff through the negligence of the defendant, in permitting sparks to escape from its engine used on the line of its railway, whereby a quantity of hay belonging to the plaintiff was destroyed. Verdict and judgment for plaintiff. Defendant appeals.

1. The first question presented is as to the effect of certain special findings of the jury, made in connection with their general verdict, which are as follows: "Special: (1) Did the fire that destroyed plaintiff's hay start from sparks emitted by defendant's engine? Answer. Yes. (2) If your answer to the last question be 'Yes,' were the sparks emitted through the negligence of the defendant? A. Yes. (3) Was the plaintiff's loss due to the negligence of the defendant? A. Yes. (4) If your answer to the last two questions be 'Yes,' in what did the negligence consist? First. Was it in the construction of the engine? Second. In its condition or equipment? Third. Its operation? A. In its condition." The learned counsel for the appellant contends that "the defendant is charged with being negligent in respect to the construction, equipment, and operation of the engine. The jury specially find that the defendant was not negligent in any one of these respects, but that it was negligent in regard to the condition of the engine. * * * They were directed by the court, upon the enumeration of all of the kinds of negligence alleged, together with another not alleged, to state in what the negligence consisted, and they say it was in one of the particulars of this enumeration only. This necessarily ex-

cludes the others, and is a special finding by them that the defendant was not negligent in any of the others enumerated. This being so, on reference to the complaint and findings it will be seen the defendant was acquitted of all negligence charged in the complaint." The allegation of the complaint upon the subject of the negligence complained of is "that on said date the defendant carelessly and negligently ran a locomotive engine along said line of railway, which engine was then and there so negligently and insufficiently constructed and equipped, and then and there was so carelessly and negligently operated by the defendant, that it emitted and threw out large sparks of fire," etc. The learned court below evidently construed the term "condition," in the findings, as applied to the engine, as embraced in the allegations of the complaint. While, strictly speaking, "equipped" has reference to the appliances to make the engine effective for the purposes for which it is intended, and "condition" has reference to the state these appliances are in for accomplishing the purposes intended, yet in common language this distinction is not usually observed, in speaking of a locomotive engine. It would doubtless be difficult for ordinary minds to comprehend the distinction between an engine not properly equipped for arresting sparks and one not in condition to arrest them. If properly equipped,—that is, supplied with whatever may be necessary to efficient action,—it would be, under ordinary circumstances, in condition to arrest sparks. If not in such condition, it would not be properly equipped to accomplish the purposes designed. We are of the opinion, therefore, that the court committed no error in holding that the finding substantially corresponded with the complaint. More especially is this so in this case, as the defendant tried the cause in the court below upon the theory that the condition of the engine was in issue, as fully appears from an examination of the testimony on the part of the defendant. Mr. Whitney, the engineer who ran the engine at the time of the fire, after testifying as to the manner of the construction of the engine, and its appliances for arresting sparks, etc., was asked: "You observed the condition of the engine at that time, did you? Yes, sir. What was its condition at that time? It was O. K. What do you mean by that? It was in good condition." The fireman and other witnesses were asked similar questions by counsel for defendant. We think it is too late, therefore, to make the point that the findings did not substantially conform to the pleadings, and we are of the opinion that by a fair construction of the complaint the allegation that the defendant's engine "was so negligently, carelessly, and insufficiently constructed and equipped" did necessarily include its condition for arresting sparks, whether its defects in that respect resulted from its original

construction, or from defects caused by use, wear, or injury to its parts. In either case it would not be properly equipped for the purpose for which it was intended. This finding then established the fact that defendant's engine was not in proper condition for arresting sparks.

2. It is further contended, however, by counsel for the appellant, that this finding of the jury is not supported by the evidence, and ought to have been set aside by the trial court, as the evidence on the part of the defendant established the fact that the engine was properly equipped, in good condition at the time of the fire, and managed by a competent and trustworthy engineer, and therefore completely overcome the presumption of negligence from the fact that defendant's engine caused the fire, as held by this court in *Kelsey v. Railway Co.*, 45 N. W. Rep. 204. But in this contention we think the counsel for appellant have not given sufficient consideration to the evidence on the part of the plaintiff in addition to the presumption of negligence caused by the fire. If the plaintiff had given no evidence of negligence, but relied solely on the presumption, the counsel's contention would have undoubtedly been correct, as this court so held in the case of *Cronk v. Railway Co.*, 52 N. W. Rep. 420, following the case of *Volkman v. Railway Co.*, 5 Dak. 69, 37 N. W. Rep. 731; *Pattée v. Railway Co.*, 5 Dak. 267, 38 N. W. Rep. 435; *Huber v. Same*, 6 Dak. 392, 43 N. W. Rep. 819. The evidence on the part of the plaintiff that the same engine set two other fires at about the same time, and within about one-half mile of the first fire, was important, as showing that the engine was not in a proper condition to prevent the emission of sparks. This evidence on the part of the plaintiff was not controverted, but it was sought, not only to rebut the presumption we have alluded to, but the evidence on the part of the plaintiff that the same engine set two other fires about the same time, by proof that the engine was properly equipped, in good condition, and operated by a competent and careful engineer. There was therefore conflicting evidence on the question of negligence, to be determined by a jury, as a question of fact, and not one of law, for the court. The case of *Railroad Co. v. Hotham*, 22 Kan. 41, was a very similar case to the one at bar. In that case the plaintiff was not aided by the presumption of negligence on the part of the defendant upon proof that the engine caused the fire, but the burden was upon the plaintiff in that state to prove the negligence of the defendant. This the plaintiff sought to do by proving that the engine that caused the fire also caused two other fires the same day. "The evidence showed, and the jury found, that the engine from which the sparks escaped which caused the fire was a first-class engine, in good order and good condition, and supplied with all the most approved appli-

ances for preventing the escape of sparks of fire. The engineer who had charge of the engine at the time the fire was produced, was also a careful, competent, and trustworthy engineer." Opinion of the court, (p. 48.) But the jury found, notwithstanding this proof, that the engine was mismanaged, and found for the plaintiff. In delivering the opinion of the court, Mr. Justice Valentine says: "The law does not attempt to define what particular facts or conduct shall constitute negligence, or prove negligence. It, at most, can only say that negligence is the absence of care, and leaves the question for the jury to determine whether, under all the circumstances, due care has been exercised or not. Of course, it is the province of the court to determine whether the evidence offered or introduced tends to prove or disprove negligence. And if no evidence is offered or introduced, tending to prove negligence, the court may itself decide that no negligence is proved, and direct the jury to find accordingly. And where evidence is introduced, proving negligence beyond all controversy, and no countervailing evidence is introduced, the court may generally say that the negligence is proved. * * * And, when all the evidence offered is introduced, then, unless there is no evidence introduced to prove negligence, or unless the evidence introduced is all one way, and proves negligence beyond all controversy, the question whether negligence is proved or not is a question for the jury, and not a question of law, for the court. In all cases where the facts constituting or tending to prove or disprove the negligence are disputed, the question whether such supposed negligence has any existence or not is a question of fact, for the jury. And even where there is no dispute about the facts, in their details, still, if they are stated or proved in such limitless, cumbrous, or diffusive detail that different minds, of reasonable capacity, might honestly differ with respect to whether they in fact constitute or prove negligence, or not, the question as to whether they do in fact constitute or prove negligence, or not, must be submitted to the jury, as a question of fact." The case of *Railroad Co. v. McCahill*, 56 Ill. 28, is also instructive upon this question. In Illinois the statute made the fact that the fire was occasioned by the engine prima facie evidence of negligence on the part of the company, and of its agents and servants in charge at the time. In that case the plaintiff proved, in addition to the prima facie case made by the statute, that the engine on the day of the fire threw out an unusual amount of sparks. This evidence was held to be sufficient to warrant a jury in finding that the engine was not in a suitable condition to run at the time. In that case the court says: "In opposition to all the evidence offered by the company, there is the unimpeached testimony of witnesses that the engine, as it passed through

the village on the day the fire occurred, threw out unusual quantities of fire, and that it did actually occasion the fire that consumed the property of appellee. Intelligent witnesses, and men of large experience, sworn on behalf of the company, concede the fact that, if it be true that the engine did emit such an unusual volume of fire as stated by the witnesses, it must necessarily have been out of repair at the time. Whether this engine was ever equipped with the best mechanical contrivances to prevent the emission of fire sparks does not very clearly appear; but, if it be admitted that it was originally so constructed, the actual results of what the engine did, in throwing out and emitting fire sparks as it passed along through the village on the day the fire occurred, are sufficient to overcome any direct evidence appearing in this record that it was in good order, or, if in good order, it must have been most unskillfully managed by the engineer. We are of opinion that the verdict is not against the weight of the evidence, and the jury were fully authorized to find as they did." See, also, *Huber v. Railway Co.*, 6 Dak. 392, 43 N. W. Rep. 819. So, in the case at bar, this court cannot say, as a matter of law, that the jury was not fully justified in finding that the defendant was guilty of negligence in using an engine in such a condition, or so equipped, as to throw out sparks of fire of sufficient size to set three fires within the limits of about one-half mile upon the line of defendant's railway, notwithstanding the positive testimony of defendant's witnesses as to the good condition of the engine; that it was equipped with the best known appliances for arresting sparks, and was at the time managed by a competent and trustworthy engineer. It was a question of fact, for the jury.

3. It is further contended by the counsel for the appellant that the court erred in calling the jury's attention to the fact of the other two fires. We are unable to discover any error in this, as the question of whether or not the fact that the engine set two other fires about the same time constituted competent evidence tending to prove that the engine was in a bad condition, or was improperly equipped, was a question of law, and it was the duty of the court to charge the jury upon the subject. It may be that the court would have been justified in refusing to give the plaintiff's instructions upon the ground that it had instructed the jury upon the subject in his general charge, but that was a matter in the discretion of the court; and the fact that the court speaks of it in its general charge, and also gives a special instruction on the same subject, not inconsistent with his general charge, constitutes no ground of error.

4. The counsel for the appellant further contends the court erred in refusing to give the following instruction which the defendant requested the court to give: "If you should

believe from the evidence in this case that the plaintiff's hay was destroyed by a fire negligently set out from, or started by, one of the defendant's engines, you would not be justified in returning a verdict for him, if you should find he had not properly guarded or cared for his hay, as against fire, and that by reason thereof the fire so set or started destroyed the hay. Refused." It is contended by counsel for the appellant that as the plaintiff alleged in his complaint that he "was not guilty of any negligence which in any way contributed to the loss of the hay," and this allegation was denied by the general denial in the answer, it was therefore an issue in the case, and that the court erred, not only in omitting to call the jury's attention to this issue, but also in refusing to give the instruction asked for by the defendant, above set out. This presents the important question as to the party upon whom is imposed the burden of proof as to the contributory negligence, or absence of contributory negligence. Must the plaintiff prove that he was not chargeable with negligence contributory to the injury? Or must the defendant prove such contributory negligence on the part of the plaintiff as a defense to the action? The courts of the several states are divided upon this question, some of the state courts holding that the burden of proving affirmatively that the plaintiff was not guilty of contributory negligence is upon the plaintiff, and others holding that the burden is upon the defendant to prove such contributory negligence. The supreme court of the United States holds with the latter courts. *Railroad Co. v. Gladmon*, 15 Wall. 401; *Hough v. Railroad Co.*, 100 U. S. 213. We are of the opinion that the rule requiring the defendant to prove contributory negligence on the part of the plaintiff, unless the evidence of the plaintiff discloses such contributory negligence on his part, is the better rule, and is supported by the greater weight of authority. The reasons advanced in support of the respective positions are clearly stated by the supreme court of Wisconsin in *Hoyt v. City of Hudson*, 41 Wis. 105, and the conclusions reached by that court are thus stated: "It seems to us that the reasons in favor of the rule which casts the burden of proof in such cases upon the defendant are the stronger and better reasons, and that such rule rests upon sound legal principles, and ought to prevail in this state. We therefore hold that, in the absence of any evidence tending to show that the plaintiff was chargeable with negligence contributing to the injury of which he complains, the presumption of law is that he was free from such negligence, and the burden was upon the defendant to prove such contributory fault, if the same was relied upon as a defense. The rule here adopted does not apply to a case in which the proofs on behalf of the plaintiff show, or tend to show, his contributory negligence. If such negligence con-

clusively appears, the court will nonsuit the plaintiff, or direct the jury to find for the defendant. If the evidence only tends to show such contributory negligence, the question must go to the jury, to be determined, like any other question of fact, upon a preponderance of evidence." This decision is important, as, to reach the conclusions announced by the court, it was necessary to overrule two prior decisions of that court. See, also, the able opinion of Judge Duer in *Johnson v. Railroad Co.*, 5 Duer, 21. We have not deemed it necessary to cite the large number of cases reported on this question, as they are either cited by counsel for respondent, or are collected in *Shear. & R. Neg.* (4th Ed.) in notes to sections 107-109. The late territorial court, in the early case of *Sanders v. Reister*, 1 Dak. 151, 48 N. W. Rep. 680, took a similar view of the law, following the rule laid down in *Railroad Co. v. Gladmon*. In delivering the opinion, Mr. Justice Bennett says: "The decisions in the different states are very conflicting on this point, but so far as this court is concerned it is effectually set at rest by the case of *Railroad Co. v. Gladmon*, 15 Wall. 401. In that case Mr. Justice Hunt, in delivering the unanimous opinion of the court, says: 'The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plaintiff.' After a careful examination of all the authorities, the same rule is laid down as the better law by *Shearman & Redfield*, (section 44,) and by *Wharton*, (section 423,) and I deem it unnecessary to elaborate the point further." See, also, *Mares v. Railroad Co.*, 3 Dak. 336, 21 N. W. Rep. 5. The allegation in plaintiff's complaint that the plaintiff "was not guilty of any neglect which in any way contributed to the loss" was surplusage, and its denial raised no material issue that plaintiff was required to prove. Unless, therefore, the evidence of the plaintiff tended to establish contributory negligence, or the defendant gave evidence tending to establish it, there was no issue upon that question to be submitted to the jury. An examination of the evidence discloses no such testimony. The evidence of the plaintiff tended to prove that his hay was stacked 60 rods or more away from the line of the railway, and that, within a few minutes after the fire started near the right of way of the railway company, it reached his stacks of hay, and consumed them. The only proof on the subject by defendant was that there were no fire guards around the hay. But there was no evidence to prove that fire guards were usual or necessary, or that the hay was not protected in the usual manner in that section of country. In the absence,

therefore, of any evidence upon the subject, it would be the duty of the court to assume that the plaintiff was not guilty of contributory negligence. In the case in 22 Kan., supra, "the court charged the jury, among other things, that the plaintiff could not recover for any injury to his hay unless the jury were satisfied, by affirmative evidence, that the said plaintiff was in the exercise of ordinary care and caution on his part to prevent such injury." Mr. Justice Valentine, in delivering the opinion of the court, says: "Now, this instruction was entirely too favorable to the defendant, and was erroneous, as against the plaintiff. In the absence of evidence tending to show either that the plaintiff was negligent or not negligent, the court should have instructed the jury to find, and the jury should have found, that he was not negligent," citing *Railroad Co. v. Pointer*, 14 Kan. 38. In the case at bar the court instructed the jury that if they found a certain state of facts to exist they should find for the plaintiff, "provided the plaintiff was not guilty of negligence in relation to said fire, and made reasonable efforts to put out the same, and save his property." We think this instruction was as favorable to the defendant as the facts in the case would justify, as there were apparently no facts requiring the question of contributory negligence to be submitted to the jury in the case. We find no error in the record, and we are of the opinion the judgment of the court below should be affirmed, and it is so ordered; all the judges concurring.

• EVANS v. BRADLEY, County Treasurer.
(Supreme Court of South Dakota. June 26, 1893.)

COUNTY WARRANT—JUDGMENT—MANDAMUS—ISSUE OF WRIT—ACT OF COURT.

1. An order made by a judge within his circuit, which he is authorized to make as a court or judge, will be presumed to be made by the court, unless it clearly appears from the order that the same was intended to be the order of the judge and not the order of the court.

2. A peremptory writ of mandamus, issued by the judge within his circuit, concluding as follows: "Witness the Hon. William Gardner, Judge of the Circuit Court. In open court, at Rapid City, S. D., this 26th day of February, 1892. William Gardner, Judge,"—held, to be the act of the court and not of the judge.

3. When the facts stated in the alternative writ of mandamus are sufficient to authorize the court to issue a peremptory writ, in the absence of proof to the contrary in the record this court will presume that the facts stated in such alternative writ were proven to the satisfaction of the court, and that the peremptory writ was properly issued.

4. When a county warrant is allowed by the board of county commissioners of a county, and drawn upon a special fund in the hands of the county treasurer, who has sufficient money in such special fund, not otherwise appropriated, to pay the same, it is ordinarily the duty of such treasurer to pay such warrant. But if he has reasonable ground to question the legality of such warrant, or the power of

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the board to issue the same, he may decline to pay the same until the validity of such county warrant is determined by the judgment of a court of competent jurisdiction.

5. When the legality of such county warrant has been established by the judgment of a court of competent jurisdiction, and the treasurer refuses to pay such judgment, the court may, upon proper application, issue a peremptory writ of mandamus to compel such treasurer to pay such judgment, when no facts are presented to the court tending to impeach or cast doubt upon the validity of such judgment, or show that the same has been, or is about to be, appealed from, or otherwise reviewed.

(Syllabus by the Court.)

Appeal from circuit court, Fall River county; William Gardner, Judge.

Application by Fred T. Evans for writ of mandate to James Bradley, treasurer of Fall River county, to compel payment of a certain judgment. Judgment granting the writ. Defendant appeals. Affirmed.

Wood & Buell, J. H. Boomer, and W. G. Rice, for appellant. Martin & Mason, for respondent.

CORSON, J. On January 6, 1892, the judge of the circuit court of the seventh judicial circuit, at Hot Springs, Fall River county, issued an alternative writ of mandamus, directed to the defendant, as county treasurer of Fall River county, commanding him to pay a certain judgment for \$5,046.38, rendered against the said county in favor of the plaintiff, or show cause, etc., before the court, at Custer City, in Custer county, in said circuit, on the 9th day of January, 1892. To this alternative writ the defendant made no answer or return, and on February 26th the said court, at Rapid City, the county seat of Pennington county, in said circuit, issued a peremptory writ commanding said defendant, as such treasurer, to pay the said judgment out of the courthouse and jail funds in his hands as such treasurer. From the order awarding the peremptory writ this appeal is taken.

The writ concludes as follows: "Witness the Honorable William Gardner, Judge of the Circuit Court. In open court, at Rapid City, S. D., this 26th day of February, 1892. William Gardner, Judge." The counsel for respondent moved the court to dismiss the appeal upon the ground that the peremptory writ was issued by the judge, and not by the court, and that under the decisions of this court in *Holden v. Haserodt*, 49 N. W. Rep. 97, and 51 N. W. Rep. 340; *Black Hills Flume & Min. Co. v. Grand Island & W. C. Ry. Co.*, Id. 342,—this court has no jurisdiction to entertain the same. While this court held in the cases cited that it had no jurisdiction to entertain appeals from an order made by a judge, and that when it clearly appeared from the record that an order was so made by a judge and not by a court the appeal from such order would be dismissed, yet it also held that the circuit courts are always open for the transaction of court busi-

ness, "except the trial of issues of fact in civil and criminal actions," and that a circuit judge may, at any time or place within his circuit, make court orders. It would seem to necessarily follow from these decisions that an order made by a judge within his circuit, which he is authorized to make as a court or judge, would be presumed to be made by the court, unless it clearly appears from the order that it was the intention of the judge to make it a judge's order only. The peremptory writ in this case having been issued at Rapid City, within the seventh circuit, and it appearing to have been issued in open court, we hold that it was issued by the court, and not by the judge. The motion to dismiss the appeal will therefore be denied.

This brings us to the merits of the case. As we have before stated, there was no answer or return to the alternative writ, and hence that writ and the peremptory writ constitute the record before us for review. If the facts stated in the alternative writ are sufficient in law to authorize the issuance of the same, the action of the court below must be affirmed, as this court will presume, in the absence of a contrary showing, that the court below had sufficient evidence before it to prove the allegations contained in the alternative writ. The alternative writ states fully and in detail all the facts pertaining to the location of the county seat at Hot Springs, in Fall River county, proceedings in selecting a site for the courthouse and jail, bids, etc., not necessary, for the purposes of this decision, to be noticed. It also states that plaintiff entered into a contract with said Fall River county to erect for said county a courthouse and jail for the sum of \$23,000, and that in December, 1891, he had about finished the erection of the same; that at that time there was due the plaintiff upon his contract the sum of \$5,000, and that the board of county commissioners of said county duly allowed him said sum, and drew a warrant for the same, payable out of the courthouse and jail fund of said county; that the defendant was the legally elected, qualified, and acting county treasurer of said Fall River county, and had in his hands as such treasurer \$10,000 belonging to said courthouse and jail fund, not otherwise appropriated; that the defendant refused, upon demand, to pay said warrant, and thereupon the plaintiff commenced an action against said county upon the said warrant in the circuit court of Fall River county, and obtained a judgment thereon for \$5,046.38, and that said defendant refused to pay said judgment, and that the plaintiff had no remedy at law for enforcing the payment of said judgment. Thereupon the plaintiff applied to the circuit court for a mandamus to compel the treasurer of said county to pay said judgment out of the said courthouse and jail fund in his hands as such county treasurer. The facts stated bring the case clearly

within the rule laid down by courts for the issuance of the writ to enforce the payment of a judgment where an ordinary execution will not be effectual, and a special fund is in the hands of the treasurer for the payment of the claim. High, Extr. Leg. Rem. §§ 229, 365, 367; 2 Dill. Mun. Corp. § 861; State v. Hoeflinger, 31 Wis. 257; Brown v. Crego, 32 Iowa, 498; City of Olney v. Harvey, 50 Ill. 453; City of Chicago v. Sansum, 87 Ill. 182; Rice v. Walker, 44 Iowa, 458; Webb v. Commissioners, 70 N. C. 307; City Council v. Hickman, 57 Ala. 338; Duncan v. Louisville, 8 Bush, 98. It appears from the alternative writ that there was a specific fund provided for the erection of the courthouse and jail, \$10,000 of which was still in the hands of the treasurer, not otherwise appropriated, when the said county warrant was drawn on said fund by the board of county commissioners, and when said alternative writ was issued, and a court of competent jurisdiction had rendered a judgment against the county thereon. These facts, we think, entitled the plaintiff to the writ of mandamus to compel the payment of said judgment. It is the duty of the county treasurer, under ordinary circumstances, to pay the warrants drawn according to law by the board of county commissioners when he has funds in his hands for that purpose. If, however, he has reasonable grounds to question the legality of the warrant, or the power of the county commissioners to draw the same, he is justified in refusing to pay such warrant until the validity of the same is established by the judgment of a court of competent jurisdiction. But when, in an application for a mandamus requiring him to pay such judgment, no facts are presented tending to impeach or cast doubt upon the validity of the judgment, or that the same has been or is about to be appealed from, or otherwise reviewed, there is certainly no error in making the mandamus peremptory. In the action brought by the plaintiff against the county upon the warrant in controversy no defense was interposed by the county, and the judgment was therefore conclusive as to the validity of the warrant, and it became the legal duty of such treasurer to pay the same, certainly in the absence of other facts. The case at bar is clearly distinguishable from the case of Bailey v. Lawrence Co., (S. D.) 51 N. W. Rep. 331. In that case no specific fund has been provided for the payment of the coupons, and the validity of the bonds and coupons was contested by the county, and there had been no judgment establishing the validity of the same. We are of the opinion that upon the facts stated in the alternative writ in this case it was clearly the duty of the defendant, as such county treasurer, to pay said judgment, and, failing to do so on demand, the court was authorized to compel the payment by mandamus. The judgment of the circuit court is therefore affirmed.

BANBURY *v.* SHERIN.

(Supreme Court of South Dakota. June 26, 1893.)

LEASE—TERMINATION—RENEWAL—RECORD OF DEFECTIVE DEED—EVIDENCE—EXCEPTIONS.

1. A complaint which alleges the making of a verbal lease for a term not specified, but "from month to month," and the giving of a month's notice to the lessee to quit, shows a termination of the lease.

2. The recording of a deed not entitled to record by reason of defective acknowledgment does not carry constructive notice of its contents, but—

3. Such defectively acknowledged deed, being good between the parties to it, is competent evidence tending to show ownership in the grantee, and consequently his right to give notice to quit.

4. An exception as follows: "We except to each of the instructions given by the court to the jury, respectively," is not such an exception as entitles appellant to a review of the general instructions given by the court to the jury.

5. When a tenant remains in possession of leased property after the expiration of the term of the hiring, and the lessor accepts rent, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year. Section 3741, Comp. Laws.

6. In this case appellant hired for one year from April 1, 1886, at a monthly rent. He held over, paying rent, without any new contract, to his lessor, thus renewing the old lease for another year. In the same manner it was renewed for a third year. During the last month of the third year respondent, who had purchased the premises of the lessor, gave the lessee written notice that the lease would not be renewed, and to surrender the possession on or before May 1, 1889. *Held*, that after said May 1, 1889, appellant was in wrongful possession, and respondent was entitled to recover damages therefor.

7. *Held*, further, that respondent did not renew the lease for another year by making an unsuccessful demand upon appellant for rent for use of the premises for the month of April, for such rent accrued, if at all, not under or by virtue of the lease, but under the license of the notice, which distinctly refused to continue or renew the lease, but gave appellant a month in which to remove from the premises.

(Syllabus by the Court.)

Appeal from circuit court, Marshall county; A. W. Campbell, Judge.

Action by John W. Banbury against Abram Sherin. Judgment for plaintiff. Defendant appeals. Affirmed.

A. Sherin, (A. B. Melville and S. B. Van Buskirk, of counsel,) for appellant. Byron Abbott, for respondent.

KELLAM, J. This was an action by respondent against appellant to recover damages for wrongfully holding over real property after the expiration of his term. The complaint was in two counts, the first claiming double damages under section 4609, Comp. Laws, for willfully holding over; and the second, damages generally for wrongfully holding over. In each count or cause of action the complaint alleged that at the time of the making of the lease under which the defendant went into possession the demised

premises were owned by plaintiff's grantor, with whom the original lease was made; that subsequently, and during defendant's occupancy as such tenant, plaintiff purchased and became the owner of such premises, and notified defendant of such transfer; that the original lease between defendant and plaintiff's grantor was a verbal one, and was from month to month, commencing March 1, 1886; that after plaintiff's purchase of the premises, and his notice thereof to defendant, he gave defendant 30 days' notice in writing to quit said premises on or before the end of the next ensuing month, and that defendant refused so to quit, but continued to wrongfully hold and occupy said premises against the will of the plaintiff. The answer denied generally, except that it admitted plaintiff's ownership at the date of the answer by transfer from defendant's original landlord. Upon trial to a jury plaintiff recovered judgment, and the defendant appealed.

Upon the trial defendant objected to the introduction of any evidence by plaintiff under the first count of the complaint, on the ground that no cause of action is stated. The overruling of this objection is the first error assigned. In his argument appellant does not specify wherein he regards the complaint defective, except to say that it does not show a termination of the lease. The complaint alleges no specified term for which the premises were demised, except that the "lease was verbal, and from month to month," and that plaintiff gave defendant a month's notice, as already stated. This was sufficient to terminate such a lease. Section 3742, Comp. Laws.

The second error alleged is the admission of the deed from the former owner and landlord of the defendant to plaintiff because of defective acknowledgment, and because no proper foundation had been laid for its introduction. The genuineness of the grantor's signature had been proved, and, although the acknowledgment was defective, it was operative to pass the title to plaintiff. If not entitled to be recorded on account of such defect, the defendant would not be charged with constructive notice by reason of the record, but notice to defendant was an independent question. His answer denied plaintiff's ownership at the time the notice to quit was alleged to have been given, and the deed was admissible to prove such ownership, and thus show plaintiff's right to give the notice.

It is next urged that the court erred in admitting as evidence the written notice to quit, served on defendant by plaintiff. Appellant contends that the evidence showed this to be a tenancy from year to year, and as such could only be terminated by a six-months' notice, as at common law. The evidence tended to show, and we think did show, and the case was tried upon that theory, that the defendant rented the premises

of plaintiff's grantor for one year from April 1, 1886, at a fixed rate per month, and that, without any new contract or lease, he continued to occupy the same as the tenant of plaintiff's grantor until February 28, 1889, when plaintiff purchased the premises. The notice to quit was served on defendant March 28, 1889, and required him to surrender the premises on or before May 1, 1889.

The only important question in the case is, what notice, if any, under the facts proved, was either party entitled to, in order to terminate the lease or tenancy? The trial court, among other things, instructed the jury that under our statute, when defendant, as tenant, held over after the expiration of the year for which he originally leased the premises, and paid his landlord rent therefor, the parties are presumed to have made another lease or contract just like the original one, and that the landlord, upon the expiration of the second or any subsequent year, might terminate such tenancy by a thirty-days notice. We do not think appellant's exception to the court's instructions requires us to review them. It was, "We except to each of the instructions given by the court to the jury, respectively." In *Kennedy v. Falde*, (Dak.) 29 N. W. Rep. 667, the territorial supreme court characterized such an exception "as no exception at all." See, also, *Galloway v. McLean*, 2 Dak. 372, 9 N. W. Rep. 98, where the court says: "If taken 'to each and every ruling severally, separately, and distinctly,' it amounts to nothing." But, as applied to the undisputed facts in this case, we think there was no error in the instructions to the prejudice of the defendant. The contention of appellant is that, upon the facts proved, he was a tenant from year to year, and that such tenancy can only be terminated by a six-months notice. To what extent our Civil Code has modified or displaced the common law as to tenancy from year to year, and the rights and incidents attaching to such tenancy at common law, we shall not now discuss, for, if the facts in this case bring it within the scope and purview of the provisions of such Code, the common law is inapplicable. Section 2505, Comp. Laws. By section 3741, Comp. Laws, it is provided: "If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year." The original lease in this case was for a year, at a monthly rental, and expired April 1, 1887. Under the provision of the foregoing section, when the lessee held over into the second year, and the lessor accepted rent, the lease was presumed to have been renewed for another year, expiring April 1, 1888, and in the same way it was again renewed until April 1, 1889. In each case it was a lease for one year, and the lessee, by holding over, became a tenant or a trespasser

at the will of the landlord, until the lessor had accepted rent, and when that was done he became tenant for another year. *Schuyler v. Smith*, 51 N. Y. 300; *Conway v. Starkweather*, 1 Denio, 113; *Tayl. Land. & Ten.* §§ 22, 524. The section quoted says a new lease is presumed to be made upon the same terms as the preceding one. The rights and liabilities of the parties are the same as though a new lease had actually been made. Appellant cites cases from Wisconsin and Nebraska holding that such a tenancy can only be terminated by a six-months notice, as at common law; but they go upon the theory, and it is so expressly provided by statute in Wisconsin, that such a holding over with consent of the landlord constitutes a tenancy from year to year, whereas our statute declares, not that such facts create a tenancy from year to year, but a tenancy for a definite and fixed term, to wit, one year in this case, and therefore not a tenancy from year to year. When respondent bought these premises he took them subject to the rights of appellant to hold until the termination of the term for which he had leased them,—that is, until April 1, 1889,—and appellant had no right to hold them longer, except by the consent of such owner, express or implied. No such consent was given, but, on the contrary, appellant was notified in writing before April 1, 1889, that such consent would not be given. The notice, however, required him to leave the premises on or before May 1, 1889. This was probably a license to hold until, but only until, that time, and his remaining would not be wrongful until then. The court so instructed the jury.

It is further complained that the court erred in refusing to instruct the jury that, if they should find that the defendant "did not willfully remain in possession of the premises in controversy after the 1st day of May, 1889, but that, on the contrary, he supposed or believed he had a right to continue in possession another year under his agreement with Leach, [plaintiff's grantor,] then the plaintiff cannot recover in this action, but will be left to his right to recover the rent in a proper action for that purpose." The instruction was properly refused. Appellant's rights, as a tenant or otherwise, did not depend alone upon his understanding of them. He could not establish himself as a tenant for another year by showing that he thought he was, or so fix the measure of damages for wrongfully holding over at the rent he had agreed to pay to a former landlord in the original lease. The court had already instructed the jury that, if they found that defendant "held possession of the premises believing, and having reason to believe, that he was entitled to continue in possession, when the holding would not be willful, and only the value of the rent of the premises should be allowed as damages." This, we think, was right, and correctly defined the rights of the parties in this respect.

It is further urged that the court erred in refusing to charge the jury, as requested by the defendant, that, if the plaintiff demanded rent after the service of the notice to quit, "he thereby waived the effect of such notice, so far as any claim for the recovery of more than the actual amount of rent agreed upon may be concerned." There was no error in such refusal. The court had already instructed the jury that defendant's possession was wrongful, if wrongful at all, only from the expiration of the notice, to wit, May 1, 1889, and that damages should be reckoned, if at all, from that time. The notice was served in March. Plaintiff might properly have demanded rent for the month of April, during which defendant held, not under the lease, but by license of the notice. The evidence of defendant is that at the end of April plaintiff called on him for the rent for that month, which defendant refused to pay. There was nothing in this, under the circumstances, that could work a renewal of the lease. We discover no error in the record for which the judgment should be reversed, and it is affirmed. All the judges concurring.

STATE v. THOMPSON.

(Supreme Court of South Dakota. June 26, 1893.)

INDICTMENT—AUTHORITY OF STATE.

1. By the provisions of section 38, art. 5, of the state constitution it is necessary that all prosecutions "shall be carried on in the name and by the authority of the state of South Dakota," but it is not essential that an indictment shall contain a recital in terms that the prosecution is by the authority of the state. It is sufficient if the record shows that the prosecution is so conducted.

2. An indictment entitled in the name of the "State of South Dakota" as plaintiff against the person charged with a crime as defendant, reciting that it is found and presented to the court by a grand jury of the state in and for the proper county, duly and legally impaneled, charged, and sworn, and which concludes that the crime charged was committed against the peace and dignity of the state of South Dakota, and is signed by the state's attorney of the proper county, sufficiently shows that the prosecution is carried on in the name and by the authority of the state.

(Syllabus by the Court.)

Error to circuit court, Kingsbury county; J. O. Andrews, Judge.

Nathaniel R. Thompson, having been convicted of murder, brings error. Affirmed.

Milville & Chamberlain, for plaintiff in error. Coe I. Crawford, Atty. Gen., and Charles S. Whiting, for the State.

CORSON, J. At the December term, 1892, of the circuit court of Kingsbury county the plaintiff in error was indicted for the crime of murder, tried, and convicted. The jury, by

their verdict, having designated that the punishment should be death, he was thereupon sentenced to be executed as provided by law at the proper time. A demurrer was interposed to the indictment, one of the grounds of which was that the indictment did not state the facts necessary to show that the prosecution was "carried on in the name and by the authority of the state of South Dakota." The demurrer was overruled, and subsequently, before sentence, a motion for a new trial and in arrest of judgment was made upon the same ground, among others, and was by the court overruled. No bill of exceptions was settled by the court below, and hence the only questions that can be considered by this court are those presented by the judgment record.

The learned counsel for the plaintiff in error contend that the demurrer to the indictment and the motion in arrest of judgment should have been sustained, and that the indictment is fatally defective in not stating that the said prosecution was carried on in the name and by the authority of the state of South Dakota, as provided by the constitution of this state, which reads as follows: Article 5, § 38: "All process shall run in the name of the 'State of South Dakota.' All prosecutions shall be carried on in the name of and by authority of the 'State of South Dakota.'" The indictment commences and concludes as follows: "The State of South Dakota, County of Kingsbury—ss.: In circuit court, third judicial circuit. The State of South Dakota vs. Nathaniel R. Thompson. Indictment. The grand jurors of the state of South Dakota in and for the county of Kingsbury, duly and legally impaneled, charged, and sworn, upon their oaths present that heretofore, to wit, on the fourth day of July, in the year of our Lord one thousand eight hundred and ninety-two, at the village of Arlington, in the county of Kingsbury, in said state of South Dakota, one Nathaniel R. Thompson, late of said county of Kingsbury, and state aforesaid, did commit the crime of murder, committed as follows: * * *. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Nathaniel R. Thompson, her, the said Electa J. Bliton, in the manner aforesaid, unlawfully, purposely, feloniously, and of deliberate and premeditated design and malice did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of South Dakota." The indictment was indorsed, "A true bill," and signed by the foreman of the grand jury and by the state's attorney for Kingsbury county. It will be observed that the indictment is entitled "State of South Dakota vs. Nathaniel R. Thompson;" that it was found and presented to the court by a grand jury of said county, under the sanction and by the authority of the

state's attorney. It would seem, therefore, to be a prosecution in the name and by the authority of the state, and that the indictment in form purports to be a prosecution in the name and by the authority of the state. It will be noticed that the constitution, while providing that the prosecution shall be carried on in the name and by authority of the state, does not provide that it shall be stated in the indictment that it is carried on by authority of the state. If, therefore, the prosecution is in the name of the state, and carried on under the sanction of the proper officer of the state, namely, the state's attorney, we are of the opinion the constitutional provision is complied with, and that it is not necessary that the indictment shall state that it is found and presented by the authority of the state.

The counsel for the plaintiff in error rely on the following authorities as supporting their contention: *State v. Hasledahl*, (N. D.) 52 N. W. Rep. 315; *Jefferson v. State*, (Tex. App.) 7 S. W. Rep. 244; *Salne v. State*, 14 Tex. App. 144; *Calvert v. State*, 8 Tex. App. 538; *Gould v. People*, 89 Ill. 216; *Parris v. People*, 76 Ill. 274. The case of *State v. Hasledahl*, decided by the supreme court of North Dakota, was a prosecution by information, and the information was not entitled in the name of the state. The court in that case says: "The information is not entitled in an action in which the state appears as a party, nor in any action, nor does the information aver in terms or indirectly that the defendant is prosecuted either in the name or by authority of the state. * * * But in the case at bar the omission to state either directly in the information, or indirectly by means of entitling it in an action, that the prosecution of the case is carried on in the name of the state, and by its authority, is nothing less than a plain violation of the explicit mandate of the state constitution." It is quite clear from the language of that learned court that, had the information been properly entitled in the name of the state, it would have been held sufficient, as it was signed by the acting state's attorney. This case cannot, therefore, be authority for holding that an indictment found by a grand jury, properly entitled in the name of the state, and properly signed by the state's attorney, is insufficient. The cases cited from the supreme court of Texas do not sustain the counsel's contention, for the reason that by the statute law of Texas, when the decisions cited were made, indictments and informations were themselves required to state specifically that the prosecution was carried on in the name of and by the authority of the state. In *Jefferson v. State*, supra, decided by the Texas court of appeals in 1888, the court, in passing upon a criminal complaint, says: "It is contended that, inasmuch as it is both statutory and constitutional that 'all prosecutions shall be carried on in the name and by the authority

of the state of Texas,' * * * It is essential to its validity that it should be commenced in the name and by the authority of the state of Texas. Our statute prescribing the requisites of a complaint does not require the use of these words, as is done in regard to the requisites for indictments and informations. * * * A similar provision to the one quoted above from our present constitution will be found in the constitution of the republic of Texas. * * * Construing that provision, * * * Justice Wheeler, in the early case of *Drummond v. Republic of Texas*, 2 Tex. 156, says: 'No prescribed form of words is necessary in order that the prosecution be "carried on in the name and by authority of the republic of Texas." It is enough that the prosecution is conducted by the proper law officers, acting under the authority and conducting the prosecution in the name of the government.' As we have seen, our statute requires that informations and indictments shall contain the words, 'in the name and by the authority of the state of Texas.' This is made, in fact, the first requisite to those instruments." We have quoted quite largely from this decision, as it fully explains the later Texas decisions, and shows that they were based solely upon statutory provisions, and not upon the state constitution, which seems, upon this subject, to be an exact copy of our own. We have examined the two Illinois cases cited, but they do not seem to us to sustain the contention of counsel for the plaintiff in error. Mr. Wharton, in his work on *Criminal Pleading & Practice*, (9th Ed.) § 92, says: "The formal statement in the indictment that it was found by the authority of the state, is not necessary if it appear from the record that the prosecution was in the name of the state." *Greeson v. State*, 5 How. (Miss.) 33; *State v. England*, 19 Mo. 386; *State v. Brooks*, 94 Mo. 121, 7 S. W. Rep. 24; *People v. Bennett*, 37 N. Y. 117; *Savage v. State*, 18 Fla. 909. In the latter case the indictment for the crime of murder upon which the parties were convicted commenced as follows: "In the Name of the State of Florida: The grand jurors, good and lawful men of Madison county, state of Florida, duly chosen, * * *" and it was signed "John F. White, State's Attorney for the Third Judicial Circuit of the State of Florida, Prosecuting Attorney for said State." In the opinion the court says: "Thus it appears that the indictment is presented by the grand jurors of Madison county, state of Florida, chosen to inquire for the body of said county in the said circuit and state, and they have presented the defendants, and charged them with the crime of murder in due form. They make the presentment in the name of the state. The constitution says all prosecutions shall be conducted in the name and by the authority of the state. It is not required that the indictment on its face shall say in words that it is 'prosecuted

in the name and by the authority' of the state. It merely directs that the state in its name, and by its authority, shall control the prosecution. It is sufficient that the court shall recognize the state and its authority, and no other party or authority, in such prosecutions, and that the proceedings are so conducted, and the records show it."

We are of the opinion that upon both principle and authority it sufficiently appears in the case at bar from the indictment and the indorsements thereon that the "prosecution was carried on in the name and by the authority of the state of South Dakota," and that the court committed no error in overruling the demurrer and motion in arrest of judgment. As no other alleged error in the record has been called to our attention, the judgment of the court below is affirmed. The case is remanded to the circuit court of Kingsbury county, with directions to that court to carry the judgment into effect according to law. All the judges concurring.

STATE v. DUBUQUE & S. C. R. CO. et al.

(Supreme Court of Iowa. May 24, 1893.)

HIGHWAYS—DEDICATION—EVIDENCE—MEANING OF PLAT.

1. Certain railways were indicted for obstructing a public street alleged to have been established by dedication across certain depot grounds. The plat, which was the only evidence of dedication, showed a solid line across the street, as well as other streets, bordering on the grounds, while streets which crossed the right of way at either end of the grounds were indicated by dotted lines. Two other streets which also crossed the right of way were indicated again by solid lines. Several of the streets were named on one side the grounds, followed by the word "street," standing alone on the other side. *Held*, not to establish a dedication beyond the reasonable doubt required in criminal cases.

2. The meaning of the plat was for the jury.

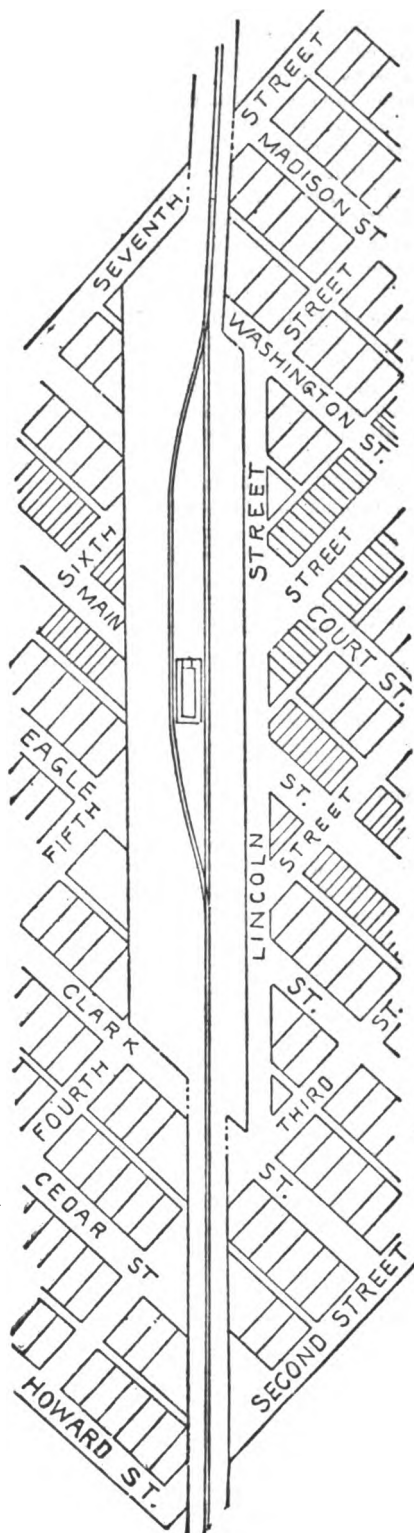
Appeal from district court, Plymouth county; G. W. Wakefield, Judge.

Indictment for obstructing a public highway. Verdict of guilty, and judgment thereon, from which the defendants appealed.

J. F. Duncombe and Argo, McDuffie & Reichmann, for appellants. Patrick Farrell, Co. Atty., and Joy, Hudson, Call & Joy, for the State.

GRANGER, J. The city of Le Mars was platted and the plat recorded in June, 1870. The plat embraced parts of sections 9 and 16, township 92, range 45. A line of railroad running diagonally through the city is owned by the Dubuque & Sioux City Railway Company, and is leased to the Illinois Central Railway Company, both being defendants in the case. The railroad was constructed in 1869. The platting and dedication of the city were by one John I. Blair, then and since a resident of New Jersey. Be-

cause of the importance of the plat to a proper understanding of the case it is here reproduced, with all important particulars:



The indictment is for an obstruction to Court street. In 1883 a coal house was built on the depot grounds in such a manner as to obstruct Court street if the street extends across the depot grounds. The contention in the case is, therefore, as to the existence of a street across the grounds. Without question the street is both north and south of the grounds by dedication, and if it extends across the grounds it is because of the same act of dedication. The following is a part of the third paragraph of the court's instruction: "The state claims the existence of Court street across the defendant's grounds by dedication. Land may be dedicated as a highway by formal contract or written declaration of the party, or by parol declarations of dedication, or by acts and conduct with or without parol declarations, such as satisfies the jury that the owner intended to and did dedicate the land to public use; and any such dedication becomes effective and legal when the same has been accepted by the public. The use and enjoyment by the public of land dedicated to public use will be considered by you in determining whether the dedication has been accepted by the public. The length of the time of such public use to show acceptance is not material. It will be enough if such use has existed for such time, and is of such character, as satisfies you of acceptance by the public under our statute. The use by the public shall not be considered as proving that the public claimed the right to the land as a street, but such adverse claim by the public must be proved by evidence distinct from and independent of such use. The plat of Le Mars, which is in evidence before you, and appears to be acknowledged and recorded, constitutes a dedication of the streets as platted thereon. The lines of Court street on said plat are not formally drawn across the grounds claimed by the defendants. It will be for you to say, therefore, from all the evidence before you, including said plat, whether the owner at the time of filing said plat or any subsequent time has dedicated to the public use as Court street the particular ground in question included within the right of way and grounds of defendants. You must be satisfied beyond a reasonable doubt that Court street has been dedicated to the public use across the railroad tracks, right of way, and grounds of defendants, and has been accepted by the public, before you can convict the defendants."

The defendant companies were convicted of a crime, under the law, and such a conviction could only be upon evidence to show beyond a reasonable doubt that Court street was, by dedication, established across the depot grounds. The plat is substantially all the testimony indicating the intent of Blair to make the dedication. Independent of the plat, the evidence is certainly as strong against as in favor of a dedication by any party. Upon what testimony the jury was

able to conclude beyond a reasonable doubt that there was a dedication for a street across the depot grounds we are unable to discover. To our minds it is a matter of very serious doubt if there is even a preponderance of evidence in support of such a fact. The plat gives no support to such a claim, but, on the contrary, it seems to have been prepared with an especial view to exclude the depot grounds from street purposes. It may be confidently stated that no competent person, intending to extend the street across the grounds, would have made the plat as it is. Let us, for a moment, look to such streets as touch the depot grounds, and gather therefrom any evident intention of the dedicator that may appear, and, with the aid of such evident intention, we may better understand other parts of the plat. Clark street is at one end of the grounds and Seventh street at the other. The continuance of each of those streets across the right of way is indicated by dotted lines. This fact is evident. Across all the other streets bordering on the grounds is a continuous line, and it is not to be doubted that the different conditions indicate different purposes. If we are correctly informed from the record, the grounds were, in June, 1870, with the depot thereon, as they now appear in the plat. In fact the record shows the plat a correct one of the town a year after the road was built. According to the plat the depot would be an obstruction to Main and Fifth streets,—a result hardly to have been contemplated. We may with profit notice some of the claims for the plat as a matter of evidence on behalf of the state. It is said that the name of the street being on one side of the grounds and the word "street" on the other indicates but one street. We think that is correct, and that it is but one street, with the parts thereof separated by the grounds. But it is said that in such a case the different parts would have different names, as "North Main Street" and "South Main Street," but we think such a conclusion does not follow. In sight of the writer of the opinion is "Tenth Street" in this city, (Des Moines.) A part of the street is on one side of the capitol block and a part on the other side. The two parts are separated by some 750 feet, and access from one part to the other is had only by passing on other streets half way around the block. The course of that street is north and south. Locust street, running east and west, was originally separated in the same manner by the capitol block. Very many instances of this kind are to be found. We doubt if such different designations as are suggested are generally given to parts of streets separated in such a manner. Such designations are oftener used when by some natural separation of the parts of a city—as by streams—it becomes convenient to designate the streets in the different parts as East, West, North, or South, according to the locality, with the

principal names the same in the different parts. We are not of appellee's opinion that such a separation necessarily makes two streets instead of one. There is nothing absolutely or practically inconsistent in such a separation of the parts of a street.

It is said that Second and Third streets cross the right of way, and the open street is not indicated by dotted lines. Just the reason for this difference is not manifest from the record, but such fact does not change what we have said as to the situation about the depot grounds, where different intentions are manifest. The fact that it makes the situation more confused or doubtful does not help, but rather weakens, the case on the part of the state. It is to be kept in mind that the state is attempting to establish a gift or grant to the public beyond a reasonable doubt. It is a criminal case. If the testimony can be fairly reconciled, consistent with the innocence of the defendants, it must be done. There is reason to believe at times in the argument of the case its character has been forgotten, for the arguments in some of their parts deal with the equities between the citizens of Le Mars and the railway companies, and they are at times weighed in very nice balances. This is not a case of that character, nor is it to be determined upon any such considerations. We are without a doubt that, had the rule as to a reasonable doubt been observed by the jury, there could not have been a verdict of guilty in the case. The peculiar facts of the case naturally led to an adjustment of rights between the city and the companies, to the neglect of the important and controlling question between the state and the defendants, charged with a criminal offense. We think it impossible for any disinterested person to read the record of the case without a serious doubt of there being such a dedication for street purposes across the depot grounds. With such a condition of the record in a criminal case we must reverse where there has been a conviction.

There is an earnest contention for the proposition that the question of what was intended by the plat is for the jury in the light of the surrounding circumstances. The proposition is entirely a correct one, but it does not reach the objection to the verdict that we are considering. Of the many authorities cited where the rule has had application not one is a criminal case. But it must not be understood that the rule is not applicable to a criminal case, subject to the rule of such cases as to the degree of proof required to sustain a conviction. If the situation as to the street involves interests as great as indicated in argument, and the legality of the street should be settled for the benefit of parties interested, it is unfortunate that the case is not before the courts in a way to more fairly meet the requirements of the situation by a final judgment. With

the views we have expressed but one duty remains for us, and the judgment is reversed.

HUTCHINSON v. CLEARY et al.

(Supreme Court of North Dakota. . May 31, 1893.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENTS — PAROL EVIDENCE — PRINCIPAL AND AGENT.

1. Under section 5260, Comp. Laws, a party to an action is prohibited from testifying to a conversation with plaintiff's intestate, notwithstanding the fact that an agent of the decedent was present at the time the conversation took place.

2. Parol evidence held incompetent because it contradicted the terms of a written agreement between the parties; and the error in admitting the evidence held prejudicial because the court submitted to the jury a question of fact, as to which there was no controversy under the evidence, except on the theory that the jury had a right to base a finding upon such parol evidence.

3. So long as the principal acts for himself in a matter, in the presence of his agent, the agent, as to such matter, does not represent the principal. His power is suspended for the time being.

(Syllabus by the Court.)

Appeal from district court, Foster county; Roderick Rose, Judge.

Action on a contract by Paul Hutchinson, administrator of the estate of Charles Hutchinson, deceased, against Joseph Cleary and others. Defendants had judgment, and plaintiff appeals. Reversed.

E. W. Camp, for appellant. S. L. Glaspell, for respondents.

CORLISS, J. This suit was commenced by Charles Hutchinson. Before the trial he died. The action is continued in the name of the administrator of his estate. The deceased was a proprietor of a flour mill in South Dakota. To induce him to move his plant to New Rockford, N. D., the defendants entered into a written contract with him. This agreement, omitting the signature, was in the following words and figures: "This contract is entered into this thirteenth day of August, A. D. 1893, by and between Charles Hutchinson, of Oskaloosa, Iowa, on the first part, and Joseph Cleary, J. M. Patch, Frank A. Brown, E. E. Henderson, T. R. Palmer, Frank S. Dunham, John R. Winslow, H. M. Clark, John G. Frankland, et al., of New Rockford, Eddy county, Dakota territory, on the second part. And this contract witnesseth that said party of the first part agrees to bring to New Rockford, Eddy county, Dakota territory, the machinery, engine, and boiler now in his mill at Mt. Vernon, Dakota territory, and to add thereto new roller machinery, of the best pattern and workmanship, to constitute and complete a mill of seventy-five barrels capacity, and to erect the same at New Rock-

ford, D. T., as quickly after the date hereof as practicable, and to operate the same as steam flouring mill, doing custom work, at said place, for a period of five years from date hereof, unless prevented by inevitable necessity, or transfer of ownership. In consideration whereof the parties of the second part agree to provide and guaranty the following privileges: (1) A deed for five acres of land contiguous to James river, with a right of way for a spur track from the Northern Pacific R. R. track, as a site for said mill; said deed to be given on arrival of lumber on the ground. (2) Nine cords of building rock for the foundation of the mill, to be deposited on the site at once, on execution hereof. (3) Free transportation for four car loads of lumber from Minneapolis, and two car loads of machinery from Fargo. (4) The sum of five hundred dollars, to be paid in cash on arrival of lumber on the ground. (5) A deed for town property of present value of one thousand dollars, when the mill is completed and running. (6) Subscriptions of wheat and cash of the value of one thousand dollars, to be paid by November 1st, 1885, if mill is completed and running by that time; and if not, as soon as it is completed and running. (7) It is hereby agreed and understood between the parties that any or all of the cash subscriptions in this section above mentioned may be paid in carpenter and other work in the construction of said mill, at the usual wages for such labor, provided such labor is needed by, and can be rendered satisfactorily to, said Charles Hutchinson or his agent; but the first five hundred dollars subscription specified in fourth section shall, as therein stated, be paid in cash, on the arrival of lumber on the ground. And it is further understood and agreed between contracting parties that said Charles Hutchinson shall not sell or transfer ownership of said mill without causing the new proprietor to assume all liabilities under this contract, and especially the one to operate the mill as a custom mill for five years from the date hereof, at said town of New Rockford, D. T., and that when such new proprietor shall thus assume this contract the said Charles Hutchinson shall be fully released therefrom. Witness our hands this thirteenth day of August, A. D. 1885." The action was brought to recover the balance due under this agreement, the plaintiff averring that he had performed all the conditions on his part which are conditions precedent to a recovery. It is undisputed that the defendants had performed the 1st, 2d, 3d, and 4th conditions of the agreement, and that they had partially performed the 5th and 6th conditions. It is to recover the balance due under these two conditions that the action was brought. It was claimed that the town property deeded to plaintiff's intestate was of the value of only \$500, instead of \$1,000, and, instead of securing subscriptions of wheat and cash of

the value of \$1,000, they had furnished such subscriptions of the value of \$200 only. The defendants allege that plaintiff failed to perform his part of the agreement, in several particulars, and seek to recover back the money paid him.

The conclusion we have reached makes it necessary for us to refer to only one of these matters. The contract provides that plaintiff is to operate this mill as a steam flouring mill, doing custom work. The defendants aver plaintiff had not, up to the time the answer was interposed, operated a custom flour mill at New Rockford. The mill which plaintiff was to operate was a roller mill. It is undisputed that the words "custom work," when used with reference to such a mill, have a meaning different from that which attaches to them, as applied to the old-fashioned gristmill. One of the witnesses who was sworn on this point said that "a custom mill is a mill that takes in farmers' grain, and grinds it, for a certain amount of toll. A roller mill gives the farmer back the equivalent of the flour from his own grain. The small old-fashioned mill grinds the farmer's grain. The large mill, even if it is stone mill, exchanges. The meaning of 'custom work,' as applied to roller mill, is that the farmer gets a certain amount of flour, bran, and shorts for a given number of bushels of wheat. A roller mill gives the equivalent, instead of the flour, from the identical grain. A roller mill gives the equivalent, instead of the flour from the same grain, because there are too many machines for the different products of grain. The mill is too complicated." It was undisputed that, in the operation of this mill, custom work was done, according to the significance of these words as applied to a roller mill. There was therefore nothing to submit to the jury on this point; and yet the court, after stating to the jury the fact that the defendants had put in issue the fact whether custom work was done by the mill, submitted to the jury the question whether the mill was operated as a custom mill. To this portion of the charge the plaintiff excepted. This action of the court renders it impossible for us to determine whether the jury did not decide against the plaintiff upon the strength of certain incompetent testimony, to which we will now refer. E. E. Henderson, one of the defendants, was asked to testify to a conversation which took place between himself and the deceased, in his lifetime, prior to the time when the written contract was executed. The question was objected to as incompetent under section 5260, Comp. Laws, and as generally incompetent and immaterial. The answer was as follows: "Mr. Hutchinson said he would build a roller mill at New Rockford under certain conditions. We asked what a roller mill was, and it was defined, to some extent, by Mr. Hutchinson. His definition was a machinery mill for exchange, and

grinding flour for sale. Our reply was, we wanted a mill for the benefit of the farmers, where we could take our own wheat, and get it ground, and get our flour from our own wheat; and we said: 'We will have that, if we put our money into it. We will have the kind of mill we want.' This evidence was immaterial, except as it tended to throw light upon the agreement between the parties; and it was incompetent for that purpose, as it was directly contrary to the terms of the written contract subsequently entered into. Under the written contract, plaintiff agreed, not to give the defendants a grist-mill, but a custom mill, according to the meaning of the word "custom," when applied to a roller mill, i. e. a mill where an equivalent in flour, etc., is given for wheat. It was improper to allow the jury to hear evidence contradicting the contract the parties had made; and it was error to submit to them the issue whether the mill was operated as a custom mill, when there was no such issue before the jury, under the evidence, except on the theory that this incompetent evidence created such an issue, and the jury had a right to consider it, and even to base a finding upon it, directly against the clear and explicit terms of the written agreement. It is by no means certain that the jury did not find against the plaintiff upon the sole ground that the mill was not operated as a custom mill, when it is undisputed that it was so operated.

The evidence of the witness Henderson was incompetent, also, under § 5260, Comp. Laws: " * * * (2) In civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or order entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party. But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs at law or next of kin, then the other party shall be a competent witness as to any and all matters to which the testimony so taken relates." The defendants endeavor to escape the force of the statute by the asser-

tion that, the agent of the deceased being present at the time the conversation took place, the case does not fall within the spirit of the law. We find no such exception in the act itself, nor do we agree with counsel for defendants that such a circumstance takes the case without the spirit of the law. The theory and philosophy of the act are that one party to a conversation or transaction shall not secure an undue advantage in proving what took place because the lips of the other party are sealed by death. If a third person was present, the surviving party to the conversation or transaction can call him as a witness. The authorities are numerous in support of the doctrine that the presence of a third person at the conversation does not render the surviving party a competent witness against the representatives of the deceased, under statutes similar to ours. *Taylor v. Bunker*, (Mich.) 36 N. W. Rep. 66; *Heyne v. Doerfler*, (N. Y. App.) 26 N. E. Rep. 1044; *Holcomb v. Holcomb*, 95 N. Y. 310; *Harris v. Bank*, (Fla.) 1 South. Rep. 140. See, also, *Ebert v. Roth*, (Pa. Sup.) 24 Atl. Rep. 685; *Reherd's Adm'r v. Clem*, (Va.) 10 S. E. Rep. 504. Nor can we see why the principle should be any different where the agent of the deceased is present at the conversation. No case has been cited which holds that such a fact makes any difference; and, even if such a distinction could be made, it would not control this case, for the person present at the talk between Henderson and the deceased, conceding him to have been the agent for the deceased in the transactions connected with the matters discussed, could not be agent for his principal, and act for him, in a transaction, when the principal himself was present, and carrying on the negotiations, and conducting the business. The case is therefore assimilated to a case where a third person is present, and under such circumstances the decisions are unanimous that the evidence of the surviving party to the conversation or transaction is incompetent. Of course, if the talk had been had with the agent alone, it would not have been a conversation with the deceased, and therefore the case would not have fallen within the statute. But no such question is presented on this appeal. For the errors to which we have referred, the order and judgment are reversed, and a new trial is ordered. All concur.

COMASKEY v. NORTHERN PAC. R. CO.

(Supreme Court of North Dakota. May 31, 1893.)

PERSONAL INJURIES—DAMAGES—INSTRUCTIONS.

In an action to recover for personal injuries, where there is no claim in the complaint or in the evidence that plaintiff's mental powers were in any manner impaired by the injury, it is error for the trial court to instruct the jury that in estimating the damages they may take into account the effect of the injury upon plaintiff's mental powers.

(Syllabus by the Court.)

Appeal from district court, Cass county; William B. McConnell, Judge.

Action for personal injuries by John Comaskey against the Northern Pacific Railroad Company. Plaintiff had judgment, and defendant appeals. Reversed.

Ball & Watson, for appellant. Taylor Crum, for respondent.

BARTHOLOMEW, C. J. This is a personal injury case, and involves but a single point. There was a verdict and judgment for the plaintiff. The court, in its general charge to the jury, used the following language: "If you find for the plaintiff, he is entitled to a verdict for the full amount of damages suffered by him on account of his injuries, not exceeding ten thousand dollars; and in considering the extent of his injuries you will take into account the extent of injury, of bodily pain and suffering which he may have suffered, according to its degree, and the bodily injury, taking into account the loss of time, the effects of the injury on plaintiff's health, its effects on his mental powers, its effect on his bodily powers, upon his capacity for labor, the pursuit of an occupation, and the earning of money." Exceptions to this instruction were saved, and it is urged that it assumes the existence of the facts therein stated, instead of leaving them to be determined by the jury. This is hypercritical. The court had already instructed the jury as to what facts they must find to exist before they could return a verdict for plaintiff. The court then said: "If you find for plaintiff he is entitled," etc., which was exactly equivalent to saying, "if you find the facts to exist as hereinbefore stated, plaintiff is entitled," etc. The instruction assumed nothing.

It is next urged that there is no evidence in the case tending to show that plaintiff's capacity to earn money was in any manner impaired by the injury he received. We think otherwise. The testimony, as a whole, clearly tends to establish that plaintiff's ability to earn money was actually impaired by the injury he received.

But the third objection urged against the instruction is fatal. There was no claim in

the complaint or in the evidence that plaintiff's mental powers had been in any manner affected by the injury, yet the court directed the jury to take into account, in estimating plaintiff's damages, the effect of the injury on his "mental powers." It is conceded that mental suffering is a proper element of damages, and that the impairment of mental faculties is also a proper element, when claimed and proven, but it is neither claimed nor proven in this case. This position is not controverted by plaintiff. His contention is that the instruction did no more than to direct the jury to take into account plaintiff's mental suffering. We cannot so construe this language. It would be idle to follow counsel in his metaphysical dissertation upon abstract mental qualities. This language was addressed to men of average business intelligence, and must be construed in its general acceptance. We speak of physical suffering, and of effect upon physical powers, and no one would claim for a moment that the two things were identical. Physical suffering may exist, and be an element of damage, and yet there be no impairment of the physical power to earn money; and the physical power to earn money may be greatly impaired, and an element for substantial damage, and yet there may exist no suffering whatever. True, the two, for a time at least, after an injury, are usually present together, but there is no necessary connection between them. The same is true in the mental domain. Mental suffering may exist, and the mental powers—that is, the power to exercise the mental faculties for the purpose of earning money or otherwise—be in no manner affected. On the other hand the power to thus exercise the mental faculties may be impaired or destroyed, and yet there may be no mental pain. What the court intended is clear from the context. The jury were directed to consider "the effects of the injury on plaintiff's health, its effects on his mental powers, its effects on his bodily powers, upon his capacity for labor, the pursuit of an occupation, and the earning of money." The effect upon the mental powers, and the effect upon bodily powers,—and the one just as much as the other,—were to be considered directly as bearing upon plaintiff's capacity to labor and to earn money. But as to the mental powers there was nothing of the kind in the case. Nor can we say this error was harmless, coming as it did; and, under the medical expert testimony in this case, its effect upon the jury is purely conjectural. It may not have been prejudicial to defendant, and it may. We cannot determine. Under these circumstances our duty is clear. The district court is directed to reverse its judgment, and order a new trial.

Reversed. All concur.

CLARK v. SULLIVAN, (VOSS, Intervener.)

Supreme Court of North Dakota. June 9, 1893.)

ATTORNEY AND CLIENT - LIEN FOR COMPENSATION
—Set-Off.

1. The lien of an attorney for money due his client, in the hands of the adverse party, under section 470, Comp. Laws, when secured by compliance with the requirements of that section, gives the attorney an interest in such moneys, similar to that of an equitable assignee thereof.

2. His interest extends to and embraces the judgment rendered in the action to recover such moneys, and also the undertaking to pay such judgment, given by the defendant in such action on appeal, and also the cause of action on such undertaking against the surety thereon. The attorney has the same equitable interest in such judgment, undertaking, and cause of action upon the undertaking that he has in the money due his client from the adverse party.

3. When, however, the surety on such undertaking, after the attorney had secured his lien, but before the surety had notice thereof, purchased a judgment against the client, *held* that, in an action upon the undertaking, on appeal, the surety's right to set off such judgment was absolute, and was unaffected by the attorney's lien.

4. The entry of notice of lien under subdivision 4 of section 470 is not notice to any except the judgment debtor.

5. One who buys a set-off to a claim against him, without notice of a prior assignment of such claim, may use the set-off as a defense, the same as though the claim against him had not been assigned.

(Syllabus by the Court.)

Appeal from district court, Morton county; W. H. Winchester, Judge.

Action on a bond by James C. Clark against James O. Sullivan. Henry G. Voss intervened, claiming an interest in the controversy. From the order sustaining a demurrer to the complaint in intervention, intervener appeals. Affirmed.

H. J. Voss, for appellant. F. H. Register, for respondent.

CORLISS, J. The contest before us is between the defendant, Sullivan, and the intervener, Voss. The action is upon an undertaking executed by defendant, Sullivan, to plaintiff, Clark, as surety for one Mead, against whom Clark had recovered judgment before a justice of the peace. From this judgment, Mead appealed to the district court, and on this appeal the undertaking sued upon was executed by Sullivan, as surety for Mead. In this undertaking, Sullivan, in substance, agreed that he would pay the amount of any judgment which should be rendered against Mead, in and by the district court, on such appeal. Judgment having been recovered by Clark against Mead in the district court, he (Clark) brought this suit against defendant, Sullivan, upon the undertaking.

As a counterclaim to the plaintiff's cause of action, defendant, Sullivan, interposed a judgment recovered against plaintiff, Clark, in favor of Fairbanks, Morse & Co., which judg-

ment was assigned to Sullivan before the commencement of this action. That such judgment constitutes a valid counterclaim, as against Clark, cannot be disputed. *Wells v. Henshaw*, 3 Bosw. 625; *Clark v. Story*, 29 Barb. 295; *Pom. Rem. & Rem. Rights*, § 799. But the intervener, Voss, who was allowed to serve a complaint in intervention, insists that the judgment can be interposed as a counterclaim against plaintiff's cause of action on the undertaking only to the extent of plaintiff's interest in that cause of action, after deducting therefrom the amount of an alleged attorney's lien which he (Voss) insists he had upon the plaintiff's cause of action against Sullivan, and upon the undertaking at the time Sullivan purchased the judgment against Clark. Had the attorney such a lien? And, if so, what is the nature of that lien? These are the questions which it is important for us to determine.

The attorney's claim to a lien grows out of the following fact: Mr. Voss was attorney for Clark in the action against Mead. In that action he rendered services for Clark in both courts, worth the sum of \$45. After the recovery of the judgment against Mead in the district court, Mr. Voss entered his notice of lien for the sum of \$45 in the judgment docket, opposite to the entry of the judgment. Under our statute, this gave him a lien, but what did it give him a lien upon? The language of our statute leaves no room for construction upon this point. The statute, so far as it is material to this inquiry, provides as follows: "An attorney has a lien for a general balance of compensation in and for each case upon: * * * (3) Money due his client, in the hands of the adverse party, or attorney for such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney for such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services. (4) After judgment in any court of record, such notice may be given, and the lien made effective against the judgment debtor, by entering the same in the judgment docket, opposite the entry of the judgment." Comp. Laws, § 470, subds. 3, 4. It is plain from this language that the lien is not upon the judgment, as the principal thing. The lien is upon the money due the client, in the hands of the adverse party. That lien, before judgment, can be secured by serving notice as prescribed by subdivision 3 of the section. After judgment it can be secured by making the entry therein provided for. But the lien is the same in either case. It is a lien upon the money due, and not upon the judgment itself. After judgment has been recovered, that lien can be secured only by making this entry, unless the notice required by subdivision 3 has already been given. In case that notice has

been given it is possible that no further notice would be necessary, so far as the judgment debtor is concerned. Whether it would suffice, as against a third person, having no actual notice, it is not proper to determine in this case. But whether notice is given under subdivision 3, or an entry is made under subdivision 4, of section 470, the lien is primarily upon the money due, and not primarily upon the judgment itself. *Winslow v. Railroad Co.*, (Iowa,) 32 N. W. Rep. 330. In this case, however, the intervener is compelled to insist that he has a lien upon the judgment, and upon the undertaking signed by Sullivan, and upon the cause of action upon such undertaking. Defendant, Sullivan, is seeking to set off the judgment against plaintiff, which he has purchased, against plaintiff's claim arising out of the undertaking. It is obvious that Sullivan's right to have this set-off allowed is absolute, if the undertaking is owned by plaintiff, and no one else has any interest in it. The statute confers upon him a legal right to defeat plaintiff's cause of action by interposing this judgment as a counterclaim. Sections 4914, 4915, Comp. Laws. The intervener can maintain his claim to priority, as against this judgment, in one way only. He must show that to the extent of his lien for services he is, in equity, the owner of the plaintiff's cause of action on the undertaking. If he became such owner before Sullivan's right to set off the judgment accrued to him, and Sullivan had notice of his rights at the time he (Sullivan) bought the judgment against plaintiff which he seeks to set off, then we are of opinion that, to the extent of the intervener's lien, the judgment does not constitute a proper counterclaim.

What were the rights of the intervener with respect to this undertaking, and the cause of action thereon against Sullivan? We are clear that he had all the rights with regard to this instrument that he had with respect to the judgment against Mead in favor of the plaintiff. This undertaking was executed by Sullivan in the very case in which the judgment was rendered, and in the undertaking Sullivan promised to pay any judgment which the district court might render in the case. The undertaking is but an additional security, provided for by the law, for the payment of the money due from Mead to the plaintiff. The lien which attaches to the money must necessarily attach to the undertaking. The money which Sullivan is to pay under this undertaking is the money which the attorney has secured for his client by the labor he has bestowed upon the original case. Nor is authority wanting to support our views. *Newbert v. Cunningham*, 50 Me. 231; *Hobson v. Watson*, 34 Me. 20; *Martin v. Hawks*, 15 Johns. 405; *Wilkins v. Batterman*, 4 Barb. 48. The reasoning upon which these cases rest is that the rights of an attorney, under his lien, are those of an equitable assignee of the judgment, to the

extent of his lien. Under our statute he would be the equitable assignee of the money due from the debtor to the creditor. Of course, as such assignee, he would have the same interest in any undertaking or cause of action which the creditor, his client, might have, as security for the payment of such money. The intervener being, to the extent of his lien, the equitable assignee of the plaintiff's claim for money due him from Mead, he was also, to the same extent, the equitable assignee of the undertaking given by Sullivan on the appeal. It is a familiar principle that the assignment of the principal thing carries with it all incidents. Our Code so declares, in express terms. Section 3243, Comp. Laws. In *Hobson v. Watson*, 34 Me. 20, the attorney had recovered a judgment for his client. Upon this judgment he had a lien for his services. The debtor in the judgment gave a poor debtor's bond, under the statute, to secure his release from execution issued upon the judgment. The client claimed the right to discharge the bond without the consent of the attorney. This the attorney contested, and it thus became necessary to determine whether the attorney had the same lien upon the bond which he had upon the judgment. The court decided that he did have such lien upon the bond, saying: "Does the lien extend to the bond in suit, and embrace it? The attorney has an interest in the judgment, to the amount of more than half of it. What is the nature of that interest? It is the property in it, to the extent of such interest, as much as if the creditor had assigned it to him as collateral security for his fees and disbursements; and, it being the property of the attorney, he has all the legal incidents which attach to it, and which by law may arise from it. He could not claim a right to the benefit of any contract made between the creditor and debtor in relation to the mode of satisfying the judgment, when it was voluntarily entered into, and not prescribed by law. The debtor has the right, without the consent of the creditor, to give a bond to release himself from arrest in execution. It does not depend upon the will of the creditor. It is a legal incident attached to the judgment and execution. The creditor is compensated by the bond for the liberation of the debtor. The bond belongs to the owner of the judgment. If the whole amount due upon the judgment was costs, upon which the attorney had a lien, would not he be entitled to the control of the bond? It would be his property, in equity, and he would have a right to use the name of the nominal party in a suit upon it." In *Newbert v. Cunningham*, 50 Me. 231, the defendant in a replevin suit recovered judgment for return of the property. The execution upon this judgment being returned unsatisfied, the defendant who had recovered the judgment brought suit upon the replevin bond. He obtained a judgment upon this

bond, but, the sureties being insolvent, he sued the sheriff for taking an insufficient bond. This last action was settled by the plaintiff therein without the consent of his attorney in the original replevin suit, in which the plaintiff recovered judgment. The attorney, claiming a lien for his services upon the original judgment in the replevin action, insisted that he had a lien to the same extent upon the cause of action against the sheriff for taking an insufficient bond, and that, therefore, the action could not be settled without his consent, to the prejudice of such lien. The court sustained him in this contention, saying: "The attorney, being regarded as an equitable assignee of the judgment, has a right to the same remedial processes as his client to obtain satisfaction to the extent of his lien. The replevin bond is a substitute for the property replevied, and a security for the damages and costs arising in the prosecution of the suit. The right to enforce it is one of the fruits of the judgment. It accrues after its rendition. It is by its enforcement that the judgment is made available. The attorney, as incidental to the judgment, has a right to enforce it, which his client cannot defeat. The bond is made running to the defendant in replevin. The attempt to collect it was ineffectual. The sureties were insolvent. But this will not discharge the sheriff. Until the attempt was made, and failed, he might have insisted it would have been successful. It being the duty of the sheriff to take a replevin bond with sufficient sureties, he is liable in case of their insufficiency. But to whom? Manifestly, to the person to whose benefit the bond, if good, would accrue. The damages awarded for taking an insufficient bond are the compensation for the loss arising therefrom. The person holding the bond is the one who suffers from the insolvency of the sureties. The defendant in replevin would primarily be entitled to the damages arising from an insufficient bond, if he obtained judgment, and as a consequence thereof. But the lien of the attorney is equivalent to an assignment of the judgment. The attorney, having a right to enforce the bond, has a right to the damages which may be given for and on account of its insufficiency. The assignment of the judgment carries with it the replevin bond, and the right to enforce it, and, in case of failure to collect, the right of action to damages by way of compensation for such failure. The assignor has no right to the suit. The action exists by virtue of the judgment, and as a mode of making it available, or of affording an adequate remedy to the party suffering through the neglect of the officer; and that judgment, to the extent of his lien, belongs to the attorney."

That the rights of the attorney, under his lien, are those of an equitable assignee, is supported by many decisions, and is sound on principle. *Warfield v. Campbell*, 38 Ala.

527, 534; *Ely v. Cooke*, 28 N. Y. 365; *Perry v. Chester*, 53 N. Y. 240; *Marshall v. Meech*, 51 N. Y. 140; *Rooney v. Railroad Co.*, 18 N. Y. 368. The intervener therefore became an equitable assignee of this undertaking, to the extent of \$45, his bill for services, several days before the defendant, Sullivan, had secured the right to set off the judgment against Clark. He (Sullivan) did not purchase this judgment until about a week after the intervener entered notice of his lien upon the judgment docket. But unless Sullivan had notice of this equitable assignment at the time he bought the judgment against Clark, his right to set off such judgment against his liability on the undertaking cannot be defeated by such assignment. Section 4871, Comp. Laws, provides: "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due." Under the terms of this section the right to set off a claim purchased by the debtor, before notice of the assignment of the claim against the debtor, is unaffected by the assignment, although the assignment is made before the right of set-off accrues to the debtor. *Natchez v. Minor*, 9 Smedes & M. 544; *Lockwood v. Bates*, 1 Del. Ch. 435; *Bank v. Ballet*, 8 Watts & S. 311; *Martin v. Wells, Fargo & Co.'s Express*, (Ariz.) 28 Pac. Rep. 958. The statute only embodies a well-established doctrine of the common law.

That defendant, Sullivan, had actual notice of the equitable assignment of the cause of action against him on the undertaking to Voss before he (Sullivan) purchased the set-off, is not pretended. It only remains to be considered whether the entry of the lien in the judgment docket constituted notice to him. When we examine the statute, we find that it limits to the judgment debtor the effect of this entry as notice. It says that by this entry the lien is made effective against the judgment debtor. It is apparent that the statute does not mean that any lien is created against the judgment debtor, or against his property, but merely that the entry of the notice constitutes notice to him, so that he cannot thereafter disregard the interests of the attorney in the moneys which he (the debtor) owes the client. The legislature has so restricted the operation of this entry of notice that only the judgment debtor is affected by it. His surety on an appeal undertaking is not within the statute. The attorney can protect himself by giving such surety actual notice of his lien, and from that moment the surety pays the client, or purchases a set-off against him, subject to the attorney's rights. The case of *Hroch v. Aultman & Taylor Co.*, (S. D.) 54 N. W. Rep. 269, has been cited to support the pri-

ority of the attorney in the case. But in that case the right of set-off was held by the court not to be absolute, as in the case at bar. Here the defendant is relying upon a legal set-off which he purchased against the plaintiff's cause of action against him, without notice that an equitable assignment of the defendant's claim had been made to the attorney, whereas in that case the court was dealing with the question of the right of a judgment debtor to set off against the judgment obtained against him another judgment recovered by him against the plaintiff in the first-named judgment. The court held the right to set off one judgment was not an absolute right, under the statute, but that the court would be governed by circumstances in granting or denying the application to set off mutual judgments. That the right was not absolute, under the decisions, cannot be doubted. The application to have judgments set off was in the nature of an appeal to the equity of the magistrate. When it would defeat justice to grant the application, it was refused. To the extent that the setting off of one judgment against another would affect the rights of third persons—rights which have equitable claim to superiority—the court will refuse to compel the payment of one of these judgments with the other. *Puett v. Beard*, 86 Ind. 172; *Thropp v. Insurance Co.*, 125 Pa. St. 427, 17 Atl. Rep. 473; *Diehl v. Friester*, 37 Ohio St. 473; *Brown v. Hendrickson*, 39 N. J. Law, 239. See cases cited in note to *Duncan v. Bloomstock*, 13 Amer. Dec. 730. Our statute regulating this matter is the same as that of South Dakota. It provides that "mutual final judgments may be set off pro tanto, the one against the other, by the court, upon proper application and notice." Section 5109, Comp. Laws. Whether we should agree with the supreme court of that state in the view that this statute works no change in the former doctrine, it is not necessary now to decide. It is sufficient to distinguish the case from that state, relied on by the intervenor, that the court held that in that jurisdiction the court will exercise its discretion on an application to set off judgments, and will grant or withhold relief according to justice, having regard to those rights of third persons which will be affected by the granting of such relief. The right of the defendant to interpose this judgment against plaintiff as a counterclaim is absolute, under the statute, he having purchased the same before notice of the intervenor's equitable interest in the undertaking. The order sustaining the demurrer to the complaint in intervention is affirmed. All concur.

CUSHING et al. v. CABLE et al.

(Supreme Court of Minnesota. June 28, 1893.)

LIABILITIES OF GUARANTOR—FINDINGS OF FACT.

1. Upon a letting for hire of personal property by the plaintiff for a definite term for the

use of the bailees, the defendant, as a guarantor for the bailees, became responsible for the return of the property. The fact that after the expiration of the term the plaintiff consented to the retention of the property by the bailees exonerates the guarantor from liability for failure to return it.

2. A fact found by the court, although expressed as a conclusion of law, will be treated as a finding of fact.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Hicks, Judge.

Action on a contract by J. E. Cushing and another against John Cable, Edwin Cooley, and others. From the judgment entered, plaintiffs appeal. Affirmed.

For report on former appeal, see 50 N. W. Rep. 891.

Rea & Hubachek, for appellants. H. D. Polk, for respondents.

DICKINSON, J. In May, 1890, the plaintiffs entered into a contract of bailment with the members of a partnership called Cable & Chute Bros., by the terms of which the former let for hire to the latter, and for their use, two boilers and engines for the period of four months, commencing May 16, 1890. The bailees agreed to pay for the use of the property the sum of \$70 a month, and to return the property to the bailors. The contract gave to the bailees the right of renewal or extension for two months by their giving notice of their election to do so before the expiration of the stated term of four months. By an agreement appended to this contract the respondent, Cooley, assumed the obligation of a guarantor for Cable & Chute Bros., undertaking that they would perform the contract according to its terms, and promising to pay all damages which the plaintiffs might sustain by reason of any violation on their part. The term of the bailment was not extended, as provided in the contract, but after the expiration of the specified time of four months the bailees did not return the property. They kept it without any new express agreement, until April, 1891, some seven months beyond the specified period of bailment. The agreed compensation was paid for the original term of four months, and somewhat more. The plaintiffs commenced this action against both the bailees and their guarantor, Cooley, in which action, upon trial, judgment was directed for the plaintiffs against all the defendants for the value of the use of the property during the entire period of its detention, less what had been paid. Upon appeal by Cooley to this court the determination of the court below as to him was reversed, resulting in a new trial, it being considered that, after the lapse of the specified term of four months, there having been no renewal of the term, Cooley's liability was limited to the damages which the plaintiffs might have suffered from the failure of the bailees to return the property. The case is reported in 48 Minn. 3, 50 N. W. Rep. 891. Upon a re-

trial of the case as to the defendant Cooley, the court found, besides the facts already alluded to, that after the expiration of the four months the bailees retained the possession of the property without any new express agreement, the plaintiffs making no objection, nor in any way indicating an unwillingness that the bailees should retain the property if they would continue to pay "rent." It was also found that the plaintiffs received payment to the amount of \$81.80 on account of the "rent" for the period following the expiration of the four months. In stating its conclusions of law the court found that the plaintiffs had consented to the retention of the property by the bailees, and that they were not entitled to recover against Cooley. The findings are not in commendable form. The conclusion that the plaintiffs consented to the retention of the property after the term of four months had expired might more properly have been classed with the findings of fact, and it should be so treated. It is sufficiently apparent that the court considered that from the evidence, to which he referred, it should be inferred that the plaintiffs had acquiesced in the retention of the property by the bailees; and this is to be taken as a finding of fact, although it is expressed as a conclusion of law. Such being the case, Cooley was not to be held responsible for the failure of the bailees to return the property at the end of the specified term to which his contract of guaranty related. The plaintiffs could not, by their own consent or acquiescence, virtually extend the term of letting, whether for a definite or indefinite time, and at the same time claim damages from the guarantor because the property had not been returned. The introduction in evidence of the pleadings, findings, and order for judgment in this action, as it was at the time of the former trial, could not have prejudiced the plaintiffs. We think that none of the assignments of error are well founded, and the order appealed from is affirmed.

VANDERBURGH, J., did not sit

LITTLE et al. v. LEE.

(Supreme Court of Minnesota. June 16, 1893.)

PLEADING—JOINT OBLIGATION—NONJOINER.

Where a complaint shows that a contract or obligation is joint, and also sets up facts showing that the liability thereon had been assumed by one of the obligees or debtors, and he is accordingly sued alone, the defendant may raise an issue upon such allegations of fact in his answer, and the burden will thereupon be cast upon the plaintiff to establish them upon the trial, and, if he fails so to do, he will not be entitled to recover upon the joint obligation against the party so named as sole defendant.

(Syllabus by the Court.)

Appeal from municipal court of Minneapolis; Elliott, Judge.

v.55N.W.no.8—47

Action by M. O. Little and A. H. Nunn, partners as Little & Nunn, against J. W. Lee, to recover on an account. Judgment for plaintiffs. Defendant appeals. Reversed.

Forrest & Wolfe, for appellant. Little & Nunn, for appellees.

VANDERBURGH, J. This action is brought to recover a balance due upon an account stated, for professional services, alleged to have been performed for the defendant and one Backus, who were therefore jointly liable therefor. But the complaint further shows that Backus had paid over to defendant his half of the claim for the use and benefit of the plaintiffs, "and upon the agreement and understanding between said Lee and Backus that said Lee should pay the amount to plaintiffs." The complaint presents on its face the excuse for the nonjoinder of Lee. These allegations are put in issue by the general denial in the answer, which also affirms that the account was stated and agreed on between plaintiffs and defendant and Backus as copartners, and not otherwise. We do not think it was necessary for the defendant to allege formally the nonjoinder of Backus, because the plaintiffs, under the allegations in the complaint, in order to recover against Lee severally, were bound to prove the facts essential to establish a several liability against defendant, Lee, and Backus was thereby shown to be a necessary party, unless the allegations excusing the nonjoinder were proven. But this issue is not covered by the findings of the court. The court simply finds the joint obligation of Backus and defendant to the plaintiffs, and the balance due thereon. Under the pleadings, this does not warrant the several judgment ordered against the defendant, Lee. The stub of the lost check testified to by defendant was not evidence of the contents of the check. It does not appear when the entry upon the stub was made, or by whom, and upon the question of veracity between defendant and plaintiffs' witness Nunn its correctness and effect as evidence must still rest upon the parol evidence of defendant, identifying it and its contents, so that it did not tend to strengthen his testimony. It was properly ruled out.

Judgment reversed, and new trial ordered.

CITY OF CHASKA v. HEDMAN et al.

(Supreme Court of Minnesota. June 21, 1893.)

MUNICIPAL CORPORATION—PAYMENT ON VOID CONTRACT—RECOVERY.

Where the officers of a municipal corporation pay out its money upon a contract which the corporation has no power to make, the payment is not an act of the corporation, and it may recover the money paid.

(Syllabus by the Court.)

Appeal from district court, Carver county; Cadwell, Judge.

Action by the city of Chaska against John Hedman and others. Plaintiff had judgment, and defendants appeal. Affirmed.

Blon A. Dodge and Henry C. James, for appellant. W. C. Odell, for respondent

GILFILLAN, C. J. This is an action to recover money which belonged to plaintiff, and which its city council paid or caused to be paid to defendants upon a contract between said council and them, according to the terms of which it was agreed that they should establish and operate for a specified period a shoe factory in the city of Chaska, and in consideration thereof the city should pay them the sum of \$5,000. It is conceded that the contract was invalid; that it was beyond the power of the corporation, and, a fortiori, of any officer of the corporation, to make such a contract. It would be hard to conceive anything more foreign to the purposes of a municipal corporation than contracts which provide for the appropriation of public moneys to be derived from taxation to the private uses of individuals. But it is claimed that, conceding all this, the plaintiff cannot recover the money paid on the contract, because the payment was voluntarily made, and with full knowledge of all the facts. As a general rule, when an individual or private corporation pays money voluntarily with full knowledge of the facts, and without fraud or mistake, it cannot be recovered back, though there was no obligation to pay. To give such effect to the payment, however, it must be the act of the individual or corporation; and in this case the payment was not the act of the corporation. It had no authority to make it; no one of its officers, nor all of them together, had authority to make it. The case stands in law as it would had some person, not connected with the city government, taken the money from its treasury, and paid it to defendants. It may be different in a case where the payment is for a legitimate purpose, within the power conferred on the municipal corporation, and is made by an officer, or upon the direction of an officer, who has authority to determine whether some condition precedent to the authority of the paying officer to pay has been complied with. As the corporation had no authority to pay the money, the payment was not a corporate act, and consequently there is no basis for the doctrine of voluntary payment. On the motion to change the venue to Ramsey county the affidavits as to the defendant Hedman's residence, whether in the county of Carver or of Ramsey, were conflicting, with little preponderance either way, and the finding of the court below on the fact is conclusive. Judgment affirmed.

VANDEBURGH, J., took no part in the case.

GRIFFIN v. CITY OF SHAKOPEE.

(Supreme Court of Minnesota. June 21, 1893.)

PAYMENT ON VOID CONTRACT—RECOVERY.

City of Chaska v. Hedman, 55 N. W. Rep. 737, (opinion just filed,) followed. (Syllabus by the Court.)

Appeal from district court, Scott county; Cadwell, Judge.

Action by James W. Griffin, receiver of the Russ-Jones Desk Company, against the city of Shakopee, to recover the amount of a check issued by defendant. Defendant alleged that the check was given pursuant to a contract which it had no power to make, and the check was therefore void. Defendant had judgment, and plaintiff appeals. Affirmed.

Chas. J. Robertson and George F. Edwards, for appellant. James McHale and Southworth & Collier, for respondent.

GILFILLAN, C. J. Taking this case in the most favorable aspect for plaintiff,—that is, as an effort by the defendant to recover back money paid,—it is like that of *City of Chaska v. Hedman*, 55 N. W. Rep. 737, (the decision being filed with this,) in which we held that it was not a case for the doctrine applicable to voluntary payments. The decision upon that point renders unnecessary the consideration of the other assignments of error.

Order affirmed.

In re KIDDER'S ESTATE.

KIDDER v. TRUE.

(Supreme Court of Minnesota. June 21, 1893.)

ADMINISTRATION—VACATING ORDER ALLOWING CLAIM—DISCRETION OF COURT.

To vacate an allowance of a claim against an estate, filed by an administrator, on the application of one who knew of the time for hearing, but failed to appear and oppose the claim,—his only excuse for not appearing being that he felt confident that the administrator would administer the estate justly and honestly, and not permit unjust claims to be allowed,—is abuse of discretion.

(Syllabus by the Court.)

Appeal from district court, Dodge county; Buckham, Judge.

O. P. Kidder, administrator of the estate of George B. Kidder, deceased, presented and procured the allowance of a claim against the estate. On the motion of Osgood True the order allowing the claim was vacated, and on appeal to the district court this order was reversed, and True appeals. Affirmed.

S. T. Littleton, for appellant. Samuel Lord, for respondent.

GILFILLAN, C. J. The administrator filed a claim against the estate, and on the day appointed for the hearing of claims, of which the appellant had due notice, the claim was heard and allowed. Seven months after-

wards the appellant moved in the probate court for an order vacating the allowance of the claim. The only excuse he made for failure to appear and oppose the claim at the time for hearing claims was the confidence he felt that the administrator would administer the estate justly and honestly, and not permit unjust claims (which he alleges this is) to be allowed. The administrator appealed from the order vacating, to the district court, which reversed the order. The result must be the same whether we are to consider the district court as exercising a strictly appellate jurisdiction, and called on to determine whether there was error in the decision of the probate court, or the matter was before it as though the motion were made there in the first instance. Such an application is addressed to the sound discretion of the court. But there must always be some show of excuse for the party's failure to protect his rights at the proper time. To relieve him without such excuse is abuse of discretion. Here there was no excuse. In adversary proceedings no one has a right to rely on the party's, whose interests are opposed to his, taking care of his. So that whether the district court were to exercise its own discretion as upon an original application, or merely review the exercise of discretion by the probate court, its decision was correct.

Order affirmed.

McKILLOP v. DULUTH ST. RY. CO.

(Supreme Court of Minnesota. June 21, 1893.)

STREET-RAILWAY COMPANIES—INJURY TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—OPINION EVIDENCE AS TO INTOXICATION.

1. One who has witnessed a person's acts, appearance, and speech, may express an opinion whether he was intoxicated.

2. If a street-railway company, without any direction from the municipal council, lays its track in accordance with a grade established for a paving of the street, contemplated, but not yet done, and so laying the track renders the street, until paved, unsafe, it is an act of negligence on the part of the company. (Syllabus by the Court.)

Appeal from district court, St. Louis county; Ensign, Judge.

Action by Alexander McKillop against the Duluth Street-Railway Company to recover for personal injuries received while plaintiff was lying in a public highway on defendant's track, in an unconscious condition. Plaintiff had judgment, and defendant appeals. Reversed.

Billson & Congdon, for appellant. Edson & Edson, for respondent.

GILFILLAN, C. J. The court below erred in excluding the opinions of the witnesses that plaintiff was intoxicated. It was hardly a question for expert testimony, so that—the facts and circumstances, his acts, appearance, and speech, being detailed by other

witnesses—a witness might be called to state whether, in his opinion, they indicated intoxication, for the matter being one of observation, and not of science or skill, the jury can judge, from the details given, as well as any one, to whom they might be stated. But there are certain conditions, mental or physical, or both together, the indications of which it is impossible for any witness to adequately describe, so that the relation of them shall have on the mind of the jury the same effect that witnessing them legitimately had on the mind of the spectator. In such cases, from necessity, so that the matter may be fully laid before the jury, the spectator may state the effects the acts, appearance, and speech had on his mind; that is, may give his opinion as to the condition they indicated. It is so in respect to joy, grief, hope, or despondency, (*Tobin v. Shaw*, 45 Me. 331;) friendliness or hostility, (*Blake v. People*, 73 N. Y. 586;) fright, (*Brownell v. People*, 38 Mich. 732; *Darling v. Westmoreland*, 52 N. H. 401;) jests or earnest, (*Ray v. State*, 50 Ala. 104;) offensive or insulting manner, (*Raisler v. Springer*, 38 Ala. 703.) So that a person appears to be well or ill, or acts sanely or otherwise. *Canady v. Lynch*, 27 Minn. 435, 8 N. W. Rep. 164. So a witness not an expert, who testifies to acts and declarations showing an opportunity to form an opinion, may give his opinion, based on such facts, of mental capacity. *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. Rep. 894. That another cause of plaintiff's demeanor was suggested by the evidence made no difference with the propriety of allowing the witnesses to give their opinions as to his intoxication. It was for the jury to determine what caused such demeanor,—an injury or intoxication; and it was necessary, in order to do so, that they have all the evidence before them. If intoxication was the cause of plaintiff's falling, and lying in a helpless condition, on defendant's track, it was contributory negligence on his part.

The defendant's offer specified in the fourth assignment of error was rightly excluded. A municipal corporation has, through its council, control and charge of the streets, and may regulate the laying of street-railway tracks upon them; and if the council directs the railway company to lay the tracks upon a specified level or grade, and so laying them makes the street unsafe for ordinary travel, the municipal corporation would doubtless be liable for injuries resulting therefrom. But it could hardly be said that so laying them would be an act of negligence on the part of the railway company. The offer did not propose to show any such direction, or even authority, from the council, but only that, the village engineer having indicated by stakes a grade for paving the street contemplated and contracted for, the railway company, in anticipation of such intended paving, laid its tracks in

accordance with the grade thus indicated. That the street was, some time in the future, to be brought to that grade, was no authority to the company to at once lay the tracks according to it, if so doing would render the street unsafe, and thus rendering it unsafe would be negligence with respect to any one injured in consequence.

The evidence of the witness Labby, objected to, was proper.

As there must be a new trial, for the error first above specified, it is unnecessary to consider the assignments of error based upon the charge of the court, further than to say that in the part of the charge specified in the ninth assignment the rule of care required of defendant, under the circumstances, might be understood by the jury more strongly than, we suspect, the trial court intended. Order reversed.

O'RILEY v. CLAMPET.

(Supreme Court of Minnesota. June 21, 1893.)

WITNESS — CROSS-EXAMINATION — EVIDENCE — RECORDS IN ANOTHER CASE.

1. It is improper, on cross-examination, to ask a witness as to the contents of a written instrument not in evidence. If the party cross-examining desire to show the contents, and cross-examine upon them, he should, if the instrument be admitted, introduce it, and make it part of his cross-examination.

2. A party's pleadings in an action may be admissible against him in another action, as his admissions; but the judgment in the first action, the parties to the two not being the same, is not admissible, either as an admission, or as evidence of the fact on which it is based.

(Syllabus by the Court.)

Appeal from municipal court of Minneapolis; Elliott, Judge.

Action by Thomas B. O'Riley against Albert B. Clampet on a contract. Plaintiff had judgment, and defendant appeals. Affirmed.

A. D. Polk, for appellant. Christensen & Tuttle, for respondent.

GILFILLAN, C. J. When the defendant, on cross-examination of plaintiff, a witness in his own behalf, asked him, "If you were not working for Jones, and didn't consider Jones to owe you anything, why did you make Exhibit 3, and therein swear that you did the work for Jones, and that Jones owed you therein \$337?" the paper, though plaintiff had, on its being shown him, testified that he subscribed and swore to it, had not been introduced nor offered in evidence, nor did defendant then offer it, nor state that he intended to offer it, and the question was properly excluded. If a party desires to show the contents of a paper, and to cross-examine upon it, he must, if the writing be admitted, introduce it as part of his cross-examination. 1 Greenl. Ev. §§ 88, 403.

The judgment in the suit of plaintiff against

Jones was not admissible. The lien statement, the complaint in that action, and the other papers signed by plaintiff, were admissible as his admissions or declarations. But the judgment was no admission or declaration of his, and, it being between other parties, it was no evidence, in this action, of the facts on which it was based.

The testimony referred to in assignments of error 2, 3, and 4, though not entitled to much weight, was admissible. It tended to show defendant's relation to the property on which the work sued for was done, and that he might be interested in having it done. Order affirmed.

MORIARTY v. HOME INS. CO.

(Supreme Court of Minnesota. June 27, 1893.)

INSURANCE—CONDITION OF POLICY — UNOCCUPIED PREMISES.

Under the condition in a policy of insurance that "if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, without notice to and consent of this company in writing, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the consent of this company indorsed hereon," the policy shall be void, the words "by any means whatever," etc., do not qualify the words "or become vacant or unoccupied."

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Brill, Judge.

Action on a policy of insurance by James Moriarty against the Home Insurance Company. Plaintiff had judgment, and defendant appeals. Reversed.

S. E. Hall, for appellant. J. C. Mangan and O. H. O'Neill, for respondent.

GILFILLAN, C. J. Plaintiff was insured by defendant's policy upon a certain dwelling house. The policy contained, among other conditions: "If the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, without notice to and consent of this company in writing, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the consent of this company indorsed hereon, * * * then, and in every such case, this policy shall be void." The dwelling having become vacant, by a tenant leaving without notice, before the fire, the court below charged the jury that, if it became vacant by means not within his control, then plaintiff could recover. It raises the question whether the words "by any means whatever within the control of the assured" qualify the words "or become vacant or unoccupied." It requires a very forced and unnatural construction to give the words that effect,—a construction which would not occur to any

one reading the policy for the purpose of determining whether he would accept it. The part of the policy quoted specifies several cases or conditions, each following a disjunctive to show that it is a condition by itself. They are divided into two groups, each followed by words qualifying each case in the group. In the first group are the case of increase of risk by the manner of use or occupation, and the case of becoming vacant or unoccupied, and the qualifying words applicable to those cases are "without notice and consent of this company in writing," those words completing the condition. In the second group are increase of risk first by the erection or occupation of neighboring buildings; second, by any means whatever within the control of the assured. Then follow the words qualifying the cases in this group,—"without the assent of this company indorsed hereon." It would be a forced and unnatural reading to jump the words "or by any means whatever," etc., over the words "without notice," etc., following the first group, and read them into each case in that group, and, if that could be done, in order to make sense it would be necessary to leave out a word. Try it thus: "Become vacant or unoccupied, or by any means whatever within the control of the assured." Strike out the word "or" before the word "by," there is some meaning, but leave that word in, and there is no sense to the words following it. A very slight change in the phraseology of conditions of this character in policies will materially change the meaning, and for this reason we get no aid from any of the decisions to which we are referred, for in no one of them were the words precisely as in this case. Of course, such a condition is not to be understood as avoiding the policy the moment the premises became vacant. The assured must have a reasonable time within which to comply with the condition by giving the notice. Whether more than a reasonable time elapsed was not made a question in the case.

Order reversed.

STATE v. KLUSEMAN et al.

(Supreme Court of Minnesota. June 22, 1893.)

PLACING OBSTRUCTIONS ON RAILROAD TRACK—INDICTMENT—IMPANELING JURY—CAPACITY TO COMMIT CRIME—PRESUMPTIONS.

1. An indictment for placing an obstruction on a railway track *held* to sufficiently state the offense.

2. Where the court, on the challenge of the state, improperly rejects a juror, it will not prejudice the defendant, if he was tried by an impartial jury, and the jury will be presumed to have been impartial if nothing appear to the contrary.

3. Where one charged with crime is above the age at which capacity to commit crime is presumed, his own testimony that he did not know it was wrong to do the act constituting the crime will not, in the absence of any evi-

dence as to his general mental capacity, tend to remove the presumption.

(Syllabus by the Court.)

Case certified from district court, Norman county; Mills, Judge.

Henry Kluseman and others were convicted of placing obstructions on a railroad track, and the case was certified to the supreme court for determination. Conviction sustained.

H. W. Childs, Atty. Gen., and Geo. B. Edgerton, Asst. Atty. Gen., for the State. W. W. Calkins and O. Moaness, for defendant.

GILFILLAN, C. J. Defendants were indicted for placing obstructions upon a railroad track. They objected to any evidence being introduced, on the ground that the indictment does not state facts sufficient to constitute a public offense. The specific objection to the indictment is that it does not state with certainty that the obstructions were placed on the track. It states that the defendants did "willfully, wrongfully, maliciously, and feloniously place an obstruction to wit, five piles of large, heavy, oak, railway cross-ties, all of which piles being within a distance of seven hundred feet upon the track of a certain railway," etc. The want of a comma after the word "feet" confuses somewhat the meaning of the sentence. Punctuation, though frequently of use in determining the meaning of sentences, is not, nor is its absence, always controlling. Courts frequently disregard it, and sometimes supply it, especially where it is necessary in order to give a meaning to the words. In this instance, the words "place an obstruction" must be held to refer to the words "upon the track," etc., else the sentence begun is not completed, and the words really have no meaning. But they have a clear meaning if we supply a comma at the point suggested. While its absence may make a more careful reading necessary to get at the meaning, we do not see how any one could be misled, or could arrive at any other meaning than that the defendants placed the ties upon the track.

Whether the facts stated by the juror Aamodt, on being challenged, made a case of implied bias, within the statute, or not, his rejection could not, so far as the record shows, have prejudiced the defendants. They had no right to any particular juror being selected, provided they had an impartial jury to try their case, and, nothing appearing to the contrary, it is to be presumed that the jury was impartial. See *Thomp. Trials*, § 120, and cases cited.

Each of the defendants, when sworn in his own behalf, admitted doing the acts constituting the offense, so that the jury could not, without violating their oaths, do else than convict.

Two of the defendants were each 15 years

old, and the other 16 years old, so that they were presumed, under the Penal Code, (sections 15-17,) to be responsible for their acts. There was no attempt to remove the presumption by proof of less mental capacity than boys of their age ordinarily have, or that they had not sufficient capacity to understand what they did, or to know its wrongfulness. Their own testimony that they did not know it was wrong to put the ties on the track, and did not know that the ties might throw the train off the track, and injure the passengers, did not, in the absence of any evidence upon the question of their general mental capacity, raise any issue as to their responsibility for their acts, for the jury to pass on. It did not tend to prove either of them to have been an idiot, imbecile, lunatic, or insane person, or that he was laboring under such a defect of reason as not to know the nature and quality of the act he was doing, or not to know that the act was wrong. Pen. Code, § 19. There was no error, therefore, in the charge of the court, or in its refusals to charge. The case will be remanded to the court below for further proceedings.

VANDEBURGH, J., took no part in the decision.

HART et al. v. KESSLER.

(Supreme Court of Minnesota. June 27, 1893.)

SALE OF PERSONALTY—EVIDENCE.

Evidence held insufficient to show a sale in praesenti of personal property.

(Syllabus by the Court.)

Appeal from municipal court of St. Paul; Cory, Judge.

Action for conversion by John Hart and others, copartners as Hart, Murphy & Whaley, against Julius Kessler, trading as Julius Kessler & Co. Defendant had judgment, and plaintiffs appeal. Affirmed.

McLaughlin & Morrison, for appellants. Williams & Schoonmaker, for respondent.

GILFILLAN, C. J. The action being for conversion, the plaintiffs could not recover unless they proved their right of property in the chattels alleged to have been converted. The evidence introduced by them did not tend to prove this. They having sold the chattels (5,000 cigars, worth \$300) to Curry, the most that could be claimed for the evidence was that he orally agreed to retransfer them to plaintiffs, and they agreed to take them in payment of their account against him. Nothing was done that could be construed to be a delivery or a payment for them, and nothing said indicating that the parties understood it to be a completed retransfer of the property, or anything but an executory agreement to retransfer. The fact that Curry excepted the cigars from his bill on sale to defendant had no tendency to

prove a sale in praesenti to plaintiffs. It was not abuse of discretion to refuse, the day after the proofs were closed, to reopen the case for plaintiffs to make further proofs. Order affirmed.

WATSON v. MINNEAPOLIS ST. RY. CO.

(Supreme Court of Minnesota. June 27, 1893.)

STREET RAILWAYS—COLLISION WITH VEHICLE— NEGLIGENCE— CONTRIBUTORY NEGLIGENCE— QUESTION FOR JURY— SENDING OUT JURY FOR FURTHER DELIBERATIONS— INSTRUCTIONS OF PARTICULAR FACTS—RIGHTS TO CROSSING AS BETWEEN CAR AND VEHICLE—DAMAGES.

1. One who had been a conductor of an electric street car for two months held competent to testify within what distance such a car, going at a specified rate of speed, can be stopped.

2. Evidence held to make a case for the jury on the questions of both defendant's and plaintiff's negligence.

3. When a jury report they cannot agree, it is in the discretion of the court to send them out for further deliberation.

4. In such case it is proper for the court to urge them to use all reasonable efforts to come to an agreement, and to state, as a reason for it, that the case is an expensive one to try.

5. At a street crossing as high a degree of care is required of those in charge of an electric street car as of those driving other vehicles.

6. Where the fact to be found is to be determined upon the consideration of numerous facts and circumstances proved, whether and to what extent the trial court, where it has fully, correctly, and clearly stated to the jury the general rules that are to control them in their deliberations on the facts, shall call their attention to particular facts and circumstances, is in its discretion.

7. A street-railway car has no priority of way at a street crossing, with respect to other vehicles, and when the driver of such another vehicle, approaching the street-railway track to cross it, sees a car approaching at such a distance that he can apparently make the crossing safely, he has a right to attempt it, and it is not negligence per se in him to attempt it without looking a second time at the car.

8. Upon much-traveled streets in a city it is negligence to run an electric street-railway car over a crossing at a high and dangerous rate of speed; and it is also negligence to run it over a crossing, the person in charge of it not being on the lookout, nor having the car under control, nor using the proper means to stop it, so as to avoid a collision.

9. Damages held not excessive.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Canty, Judge.

Action for personal injuries by Lucius E. Watson against the Minneapolis Street-Railway Company. Plaintiff had judgment for \$6,000, and defendant appeals. Affirmed.

Koon, Whelan & Bennett, for appellant. Merrick & Merrick and H. H. Merrick, for respondent.

GILFILLAN, C. J. The witness Walden showed himself competent to state within what distance an electric railway car going at the rate of 14 miles per hour (at which rate some of the evidence indicated the car

which injured plaintiff was going) can be stopped. He had been conductor on such a car two months, must have seen such cars stopped many hundreds of times, when going at as high a rate of speed as they ordinarily attain, and was at the time conductor on the car which did the injury. It must be presumed that he was an ordinarily observant man, and, if so, he must have been able to express a pretty accurate opinion on the point.

The evidence made a fair case for the jury, both as to the negligence of the defendant and the contributory negligence of the plaintiff; so that the 3d, 4th, and 5th assignments of error are not well taken. And it is the same with the 18th to the 22d, both inclusive, and the 26th and 27th.

Whether, when a jury comes into court, and reports that it cannot agree, it shall thereupon be discharged, or shall be again sent out to deliberate further upon the case, is in the discretion of the trial court; and, before this court could order a new trial because of the jury having been sent out again, clear abuse of discretion, resulting in prejudice to the party complaining, would have to appear. Nothing of the kind appears in this case.

There was no impropriety in the court urging upon the jury to use all reasonable efforts to come to an agreement, and stating, as a reason why they should do so, that the case was an expensive one to try, both to the county and the parties.

The court below, in its general charge, in connection with some requests to charge, given and not excepted to, stated clearly and concisely the rules of law applicable to the respective rights of the parties upon the street, and the duty of each in respect to care in making the crossing, and the matter of negligence or absence of negligence on the part of either or both the parties. The only objection to the general charge, insisted upon in appellant's brief, is to a part where the court, after stating the degree of care required of each of the parties, said: "If two teams collide in the street, you must determine by the same rules whether they were using reasonable care towards each other, and, if not, who is to blame." The only suggestion in the brief, of error in this, is that there is a difference between an electric car, running on a fixed track, and a team able to turn to the right or left. That is an important consideration when at the time of the collision the car and other vehicle are passing along the same streets, and the question is which ought to have made way for the other. But the collision in this case was at a crossing, and there is no question which ought to have turned to the right or left to let the other pass. Requiring of those in charge of an electric car at a street crossing the same degree of care as is required of the drivers of other ve-

hicles is not stronger than was laid down in *Shea v. Railway Co.*, (Minn.) 52 N. W. Rep. 902, where it was said: "There is no modification or exception that relieves a street-railway company from exercising at least as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars." So that the degree of care required of a street-railway company at a crossing, by the clause quoted from the charge, to wit, that required of the driver of any other vehicle, was not overstated.

There were numerous requests to charge, some of them very long. Those on the part of the appellant take up over five pages of the paper book. There is a growing tendency—not to be encouraged, we think—on the part of attorneys trying causes, especially those where the fact to be found (such, for instance, as negligence) is to be determined upon the consideration of numerous facts and circumstances proved, to make long requests, instructing the jury what effect they are to give to one or more of such facts and circumstances in arriving at a conclusion on the principal question. It is frequently, perhaps generally, unsafe to give such requests, as it may induce the jury to consider unduly the facts and circumstances specified, and leave out of account others that may be entitled to materially modify their effect. Several of appellant's requests, which the court refused, were of this character. An illustration of it is afforded by its ninth request, which was, in substance, that if, when plaintiff first came along Eleventh, to cross Washington, he saw the car approaching, and knew it would cross the path along which he was moving, and he drove his team along such path, and did not again look until such interval had elapsed that the car was too near to avoid collision, and if, during such interval, had he looked, he could have avoided the collision, he was guilty of negligence. This leaves out very important circumstances, which, on the question of his negligence, the jury were to consider: First, the distance the car was from him when he saw it; second, at what rate of speed he had a right to suppose it was approaching. Suppose, when he saw it, the car was so far away that if it came at the usual rate of speed he could have easily passed before the car reached the crossing. Certainly, in such case, it would not be negligence per se, as the request assumes, to cross without looking a second time. The fourteenth request has precisely the same fault.

When the court, in its general charge, states fully, correctly, and clearly the general rules that are to control the jury in their deliberations on the facts, whether it will call their attention, and, if so, to what extent it will call their attention, to particular facts and circumstances tending to establish the principal fact, such as negligence, is in the

sound discretion of the court. It will not be error to decline to do it at all, though, if it do it in such a way as to mislead the jury, it will be error. Of course, where the fact proved is conclusive upon the fact to be found, as proof of an attempt to cross a steam railway without looking and listening, when there is nothing to prevent the party looking or listening, and by doing so he can avoid the danger, is conclusive of his negligence, the court must so instruct the jury. The appellant's 11th, 12th, and 13th requests were merely the application, to particular facts and circumstances specified, of the rules which the court had, in its general charge or in requests given, stated to the jury, and it was proper to leave it to them to make the application.

The giving of plaintiff's fourth request is assigned as error. That request comes, at least, very near to being obnoxious to the criticism we have made upon several requests on the part of the defendant, and it is necessary to consider if it could have misled the jury. It may be divided into two parts,—the first relating to the question of plaintiff's negligence; the second, to that of defendant's negligence. The first part is the proposition that if, when plaintiff was about to cross, the car was not on that portion of the street over which he attempted to cross, and was not threateningly near or threateningly approaching the same, or if there was nothing to warn the plaintiff of the approach, or of the rate of speed at which it was approaching, he might lawfully drive across said track. The objection to this part of the request is that it ignores the conceded fact in the case,—that he saw the car as he approached the crossing, from which it is claimed that warning of the car's approach was unimportant. As he was about to cross he saw the car just coming off of Twelfth avenue, nearly a block away from him, and there was no evidence that he saw it again till he was already on the track, and it was too late for him to avoid a collision. The request is to be understood, and the jury must have understood it, with reference to that situation. If he had no other notice of the approach than having seen it a block away, and no warning that it was approaching at such rate of speed that he could not safely attempt to cross, he had a right to do so, unless he was bound, seeing it at that distance, to stop till it passed. But, as held in the *Shea Case*, a car on a street railway has not, as, from the necessity of the case, has a train on an ordinary steam railway, a priority of way at the crossing. Of course it would be negligence to attempt it when one has reason to believe that the car cannot be controlled or checked so as to avoid a collision before he gets across. But, with the uncontradicted evidence in the case as to the distance within which the car could be stopped, one seeing it nearly a block away, as he was about to go upon the crossing, would not have any

reason to suppose it dangerous. There was no error in that part of the request. After what we have stated above from the request, it continued: "And if, in the exercise of ordinary care, as a prudent person, in so doing, he was injured through the negligence of the defendant in." Then follows the specification of acts or neglects which the court, in effect, charged would be negligence. The first of these, to which attention is called by appellant's brief, is: "If said car was running at a high and dangerous rate of speed." There can be no question that, upon much-traveled streets in a city, that would be negligent. The second is: If the person in charge "was not then on the lookout, and did not then have his car under control; did not use the proper means or necessary means to stop said car, and avoid such collision." What is then indicated as the duty of one in charge of such a car is not higher than would be required of an ordinary, prudent person in propelling through the thronged street of a city so dangerous a vehicle as an electric car. The neglect of that duty would be negligence.

The damages allowed were large, but, in view of the injuries sustained by plaintiff,—severe, lasting, and liable to terminate fatally,—we do not consider them excessive. Order affirmed.

WAY v. COLYER.

(Supreme Court of Minnesota. June 28, 1893.)

ACTION ON JUDGMENT BY ASSIGNEE — SET-OFF —
NEGOTIABLE INSTRUMENTS — LIMITATION — CON-
FLICT OF LAWS.

1. In an action on a judgment, by an assignee thereof, the defendant may set off an indebtedness of the assignor, the original judgment creditor, to him, existing at the time of the assignment.

2. As respects promissory notes made in a foreign state by a resident thereof, the statute of limitations of this state does not bar an action against the maker, in the absence of proof that he had become a resident of this state. The action is not barred by the law of the foreign state, in the absence of proof of the foreign law.

(Syllabus by the Court.)

Appeal from district court, Traverse county; Brown, Judge.

Action on a judgment by Frank A. Way against C. H. Colyer. Defendant had judgment, and plaintiff appeals. Affirmed.

J. Bohmbach, for appellant. W. H. Townsend, for respondent.

DICKINSON, J. This is an action upon a judgment recovered by one Thing against this defendant, in the state of Wisconsin, in August, 1887. In October, 1887, Thing assigned the judgment to one Benjamin F. Way, and in January, 1891, the latter assigned it to this plaintiff. In 1879, in the state of Wisconsin, Thing executed to this

defendant his promissory notes for considerable sums, payable at different times in the year 1880, and which have never been fully paid. The defendant held these notes against Thing when the latter assigned his judgment to Way. In this action the defendant pleaded these notes as a set-off, and this defense was sustained by the court. We hold, in accordance with the ruling of the court below, that this indebtedness of Thing to the defendant on the notes, existing at the time of the assignment of the judgment, was allowable as matter of set-off, to defeat a recovery in this action. The assignment of the judgment was, as the statute declares, "without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment." Gen. St. 1878, c. 66, § 27. The assignee acquired the judgment subject to any set-off or other defense which would have been available to the judgment debtor as against the assignor, the original judgment creditor. *Brislin v. Newhall*, 5 Minn. 273, (Gil. 217.) And see *La Due v. Bank*, 31 Minn. 33, 16 N. W. Rep. 426. If Thing, without having assigned his judgment, had prosecuted an action like this, to recover on the judgment, the defendant would have been allowed to set off the counter indebtedness of the former on his promissory notes then held by the defendant. Such a counterclaim would have been authorized, within the terms of our statute. "In an action arising on contract, any other cause of action, arising also on contract, and existing at the commencement of the action." Gen. St. 1878, c. 66, § 97, subd. 2; *Taylor v. Root*, *43 N. Y. 835. The action on the judgment is, within the meaning of the statute, an action arising on contract, a judgment being a contract of record. 1 Chlt. Cont. (11th Amer. Ed.) 2, 3; *Taylor v. Root*, supra; *O'Brien v. Young*, 95 N. Y. 428, 436, 437. If the right of action on the notes had become barred by any statute of limitations, that was a matter of defense, to be established by the party opposing the asserted claim of liability on the notes. *Trebbly v. Simmons*, 38 Minn. 508, 38 N. W. Rep. 693. These notes were made in Wisconsin, and it is sufficiently apparent that the maker, Thing, resided there. He does not appear to have ever become a resident of this state. Hence it is not apparent that the right of action on them has been barred by our statute of limitations. *Smith v. Glover*, 44 Minn. 260, 265, 46 N. W. Rep. 406; *Hoyt v. McNeill*, 13 Minn. 390, (Gil. 362); *Fletcher v. Spaulding*, 9 Minn. 64, (Gil. 54.) Neither does the cause of action appear to have been barred by any statute of the state of Wisconsin, for no statute of that state was pleaded or proved. *Hoyt v. McNeill*, supra.

The conclusions above indicated are decisive of the case. While the sixth finding of the court was probably not justified by the evidence, as it appears in the record, it becomes immaterial, in view of the other de-

fense or set-off, to which we have more particularly referred. Order affirmed.

VANDERBURGH, J., did not sit.

SCOFIELD v. QUINN.

(Supreme Court of Minnesota. June 28, 1893.)

QUIETING TITLE—ENFORCING UNSEALED CONTRACT.

In an action, under the statute, to determine adverse claims to real estate, the defendant asserted title by a conveyance from the plaintiff to her (plaintiff's) mother, and by devise from the latter to the defendant. In reply, the plaintiff alleged that, simultaneously with the delivery of the deed (quitclaim) to her mother, the latter executed and delivered to her a written instrument, not under seal, (set forth in full,) referring to the deed, and declaring the intention of the parties to be that the grantee should hold only a life estate; it being pleaded also that this was in accordance with the agreement of the parties, and that the two instruments were parts of the same transaction, and were intended to carry into effect the agreement and purpose to convey a life estate. The conveyance was made upon considerations of filial duty. *Held*, that the two instruments should be read together, to ascertain the intention of the parties. It being apparent that the parties intended the unsealed writing to qualify the deed referred to therein, equity will afford relief, and carry that intention into effect, notwithstanding it was not so executed as to affect in law the absolute terms of the deed. Upon the facts alleged in the reply, (in this statutory action,) the plaintiff was entitled to relief in equity, and it was error to grant judgment for the defendant on the pleadings.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Lochren, Judge.

Action by Annie E. Scofield against Jennie E. Quinn to determine the validity of adverse claims to realty. Defendant had judgment, and plaintiff appeals. Reversed.

R. J. Burglehaus and F. V. Brown, for appellant. J. F. Fitzpatrick, for respondent.

DICKINSON, J. On motion of the defendant, judgment was rendered in her favor on the pleadings, and the plaintiff appealed therefrom. The plaintiff being in the possession of certain real estate, and asserting title thereto, instituted the action under the statute to determine adverse claims asserted by the defendant. The defendant, this respondent, answered, setting up title through a conveyance made by the plaintiff to Margaret Brosseau in 1879, and who died in 1888, leaving a will, by which she devised to this respondent an undivided one-fourth of the premises. The plaintiff replied, setting forth this state of facts: The plaintiff was a daughter of Margaret Brosseau, who had no home, and was in indigent circumstances. For the purpose of providing a home for her mother, the plaintiff proposed to give to her a life estate in the land in question, and for the purpose of doing so the plaintiff executed a quitclaim deed of conveyance to her mother in such form as would have conveyed

the whole estate. The deed was executed in August, but was not delivered until October 21st, at which time, for the purpose of limiting the grant to a life estate, in accordance with the agreement of the parties, Margaret Brosseau made, signed, and executed, and delivered to the plaintiff, simultaneously with the delivery of the deed of conveyance, and as a part of the same transaction, this instrument in writing: "Oct. 21st, 1879. Bloomington, Findley Farm. I, Margaret Brosseau, do agree and promise to my daughter, Annie E. Findley Scofield, not to bargain, sell, or dispose, without her consent, the lands lying in Bloomington, known as the 'Findley Farm,' conveyed to me by quitclaim deed the 23d of August, 1879, it being understood between us that I shall hold only a life estate in said land. Signed and delivered by me, Margaret Brosseau." If this instrument and the deed therein referred to are to be read together as though they had been but one instrument, and effect given to both according to the expressed intention of the parties, the grant should be construed as being only of a life estate. The language of the above-recited instrument clearly indicates that such was the intention of the grantee, and according to the allegations of the reply,—the truth of which is to be taken as admitted,—such was also the intention of the grantor, evinced by requiring the execution of that instrument and by her acceptance of it when she delivered her deed, and as a part of the same transaction. It would seem to be difficult, reading the two instruments together, to attribute to the parties any other intention. It is of secondary importance in what part of the instruments the intention is expressed, if, notwithstanding any technical impropriety in the arrangement or association of the different clauses, the intention is manifest. *Flaten v. City of Moorhead*, (Minn.) 53 N. W. Rep. 807. The only apparent reason which might prevent the court from reading the two instruments together, and giving legal effect to the intention thus disclosed, is the fact that the above-recited writing is not sealed and attested in accordance with the law relating to conveyances of real estate. But allowing all possible force to this fact, it is not conclusive. In this form of action the defendant occupies, as respects the title asserted by her, the position ordinarily assumed by a plaintiff. *Walton v. Perkins*, 28 Minn. 413, 415, 10 N. W. Rep. 424. She is seeking to sustain and enforce, as against the plaintiff, a claim of ownership in fee. If the facts alleged in the reply would constitute a defense, or entitle the plaintiff to any relief, whether legal or equitable, as against the defendant's asserted title, it was error to give judgment against the plaintiff on the pleadings. *School Dist. v. Wrabeck*, 31 Minn. 77, 16 N. W. Rep. 493. It may be conceded that the deed alone conveyed the legal title, and that, if it were not

for the intervention of the court in the exercise of its equitable jurisdiction, the other written instrument could not be given legal effect, as limiting the operation of the deed to a conveyance of a life estate, because it was not executed with the formality of a seal and subscribing witnesses. But the case is such that equitable principles should be applied and equitable relief afforded so far as necessary to carry into effect the intention of the parties. The reply shows that it was the agreement and intention of the parties that a life estate only should be conveyed, and that the deed and the other instrument were executed as the means whereby that should be done. If that intention of the parties was not thus accomplished it was only because one of the instruments was technically defective as to the manner of its execution, so that in the strictness of the law it was inadequate to qualify the effect of the other instrument, standing alone. But equity will afford relief in such a case, either by reforming the defectively executed instrument, or by restraining the assertion of rights contrary to the real and expressed intention of the parties, or, a right to reformation being shown, by treating the defective instrument as reformed. Thus, an instrument, defective for want of a seal, will be given effect in equity by reformation. *Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. Rep. 145. So of an instrument defective for want of witnesses. *Ross v. Worthington*, 11 Minn. 438, (Gil. 323.) See, also, *Chase v. Peck*, 21 N. Y. 581; *Bernards Tp. v. Stebbins*, 109 U. S. 341, 349, 3 Sup. Ct. Rep. 252; *Brinkley v. Bethel*, 9 Helsk. 786; *Mastin v. Halley*, 61 Mo. 199; *Smith v. Ashton*, *Freem. Ch.* 308; *Cockerell v. Cholmeley*, 1 Russ. & M. 418, 424; 1 Story, *Eq. Jur.* (13th Ed.) p. 102. It is a sufficient reason for the intervention of equity in such a case as this that, in the absence of such relief, not only will the real intentions of the parties fail of accomplishment, but the transaction would have the effect of defrauding one party for the benefit of the other. The grant made to the plaintiff's mother was based only on the consideration of filial duty and affection. It was intended by both parties to be restricted to a life estate. They adopted means supposed to be adequate to thus limit the operation of the deed. By their failure to comprehend the legal effect of the writing, the entire estate was legally conveyed. If that effect is to be given to the transaction it would operate as a fraud on the plaintiff, divesting her without consideration of the estate which both parties intended should remain in her. It may be said that the instruments were in the form intended, and that the mistake was only as to the legal effect. But even in such a case equity will grant relief, under proper circumstances, as was considered in *Benson v. Markoe*, 37 Minn. 30, 33 N. W. Rep. 38, and cases cited. The principles upon which that decision was founded are also ap-

pllicable in this. Our conclusion is that upon the facts stated in the reply the plaintiff would have been entitled to relief, and that the judgment on the pleadings was erroneous.

Judgment reversed.

VANDEBURGH, J., did not sit.

ROUSSAIN et al. v. NORTON et al.

(Supreme Court of Minnesota. June 27, 1893.)

DEED—ACKNOWLEDGMENT—VALIDITY OF CERTIFICATE—RECORDING—NOTICE OF ADVERSE CLAIMS—OPINION EVIDENCE.

1. Where an officer has authority to take acknowledgments anywhere in the state, the addition, in the venue to the certificate, of a wrong county, or where there is no such county, will not affect its validity.

2. Where a deed and the acknowledgment are regular on their face, it will not impair the effect of the record that the acknowledgment was in fact taken before the deed was complete, as where the name of the grantee, or description of the premises, had not been inserted.

3. One purchasing real estate from one appearing to be the owner, by the records in the register's office, is not chargeable with notice that it is assessed for taxation to another person.

4. On the question of the market or selling value of the land, the opinion of a geological expert, not published or known so as to affect people's estimate of the value, that there is valuable stone beneath the surface, is not admissible.

5. Possession of the land, in order to be notice of the possessor's rights to one who buys from the apparent record owner, must be a present possession. A former possession, which has ceased, though there be still evidence of it on the land, will not suffice. And where the possession is not shown by residence on the land it must be shown by acts of dominion over it, such as indicate, not mere casual entries, but a continued claim of right.

6. Certain findings of fact held justified by the evidence.

7. And certain facts and appearances on the land, including the presence of graves,—some with gravestones bearing the names of those buried,—considered, and held not to be indicative of the present continued exercise of dominion over the land, so as to be notice to a purchaser from the record owner that some other person claims it.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Searles, Judge.

Action by Zoe Roussain and others against James W. Norton and others. Defendants had judgment, and plaintiffs appeal. Affirmed.

H. S. Lord and M. B. Webber, (John H. Norton, of counsel,) for appellants. White, Reynolds & Schmidt and Warner, Richardson & Lawrence, for respondents.

GILFILLAN, C. J. This is an action under the statutes to determine adverse claims to real estate, brought by the widow and heirs of Francois Roussain, Sr., deceased. In 1860 the land in controversy, consisting of one tract of 168 acres, was conveyed to him by United States patents duly recorded in

the register's office in the county (St. Louis) in 1863. January 10, 1867, he, by deed absolute in form, but intended as security, and so a mortgage, and duly recorded January 14, 1867, conveyed the land, in terms, to one Morrison. April 15, 1872, Morrison reconveyed the land to Roussain by deed not recorded till March 26, 1890. So that from January 14, 1867, till the conveyance to Johnson, hereafter mentioned, Morrison appeared by the record to be the absolute owner. Roussain died in June, 1885. In January, 1887, Morrison, by deed (the peculiarities in the execution and acknowledgment of which will be hereafter referred to) duly recorded January 28, 1887, conveyed the land to one Johnson, subject to taxes, and a certain tax sale. The consideration expressed in the deed was \$200, and the amount required to redeem from the tax sale, and pay off the taxes then on the land, was \$181.49. The court below finds, as facts, that Johnson purchased in good faith, and without notice or knowledge of the unrecorded deed of April 15, 1872, or that the deed of January 10, 1867, was intended to operate otherwise than according to its terms, or that after January 10, 1867, Roussain or the plaintiffs had or claimed any interest in the land; and there are similar findings in respect to those who purchased from Johnson, and those who purchased from them. In respect to Johnson there is, in the evidence, strong suggestion to the contrary of the finding. But as a purchaser in good faith from a purchaser in bad faith will be protected, under the registry laws, it is immaterial whether the finding in respect to Johnson is sustained by the evidence, if it be sustained in respect to the purchaser from him.

February 17, 1887, Johnson conveyed to Norton and Patten by deed duly recorded March 9, 1887, and the other defendants claim through those grantees. The circumstances referred to in respect to the execution and acknowledgment of Morrison's deed to Johnson were that Morrison filled a blank form of deed, leaving, however, blanks for the grantee's name, and the description of the property; and in that condition he and his wife signed and sealed it in the presence of two subscribing witnesses, and then, at Superior, in the state of Wisconsin, acknowledged the same before a notary public of that state. The venue to the notary's certificate was, "State of Wisconsin, county of St. Louis—ss.," there being then no such county in Wisconsin. But according to the statute in that state, as construed by a decision of the supreme court,—both being properly proved as facts,—a notary public in that state may take an acknowledgment anywhere within the state. The purpose of the venue to an official certificate is to show that the official act is done within the territorial jurisdiction of the officer. Any more in the venue than is necessary for that purpose is surplusage, and may be disregarded. This

notary's jurisdiction extending over the whole state, the name of the state was all that was necessary in the venue. The addition of surplusage, whether untrue or not, did not affect it. Morrison then took the deed, with said blanks in it, to Duluth, where Johnson filled the blanks, and it was then delivered by Morrison to him. The deed was thus an effectual deed, as to Morrison. The acknowledgment was improperly taken, because, when taken, the instrument was, by reason of the blanks, of no force. That, however, did not affect the record of it. When an acknowledgment appears to have been taken, within his jurisdiction, by the proper officer, and there is nothing on the face of the deed or certificate of acknowledgment showing either to be void, the record will have the same effect as if both are entirely regular; that is, no extrinsic fact will impair the record. *Clague v. Washburn*, 42 Minn. 371, 44 N. W. Rep. 180; *Bank v. Hove*, 45 Minn. 40, 47 N. W. Rep. 449.

Morrison and his wife would, under the decision in *Pence v. Arbuckle*, 22 Minn. 417, be estopped, in favor of bona fide purchasers from Johnson, to allege that either the deed or the acknowledgment, by reason of its having been prematurely taken, was invalid; and if the grantor's record title pass by his deed it does not matter, either as to him or any one else, how its execution is established,—whether by estoppel, or by actual proof of the facts constituting a proper execution. To show that Morrison's record title passed by his deed it was proper, as against any one claiming that title, to prove its execution by such facts as would estop Morrison to deny it.

There was nothing on the face of the record to put any purchaser from Johnson upon inquiry, beyond the record, as to his title. The erroneous insertion in the venue to the notary's certificate of the words, "County of St. Louis," would not suggest a doubt as to Morrison's title, nor anything except that the notary inserted them through inadvertence.

The fact that notwithstanding the title appeared, by the records in the register's office, to be in Morrison, the lands were assessed for taxation in the name of Roussain as owner, and that he paid the taxes for one of the years, (1881,) was not constructive notice to a proposed purchaser of the Morrison record title that Roussain had any interest in the land. The books in the county auditor's office are not kept for a record of titles to real estate, and no one examining titles, or proposing to purchase, is required or expected to examine them to ascertain who is the owner, nor who has paid the taxes, nor for any purpose except that of which they are evidence, to wit, that there are or are not at the time taxes due on the land.

Norton and Patten having testified—and that evidence was proper—that they had no actual notice that at the time of their pur-

chase any one but Johnson made any claim to the land, and the court having so found, there being no evidence to the contrary on that point, the plaintiffs' case must rest on constructive notice to those purchasers; and the question of constructive notice is brought down to the one whether the plaintiffs were in possession, so that the law made it the duty of purchasers from Johnson to know of such possession, and, in the exercise of good faith, to inquire as to the right under which such possession was had.

But before taking up the question of possession we will refer to a claim of appellants, that the consideration stated in the deed from Morrison to Johnson was suggestive of some defects in the former's title, so as to make it the duty of the purchasers from Johnson to inquire beyond what the record showed as to the title of the former. The purchase by Norton and Patten followed so closely in time upon the conveyance by Morrison to Johnson that it may be assumed they knew the value of the land at the time of that conveyance; and, if the consideration were so grossly disproportionate to the value as to suggest that the inadequacy of consideration was because there was something wrong with the title, good faith might have required of the purchasers from Johnson to inquire what, if any, were the defects in Morrison's title. But the court below found, in effect, that the consideration was not disproportionate to their value, and that finding is justified by the evidence. And, as to the evidence of value, the opinion of a geological expert, not published or known so as to enter into people's estimate of value, that there was brownstone under the surface, could not be supposed to affect the market or selling value of the land, and the court below properly excluded such an opinion.

On the question of good faith on the part of Norton and Patten, it is of no consequence that prior to making their purchase they did not go to the land, unless by going they could have ascertained that some one was in possession. To charge a purchaser with notice of the rights of others than his grantor by the mere fact of possession, the possession must be a present one. A former possession, which has ceased, will not suffice, although there be evidence of its having existed still apparent on the land. The question in such case is not what was the condition as to possession, or the indication of possession, years before, but what was such condition and indication at the time of the purchase or during the negotiations ending in it. In this case there was no one resident on the land. Nor is that necessary where, in lieu thereof, the party claiming an interest in the land is exercising acts of dominion over it, such as leaves on the land indications of not mere casual entries, but a continued claim of right to it. The facts found by the court below as to the possession—and

the evidence sustains the findings—are stated as follows: “(22) That here then were grouped together upon a small patch of said land, near the southeast corner thereof, about thirty graves, some of which were very old, and others less so, and some of said graves were provided with gravestones, with inscriptions on them indicating that some of the persons buried there had borne the name of Roussain, and others the name of Durfee, and most of them other names, and one of them indicated that the body of said Francois Roussain, Sr., had been, as it was, buried there. Said patch of land was unfenced, but some of said graves were separately inclosed. (23) Said land then had the general appearance of having been once partially improved, (as it had been by said Francois Roussain at or about the dates of said patents,) and then permanently abandoned a great many years anterior to A. D. 1887. There was then an old clearing in the timber on said land, of about four acres in extent, through which clearing extended an old, unfenced, and abandoned road, which in former days had been the road from said village of Fond du Lac to Thomson. Said clearing was then largely grown up with brush, and here and there between the clumps of brush was sod, on which grew tame grass. Near the south side of said old road, within said clearing, there were the remains of a few fruit trees, the bodies of which were dead and broken down, with sprouts from the roots; and, about the spot where these trees were, there then were the remains of what once had been a pole fence, which then was rotten and broken down. Said graves were not within said clearing, but near the side of said road, and a little east of said clearing, in an opening in said timber near the southeasterly corner of said land. There was not then, and had not been for more than twenty years, any building on said land; but there was once a house thereon, which had been burned,—just when, did not appear in the evidence. Said land was then uninclosed, and there was nothing to indicate that it ever had been fenced in any manner, and in point of fact it never had been fenced or inclosed in any way. Said land was located in what had been a heavily-timbered region, covered with dense undergrowth.” In this recital of facts everything indicates that there was no present possession, no continued exercise of acts of dominion over the land,—such, for instance, as annual cultivation, or a use of it for a wood lot, or any such purpose. In considering the question of continuing exercise of dominion indicating a present claim, the mind could pause on none of these facts, unless those relating to the presence of the graves. That one may make a continued assertion of right to a tract of land, so as to put a purchaser from another upon inquiry as to his right, by devoting a part of it to, and maintaining it as, a private

burial ground for his family, relatives, and friends, must be conceded. It is true the dead are incapable of possessing the land. It is the act of the living in burying their dead on the land which constitutes exercise of dominion over, and the assertion of claim of right to, it. But according to the fact, as found, these graves did not present the appearance of the spot being maintained as a private or family burial ground by any person, so as to indicate the exercise of exclusive dominion over the land by any one. On the contrary, the number of the graves, the gravestones,—some bearing the name of Roussain, others of Durfee, and most of them other names,—suggest only that this secluded spot in the wilderness was used for burying their dead, generally and in common, by the people of the sparsely-settled neighborhood. The conclusion from the number of, and names over, the graves, that it was a common, and not an exclusive or private, burial ground, would be strengthened by the neglected and abandoned appearance of the entire tract; that the spot was not inclosed, and, so far as found, or the evidence shows, was not cared for by any one. It is impossible to hold that under the circumstances the presence and appearance of those graves was notice of plaintiffs’ right to a purchaser of the record title.

Of the claim that the Roussain possession ripened into title by adverse possession, as against the apparent record title, while we do not see how such a title could deprive a purchaser of such record title, without notice of the title by adverse possession, of the protection afforded by the registry laws, it is enough to say that the facts as to the character and time of possession by Roussain and the plaintiff do not show title by adverse possession.

It would be both tedious and unprofitable to allude in detail to the many assignments of error. All that deserve attention are, in general terms, covered by this opinion.

Order and judgment affirmed.

BAKER et al. v. JAMISON.

(Supreme Court of Minnesota. June 28, 1893.)

SELECTION OF SCHOOL LANDS — LEASES OF MINERAL LANDS — PRIORITY — TRUSTS — PARTIES — FLEADINGS.

1. The state, by merely selecting lands of the United States to supply deficiencies of school lands arising from pre-emption, does not acquire a title to such lands,—not, at least, until such selection is approved by the secretary of the interior; and perhaps not until the lands are certified to the state does the latter acquire title.

2. Chapter 22, Laws 1889, authorizing leases of mineral lands by the state, is applicable only to lands “belonging to the state.” It is not applicable to lands which have been merely selected by the state. Hence applications for leases filed with the state land commissioner prior to the approval of the selection are premature, and of no legal effect, even though recognized as valid by the commissioner.

3. But if, after the state acquires such

lands, the applicant directs the attention of the commissioner to the premature application on file, and the officer then recognizes it as a valid application, it then becomes such.

4. Priority of application gives no superior right as between several applicants; but an unauthorized preference by the land commissioner of one of two applicants in the granting of a lease, without affording opportunity for competitive bidding by them, does not justify an adjudication charging the applicant to whom the lease is granted as a trustee of the same for the disappointed applicant.

5. Nor can such lease be set aside at the suit of the disappointed applicant, the state not being a party to the action.

6. If the commissioner should be guilty of official misconduct by being a party in interest in the favored application, so as to avoid the application, a lease granted thereon might be adjudged to be held in trust for the other applicant.

7. Complaint considered as not showing that the commissioner was interested in the applications filed by the defendant.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Ensign, Judge.

Action by James H. Baker and others against Robert Jamison to determine the priority of certain leases of public lands. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Young & Lightner, for appellants. Penney & Jamison, for respondent.

DICKINSON, J. This is an appeal by the plaintiffs from an order sustaining a demurrer to the complaint. The plaintiffs claim to have acquired a right to leases from the state of certain mineral lands, in accordance with the provisions of chapter 22 of the General Laws of 1889. Leases having been executed to the defendant, Jamison, the plaintiffs seek by this action an adjudication to the effect that their right to such leases was superior to that of the defendant; that they are in equity entitled to the same; that the defendant be adjudged to hold the leases in trust for the plaintiffs; that a transfer of the same to the plaintiffs be adjudged, or, alternatively, that the leases be canceled, and that the right of the parties to acquire leases be determined by competitive bidding therefor under the statute as it was construed in *Whiteman v. Severance*, 46 Minn. 495, 49 N. W. Rep. 255. The sufficiency of the complaint, as setting forth a cause of action, is to be decided.

The lands in controversy are a part of the indemnity school lands granted by the United States in lieu of deficiencies in the school land sections, (16 and 36.) It is claimed that the state selected these lands, and filed a list thereof in the United States land office in January, 1888, but it appears from the complaint that not until March, 1891, was this selection approved and certified by the secretary of the interior. This certified list of lands was transmitted from the general land office to the governor of the state in April, 1891. It was received by the governor as early as April 21st, and on the 24th

of April delivered to the commissioner of the state land office. It is averred in the complaint that, upon the passage of the act of 1889 (chapter 22) relating to the leasing of mineral lands, the state auditor made a rule that in awarding leases under that law if there should be more than one application for a lease of any parcel of land, the lease should be awarded to the person making the first application, and who should in other respects comply with the requirements of that act. While this rule was in force, but before the approval and certification of the lands by the department of the interior, and, as it seems, as early as March, 1890, the plaintiffs presented to W. W. Braden, then commissioner of the state land office, applications in proper form for mineral leases of the lands in question. Such applications were by the commissioner accepted and filed in his office as proper and sufficient applications under the statute, the commissioner determining and certifying that the plaintiffs were entitled to leases when the lands should be conveyed to the state; but, for the reason that the lands had not been patented to the state by the United States, the commissioner refused to give orders, as prescribed by the law, for the payment to the state treasurer of the money required to be paid before leases are to be granted, and, because such order was not given, the state treasurer refused to receive the money, although the plaintiffs tendered payment. The plaintiffs' applications were the only ones that were made for leases of these lands, excepting those of the defendant, Jamison. The certified list of these lands, transmitted to the governor as above stated, was delivered to the state land commissioner, A. Bierman, (who had succeeded Mr. Braden in that office,) in the afternoon of April 24, 1891. Thereafter, and on the same day, the applications of the defendant, Jamison, for leases of these lands were filed, upon which applications leases were some days subsequently executed to him, by direction of the commissioner. On the morning of the 25th day of April, 1891, as soon as the plaintiffs learned of the approved and certified list of lands having been received in the state land office, they applied to the then commissioner for leases upon the applications previously filed by them, and of which, as well as of the action of the former commissioner thereon, Mr. Bierman had long before been fully informed. The plaintiffs then called the attention of the commissioner to their applications on file, to the action of the former commissioner thereon, and to the rule adopted by him in respect to applications of this nature. They also on that day paid the requisite sums of money to the state treasurer. The commissioner then recognized the plaintiffs' rights by reason of such applications, and determined that they were entitled to leases, which he directed to be prepared. The complaint further

sets forth that, after the filing of the plaintiffs' original applications, the defendant, Jamison, and others entered into an agreement and combination for the purpose of acquiring leases of the same lands, knowing the facts before stated relative to the prior filing and acceptance of the plaintiffs' applications, and that the commissioner, Mr. Bierman, "became a member of such combination," and was such when the leases were issued to Jamison. It is alleged that the members of the combination, for the accomplishment of such purposes, and to defeat the plaintiffs, contrived to have the certified list withheld from delivery to the commissioner, and its receipt by the governor kept secret, until the formal applications of the defendant had been prepared ready for filing, and that the leases to the defendant were executed by the commissioner in fulfillment of such agreement, and to carry out the purposes of the combination.

We are referred to the following laws of congress as being the laws under which the state acquired the lands, and which regulated the manner of such acquisition: (1) The act of February 26, 1857, authorizing the formation of a state government, (Gen. St. 1878, p. 16, § 5, subd. 1.); (2) resolution of congress of March 3, 1857, (11 Stat. 254); (3) act of May 20, 1826, (4 Stat. 179); (4) act of February 26, 1859, (11 Stat. 385; sections 2275, 2276, Rev. St. U. S.); and (5) act of August 3, 1857, (Rev. St. § 2449.) But we find it unnecessary to consider the nature of the rights which the state may have acquired under the statutes above cited by its mere selection. It certainly did not acquire any title thereby. It seems to be conceded on the part of the appellants, and it cannot well be questioned, that any selection made by the state would be ineffectual to transfer the title from the United States to the state, at least until such selection should be approved by the secretary of the interior. Until then, at least, if not until the certification of such lands to the state pursuant to the provisions of section 2449 of the Revised Statutes, the lands selected by the state were not subject to the operation of chapter 22 of our statute of 1889. That law we deem to be applicable only to lands "belonging to the state." This language, both in the body of the law (section 1) and in the title, indicates this as being the proper and most natural construction, if, indeed, there is any room for construction. Besides, it is hardly to be supposed that the legislature could have intended to authorize leases of, and the prosecution of mining operations on, lands of the United States of which it might never secure the title. Only under the act of 1889 can any rights have been acquired in these lands. Only by force of this statute was the land commissioner authorized to make leases, and the conditions under which he might do so are prescribed by that

statute. As the act is applicable only to lands belonging to the state, and as these lands did not in any sense belong to the state when the plaintiffs filed their applications, prior even to the approval of the selections by the secretary of the interior, such filing was not authorized by the law or within its contemplation, and the plaintiffs acquired no rights or advantage thereby. It was of no legal effect. *Flinney v. Berger*, 50 Cal. 248; *Lansdale v. Daniels*, 100 U. S. 113. Nor did the action of the former commissioner, Mr. Braden, give effect or validity to such applications. Being thus unauthorized and ineffectual, such applications did not acquire validity and become effectual, of themselves and without further proceedings, upon the filing of the selected lists of lands, approved and certified, in the office of the state land commissioner. *Lansdale v. Daniels*, supra. But when, after the filing of such lists, the plaintiffs directed the attention of the commissioner to their applications then on file, and when the latter accepted and recognized them as proper applications, we think that the purposes of the law were accomplished. The purpose of the requirement as to making formal applications was to inform the land commissioner, in order that he might properly discharge his duties in respect to the making of leases and contracts. As between several applicants, priority of filing would give no advantage. *Whiteman v. Severance*, 46 Minn. 495, 49 N. W. Rep. 255. Hence it was not important that the filings indorsed on the several applications should show when, or in what order, the applications were presented. It was not essential that the applications should show by indorsed dates of filing, or otherwise, when they were presented at the office, although such filings doubtless ought to be made for purposes of authentication and proof, and as the orderly course of proceeding. Therefore the plaintiffs' applications on file gave them the rights of applicants when the commissioner, Bierman, accepted and treated them as valid, the parties then having the right to file applications. If the applications had been withdrawn from the hands of the commissioner, as they might have been, and immediately returned to him as renewed applications, they would have been valid. But that empty formality was not necessary. Our conclusion on this branch of the case, as presented in the complaint, is that the plaintiffs' applications became effectual before the leases were made to the defendant, and the question as to which of the applicants should be preferred ought to have been determined by competitive bidding between them, as was decided in *Whiteman v. Severance*. But, as was also decided in that case, the unauthorized preference of one of the applicants, the other not being afforded an opportunity to bid

for the preference, would not justify an adjudication charging the former as trustee for the latter. Nor do the facts that the plaintiffs were not afforded an opportunity to bid in competition with the defendant, and that leases were erroneously awarded to the latter, afford a sufficient ground for setting them aside, so as to permit the parties to enter into competitive bidding for leases. The state is one of the two parties to the leases which have been made to the defendant, and, the state not being a party to this action, the leases cannot be judicially annulled.

Under the decision in *Whiteman v. Severance*, to which we adhere, the plaintiffs cannot prevail upon the facts stated in the complaint, unless the complaint alleges such corrupt misconduct on the part of the state land commissioner, so connected with the applications filed in the name of the defendant, that such applications should be declared to have been void. It may well be assumed that if these applications were void,—of no legal effect,—so that the plaintiffs' applications were to be regarded as having been the only legally effectual filings, the plaintiffs would have been entitled to leases, and that in such a case the defendant might be adjudged to hold the leases made to him in trust for the plaintiffs. But we are of the opinion that the complaint does not show such conduct on the part of the commissioner as would render void the defendant's applications. It is probably true that if the commissioner was a party in interest with the defendant in the applications filed in the name of the latter, it being agreed that the officer was to share in the benefits to be derived therefrom, considerations of public policy would forbid that legal validity should be ascribed to the applications. But the complaint does not allege such a state of facts, and the allegations of a pleading are not to be extended by mere inferences of official misconduct. The complaint does not allege that the officer had, or that it was ever agreed or even understood that he was to have, any interest in the leases applied for by the defendant. In construing the pleading it is not to be legally inferred that such was the case from the facts alleged,—that, an agreement and combination having been formed between the defendant and divers other persons for the purpose of acquiring leases of these lands for their joint benefit, the officer "became a member of such combination." Not only is there no averment that the commissioner ever had any personal interest in the transaction, but he is not made a party to the action, which

fact lends support to the conclusion, resting chiefly, however, upon the construction of the complaint itself, that the plaintiffs did not intend to rest their case on the fact that the officer was himself a party in interest in the transaction. A distinction is to be observed between a case where the officer has himself an interest in an application concerning which he is to act officially,—which might of itself render void the application,—and a case where the officer acts erroneously, or even wrongfully, in furtherance of an application or claim in which he is not thus interested. This complaint seems to fall under the latter class, and, however culpable might be such conduct as is there ascribed to the officer, it did not render void the applications of the defendant. What is alleged as having been done prior to, or at the time of, the filing of these applications, seems to have been directed to the end of enabling the defendant to be the first to file applications after the approved list of lands should be received from Washington, and filed in the state land office. But that did not prejudice the rights of any others who might desire to apply for leases of the same land, for as we have already said, and heretofore decided, priority of application gave no superior right. Hence, even if the officer did improperly, or even with the wrongful intent of favoring this defendant, contrive to enable him to make the first filing, that did not render that filing or application void. The defendant had an absolute right to make the application, and, whether it was made before or after others should exercise the same right, its legal effect would be the same. As to what was done after the filings had been legally made, for the purpose of favoring and preferring the defendant's claim, it is enough, for the purposes of this decision, to say that it had no retroactive effect, so as to render the applications invalid and void; and, as has been already said, the plaintiffs' right to have it declared that the leases are held in trust for them depends upon the proposition that the plaintiffs were, in legal contemplation, the only applicants. If the state were a party to the action, so that the leases might be judicially avoided, the allegations as to the conduct of the commissioner and of the defendant subsequent to the filing of the applications would have a different bearing, and might be deemed to constitute sufficient ground for setting aside the leases. For the reasons here stated, we are of the opinion that the court ruled correctly, and the order is affirmed.

VANDERBURGH, J., did not sit.

STATE v. MCGAHEY.

(Supreme Court of North Dakota. July 7, 1893.)

CRIMINAL LAW — EXAMINATION OF WITNESSES — NECESSITY OF PRODUCING ALL EYEWITNESSES — REMARKS OF COUNSEL — HARMLESS ERROR—INSTRUCTIONS.

1. It is proper upon the redirect examination of a witness in a criminal case to permit him to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that arise from the matters drawn out on cross-examination, and this rule is not changed because such facts and circumstances may be of such a character as to prejudice the defendant in the minds of the jury.

2. An error of the court in ruling upon the admission of evidence that conclusively appears to have been innoxious, and could have worked no prejudice to the party objecting, is no ground for reversal.

3. Where, in answer to proper questions, a witness volunteers incompetent and irresponsible matter in his answers, and which matter has but an indirect bearing upon the issue upon trial, and is promptly stricken out by the court, in the presence and hearing of the jury, on motion of opposing counsel, such action amounts to a withdrawal of such matter from the jury, and no duty rests upon the court, in the absence of any request thereunto, to further caution the jury, either at that time or in the general charge, to disregard such matter.

4. No duty rests upon the prosecution in a criminal case to produce and swear as witnesses for the state all the eyewitnesses to the transaction, where the testimony of the witnesses called, or some of them, is direct and positive, and apparently covers the entire transaction.

5. The control of the remarks of counsel for the state during a criminal trial is a matter largely in the discretion of the trial court; and where the objectionable remarks are of a general character, and such as would not be likely, under the attending circumstances, to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to strike out such remarks, or caution the jury against them, is not such an abuse of discretion as will constitute error.

6. While a party to an action cannot object to questions asked a witness upon cross-examination, tending to elicit proof that the witness had been guilty of practices that would affect his credit before the jury, yet, where such matters are purely collateral to the issue, the answer of the witness is final, and it is not proper to introduce contradicting evidence.

7. The state has the right, on cross-examination, to show the nature of the relations existing between the witness and the accused, so far as their relations are such as would create a bias on the part of the witness that might reasonably be supposed to affect his testimony, and this rule cannot be changed by the fact that these relations may be such as to prejudice the accused in the minds of the jury.

8. It is not error to refuse an instruction requested that correctly states the law, and is applicable to the case, when the court, in its general charge, has fully and specifically covered the same points.

(Syllabus by the Court.)

Error to district court, Grand Forks county; Charles F. Templeton, Judge.

Arthur McGahey was convicted of shooting at another with intent to kill, and brings error. Affirmed.

v.55N.W.no.9—48

John M. Cochrane, for plaintiff in error.
W. H. Standish, Atty. Gen., and Tracey R. Bangs, State's Atty., for the State.

BARTHOLOMEW, C. J. Arthur McGahey, the plaintiff in error, was convicted in the district court for the county of Grand Forks of the crime of shooting at one Thomas Hill with intent to kill. It is not possible to read the record in this case without becoming strongly impressed with the belief that McGahey had also been guilty of adulterous intercourse with Hill's wife. It is safe to say that all the evidence tending to establish or indicate such adultery was objected to by the able attorney for the plaintiff in error, and the rulings of the court upon these objections are here for review. The elementary principle which would ordinarily render such evidence inadmissible is too familiar to need mention, and the state, admitting the principle, contends that there has been no violation of it in this case. The shooting affray occurred upon one of the thoroughfares of the city of Grand Forks, in daylight. Hill, with his wife, was in a building used as a skating rink, and of which he was the proprietor. McGahey was on the sidewalk, on the opposite side of the street. It is undisputed that McGahey fired three shots from a revolver at or in the direction of Hill, and that Hill fired one shot from a rifle at McGahey. Each party claimed that the other shot first, and on that point the case turned. The shooting occurred about 8 o'clock in the evening on May 24, 1892. Hill, as the principal witness for the state, testified that he was sitting upon a pile of lumber in the rink, talking with his wife; that the door was open, and McGahey came down the other side of the street, and, seeing witness through the door, drew his revolver, and commenced firing; that he (Hill) ran over to an open window, and returned the fire. On cross-examination it developed that, a few hours before, Hill had gone into a store, and procured a repeating rifle, and caused it to be loaded, and, taking it with him, went down into the woods by the brewery, where he had been told he would find his wife and McGahey. He was asked, "How did you come to feel the necessity of having a gun just at this time?" He answered, "I knew if I ran against this man at the place I was going to look for him I might have trouble." From this language, under the circumstances, a strong inference might be drawn that Hill was the aggressor. On redirect examination the question was put, "Why did you think you needed this [the rifle] to protect yourself?" This was objected to as not proper redirect examination. The plain purpose of the question was to enable the witness, by giving antecedent facts and circumstances, to remove the inference left by the cross-examination. This is one of the most important purposes for which a re-

direct examination is allowed. *Schaser v. State*, 36 Wis. 429; *State v. Hopkins*, 50 Vt. 316; *People v. Smallman*, 55 Cal. 185. The fact that the answer to the question called out a narrative of certain matters touching former conduct of plaintiff in error and his relations with Mrs. Hill, that might prejudice him in the eyes of the jury, cannot change the rule of law. Plaintiff in error moved to strike out a certain portion of the answer to the foregoing question as not responsive, and the court made no ruling. This is assigned as error. This failure of the court to make a ruling was probably equivalent to a denial of the request, but there was no prejudicial error. True, the language was not strictly responsive, but it had no element of prejudice in it. The witness stated that plaintiff in error was at one time in the habit of going to his room late at night, changing his clothes, and going out again. This act is entirely consistent with innocence and good character. We would not depart, particularly in a criminal case, from the rule which requires reversal in every case where evidence is improperly admitted, unless it conclusively appears that such error was innoxious,—that it not only might not, but could not, be prejudicial to the party against whom it was offered; but we feel bound to say in this case that such harmless language could not prejudice the minds of jurymen of average intelligence.

The 4th, 5th, 6th, 7th, and 8th assignments of error present in different forms the same question discussed under the 1st, and require no separate discussion. The 9th and 10th assignments are identical in principle. Certain questions were asked the witness Hill on his redirect examination, and objections thereto overruled. After the witness had answered, motions were made to strike out the answers, or parts thereof, as not responsive, and as immaterial. These motions were sustained, but the court, neither at the time nor in the general charge, cautioned the jury to disregard such testimony. The questions were proper, but a willing witness dragged in incompetent and irresponsible matter in his answer, and, although promptly stricken out on motion, it is urged that this was not sufficient to remove the poison that it had instilled in the minds of the jurors; that it was a case where it became the duty of the court, without any special request thereto, to caution the jury to disregard it. It has been held that where counsel, in argument to the jury, stated evidentiary matters of which there was no proof, it was the duty of the court, without request, to instruct the jury to disregard such statement. *Yoe v. People*, 49 Ill. 412. It has also been held that, where incompetent evidence has been admitted upon the statement of counsel that he would subsequently, by other evidence, so connect the incompetent testimony with the case as to remove the objection, and such

subsequent testimony was not produced, it became the duty of the court to expressly withdraw such incompetent testimony from the jury. *Dillin v. People*, 8 Mich. 357. And it has even been held, under such circumstances, that the subsequent withdrawal of such testimony did not cure the error. *Marshall v. State*, 5 Tex. App. 273. And see *Arthur v. Griswold*, 55 N. Y. 400. A full discussion of the subject may be found in *Thomp. Trials*, §§ 715-723. While there is lack of uniformity in the decisions, no case is cited which fairly supports the contention of plaintiff in error in this case. The divergence of authority arises from the inherent difficulty in announcing any rule of universal application. When important testimony, bearing directly upon the issue, is introduced at one stage of the trial, and permitted to remain before the jury, while other testimony is given, forming an integral part of the facts, that find a lodgment in the minds of the jurors, and on which they reach their conclusions, and it subsequently appears that such former testimony was, for any cause, clearly improper, it is no doubt the duty of the court in explicit language to direct the jury to disregard such testimony. And the mind can readily suggest cases in which, by reason of the equipolse of the other evidence in the case, and the magnitude of the issues at stake, no words of the judge could certainly be relied upon to enable the jurors to entirely emancipate themselves from the effects of the vicious testimony. "It had poisoned their minds, and its effects could not be erased from their memories." But to hold that where an over-willing witness, in answer to a proper question, volunteered immaterial and irresponsible matter in his answer, such error could not be cured by immediately withdrawing such improper matter from the jury, would open the door for a reversal of a large percentage of criminal cases, and for no material reason, and for no error of the prosecution or the court. But it is claimed this matter was not taken from the jury. We think it was, in effect. As soon as the improper testimony left the mouth of the witness, counsel moved that it be stricken out, and the court, in the presence and hearing of the jury, so ordered. No intelligent juror misconceived the situation. In a case of this kind, (and we need go no further,) where, at most, the evidence had but an indirect and inferential bearing upon the case, the court had no further duty pertaining to the matter. It was but an incident, and by no means an important incident, in the trial. Before the general charge was reached, it had naturally passed from the mind of the court. If counsel desired a specific instruction on the point, he should have requested it. Doubtless, in the abundance of protection that courts properly throw around persons accused of crime, such a request would have been given. We do not say that a re-

fusal to give it would have been error, but we do say that no error can be predicated upon the failure of the court to give such specific instruction without request.

The testimony of the state developed the fact that Mrs. Hill was present at the rink when the shooting occurred, and might have been an eyewitness of the affray, or at least a portion of it. When the state rested, the plaintiff in error requested the prosecuting attorney to produce Mrs. Hill, and have her sworn as a witness for the state. This the prosecutor declined to do, whereupon counsel for plaintiff in error moved the court to order that Mrs. Hill be so produced and sworn. The motion was denied, and this ruling is assigned for error. It is proper to state that besides the witness Hill not less than six other persons had been sworn for the prosecution, all of whom based their testimony upon the sense of sight or hearing, or both, and the testimony thus produced covered all parts of the transaction. Under this assignment of error it is urged that it was the duty of the prosecutor to produce and swear all persons who were shown by the evidence to have been present at the time of the affray, and whose testimony could throw any light upon the subject that would in any degree aid the jury in ascertaining the facts. The rule thus invoked was early established in England. In *Reg. v. Holden*, 8 Car. & P. 606, Paterson, J., said: "Every witness who was present at a transaction of this sort ought to be called, and, even if they gave different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusions as to the truth of the matter." This was a homicide case. And see *Reg. v. Chapman*, Id. 559; *Reg. v. Bull*, 9 Car. & P. 22; *Rosc. Crim. Ev.* 128. While this rule was established in that country at a time when the right of persons accused of crime to be represented by counsel was denied, or greatly abridged, and hence the rule found greater support in justice and necessity than at present, yet we are not aware that it has ever been abrogated. The state of Michigan seems to have adopted this rule in its entirety. It is true that the cases in that state which first discussed the question (*Maher v. People*, 10 Mich. 212; *Hurd v. People*, 25 Mich. 405; *Wellar v. People*, 30 Mich. 16; and *Thomas v. People*, 30 Mich. 309) announced the modified rule hereinafter stated, but the latest and strongest utterance of that very able court on the subject is found in *People v. Deitz*, 86 Mich. 419, 49 N. W. Rep. 296. This was a case of assault with intent to do great bodily harm. There were four persons engaged in the affray,—two on each side. The prosecutor called the two on one side, and the testimony covered the entire transaction. The court refused to require the prosecution to swear the other party to the affray, not on trial, and who was present in court, and

also refused to require the prosecution to produce and swear three ladies who witnessed the difficulty from the porch of a house 35 rods distant, and who were sworn on the preliminary examination. The case was reversed, and the court said: "We think the better rule is that it is incumbent upon the prosecutor not only to have the witnesses present in court, but to have them sworn in behalf of the people, and he may then examine them much or little, as he chooses. It affords the defense an opportunity to cross-examine without prejudicing their case by the bias of the witness, if he should have any." And see *People v. Gordon*, 40 Mich. 716; *People v. Etter*, 81 Mich. 570, 45 N. W. Rep. 1109. But see, also, comments of Cooley, C. J., in *Bonker v. People*, 37 Mich. 4. We do not think *State v. Magoon*, 50 Vt. 338, cited by counsel, sustains his position; and *Donaldson v. Com.*, 95 Pa. St. 21, also cited, is not an authority. The case was rape, and was reversed upon another ground, but the court said: "We cannot forbear, however, remarking that, in our opinion, the physician who, the day after the occurrence, examined the person of the girl upon whom the offense was alleged to have been committed, should have been called as a witness, and required to testify by the district attorney. Whether his evidence tended to acquit or convict, it was demanded equally by the cause of humanity on the one side and of justice on the other. We say this more especially because there was no direct evidence of the factum of the crime, and no proof of actual penetration, the prosecutrix having testified that she was insensible, and had no knowledge of what took place. We do not reverse for this reason, and do not sustain the fifth assignment of error, which raises the question, but merely express our opinion as to what should have been done in the peculiar circumstances of this case." In the case in 10 Mich., Judge Christy said: "Whenever it appears evident to the court that but part of the facts, or a single fact, has been designedly selected by the prosecution from the series constituting the *res gestae*, or entire transaction, and that the evidence of the others is within the power of the prosecutor, it would, I think, be the duty of the court to require the prosecutor to show the transaction as a whole." And in *Hurd v. People*, supra, the same learned judge, again speaking for the court, said: "But the prosecution can never in a criminal case properly claim a conviction upon evidence which expressly or by implication shows but part of the *res gestae* or whole transaction, if it appear that evidence of the rest of the transaction is obtainable. This would be to deprive the defendant of the benefit of the presumption of innocence, and throw upon him the burden of proving his innocence." In *Territory v. Hanna*, 5 Mont. 248, 5 Pac. Rep. 252, it is said: "The authorities are clear and conclu-

sive upon the proposition that the prosecution cannot select out part of a transaction, and ask a conviction thereon, when testimony showing the whole thereof is within its reach." *Thompson v. State*, 30 Tex. App. 325, 17 S. W. Rep. 448, was a homicide case, where the shooting was admitted, and self-defense relied upon, by defendant. It was admitted that there were four eyewitnesses to the shooting, all of whom had been subpoenaed by the state, and were present in the court room. The state introduced only circumstantial evidence and the testimony of experts, and the court refused to require the prosecutor to introduce any of the eyewitnesses. This was held error, on the broad ground that the evidence introduced was not the best evidence of which the case was susceptible, and revealed the existence of more original sources of information, as stated in 1 Greenl. Ev. § 82. The modified rule applied in these cases commends itself so instantaneously to the judicial mind that it would probably be accepted by any court in the land. But the facts and circumstances of this case leave it clearly outside the influence of this rule. Here not less than seven witnesses had testified directly to facts as they saw them and heard them. There had been no particular facts selected out by design or otherwise. The entire transaction had been sifted in all its details. There is not even a suggestion of concealment in the evidence. Nor is it suggested that Mrs. Hill was in better condition to know the facts than any one of several witnesses whom the state called. The most that can be claimed is that Mrs. Hill, testifying upon the same matters, and with the same means of knowledge, might have contradicted the testimony of the other witnesses. Under such circumstances, no duty rested upon the state to call her. The law is ever more zealous to protect innocence than to punish crime. Persons accused of crime have the full and free use of the process of the court to compel the attendance of witnesses. They are always represented by counsel, chosen either by themselves or by the court. They can be convicted only upon evidence that the jury regards as practically conclusive, and so juries are always instructed. We regard it as clearly unsafe to go further, and require the prosecution, after it has fairly and in good faith given the entire *res gestae* to the jury, to call every witness to the transaction, howsoever bitterly hostile such witness may be to the prosecution, or howsoever powerful his motives may be to screen the defendant. To place such a witness in the hands of astute counsel for cross-examination would be to confound justice, and establish a rule that innocence never requires for its protection. This assignment of error cannot be sustained on this ground. *State v. Middleham*, 62 Iowa, 150, 17 N. W. Rep. 446; *State v. Eaton*, 75 Mo. 586; *State v. Johnson*, 76 Mo. 121; *State v. Martin*, 2 Ired.

101; *State v. Smallwood*, 75 N. C. 106; *State v. Cain*, 20 W. Va. 679; *Com. v. Haskell*, 140 Mass. 123, 2 N. E. Rep. 773.

When counsel for the plaintiff in error asked the court to compel the prosecution to produce and swear Mrs. Hill, the prosecuting attorney, in opposing such request, and in the presence and hearing of the jury, used the following language: "Information comes to me that the witness whose presence is requested as a witness for the state has been known to be conniving and going with the defendant in endeavoring to secure testimony in any way that it can be secured as against the state, in favor of the defense, and for that reason the state declines to produce her or to swear her here as a witness for the state." Counsel for plaintiff in error immediately moved to strike out this statement as an improper statement to be made before the jury. There was no ruling on the point, and this absence of action by the court is assigned as error. Regarding the failure to rule as equivalent to denying the motion, it follows that, if the statement was improper, the point made must be sustained. The diligence of learned counsel has been rewarded with the citation of numerous cases upon this question. The citations are all of comparative recent date, as the question is one of the refinements of the law that has but recently developed into its present proportions. That the rules announced in these cases are in the interests of fairness and justice, and that they should be implicitly enforced in all proper instances, cannot for a moment be doubted; but they should not be indiscriminately extended. Counsel must have some latitude and some discretion. In the heat of nisi prius trials, where questions are raised that must be instantly met, counsel cannot be expected to weigh with nicety and precision the effect of their words. This matter must, of necessity, rest largely in the discretion of the court, and abuse of that discretion is not to be rashly presumed. We are in full accord with the language of the learned supreme court of the state of Indiana, that, "when the statement is a general one, and of a character not likely to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal." *Combs v. State*, 75 Ind. 215. And more emphatically would this be true where, as in this case, the remarks were addressed to the court, and were entirely pertinent and proper for the court to hear; and, while in the presence of the jury, yet in no sense directed to them, or intended to influence them. No case cited by counsel would warrant us in sustaining his point. The cases will be found to fall almost without exception into one of three classes. By far the largest class are cases where counsel have violated some express statutory provision, such as referring in ar-

gument to the jury to the fact that a defendant in a criminal case failed to be sworn as a witness, or by referring on a second trial to the fact of a former conviction. In these cases a reversal is, of course, imperative. In other cases counsel have stated to the jury, as facts in counsel's own knowledge, matters prejudicial to the defendant, but immaterial to the issue on trial, and which could not be properly given in evidence; or have sought to augment the force of the evidence by their own positive but unsworn assertion of a pertinent and material matter. Another class of cases comprise the instances where counsel, in argument, have assumed certain facts to be proven, of which there was no evidence whatever. In all the cases it will be found that the objectionable language was gratuitous. In this instance, under the condition of the authorities heretofore cited, the prosecuting attorney was entirely warranted in believing that, when opposing counsel demanded that he produce and swear as a witness for the state a party who was present at the transaction, it was imperatively necessary for him to render to the court a good and sufficient reason for not so doing. This he did in a manner by no means extravagant, and what he said could only indirectly affect the accused by impairing the credit of a witness whom he subsequently called. But we do not think its effect even went to that extent. The prosecutor was careful to state nothing as a fact. He did not give to the statement the weight of his own assertion of its truthfulness. He simply said that information had come to him of a certain character. This information was such that it would be dangerous for him to call the party, unless he knew the information to be false. We do not think the language used, in the manner, under the circumstances, and for the purpose stated, was at all "likely to prejudice the cause of the accused in the minds of honest men of fair intelligence," and hence there was no abuse of judicial discretion in refusing to strike it out, or caution the jury against it.

The defendant below called one Susie Thompson as a witness, and, after showing her age to be 16, sought to prove by her that she had been seduced by the complaining witness, Hill, and that he was the father of her bastard child. After a number of questions in this line had been ruled out on objection by the state, counsel for plaintiff in error made a formal offer to prove that said Hill had seduced this witness, and was the father of her child, and that he had seduced another young girl, and had an abortion produced upon her; that he had admitted these facts to various parties, and, among others, to McGahey; and that McGahey told Hill "that if he didn't desist from such practices he would make a complaint to the officers, and procure his arrest." The offer was rejected by the court. Counsel then insisted, and now insists in this court,

that such evidence was proper for the purpose of impeaching Hill, and also for the purpose of showing threats by McGahey against Hill, and thus, as bearing upon the question as to who was the aggressor, furnish a motive on the part of Hill for putting McGahey out of the way. These positions are entirely untenable, and need but brief mention. Hill had been asked on cross-examination as to all of these alleged criminal practices, and had denied them. It was proper to ask him these questions on cross-examination, as affecting his credibility; but his answers were final. The court could not go into an investigation of the truth of these purely collateral matters, and thus virtually place Hill upon trial, instead of McGahey. This is elementary. 1 Greenl. Ev. § 449, and cases cited.

Nor need we enter into a discussion of the law as to threats, communicated or uncommunicated. The question does not properly arise. McGahey did not threaten Hill with prosecution for anything that he had done. The threat was that, "if he did not desist from such practices, he [McGahey] would make complaint," etc. But there was no intimation in the offer of proof that Hill had been guilty of any such practices since McGahey's warning. There was no claim that the condition, upon which alone the threat was based, existed. The offer showed nothing that could raise in Hill's mind the least apprehension of danger from McGahey.

Mrs. Hill was sworn as a witness for plaintiff in error. On cross-examination the state's attorney, over the objection of the opposing counsel, was permitted to interrogate her at length as to her relations to and criminal intercourse with McGahey. This is urged as error. The able counsel does not contend that it was improper to ask the witness on cross-examination as to her criminal relations with men generally as affecting her credit, but urges that such object could be equally well attained without specifically naming McGahey, and that the necessary effect of so naming him must have been to prejudice the jury against him. Admitting counsel's conclusion, we are still of opinion that the line of cross-examination was proper. The state has the right to show the relations existing between the witness and the party at whose instance, and presumably in whose interest, she was testifying. It had the right to expose to the jury every motive and desire of the witness that might naturally and reasonably be supposed to produce that bias that would affect the character of her testimony. 1 Greenl. Ev. 450, note; Cameron v. Montgomery, 13 Serg. & R. 128; Batdorff v. Bank, 61 Pa. St. 179; State v. Bacon, 13 Or. 143, 9 Pac. Rep. 393.

Some errors pertaining to the charge of the court are argued in the brief of the counsel for plaintiff in error, but an examination of the abstract, amended as stipulated at the oral argument, shows that no exceptions to

the action of the court in this matter were saved except in one instance, and that pertains to the refusal of the court to give an instruction requested relative to the law of self-defense. We see no objection to the instruction asked, and it was applicable to the case, but its refusal was not error. It is true that a general charge will not always cure the error in rejecting a specific instruction. Elliott, App. Proc. § 706, and cases cited in note. But in this case the charge of the court covered every point in the instruction refused as specifically and as favorably to plaintiff in error as did the rejected instruction; hence its rejection was not error. Thomp. Trials, § 2352, and cases cited in note. We have noticed all the points argued, and, finding no error in the record, the judgment of the trial court must be affirmed. All concur.

BRANSTETTER v. MORGAN.

(Supreme Court of North Dakota. May 31, 1893.)

CLAIM AND DELIVERY—EXAMINATION OF WITNESSES—EVIDENCE.

1. A plaintiff may properly introduce evidence to refute an inference or presumption of fact that might arise from matters drawn from himself on cross-examination, even though such evidence has no direct bearing upon the issues, and the time of the introduction of such evidence is peculiarly within the discretion of the trial court.

2. In claim and delivery, where each party claims the right of possession by virtue of absolute ownership, and in no other manner, a verdict which finds the plaintiff entitled to the possession of the property, and fixes its value, will support a judgment for plaintiff for possession of the property, or its value as found by the jury.

(Syllabus by the Court.)

Appeal from district court, Barnes county; Roderick Rose, Judge.

Action by Henry C. Branstetter against William H. Morgan for the recovery of six horses. Plaintiff had judgment, and defendant appeals. Affirmed.

M. A. Hildreth, for appellant. G. K. Andrus, for respondent.

BARTHOLOMEW, C. J. The judgment in favor of the plaintiff in this case must be affirmed. There was practically no defense to the action. The case was claim and delivery for six horses. Both parties claimed by absolute ownership. Plaintiff's evidence showed that he raised the horses on his ranch in Umatilla county, Or.; that they were branded when young colts with a Y brand on the left shoulder; that these horses, with 25 or 30 more, were stolen from his ranch about August 5, 1891, and that they were shipped east over the Northern Pacific Railroad by a party by the name of C. McCullom. Plaintiff positively identified the horses, both by the brand and by

general appearance. The branding iron with which these horses were branded, and which plaintiff swore he had used for more than 12 years, was put in evidence, over defendant's objection. It might have been of assistance in identifying the horses, and was thus material. Plaintiff's neighbors who had assisted him in branding swore positively to the branding iron, and to plaintiff's loss of horses, but these witnesses were not permitted to see the horses in controversy, they being still in defendant's possession. Defendant's claim of title rested exclusively upon the fact that he purchased the horses in August, 1891, from one Charles McCullom, at Tower City, in this state, and paid full value therefor. This was consistent with and corroborative of plaintiff's evidence. No effort whatever was made by defendant to show that McCullom had any title to the horses. But it was sought on cross-examination of plaintiff to draw out matter on which to base an argument to the jury that plaintiff and McCullom were in collusion, because plaintiff had not taken active measures to apprehend and punish McCullom. In rebuttal of this idea, plaintiff was permitted to introduce, over defendant's objection, a subscription paper signed by 30 citizens of Oregon, and to to which plaintiff was its largest subscriber, which was gotten up to raise funds to capture and convict parties implicated in stealing horses, and which paper stated that "H. C. Branstetter is a heavy loser." Plaintiff was also allowed, over objection, to show, by the district attorney of Barnes county, that he applied to that officer to prosecute said McCullom, and by a justice of the peace that a warrant was issued for said McCullom, and by the deputy sheriff that said warrant was placed in his hands, and he went to New Rockford to arrest said McCullom, but did not find him. This was all proper to rebut the claim that plaintiff was in collusion with McCullom, and was properly admitted. See *State v. McGahey*, 55 N. W. Rep. 753, (decided at this term,) and cases there cited. The order in which the proof was offered might be open to criticism, but that matter is peculiarly in the discretion of the trial court. The verdict finds the plaintiff entitled to the possession of the property, and the value thereof. It is urged that this is entirely insufficient to support the judgment for plaintiff, in that it does not pass upon the question of ownership. Some early Wisconsin cases are cited to support the claim. These cases for the most part were decided when the practice in replevin cases was quasi criminal, and the plea of "not guilty" put in by defendant put in issue every material allegation in the complaint. Ownership, both general and special, was thus put in issue; also the right of possession, as well as the wrongful taking or wrongful detention. It is elementary that the verdict must respond

to all the issues; and this is the same whether the issues are raised by plea of "not guilty" or specifically by answer. But in this case there was, under the pleadings, but the one issue. Each party claimed absolute ownership. Neither claimed any right, except such as flow from and are incident to such ownership. Under the pleadings, ownership necessarily carried with it the right of possession, and the party entitled to possession was necessarily the owner. The verdict settled the only issue in the case, and was sufficient. *Krause v. Cutting*, 32 Wis. 688; *Everit v. Bank*, 13 Wis. 468; *Faulkner v. Meyers*, 6 Neb. 415; *Underwood v. White*, 45 Ill. 438; *Clark v. Heck*, 17 Ind. 281; *Payne v. June*, 92 Ind. 253. Judgment affirmed. All concur.

HURON WATERWORKS CO. v. CITY OF HURON.

(Supreme Court of South Dakota. July 5, 1893.)

INJUNCTION PENDENTE LITE — REVIEWING ORDER FOR.

Where an appeal is from an order granting or continuing a temporary injunction upon a sufficient bond, the only purpose and effect of which injunction is to hold the property involved in statu quo during the pendency of the litigation, and where the title to the property in dispute is in doubt, depending upon many questions of law, and probably of fact, not considered or discussed by counsel on such preliminary appeal, this court will treat the question of title as a doubtful one, and decide only whether, under such circumstances, the temporary injunction was rightly granted.

(Syllabus by the Court.)

On petition for rehearing. Denied.

For former report, see 54 N. W. Rep. 652.

KELLAM, J. This case was before this court, at its last term, upon an appeal from an order of the circuit court granting a temporary injunction, restraining appellant from interfering with the property which was the subject of the action during the pendency of such action. A decision by this court was filed, sustaining the action of the trial court. It is reported in 54 N. W. Rep. 652. Appellant has presented a petition for rehearing on the ground that the decision heretofore filed does not dispose of the question of the title to the property in dispute, and that upon the trial of the main action on its merits that question will necessarily be involved, and that an expression of opinion, on this preliminary appeal, upon the question of title, might be decisive of the action on its merits. This is probably true, but, on the determination of the ultimate question of the rights of the parties in and to this waterworks property, there are a number of constituent questions, whose solution may depend, to some extent, upon evidence that may be offered upon the trial. While we may finally so conclude, we are not now entirely clear that respondent's rights in this waterworks

property depend solely upon the construction of the two express provisions of the city charter referred to on the argument as defining the powers of the city. Certain kinds of property held by a city, it has power to sell; other kinds, it has not. The property involved in this dispute is described in the pleadings as a system of waterworks, constructed by the city of Huron, consisting of land, buildings, wells, reservoirs, pumps, hydrants, etc., used for supplying the city and its inhabitants with water. Are these facts alone all a court needs, or all the parties are entitled to, for the conclusive determination of the character of this property, as alienable or nonalienable by the city? Perhaps so. We only suggest the question. If the trial court is entitled to receive evidence as to the character, object, and use of the property, for the purpose of enabling it to determine whether the city could lawfully sell it, or not, we ought not to forestall or prevent such inquiry by holding, upon this preliminary appeal, that the city had or had not authority to sell it. Besides, there are a number of questions which, without much deliberation, occur to us, as bearing upon the rights of the parties to this contest, which have not yet been suggested by either side, and which will probably be called out on an examination of the merits. Upon reflection we might conclude that these questions are not very pertinent to the case, but we feel very sure that if we had decided the title to this valuable property on this preliminary appeal the defeated party would have at once applied for a rehearing for the purpose of more fully presenting the case upon the merits, and would probably have complained that the main question was prematurely decided. The distinct question presented by the appeal is, did the trial court do right in granting the temporary injunction, holding the property in statu quo during the litigation? We thought it fairer to the court and to the parties to decide the particular question presented by the appeal, leaving the general question of title to be determined upon a trial where the merits will be more fully presented, evidence introduced, if desired, and the discussion more general and satisfactory, because more immediately responsive to the particular questions presented.

Petition for rehearing is denied.

KIRBY v. WESTERN UNION TEL. CO. (Supreme Court of South Dakota. June 28, 1893.)

TELEGRAPH COMPANIES—AGREEMENT RESTRICTING LIABILITY—REFUSAL TO SEND MESSAGE—HARMLESS ERROR.

1. The statute law of this state (sections 3881-3910, Comp. Laws) makes a telegraph company, which offers to the public to carry telegraphic messages, a common carrier of such messages.

2. Such statutory provisions were not superseded nor repealed by section 11, art. 17, of the constitution of the state, imposing upon the

legislature the duty of providing reasonable regulations, by general law, for giving effect to the right of a corporation organized for such purpose to construct and maintain lines of telegraph within the state.

3. While a common carrier may, in general, determine for himself the character and condition of what he will offer to and will carry, he cannot, by offering to carry under a qualified liability, constitute himself a common carrier with such liability only as he advertises to assume.

4. A common carrier is under a legal duty to accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry, subject to the full liability of a common carrier, unless such liability is restricted by a valid agreement between such carrier and his employer.

5. Such agreement, restricting the carrier's liability except as "to the rate of hire, the time, place, and manner of delivery," can only be manifested by the signature of the passenger, consignor, consignee, or person employing such carrier. Section 3888, Comp. Laws.

6. Such modification of the common carrier's liability depends upon, and results from, the agreement of the parties, and the carrier cannot legally exact such agreement as a condition precedent to receiving or carrying the offered freight or message.

7. As a common carrier, a telegraph company cannot legally refuse to accept and transmit an offered message because the person offering will not sign an agreement that such carrier shall not be liable for damages in any case where the claim is not presented, in writing, within 60 days after the message is filed with the company for transmission.

8. While such an agreement, when freely made, is binding, the carrier cannot exact it as a condition precedent to the discharge of his duty as such common carrier.

9. In the afternoon of January 4th, respondent offered appellant, for transmission, a message confessedly unobjectionable, except that it was not written on or attached to one of appellant's message forms. Respondent declined to sign or agree to the stipulations printed on such blank, and for that reason appellant refused to receive or send his message. Respondent then wrote a letter to the party to whom he desired to send the message, but still later, about 7 o'clock in the evening, went to the office of appellant, and sent a message upon one of its blanks, substantially like the one previously refused. *Held*, that appellant's refusal to send the first message constituted a refusal, within the meaning of section 3910, Comp. Laws, and that the sending of the second message was neither a cure of the wrong upon the part of appellant, nor a waiver of it on the part of respondent.

10. Where, upon undisputed facts, no other verdict than the one returned could have been properly rendered, this court will not examine an alleged error in allowing the jury to separate temporarily without being admonished by the trial court not to converse among themselves, or with others, upon the subject of the trial, as it is evident that no prejudice resulted therefrom.

(Syllabus by the Court.)

Appeal from Minnehaha county court; E. Parliaman, Judge.

Action by Joe Kirby against the Western Union Telegraph Company to recover damages for refusal to send a message. Judgment for plaintiff. Defendant appeals. Affirmed.

Bailey & Voorhees, (George H. Fearons, of counsel,) for appellant. Joe Kirby and A. O. Boylan, for respondent.

KELLAM, J. On the 4th day of January, 1892, the respondent offered to the appellant, at its office in the city of Sioux Falls, a written message, confessedly unobjectionable in matter, and requested that it be transmitted in the usual way to the party to whom it was addressed, and then and there offered to pay the usual compensation therefor. The message was written on ordinary white writing paper. The company declined to send the same unless written upon, or attached to, one of its message blanks. This the respondent refused to do unless the stipulations contained in such message blank should be first erased, so that he would not be bound thereby. Under these circumstances the message was refused by the company. Upon these facts, which appear to be undisputed, respondent brought an action against the appellant company to recover actual damages, and \$50 in addition thereto, under section 3910, Comp. Laws. The section reads as follows: "Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto." Upon the trial the respondent proved his actual damages, and had a verdict for 25 cents actual and \$50 statutory damages. Upon this verdict judgment was entered, a new trial refused, and the company appeals.

While other assignments of error, which will be hereafter noticed, were presented and argued, it is evident that the major question is the right of the appellant company to insist upon the message being received and sent subject to the stipulations contained in the message blank, and, if the person offering the message refuse to agree thereto, to decline to receive or transmit the same. If the law sustains the company's right to so insist, or to refuse the message, then, upon the facts in this case, respondent should not have recovered, for it is uncontradicted that the message was refused upon the distinct ground that the respondent positively declined to have it sent subject to the stipulations printed upon the message blank.

By the statute law of this state, (section 3881, Comp. Laws,) "every one who offers to the public to carry persons, property, or messages is a common carrier of whatever he thus offers to carry." That the word "messages," as here used, was intended to include telegraphic messages, is evident from the closely-following sections, wherein a "carrier by telegraph" and a "carrier of messages by telegraph" are expressly named, and their duties as such defined. From the adoption of the Civil Code, in 1872, until the legislative session of 1873-74, the state of California had the same statutory provisions, but at the session named the above-quoted section was amended by inserting an express exception of "telegraph-

ic messages." During the short time such original provision was there in force, we do not find any reported case in which it was considered. Prior to the adoption of such Code provision the supreme court of that state had held in *Parks v. Telegraph Co.*, 13 Cal. 422, that the defendant company, as a general telegraph company, was a common carrier; but the decisions of the courts have been, with great unanimity, against this view, and under the amended statutes it is now so held in California. *Hart v. Telegraph Co.*, 66 Cal. 579, 6 Pac. Rep. 637. Appellant, however, advances the proposition that these provisions of the old Civil Code, being the sections of the Compiled Laws, above cited, which declare telegraph companies to be common carriers, are superseded and repealed by, because inconsistent with, the constitution. This contention is founded largely upon section 11, art. 17, of the constitution: "Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph in this state, and to connect the same with other lines, and the legislature shall by general laws, of uniform operation, provide reasonable regulations to give effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of, any other telegraph company owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph." We think appellant claims too much for this section. It simply declares the right of an association, corporation, or individual to construct and maintain telegraph lines within this state, and to connect them with other lines, and then forbids the consolidation of competing lines. To carry into effect this general right to construct and maintain, and this prohibition against consolidation, the legislature is charged with the duty of providing suitable and reasonable laws and regulations, of uniform operation; regulations by and under which the right to construct and maintain may be used and exercised, and the prohibition of consolidation be enforced. We are not convinced that there is anything in the constitutional section which would forbid the legislature now, if it had never been done before, to impose upon telegraph companies the character and duties of common carriers. But, even if we understood this constitutional section to mean that the legislature should provide reasonable regulations for the conduct of the current business of telegraph companies, we should not think it had the retroactive effect of repealing former legislation, even though assailed as unreasonable. It is a general rule that neither constitutions nor statutes should be so construed as to have a retroactive effect, unless such intention is clearly expressed. *Cutting v. Taylor*, (S. D.) 51 N. W. Rep. 949; *Coo-*

ley, *Const. Lim.* pp. 62, 63; *Suth. St. Const.* §§ 463, 464; *Allbyer v. State*, 10 Ohio St. 589; *People v. Gardner*, 59 Barb. 198; *Ex parte Burke*, 59 Cal. 6. Although peculiar to our state, and the statute itself an exceptional one, I think we must recognize its effect to be to make, in this jurisdiction, a telegraph company "a common carrier of whatever it thus offers to carry," and its duty to receive and transmit respondent's message must be tested by its rights and duties as a common carrier. An individual or corporation becomes a common carrier of just what it offers to carry. Its duty to the public springs from its offer to the public, and must be measured by it; so that the carrier who only offers to carry grain in canvas sacks cannot be required to carry grain in bulk. But while the carrier may thus, in general, determine for himself the character and condition of what he will carry, he cannot, by offering to carry for the public under a qualified liability, constitute himself a common carrier with such a liability, only, as he advertises to assume. As a common carrier it was appellant's legal duty, if able to do so, to accept and transmit respondent's message, if offered at a reasonable time and place, and if it was of a kind that it undertook or was accustomed to carry. Section 3882, *Comp. Laws*. The ability of appellant to receive and transmit the message; that it was offered at a reasonable time and place; and that the message itself, except as to the paper on which it was written, was of a kind that it was accustomed to carry, are not disputed.

The dominant question in this case, upon the merits, being whether the stipulations upon the message blank, or any of them, so far restricted appellant's liability as a common carrier as to justify respondent's refusal to consent to them, as a condition of having his message accepted and sent by appellant, we have thought it just to both parties to examine them severally, expressing our opinion upon each, so far as they are involved by the facts in this case. It is not claimed that either of the regulations or stipulations printed upon the message blank, and which respondent was required to assent to, offended against the rule of impartiality, which appellant, as a common carrier, was bound to observe. Respondent, however, strenuously insists that the stipulation on the printed blank would, if assented to by him, have the effect of relieving the company from a liability imposed upon it by law, as a common carrier, and consequently he ought not to be compelled to agree to it, as a condition of having his message sent.

The first matter objected to is as follows: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the original office for comparison. For this, one-

half the regular rate is charged, in addition." So much is only explanatory and advisory. Then follows: "It is agreed between the sender of the following message, and the company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatable message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured; nor, in any case from unavoidable interruption in the working of its lines, or for errors in cypher or obscure messages." Then follows the rates for sending insured messages. The order in which the rates, terms, and conditions are stated upon which the company would receive and transmit this message are, of course, not important. The essential thing to know is, did they tally with the duty of the company, as a common carrier. As such common carrier, it must insure, subject to conditions and exceptions hereinafter noticed, the correct transmission of the message, for which it was entitled to a just and reasonable compensation. This, by the printed form, it offered to do, and stated the compensation. There is no claim that the compensation named for such service was not just and reasonable, and no such question was raised. The effect of the printed condition is the same as though the rate for an insured message—that is, the compensation for assuming all the duties of a common carrier—had been first stated, and then had followed an offer that for a less compensation it would send the message without incurring the full liability of a common carrier. It left the respondent free to exercise his election as to which offer he would accept, and determine for himself whether he would pay the company for insuring the correct transmission of the message, as a common carrier, or pay less, and assume a part of the risk himself. A common carrier may have two rates for the transportation of goods,—one covering its full common-law liability, the other, a special or limited liability,—so long as the shipper has a choice between them, at reasonable rates. He cannot be denied the right to have his goods carried by the carrier under its common-law liability, but if he desires, and neither statute nor public policy forbid, he may enter into a special contract with the carrier, limiting its common-law liability. *Railroad Co. v. Dill*, 48 Kan. 210, 29 Pac. Rep. 148. It is matter of common knowledge that the sending office marks upon the message form the rate or compensation paid, and thus is preserved, for the protection of both parties, some evidence, at least, of the election of the sender, and the resulting contract. It was entirely competent for the appellant to limit by special contract its obligation as a

common carrier. Section 3886, Comp. Laws. The respondent was not obliged to make such a contract unless he chose. It was a matter of agreement between them. Parties who use telegraph lines are usually economical of their time. In most cases it is important that messages go at once. There is generally little time or opportunity for negotiation. As an expeditious and direct means of bringing both parties to a definite understanding, the company provides and furnishes to the public message forms containing its proposal of terms. The sender of a message may elect either. One of its offers covers its duty and liability as a common carrier. The sender may pay the tariff fixed for that service, and hold the company to its liability as a common carrier. We are unable to perceive how the offer of the company to qualify its full liability as a common carrier, and accept a less compensation therefor, if the sender so desires, can affect the rights of either. The offer only becomes binding when accepted and signed, and the sender is under no compulsion. He may pay for and get the full liability of a common carrier, or pay less, and get a limited liability. The causes or conditions named in the stipulation as excusing full performance of the company's obligation, and as a common carrier, are "unavoidable interruption in the working of its lines," and "errors in cypher or obscure messages." An "unavoidable interruption" is one that cannot or could not be avoided; and while the courts have not been strictly at one in their views as to what, in modern times, should be regarded as equivalent to "the act of God or the public enemy," of the old authorities, our statute (section 3899) expressly makes "any irresistible superhuman cause" sufficient ground for avoiding the common carrier's liability, and section 3880 definitely fixes the measure of a telegraph company's duty in the transmission of messages to be the exercise of the "utmost diligence." We should be unwilling to rule, as a matter of law, particularly in view of the peculiar nature of telegraphic communication, that the utmost diligence could prevent, or successfully guard against, an "unavoidable interruption in the working of its lines." It may sometimes be a question for the jury whether the facts in a particular case bring it within the rule, but, where the interruption is proved to be broadly unavoidable, we think the company would not be liable. Whether, strictly, as a common carrier, appellant could exact, as a condition of the acceptance and transmission of a cypher or obscurely written message, that the sender should release it from liability for an incorrect sending, we need not now determine, for the refused message was confessedly neither.

It was further provided, as one of the stipulations to which respondent should consent, as a condition of sending his message,

that "no responsibility regarding messages attaches to the company until the same are presented and accepted at one of its transmitting offices." This would seem to be quite consistent with the provisions of our statute making the carrier's duty to commence when whatever is to be carried is offered "at a reasonable time and place;" but that, like the stipulation as to cypher and obscurely written messages, is not a question in this case, for it is undisputed that the message was offered at the proper office of the appellant, so that such stipulation could not restrict or affect appellant's liability to respondent in this case.

Another stipulation of the message blank was that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." Appellant here insists that this condition does not propose, nor is its effect, to limit in any way its responsibility as a common carrier, but is rather in the nature of a reasonable regulation, which appellant has a right to make, and which respondent, without any special contract on his part, was bound to observe, and cites cases in support of that view, notably that of *Express Co. v. Caldwell*, 21 Wall. 264. That case came before the court on plaintiff's demurrer to defendant's plea averring an express agreement upon the part of the plaintiff shipper that defendant should not be liable for loss or damage unless claim therefor was made within 90 days, and the question presented and decided was whether such an agreement, when made, was binding on the plaintiff. As to the necessity for an agreement in order to so qualify its liability, the court says: "Certainly, it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation, without a clear and express stipulation to that effect obtained by him from his employer;" thus treating the stipulation in question not as a reasonable regulation, which it was competent for the carrier to make, and binding on the shipper without his consent, but as an agreement depending upon the consent of both parties. The court held that such an agreement was not such an attempted restriction of the carrier's responsibilities as would be invalid, but being reasonable, and fully assented to by both parties, it was binding; but that is not equivalent to saying that the carrier could compel the shipper to enter into such a contract, or require it as a condition of accepting his shipment. The very fact that such limitation of liability is the subject of agreement between the parties implies that either party may refuse to make such agreement. However such agreement may be proved elsewhere, our statute provides that here it can only

be manifested by the signature of the consignor, etc. Section 3888, Comp. Laws. In *Hartwell v. Express Co.*, 5 Dak. 463, 41 N. W. Rep. 732, our territorial supreme court rejected the defense of the carrier that the claim of loss upon which the action was founded was not presented to the company within the time specified in its receipt, upon the distinct ground that under the controlling statute just referred to there was no special contract so providing, or binding upon the parties. It was a rule or regulation of the company, and as such was printed in the receipt delivered to the consignor, but the court held that it did not operate to make the liability of the company different in any respect from what it otherwise would be, because, not being signed by the consignor, it was not a special contract, as required and defined by the statute. Now if, without such special contract, the liability of the carrier is not thus limited, and with it it is, can the carrier refuse the offering of a shipper of "whatever it is accustomed to carry," unless he will so contract to limit the carrier's liability? We think not. The carrier's duty is to receive and carry subject to the full measure of liability, unless restricted by mutual agreement; and except as to "rate of hire, the time, place, and manner of delivery," such an agreement can only be shown by the signature of the shipper or sender. In *Tied. Lim.* pp. 256, 257, the learned author, after recognizing and discussing the right of a common carrier to modify and restrict its liability by special agreement with its patron or employer, says: "But the contract must be freely and voluntarily made. The carrier cannot refuse to take goods for carriage under the common-law liability if the consignor should refuse his assent to a limitation." To same effect, see *New Jersey Steam Nav. Co. v. Merchants' Bank*, 8 How. 344. Nor can a carrier require of a shipper a waiver of any of his rights as a condition precedent to receiving and carrying his freight. *Railroad Co. v. Fagan*, (Tex. Sup.) 9 S. W. Rep. 749. To sustain such a stipulation, where fairly made, is only to concede the right and power of the parties to make it, and comes far short of meaning that the carrier may exact the making of it as a condition precedent to the discharge of his duty as a common carrier. The statute was evidently intended to settle within this jurisdiction the question of how, and to what extent, the general liability of a common carrier may be limited; and by providing, as it does, that it can only be accomplished by a special agreement, it has deliberately left it with either party to consent, or to refuse to consent, to such an agreement. The right to exercise such freedom of will by the respondent in this case would be denied and destroyed if he were compelled to consent under penalty of having his message re-

fused. It has been suggested that respondent could found no right of action upon refusal of appellant to transmit his message unless he would agree to the stipulation, because, if made under such compulsion, it would not be enforceable against him, and therefore harmless; but such conclusion would be consistent with neither the duty of the appellant, nor the right of the respondent. This right and this duty were correlative, and each was a measure of the other. Whatever respondent had a right to have sent, it was appellant's duty to send. If it was respondent's right to have his message transmitted without agreeing to this condition, it was appellant's duty to transmit it without imposing such condition; and it could not justify a refusal to send on the ground that the stipulation sought to be exacted as a condition precedent might, by proper effort on his part, be avoided by respondent, because made under compulsion, or because void and nugatory, (if such statute should be held to apply to such a case,) under section 3582, Comp. Laws.

Following the line of these views, we are of the opinion that appellant could not, as a common carrier, legally require respondent to enter into the agreement which we have just discussed, and so that it could not legally refuse to receive and transmit his message because he declined to make such agreement. Of course this decision will not be understood as touching the question of the right of the company to make and enforce reasonable general regulations for the convenient and orderly transaction of its business, and for the proper protection of its interests, consistent with its duties as a common carrier. The appellant did not object to respondent's message because it was written on respondent's letter head, instead of on a message blank, and so inconvenient for filing or preservation in accordance with the practice of appellant. Respondent offered to use the blank, if appellant would erase the contract which he would otherwise be required to assent to in using it. The issue between the parties was distinctly as to the right of appellant to require assent to the stipulations restricting its liability as a common carrier, and this decision covers only that question. Its refusal to receive and transmit respondent's message, under the facts proved, constituted a refusal, within the meaning of section 3910, Comp. Laws. Such refusal gave respondent a cause of action, and his right of action was not destroyed or affected by the fact that he afterwards sent substantially the same message. If to refuse the first message was an actionable wrong to respondent, persistence in it by appellant, to the extent of compelling respondent to submit to it, and to send another message on appellant's terms, did not cure or undo the first wrong. The testimony seems to show that respondent offered and attempt-

ed to have his message sent in the afternoon, between 2 and 4 o'clock; that it was refused, under the circumstances above recited; that he then wrote a letter to the party to whom he desired to send the message, but subsequently, and that evening, about 7 o'clock, feeling doubtful of its reaching the party in time, he went to the office, and sent upon one of the appellant's blanks a message of very nearly the tenor of the message previously refused. There was nothing in this to waive the wrong of the refusal, or affect respondent's legal right to complain of it.

Finally, it is assigned as error that during the trial the jury was allowed to separate for a few moments without being admonished by the court, as required by section 5051, Comp. Laws, not to converse among themselves, or with others, upon the subject of the trial. Whether, in any case, this fact alone would constitute reversible error, it is not now necessary to determine. The facts were not in dispute, and the law, as we understand it, applied to the conceded facts, plainly required the verdict which the jury rendered. Under such circumstances the appellant could not have been prejudiced. The judgment of the county court is affirmed. All the judges concurring.

McLENNAN v. PRENTICE.

(Supreme Court of Wisconsin. June 21, 1893.)

DRED—BREACH OF WARRANTY—DAMAGES—AFTER-ACQUIRED TITLE BY GRANTOR—FAILURE OF TITLE—BED OF NAVIGABLE BAY—RESCISSION ON GROUND OF FRAUD—JOINDER OF ACTIONS—RES JUDICATA.

1. Where the grantor in a warranty deed of lots, of which the grantee is not put in actual possession, acquired title to part of the lots after the execution of the deed, and before the grantee attempts to rescind the entire sale, the latter is not entitled, in an action on the covenant of seisin, to recover the entire purchase money, with interest, since defendant's after-acquired title inures to plaintiff's benefit, and as to such lots he is only entitled to nominal damages, especially where, after the grantee has knowledge of the state of the title to each lot, it is arranged between him and the grantor that his title thereto should be perfected.

2. Where such lots are vacant, except that a railroad company, which has a track on an adjoining street, has put an embankment thereon, which is used by others in rolling logs from cars into an adjacent bay, and there is no obstacle preventing plaintiff from taking actual possession, there is no eviction from any part of such premises, in the absence of any showing that the use made of the lots is adverse to plaintiff's title, and the latter is not entitled to recover substantial damages.

3. Where the grantee of lots obtains, by agreement, a rescission of the sale, as to part of the lots, because of the failure of title, after knowledge by him of the true state of the title to the remaining lots, and agrees that the grantor may perfect the title to the latter, he cannot afterwards rescind the sale as to the latter on the ground of fraudulent representations.

4. An action to rescind a sale of land on the ground of fraud cannot be joined with an action on the covenants of seisin and right to convey contained in the deed thereof, since the former is a disaffirmance, while the latter is an affirmation, of the contract.

5. Where, on a prior appeal of such case, the evidence showed an absence of title in defendant, as to part of such lots, at the time he conveyed, and there was an entire absence of evidence as to the title to the other lots, the decision of the court, on such appeal, that on such facts plaintiff was entitled to recover the entire consideration, and interest, is not res judicata on a new trial, wherein the title to part of such lots appears to be vested in plaintiff.

6. Where such deed is in the statutory form, and part of such lots lie under the shoal waters of a bay, between the bank and navigable water, there is a breach of all the covenants, as to them, at the time of the conveyance, since such lots or lands are not the subject of private ownership, so that they may be conveyed in fee or otherwise.

7. In such case the measure of plaintiff's damages is such fractional part of the whole consideration paid as the value, at the time of the purchase, of the part to which title failed bears to the whole of the lots purchased, and interest during the time plaintiff has been deprived of the use of such part, not exceeding six years.

Appeal from circuit court, Ashland county; E. G. Bundy, Judge.

Action by James M. McLennan against Frederick Prentice to recover damages for breach of covenants of a deed to certain real estate. From a judgment for plaintiff, defendant appeals. Reversed.

The other facts fully appear in the following statement by PINNEY, J.:

This case was before this court on an appeal by plaintiff from a judgment rendered against him on the merits, (77 Wis. 124, 45 N. W. Rep. 943,) which was reversed, with directions to the circuit court, in its discretion, to grant a new trial, upon cause shown, of all the issues, instead of rendering judgment for the plaintiff for the amount of his claim to which he was entitled upon the facts, as they then appeared. Subsequently the circuit court granted a new trial pursuant to the right so reserved to it. The case is stated in 77 Wis. 124, 45 N. W. Rep. 943. It appeared upon the new trial that neither of the parties to the conveyance, upon the covenants of which the action is founded, had ever been in the actual possession of the premises described therein. This court had held that the action was one on the covenant of seisin, and that the burden of proof was on the defendant, the grantor, to show that he was seised of an estate in fee at the time of the execution of the deed, and in the absence of such proof the grantee therein was entitled to recover the purchase price, and interest from the date of the deed. The conveyance included all of lots 1, 2, 3, 4, 5, and 6, in block 23, constituting the entire block, (sold for \$6,000,) and lots 20 and 21, in block 37, (sold for \$2,500,) in Ellis' addition to Ashland, for the entire consideration of \$8,500, and was dated April 2, 1887. In July of that year the plaintiff became satis-

fied that there were no lots in block 37, and became very much afraid that block 23 was not as the defendant represented it to be, and desired him to settle the matter up in respect to lots 20 and 21, in block 37. He had then found out that lots 2 and 3, in block 23, belonged to the railroad company, and about the title to the lots in block 23, except as to 1 and 6. At this time the plaintiff quitclaimed to the defendant lots 20 and 21, in block 37, for \$2,500; and the purchase-money mortgage given at the time of the original purchase for \$5,000 of the price, of \$8,500, was discharged, and the plaintiff gave the defendant a new mortgage for \$2,500, being the balance thereof, \$3,500 having been paid down at the time of the purchase. The defendant then told the plaintiff he could not fix it up in regard to block 23 at that time; that he wanted to ascertain his rights more fully; and the plaintiff says he told him he "was perfectly willing to take block 23, under these circumstances, if he would make it right with me in regard to the balance of the purchase money;" that he "would do what was right about block 23 when he could find out more about it." The plaintiff testified that he supposed that the title to the block was perfect when he purchased it, except as regards the title to two of the lots in the Wisconsin Central Railroad Company, which the defendant promised to obtain from the railroad company—lots 2 and 3—for him. The defendant had no title to lots 2 and 3, in block 23, at any time, except as riparian owner of lot 1; and on the 11th of May, 1888, the plaintiff tendered a quitclaim deed to the defendant of the entire block, and brought this action to recover the contract price. All of the lots in block 23 lie side by side under the shallow water between the shore of Ashland bay and navigable water, except lot 1, a considerable part of which was high land on the bank. The complaint charged that fraudulent representations were made by the defendant at the time of the purchase—First, in respect to the quantity of hard land in lot 1; and, second, that the defendant had a good title to the entire block. But in view of the former decision, and the finding and facts already stated, this branch of the case, it is understood, is eliminated from the present controversy. The court found, as matter of fact, that lots 4 and 5, in block 23, were both owned by the defendant, and that lots 1 and 6 had been formerly owned by him, and, in substance, that the title thereto was then held in trust for him; that after the conveyance by the defendant to the plaintiff, which was by warranty deed, he procured them to be conveyed to one Maddocks, and by said Maddocks to the defendant, who now owns the same; that as to lots 2 and 3 the defendant has not, and never had, title thereto. The evidence shows that the deed from Maddocks to the defendant for lots 1 and 6 was made December 13, 1887; that the

plaintiff claimed that there was a total want of title to lots 1, 2, 3, and 6. It was also found that in 1883 the Wisconsin Central Railroad Company commenced building a track of its road in the street south of lot 1, and completed it the next year, erecting an embankment which extended on lot 1, and covered substantially all of the hard land thereon,—the embankment running to the water's edge, and on a portion of the lot extending into the water; that the embankment is permanent, and the railroad company thus appropriated all of the hard land on block 23, and continue to use it for the purposes of their track, and embankment supporting it, but had never acquired title to the land, nor instituted proceedings to condemn it; that the plaintiff purchased block 23 because it was deemed valuable for the riparian rights appurtenant thereto, and as a suitable place to carry on business connected with the navigation of the lake, and that the block is of little value for any other use or purpose; that in order to carry on such business it would be necessary to have free access to and from the shore, and from the northerly limits of such block, out to the navigable waters of the lake, and ownership of lots 2 and 3 in other parties would render it of no value for such purposes. The court found, as a conclusion of law, that the plaintiff was entitled to judgment for the sum of \$6,000, and interest from the date of such sale, April 2, 1887.

Tomkins & Merrill, for appellant. T. L. Kennan, for respondent.

PINNEY, J., (after stating the facts.) 1. It was found that when the defendant executed the conveyance to the plaintiff in question he owned water lots 4 and 5, in block 23; and it was proved that he afterwards, on December 13, 1887, acquired title to lot 1, part of which was on the bank, and hard land, and the rest under shoal water of the bay, and also apparent title to lot 6, lying out beyond lots 4 and 5, and extending to or towards navigable water. This was many months before the plaintiff attempted to rescind the sale. The evidence shows that he was satisfied with block 23 at the time the arrangement of July, 1887, was made, whereby the mortgage on block 23 to the defendant was canceled, and another mortgage executed thereon for \$2,500, after applying the proceeds of lots 20 and 21, above mentioned. He then had full knowledge, or the means of knowledge, as to the true state of the title to each lot in the block, and he knew that he had obtained no title to lots 2 and 3, but supposed he had good title to lots 4 and 5; and it was understood that he was to obtain good title to lots 1 and 6, and also to lots 2 and 3. He was then content to await the efforts of the defendant to complete the title. When the plaintiff tendered to the defendant, on the 11th day of May, 1888, a reconveyance of

block 23, and commenced this action, he had acquired record title to all the block, except lots 2 and 3. The covenant of seisin in the deed from the defendant to the plaintiff was partially or wholly broken, if at all, when made; and if the deed did not pass any title to the plaintiff, or to the extent that it failed to pass title to the premises described in it, and if the grantee did not obtain possession, the covenant of seisin would thereby be turned, wholly or partially, as the case might be, into a right of action, and he might at once sue on the covenant of seisin, and recover the entire purchase money, with interest, or a proper portion thereof, if the failure to convey title was only partial. If the grantee had entered or been put in possession of the premises included in the deed, the breach of this covenant would be technical, and would entitle the grantee, in case he sued on it, to nominal damages merely; but he could not in such case recover substantial damages until he had been evicted, or in some way deprived of the whole or a part of the premises, or suffered substantial loss. Proof of eviction is not necessary to entitle the grantee to recover on this covenant, and has no bearing in an action on it, except on the question of damages. But where the deed contains a covenant of warranty, by which the grantee has obtained seisin of a title subsequently acquired by his grantor, it would be inequitable that he should have the seisin, and be allowed to recover back the consideration paid for it. Accordingly, when the defendant acquired the title to lots 1 and 6, December 13, 1887, his seisin at once inured and passed to the plaintiff, in virtue of the covenant of warranty in his deed. *Baxter v. Bradbury*, 20 Me. 280; *Somes v. Skinner*, 3 Pick. 52; *Knowles v. Kennedy*, 82 Pa. St. 445; *Knight v. Thayer*, 125 Mass. 25; *King v. Gilson*, 32 Ill. 348. If the plaintiff acquired, before the commencement of the action, by virtue of his deed, the seisin which it was the object of both the covenants of seisin and of warranty to secure to him, he would be entitled only to nominal damages. In *King v. Gilson*, supra, it was held sufficient to restrict the grantee to nominal damages if he acquired, by inurement, the legal title, at any time before the assessment of damages in the action on the covenant of seisin. *Baxter v. Bradbury*, 20 Me. 264.

2. When the plaintiff commenced his action he had not been evicted by paramount title, either actually or constructively, from any part of the premises. The lots were vacant, and there was no obstacle to prevent the plaintiff from taking actual possession of them, except in respect to the alleged occupancy by the railroad company of part of lot 1, by putting an embankment on it. The evidence shows that no part of this lot is within the limits of its track, which is within the adjoining street, and that it is its track that has been so long used and occupied by the railroad company, and that this part of

lot 1 is generally used by others as a place to roll saw logs off the cars into the bay. But this use does not appear to have been adverse or hostile to the title thus conveyed, and in the absence of such proof it is presumptively permissive, and in subordination to it. The railroad company had no title to this lot, nor had it attempted to acquire any. Neither unlawful intrusion on lands, nor the taking thereof by the right of eminent domain, will constitute a breach of any of the ordinary covenants in the deed. *Rawle, Cov.* 129, 153; *Kutz v. McCune*, 22 Wis. 628; *Smith v. Hughes*, 50 Wis. 621, 7 N. W. Rep. 653; *Bailey v. Miltenberger*, 31 Pa. St. 37. A further question remains, concerning title in respect to lots 2 and 3; and as to them the plaintiff acquired, by reason of his deed of lot 1, and the general covenant of warranty contained in it, the title and control thereof incident to his riparian ownership of that lot. But of this more remains to be said.

3. As already stated, the cases in which nominal damages only may be recovered in actions on the covenant of seisin, or less than the entire purchase money and interest, are those where the grantee has obtained, and still holds, possession, or where some other benefit or advantage, such as a title to a part only, has passed by the deed; but where no semblance of title or benefit whatever has passed, where the grantee has derived no advantage whatever from it, and can derive none without a wrongful entry upon the estate of another, he is entitled to recover at once substantial damages, and to the full amount of the consideration, and interest. Substantial damages, or damages to be measured by the consideration paid, and interest, cannot, in the former case, we think, be allowed, until there has been an eviction by title paramount, either actual or constructive. This is, we think, in accordance with well-settled principles. But the subject has been somewhat complicated in consequence of the effect given in later cases to a remark in *Mecklem v. Blake*, 22 Wis. 495, not material to the case, to the effect that where there has been a breach of the covenant of seisin the plaintiff, "if he desired to rescind for want of title, and to recover back the purchase money paid, and interest, he should have tendered the defendant a reconveyance and the possession, and then he could have maintained his action;" citing *Taft v. Kessel*, 16 Wis. 273, in which the distinction between rescinding executory contracts for the conveyance of land, and deeds executed in performance thereof, seems to have been overlooked, and the law in respect to the former class of cases was applied to a case where the contract had been executed by the delivery of a deed of conveyance. In the former class a want of title is ground for rescission, but, where the contract has been executed by the delivery of a deed of conveyance, no rescission can be

had on the ground of want of title, without showing fraud. And this dictum in *Mecklem v. Blake* has been the foundation for subsequent statements to the effect that rescission may be had after deed executed, on the ground, only, of want of title in the grantor. In *Booth v. Ryan*, 31 Wis. 58, speaking to this point, *Dixon, C. J.*, says: "Executory agreements for the purchase or conveyance of land may be rescinded on the ground of want of title, and the contracts canceled; but as to executed agreements, or conveyances made and possession delivered or taken under them, the rule is different, and the power has never been exercised." This is directly the reverse of what was said in *Mecklem v. Blake*, where the plaintiff had obtained possession. In *Smith v. Hughes*, 50 Wis. 620, 7 N. W. Rep. 653, the remark quoted from *Mecklem v. Blake*, supra, was noticed and withdrawn, and it was held that rescission could not be had, in the absence of fraud, after deed executed. In *Clementson v. Streeter*, 59 Wis. 429, 18 N. W. Rep. 340, the same ruling was made. Chancellor Kent says: "I apprehend that in sales of land the technical rule remits the party back to his covenants in his deed, and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on a failure of title." And this is the strict English rule, both at law and in equity. 2 Kent, Comm. 473; 2 Sugd. Vend. 193, and cases cited in note g. The terms or provisions of the contract of sale are in such case merged in the deed. *Williams v. Hathaway*, 19 Pick. 388; *Witbeck v. Waime*, 16 N. Y. 535; *Jones v. Wood*, 16 Pa. St. 25; *Gates v. Winslow*, 1 Mass. 65; *Joyce v. Ryan*, 4 Me. 101; *Holden v. Curtis*, 2 N. H. 63; *Abbott v. Allen*, 2 Johns. Ch. 523; *Kerr v. Kitchen*, 7 Pa. St. 486; *Fisk v. Duncan*, 83 Pa. St. 197. An action for a breach of the covenant of seisin is an action on a contract for indemnity. It is not founded on any right to rescind the contract or deed, though rescission is the consequence of a recovery and satisfaction, in equity, if not at law. *Rawle, Cov.* § 185. We think it clear, both upon principle and authority, that an executed conveyance cannot be rescinded, in the absence of fraud, merely because of a breach of the covenant of seisin contained therein. In this case there was no actual eviction by paramount title, so as to warrant a recovery on the ground of the covenants of warranty and for quiet enjoyment. There was such eviction in *Blanchard v. Ellis*, 1 Gray, 195; and so in *Nichol v. Alexander*, 23 Wis. 118, ruled on the strength of it, and which was a suit on all the usual covenants, where a mortgage on the premises had been foreclosed, and the premises sold. Both the grantor and grantee in the deed sued on were parties to the foreclosure suit, and a writ of assistance could have issued at once. There was an actual eviction, as the sale and con-

veyance vested the title in the purchaser, and, though there was no one in possession, it gave him constructive possession; but the recovery was held sustainable on the covenant against incumbrances, and it was properly held that there was an actual eviction. The question of constructive eviction was not in the case, nor was it in *Blanchard v. Ellis*, supra. In *McInnis v. Lyman*, 62 Wis. 194, 22 N. W. Rep. 405, the general language used in *Nichol v. Alexander*, supra, was substantially repeated, where there had been no eviction, actual or constructive, within the rule of any previous case; but it was held that, "if the title was perfected in the plaintiff when the action was brought, he was entitled to a fair indemnity for all damages he had sustained by reason of any acts done upon the premises under the tax deed," which was the adverse title purchased in by the defendant, and of which the plaintiff obtained the benefit by virtue of the covenant of warranty in his deed. And *Noonan v. Ilsley*, 21 Wis. 138, and *Smith v. Hughes*, 50 Wis. 620, 7 N. W. Rep. 653, are cited in support of this proposition. And it was also said in *McInnis v. Lyman* that "the trial failed to determine whether the plaintiff now has the title to the land described in the tax deed, or whether he remains disseised thereof. The question is material, because the rule of damages depends upon its solution." The utmost extent the courts have gone on the subject of constructive eviction is to hold that it may be said to exist "where the paramount title has been hostilely asserted." *Rawle*, Cov. §§ 135, 150; *Axtel v. Chase*, 83 Ind. 546; *Knepper v. Kurtz*, 58 Pa. St. 480; *Sprague v. Baker*, 17 Mass. 590; *Loomis v. Bedell*, 11 N. H. 74; *Green v. Irving*, 54 Miss. 450; *St. John v. Palmer*, 5 Hill, 599. In *Matteson v. Vaughn*, 38 Mich. 375, the court, by Campbell, C. J., speaking of this question, said: "Inasmuch as *Matteson* [the grantee] was never in possession, actually or constructively, it is difficult to see what difference there is between his original and his present position. He is no more excluded now than he has always been. We do not comprehend how he can be said to have been evicted. The substantial remedy, in such cases as this, is on the covenants of seisin, and those against incumbrances. If land is vacant it is a very easy thing to assume possession, and possession may ripen into a good title, while, if disturbed, there is no doubt of the remedy for eviction." *Rawle*, in his work on Covenants, (section 150,) says: "However far the doctrine of constructive eviction has been carried, it is believed to be still absolutely necessary that the adverse claim should have been hostilely asserted. * * *

According to the weight of authority the distinction is not whether there is or has not been a judgment in favor of the paramount claim, but whether it has been hostilely asserted." *Funk v. Creswell*, 5 Iowa, 89; *Mead v. Stackpole*, 40 Hun, 473; *Shattuck v. Lamb*,

65 N. Y. 505; *Parkinson v. Sherman*, 74 N. Y. 93. In *Patton v. McFarlane*, 3 Pen. & W. 419, it was said: "If a recovery upon the covenant of general warranty can be supported without either allegation or proof of an eviction, it would, in effect, be deciding that the covenant of general warranty contains within it each of the five covenants for title, which would be a novel idea to conveyancers and professional men." We hold, therefore, that, as the plaintiff had not been evicted by paramount title, the defendant had a right, before this action was commenced, to get in the outstanding title, so far as he might be able, and that it inured pro tanto to the benefit of the plaintiff. It appears that it was understood between the parties that the defendant was to perfect the title, and, having done so, in part at least, he is entitled to the benefit of it in his defense to this action. Any other conclusion would be plainly unjust.

4. It was argued on behalf of the plaintiff that the finding of the court in respect to lots 1 and 6 was erroneous; that the title subsequently acquired by the defendant, as already stated, was derived from *Ashland* county, as a remote grantor; and that no authority was shown from the board of supervisors for conveying these lots to *Ellis*, also a remote grantor of the defendant. This question is not open for consideration on this appeal. The finding of the court as to the facts, not having been excepted to by the plaintiff, is as to him an absolute verity, and, for want of such exceptions, cannot be reviewed in his behalf. *Hallam v. Stiles*, 61 Wis. 270, 21 N. W. Rep. 42; *Cramer v. Hanaford*, 53 Wis. 85, 10 N. W. Rep. 15; *Evenson v. Bates*, 58 Wis. 24, 15 N. W. Rep. 837.

5. There can be no relief, by way of rescission, on the ground of fraud. This is very clear. The court found that there was no fraudulent misrepresentation made by the defendant as to the quantity of hard or dry land on lot 1; and although the charge that the defendant fraudulently represented that the title to the premises was good, is sustained by the finding, still the evidence shows that the plaintiff is in no position to claim a rescission on that ground. When the new arrangement in regard to the plaintiff's purchase was made, in July, 1887, by which the plaintiff released to the defendant lots 20 and 21, in block 37, for \$2,500, to be credited on the purchase-money mortgage for \$3,000, which was accomplished by discharging it, and executing a new mortgage on block 23 for the difference,—\$2,500,—the plaintiff knew that he had acquired no title to lots 2 and 3, in block 23; and it was understood, or at least the plaintiff stated, that he was satisfied with block 23, the defendant having agreed to make the title to this block all right. He had had a partial rescission by consent. He could not get another partial rescission without consent. And no ground existed, when he brought his action, for a total rescission, even as to block 23. Besides, this court, by

its former decision, held the action to be one on the covenants of seisin and of good right to convey. A claim to rescind on the ground of fraud could not be joined, as one claim would be in affirmance of the contract, and the other in disaffirmance. The plaintiff cannot be allowed, at the same time, "to blow hot and cold." It will be seen, therefore, that the circuit court erred in holding that the title to lots 1 and 6 remained in the defendant, instead of inuring to the benefit of the plaintiff by virtue of the covenant of warranty in defendant's deed to him, and also in holding that the railroad company had evicted the plaintiff from lot 1, and that this lot had been legally appropriated by the company.

6. An apparent title by conveyances of record is thus found to have been vested in the plaintiff by his deed to the entire block, except lots 2 and 3. If it was not valid as to the portion lying under the shoal waters of the bay between the shore and navigable water, still he obtained title to the part of lot 1 on the bank, with the riparian rights thereby conferred in the rest of the block, and out to navigable water. The evidence tends to show that the property and property rights which thus passed to the plaintiff were quite valuable. There was not an entire want of title, so as to authorize the recovery allowed, for the entire consideration money and interest. But the plaintiff contends substantially that the entire merits of the action became *res adjudicata* by the former decision, (77 Wis. 124, 45 N. W. Rep. 943,) and that on this ground the judgment should be affirmed. The case before the court on the former appeal was, in brief, an action to recover the entire consideration and interest, as for a total breach of the covenants of seisin and right to convey, as to all of the lots in block 23, and the court said: "Under the complaint the plaintiff had the right to recover upon a breach of the covenant of seisin, and on the covenant of a right to convey, upon proof of the execution and delivery of the deed, and payment of the purchase money, and that the actual possession of the property had never been taken by the plaintiff under his deed." That "the burden of showing that the grantor was seised of an estate in fee at the time of the making and delivery of the deed was on the grantor." The opinion proceeds to say: "What evidence there was produced on the part of the plaintiff shows *prima facie* that the legal title to two of the lots was net in the defendant at the time of the execution and delivery of the deed. There was no evidence given as to who held the title to lots 2, 3, 4, and 5." The breach of the covenant of seisin, etc., thus appeared to be total; and the plaintiff was therefore held entitled to recover the entire purchase money and interest, or what was equivalent to it. This is the entire case, and all said outside of this was not material to the case before the court, and is in no just sense blind-

ing in the case, as it is now before us. The court, while it reversed the judgment of the circuit court in favor of the defendant, for error in holding that the burden of proof was on the plaintiff, and directed judgment for the plaintiff, gave the circuit court the right, in its discretion, and upon cause shown, to grant a new trial upon all the issues in the case. The case now made is an entirely different one from the one then before the court, and it came in under an order opening the case "upon all the issues." It would, we think, be a manifest misapplication of the rule to hold that the former decision is *res adjudicata* upon a case never before it until the present appeal. The question now before the court is what judgment ought to be given upon the title shown by the defendant, and not what judgment it was proper to give, when the burden of proof was on him to show title, and he wholly failed to show any title at all. The former judgment of this court upon the case then before it was plainly correct, and not in conflict with the views here expressed. Upon the whole case it is evident that the judgment of the circuit court must be reversed, and the cause remanded to make an assessment of such damages as the plaintiff is entitled to recover.

7. The conveyance from the defendant to the plaintiff is in the statutory form, (Sanb. & B. St. § 2208,) and imports the usual covenants of seisin, and of good right to convey the premises described in it, and was an assurance to the plaintiff that the grantor had the very estate, in quantity and quality, which the conveyance, as thus construed, purported to convey; and if the title of the grantor, which he had power to convey, was less, to the whole or any part of the granted premises, then these covenants were broken. 2 Suth. Dam. § 592; Guthrie v. Pugsley, 12 Johns. 126; Mott v. Palmer, 1 N. Y. 573; Smith v. Strong, 14 Pick. 128, 132; Parker v. Brown, 15 N. H. 176, 187; Frazer v. Supervisors, 74 Ill. 291; Kincald v. Brittain, 5 Sneed, 119. The question whether the lands or lots lying under the shoal water of the bay, and between the bank and navigable water, are the subject of private ownership, so that they can be conveyed in fee or otherwise, is a very important one, and has recently been much discussed, as well as the rights of riparian owners over the same, and out to navigable water. In the case of Dledrich v. Railroad Co., 42 Wis. 248, it was held that "a riparian owner upon a natural lake or pond takes only to the natural shore, or ordinary low-water mark thereof, and that, distinguished from appropriation and occupation of the soil under the water, a riparian owner upon navigable water has a right (unless prohibited by local law) to construct in shoal water, in front of his land, proper wharves or piers in aid of navigation, and at his peril of obstructing it, through the water, far enough to reach actually navigable water; that such riparian

rights proper rest upon title to the bank, and are the same whether the riparian owner owns the soil under the water or not; that the general right of appropriating and occupying the soil under the water, when it exists, is not properly a riparian right, and rests not upon title to the bank only, but more directly upon title to the soil under the water;" and subject to these, and certain rights of protection of the land against the water, "any extension of possession, or intrusion into the water beyond the natural shore, whether by the riparian owner or a stranger, without express and competent grant from the public, vests no title in the person who makes it." *Boom Co. v. Rellly*, 44 Wis. 304. In the absence of express and competent grant to some other, the state is the owner of the fee of all lands under navigable waters in the great lakes, but in trust, only, for the public uses and purposes of navigation and fishing, and they may not be granted by the United States to a private person for a purely private purpose; that, the title to such lands being in the state, "they are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by congress with regard to public navigation and commerce, * * * state control and ownership therein being supreme, subject only to the paramount authority of congress in making regulations of commerce, and subjecting the lands to the necessities and uses of commerce." *Hardin v. Jordan*, 140 U. S. 381, 382, 11 Sup. Ct. Rep. 808, 838. The common-law rule in regard to tide waters has been extended to our Great Lakes, which are treated as inland seas, and it is held that it depends on the law of each state to what extent this prerogative over lands under the water shall be exercised. In the case of *Barney v. Keokuk*, 94 U. S. 334, it was held that "it is for the several states themselves to determine" this question, and that "if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections." But "it has never been held that the lands under water in front of the lands of riparian owners are reserved to the United States, or that they can afterwards be granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and derogate from the value of natural boundaries, like streams and bodies of water." *Hardin v. Jordan*, supra. The construction of the grants of the United States along navigable waters is left to the principles of the common law, and rules adopted by each state where the land may lie. These views are sustained by and in accordance with the case of *Illinois Cent. R. Co. v. Illinois*, 148 U. S. 337, 13 Sup. Ct. Rep. 110, in which it was held that the construction of a pier, or the extension

of any land, into navigable waters, for a railroad or other purposes, by one not the owner of land on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. 148 U. S. 445, 13 Sup. Ct. Rep. 115. That "riparian rights are incident to riparian ownership, and existing with it, and passing with the transfer of the land. The land must not only be contiguous to the water, but in contact with it. That proximity, without contact, is insufficient. The riparian right attaches to land on the border of navigable water, without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage." In *Yates v. Milwaukee*, 10 Wall. 497, 504, it was held that the riparian proprietor is entitled to access to the navigable part of the water, on the front of which lies his land, and for that purpose to make a landing, wharf, or pier for his own use, or the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public, and that such riparian rights are property, and valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously impaired. It is plain that no grant by the state, for purely private purposes, of such lands, could operate to impair or defeat the previously acquired rights of the riparian owner, for the state has no right to make such a grant. The right which the state holds in these lands is in virtue of its sovereignty, and in trust for the public purposes of navigation and fishing. The state has no proprietary interest in them, and cannot abdicate its trust in relation to them, and, while it may make a grant of them for public purposes, it may not make an irrevocable one; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. These views are maintained with clearness and vigor in the very able and elaborate opinion of the court in the case of *Illinois Cent. R. Co. v. Illinois*, supra, and are supported and illustrated by numerous adjudicated cases. There is no claim that the state has ever granted the water lots in question to any one, and it is impossible to say that they have ever become private property, for private purposes, so as to be the subject of conveyance, in fee or otherwise. It is plain that as to these lots a breach of the covenants of seisin and of good right to convey has been established, but not so, however, as to the portion of lot 1 on the bank, and in contact with the water. The title which the plaintiff acquired to this land by his deed, with its appurtenant riparian rights, is valuable property, and to that extent the covenants sued on remain unbroken. The plaintiff is entitled to recover damages corresponding only to the extent of the breach of these covenants.

8. The measure of damages in case of a breach of the covenants of seisin, or of good right to convey, going to the entire estate, is the amount of the consideration paid, and interest thereon during the time the grantee has been deprived of the land, but not for more than six years. 2 *Suth. Dam.* § 593, and cases cited; *Blossom v. Knox*, 3 *Pin.* 262; *Conrad v. Trustees*, 64 *Wis.* 258, 25 *N. W. Rep.* 24; *Semple v. Whorton*, 68 *Wis.* 628, 32 *N. W. Rep.* 690; *Docter v. Furch*, 76 *Wis.* 161, 44 *N. W. Rep.* 648, 826; *Larson v. Cook*, (Jan. term, 1893,) 55 *N. W. Rep.* 703. The measure of damages in this case, of failure of title to a part of the premises described in the deed, is such fractional part of the whole consideration paid as the value, at the time of the purchase, of the part to which the title failed, bears to the whole block purchased, and interest thereon during the time the plaintiff has been deprived of the use of the part to which the title failed, but not exceeding six years. *Semple v. Whorton*, 68 *Wis.* 627, 32 *N. W. Rep.* 690, and cases there cited; *Larson v. Cook*, *supra*. The evidence before us is not such as to enable us to determine what real or practical difference in value there is between the estate and incident riparian rights which the plaintiff acquired and the estate and rights which the deed to him purported to convey, within the meaning of this rule; and the judgment of the circuit court will be reversed, and the cause remanded to ascertain what damages the plaintiff ought to recover, and to give judgment accordingly, and for that purpose either party may produce such evidence as he may be advised. The judgment of the circuit court is reversed, and the cause is remanded for further proceedings as above directed.

WARD v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Wisconsin. June 21, 1893.)

ACTION AGAINST RAILROAD COMPANY — ACCIDENT AT CROSSING — RUNNING SWITCH — INSTRUCTIONS — EVIDENCE.

1. In an action against a railroad company for injuries received at a crossing, it appeared that plaintiff, when about to cross in his wagon, waited till an approaching train had passed, and, then proceeding, was struck by a single car following the train at a distance of about 150 feet, which had been cut off to make a flying switch, and which he had not seen. The conductor was on the car, and saw plaintiff, but, thinking that the car would pass before plaintiff reached the crossing, did not stop it by applying the brakes, though by so doing he could have avoided the accident. He testified that he shouted to plaintiff, and a brakeman at a neighboring switch testified that he did the same. *Held*, that a verdict for plaintiff was proper.

2. It was proper to charge that making a "flying switch" over a street crossing "was a most dangerous proceeding," and that "it was the duty of the defendant to have taken special pains to give the public full warning of the danger," and that it was the duty of the conductor to see persons approaching the cross-

ings, unaware of the danger, and give them sufficient warning.

3. Intoxication on the part of plaintiff did not constitute contributory negligence if it was in no way the cause of the accident.

4. It was proper to allow a witness, who lived near the scene of the accident, and had seen many trains pass, to give his opinion as to how many miles an hour the train was running, though it appeared that he did not know how many feet or rods there were in a mile.

5. Evidence as to the distance in which such a car, with a sound brake, could be stopped, was admissible.

Appeal from circuit court, Eau Claire county; W. F. Bailey, Judge.

Action by Truman C. Ward against the Chicago, St. Paul, Minneapolis & Omaha Railway Company for injuries received at a crossing. From a judgment for plaintiff, defendant appeals. Affirmed.

S. L. Perrin and R. J. MacBride, for appellant.

T. F. Frawley, for respondent.

It was proper to charge that the making of a running switch over a street crossing is a "most dangerous proceeding," and that it is the duty of the railroad company to take special pains to give the public full warning of the danger. 1 *Thomp. Neg.* 452; *Beach, Contrib. Neg.* 223; *Brown v. Railway Co.*, 32 *N. Y.* 597; *Sutton v. Railway Co.*, 66 *N. Y.* 243; *Kay v. Railway Co.*, 63 *Pa. St.* 269; *Railroad Co. v. Baches*, 55 *Ill.* 379; *Railway Co. v. Dignan*, 56 *Ill.* 487; *Railroad Co. v. Garvy*, 58 *Ill.* 83; *Railroad Co. v. Hammer*, 72 *Ill.* 347; *Murphy v. Railway Co.*, 38 *Iowa.* 539; *Murphy v. Railroad Co.*, 45 *Iowa.* 661; *Railroad Co. v. Summers*, (Miss.) 10 *South. Rep.* 63; *Fulmer v. Railway Co.*, 68 *Miss.* 355, 8 *South. Rep.* 517; *French v. Railway Co.*, 116 *Mass.* 537; *O'Connor v. Railroad Co.*, 94 *Mo.* 157, 7 *S. W. Rep.* 106; *Butler v. Railway Co.*, 28 *Wis.* 487; *Ferguson v. Railway Co.*, 63 *Wis.* 147, 23 *N. W. Rep.* 123; *Howard v. Railway Co.*, 32 *Minn.* 214, 20 *N. W. Rep.* 93; *Railroad Co. v. State*, 61 *Md.* 108; *Brown v. Railroad Co.*, 32 *N. Y.* 600; *Ewen v. Railway Co.*, 38 *Wis.* 616; *Johnson v. Railway Co.*, 49 *Wis.* 529, 5 *N. W. Rep.* 890; *Townley v. Railway Co.*, 53 *Wis.* 634, 11 *N. W. Rep.* 55; *Farley v. Railway Co.*, (Iowa,) 9 *N. W. Rep.* 230; *Frick v. Railway Co.*, 5 *Mo. App.* 435; *Cheney v. Railway Co.*, 16 *Hun.* 415.

ORTON, J. The following are substantially the facts of this case, according to the testimony: The village of Fall Creek, in the county of Eau Claire, has about 500 inhabitants, and one main street running east and west, very much traveled. The defendant's railway runs through the village, and across said street, southeast and northwest. There are three tracks crossing said street, one main track and two side tracks. It was down grade from a considerable distance southeast down to this crossing. There was a switch about 150 feet northwest of

the crossing, and the depot is some distance beyond to the northwest. On the 6th day of January, 1891, about 4 o'clock P. M., the plaintiff, who was a farmer living several miles southeast of the village, and about 32 years of age, and having a family, started with his team and empty double wagon from near the center of the village, where he had left his load, to go home by this street, and over this crossing. When he came near the crossing he saw a locomotive and a freight train of 18 or 20 cars approaching it, coming from the southeast, and he stopped his team about 32 feet from the center of the main track, and waited until said train passed by, and he then drove on, and when the team had crossed over the track, a single detached freight car, following the train about 150 or 200 feet behind, running by the impetus given it by the speed of the train and by its own momentum, came upon the crossing without any warning or signal, and unseen by the plaintiff, and struck his wagon in which he was riding and driving, and threw it off the track, and dashed the plaintiff to the ground headlong, and broke his skull in two places and permanently injured and disabled him. This car had been cut off from the train about 1,500 feet back to make what is called a "flying switch" upon a side track, about 150 feet northwest of the crossing. John Roddy, the conductor of the freight train, was on and in charge of this car, and first saw the plaintiff approaching the crossing when his car was from 50 to 70 feet from it. According to his own testimony, he let the car run without using the brakes because he thought he could get over the crossing before the plaintiff reached it. He was standing near the brake, on the forward end of the car, and the testimony tended to show that he could have stopped it by applying the brakes after he saw the plaintiff approaching the crossing, in time to have avoided the collision. It was his duty to have looked before he came so near to it, to see if this crossing, so much used, was clear of teams and travelers. Situated where he was, on the top of the car, so high above the ground, he should have looked ahead continually, to see if the track was clear. His car had no bell or whistle or other means of signaling or warning, and his constant vigilance and applying the brakes were his only means of avoiding danger, and he failed to use either. He said he hailed or hallooed to the plaintiff, and the brakeman at the switch says that he did the same, but the plaintiff did not hear either of them. The human voice is weak and of little use when compared and in competition with the noise of cars and wagons, and a desperate "make-shift" in such a dangerous emergency. The plaintiff did not look in the direction of this car coming. He was watching and waiting for the train to pass. His attention was diverted from that direction, and as soon as the train was over and away from the cross-

ing he drove on, not supposing or having any reason to expect or think that this detached car was following after the train. No ordinarily reasonable man would have so expected or thought, situated as the plaintiff was. The duty of a traveler before crossing a railway to look both ways and listen depends upon the conditions that he might reasonably expect the coming of a train at any and all times, and that his attention is not reasonably arrested or diverted. Here both of these conditions were absent. It is claimed by the learned counsel of the appellant that the plaintiff was intoxicated, notwithstanding the verdict of the jury otherwise. In view of the facts, this question does not seem to be material. It is only material as affecting the question of the plaintiff's contributory negligence. If not the least want of common care and prudence can be imputed to him, then it is immaterial whether he was drunk or sober at the time. Railway companies have no more right to run over a drunken man than a sober one. Drunkenness is not negligence per se, nor unless it contributes to the accident or injury. If it did not, then it is a matter of no concern to the defendant. What more could or would have been reasonably done by the plaintiff, or by any one so situated, if unquestionably sober, than he did to protect himself from injury? If nothing, then it was no matter whether he was drunk or not. If the plaintiff did not do anything he ought not to have done, or omit to do anything that he ought to have done, under the circumstances, then its immateriality is apparent. The jury found a special verdict that the defendant was negligent, in that its servant failed to stop the car, and that such negligence was the proximate cause of the injury; that the conductor in charge of the car did not use due diligence to warn the plaintiff of his danger, and could have stopped the car in time to have prevented the collision, by applying the brakes after he discovered the plaintiff approaching the track; that the plaintiff was not guilty of any want of ordinary care which contributed to the injury, and that he was not intoxicated immediately prior to the accident, or incapable of managing and conducting himself with ordinary care. The jury found the plaintiff's damages at \$4,700, and the court rendered judgment accordingly. The errors assigned will be disposed of in their order.

1. The court ought to have granted a nonsuit, or directed a verdict for the defendant, or granted a new trial. On the merits of the case involved in these motions but little need be said. This is a very plain case. There is nothing in the conduct of the plaintiff that suggests even a suspicion of the want of ordinary care. The question of his being intoxicated is not, therefore, properly in the case. But the jury found that he was not intoxicated, and there was evi-

dence to that effect. Under the circumstances, he was not bound to look in the direction of the approaching car. In *Ferguson v. Railway Co.*, 63 Wis. 152, 23 N. W. Rep. 123, the plaintiff's attention was diverted in the same manner, and it was held that his not looking in the direction of the single car was excused. See, also, *Butler v. Railway Co.*, 28 Wis. 487; *Duane v. Railway Co.*, 72 Wis. 523, 40 N. W. Rep. 304; and *Winstanley v. Railway Co.*, 72 Wis. 376, 39 N. W. Rep. 850; *Greany v. Railroad Co.*, 101 N. Y. 419, 5 N. E. Rep. 425. The negligence of the defendant was clearly shown, and the negligence of the conductor was gross. He could have stopped the car within the 50 or 70 feet from the crossing after he saw the plaintiff, and did not even try to do so, but took the chances of getting over the crossing first, or of killing or mangling the plaintiff. It was one of the most daring feats of recklessness ever attempted.

2. The court charged the jury to the effect that making this "flying switch" over a street crossing "was a most dangerous proceeding;" and "that it was the duty of the defendant to have taken special pains to give the public full warning of the danger;" and that it was the duty of the conductor to see persons approaching the crossing, unaware of the danger, and give them sufficient warning. Special exception is taken to the language, "a most dangerous proceeding," "special pains," and "full warning." If it was a "most dangerous proceeding," then it follows, of course, that "special pains" should be taken to give the public "full warning." The learned counsel of the appellant, in stating the principle of certain cases cited and claimed to be against the above instruction, uses the following language: "It is not negligent to push, back, or switch cars over a crossing, even though the cars be 'kicked,' or a 'flying switch' be made, if precautions to prevent injury to travelers on the highway are taken that are proportionate to the special danger of the mode adopted." This language justifies the instruction. Precautions to prevent injury to travelers proportionate to the special danger must be "special pains" to give full warning to the public, or it is not proportionate to the "special danger;" and "special danger" is not common or ordinary danger, but uncommon and extraordinary danger, or very dangerous, or "most dangerous." The meaning is the same. In *Ferguson v. Railroad Co.*, *supra*, clearly analogous to this case, Mr. Justice Lyon characterizes the act as "a most dangerous proceeding," and the precautions to be used must be "a high degree of care," or "the utmost care;" and in *Butler v. Railway Co.*, *supra*, it is held that a flagman at the crossing would not be an unreasonable precaution. In *Johnson v. Railway Co.*, 49 Wis. 529, 5 N. W. Rep. 886, the running of cars across public streets is said to be attended with "great peril" to human life, and the

"utmost care" should be exercised to avoid injury. It may be said that in all such cases the language of the courts has been as strong, and often stronger, in characterizing such a dangerous proceeding, and in requiring the utmost care on the part of the company to prevent injury. The learned counsel contends that such instructions invade the province of the jury. Has the jury a right to find that this was not "a most dangerous proceeding," and that "special pains" need not be used to prevent injury in such a case? If not, then it is not exclusively a jury question. It is the statement of an obvious fact, within the common knowledge of everybody. It is the duty of courts to denounce such a dangerous proceeding as making "flying switches" over populous streets, and to raise high the standard of care and precaution to be used in apt and forcible language. See, also, other cases cited in respondent's brief.

3. The refusal of the court to give the instructions asked by the defendant was not error. The instructions given embraced every material question in the case.

4. The questions submitted to the jury were also ample and sufficient to embrace all the material issues, and the refusal to submit those presented by the defendant's counsel was not error.

5. The court refused to strike out the testimony of the witness Shaun, in respect to the speed of the train. This witness was 20 years of age, and had lived with his father, about 30 rods from the upper switch, in this village, many years, and had seen a great many trains pass by, and he gave an opinion as to the speed of this train that it was about 25 miles per hour. On cross-examination he said he did not know how many feet or rods there were in a mile. It was objected that this showed him incompetent to testify on that question. It is a mere matter of opinion how many miles an hour a train is running, with the best of witnesses. It is not a matter of expert evidence or of science. *Railroad Co. v. Van Steinburg*, 17 Mich. 104. The opinion of some witnesses would be more reliable than that of others. It would depend upon their intelligence and experience. It does not follow that a witness may not be able to form a reasonably intelligent opinion of the distance or space of a mile if he cannot readily know or tell how many feet or rods there are in a mile. He may be able to form an opinion of what is a foot in length, height, or depth, or of what is a rod or a mile. A knowledge of these main spaces is acquired by observation and practical test, while their minute subdivisions depend much upon the tables to be learned and remembered. The weight to be given to the opinion of any witness will depend upon his general intelligence, learning, and experience. But the opinion of one who ranks below the common standard is not to be stricken out as incompe-

tent. The jury should be allowed to give it its proper weight. It would be arbitrary to prohibit any witness of sound mind from giving his opinion of a matter that is within the common knowledge of mankind, and does not depend upon the science or peculiar skill of experts.

6. The first question put to the witness Roedel, and objected to, was immaterial; and the question as to the distance in which such a car, with a sound brake, could be stopped was clearly competent, relevant, and material. The order in which the testimony may be introduced is in the discretion of the court. *Remlinger v. Young*, 22 Wis. 426. There do not appear to have been any good reasons for the court to grant the motion for a new trial. The evidence seems to have fully warranted the verdict, and the damages awarded appear to be reasonable and proportionate to the plaintiff's injury. The judgment of the circuit court is affirmed.

STATE v. HASTINGS, Attorney General, et al.

(Supreme Court of Nebraska. June 5, 1893.)

STATE OFFICERS—IMPEACHMENT—DEGREE OF
PROOF—MISDEMEANORS—ERROR IN JUDGMENT—
CONTRACTS—USE OF APPROPRIATION—FAILURE
TO DETECT FRAUD.

1. By the provisions of section 14, art. 3, Const. 1875, the supreme court did not succeed to any of the political functions of the senate as a court of impeachment under the prior constitution. The provision for the trial of impeachments before this court was intended to insure a strictly judicial investigation in such cases according to judicial methods.

2. Where, in an impeachment proceeding, the act of official delinquency consists in the violation of some positive provision of the constitution or statute, which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty, willfully done, with a corrupt intention, or where the negligence is so gross, and the disregard of duty so flagrant, as to warrant the inference that it was willful and corrupt, it is a misdemeanor in office, within the meaning of section 5, art. 5, of the constitution.

3. But where such act results from a mere error of judgment or omission of duty, without the element of fraud, or where the alleged negligence is attributable to a misconception of duty, rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state. Maxwell, C. J., dissenting.

4. Impeachment is, with respect to the production of evidence and quantum of proof required to warrant a conviction, essentially a criminal prosecution; hence the guilt of the accused must be established beyond a reasonable doubt.

5. The functions of the board of public lands and buildings in passing upon claims against the state, and in the selection of subordinate officers and agents, authorized by law, are in their nature quasi judicial. *Brown v. Otoe Co.*, 6 Neb. 115. Maxwell, C. J., dissenting.

6. An officer is not liable for a judicial act except where he acts willfully, maliciously, or corruptly. This is a rule of great antiquity, and rests upon the soundest public policy, and in its application is not limited to judges, but

extends to all officers and boards charged with the decision of questions quasi judicial in character.

7. The legislature of 1891 appropriated \$40,000 for the building of a cell house at the penitentiary by days' work. The board of public lands and buildings, having said building in charge, selected for superintendent of construction one D., known to be the agent and manager of M., the lessee of the prison labor, with the understanding that he would have to contract with M., his principal, in behalf of the state, for the necessary labor, and fix the price to be paid therefor. It does not appear that the labor could have been procured for less than the rate allowed by D., to wit, one dollar per day, and is admitted to have been worth more than that amount. *Held*, that the action of the board in selecting D. as the representative of the state, while highly censurable, as unbusinesslike, and wanting in that intelligent regard for the interest of the public which the state exacts from its officers, was at most an error of judgment, not amounting to a misdemeanor in office. Maxwell, C. J., dissenting.

8. It is not a misdemeanor in office to advance money appropriated by the legislature to a disbursing agent to enable him to procure material and labor for the erection of a public building of the state where such advancement is not prohibited by law, especially where the state is protected by a sufficient bond. Maxwell, C. J., dissenting.

9. Through the negligence, incompetency, or fraud of a superintendent of construction, the state was charged for building material greatly in excess of the reasonable or market value thereof, and for labor which had not been performed. The bills rendered therefor were presented in the usual course of business, and allowed by the board of public lands and buildings, acting in good faith, and in the belief that such claims were legitimate charges against the state. *Held*, that the allowance of such claims is not a misdemeanor in office, for which the members of the board are impeachable. Maxwell, C. J., dissenting.

10. The board of public lands and buildings used \$500 of money appropriated for the building of a cell house at the penitentiary to defray the cost of visiting prisons in neighboring states, the alleged purpose of such visit being to gain information with respect to the character and quality of cells to be selected for said building, also improved systems of ventilation, and other methods of bettering the sanitary condition of the prison. It appears that they were advised by the attorney general that said money could be lawfully used for the purpose named. *Held*, that the test of their liability in this proceeding is not whether such advice was technically correct. If they in good faith construed the law as authorizing them to apply the money to the object named, and actually used it for such purpose, they cannot be adjudged guilty of a misdemeanor in office, solely because this court may differently construe the law. Maxwell, C. J., dissenting.

11. Evidence examined, and *held* not sufficient to warrant a finding that the respondents are guilty of converting any part of the sum last above named to their own use. Maxwell, C. J., dissenting.

12. The board of public lands and buildings, out of the cell house fund above named, paid the sum of \$200 to defray the expenses of the warden and chaplain of the penitentiary as delegates to the National Prison Congress at Pittsburgh, Pa. While such expenditure was not within the scope of the authority of the board, and the respondents are liable to the state for the money so appropriated, they acted in good faith, and from motives of humanity, without the possibility of personal gain; and such facts are not sufficient in law to warrant their impeachment. Maxwell, C. J., dissenting.

13. During the year 1891, and the month of February, 1892, extensive frauds were practiced upon the state by contractors for coal at the asylum for the insane at Lincoln, although the amount of such frauds cannot be determined from the proofs. Following the practice which had prevailed for many years, the board required all vouchers for supplies to be certified by the superintendent as correct. When so certified, they were compared with the contracts on file, and, if found to correspond, and the extensions correct, they were allowed. During the period mentioned, through the negligence or credulity of the superintendent, he was induced to certify to accounts largely in excess of the coal actually received, and which were allowed by the board, relying in good faith upon such certificates. The board at that time were required to disburse over \$450,000 annually for current expenses, and \$225,000 for the erection of public buildings, which necessitated the examination of hundreds of vouchers monthly. *Held*, that the failure to detect and prevent the frauds in question is not per se a misdemeanor in office. Maxwell, C. J., dissenting.

14. Bills for coal, amounting to \$12,000, on account of the asylum for the last quarter of 1890 and the first quarter of 1891, remained unpaid, the appropriation for that biennial period having been exhausted. Said bills were submitted to the legislature of 1891, and referred to the proper committees for investigation, and the sum of \$12,000 appropriated with which to pay them. Subsequently they were certified to by the superintendent, and allowed by the board, in the belief that they were proper charges against the state. *Held*, that the action of the legislature is complete justification of the act of the board. Maxwell, C. J., dissenting.

(Syllabus by the Court.)

Original action before the supreme court for impeachment of George H. Hastings, attorney general, John C. Allen, secretary of state, and Augustus R. Humphrey, commissioner. Judgment for respondents.

P. H. Barry, C. D. Casper, and Geo. R. Colton, managers. G. W. Doane, S. B. Pound, W. L. Greene, and G. M. Lamberton, for prosecution. Geo. H. Hastings, J. R. Webster, and John L. Webster, for defendant Hastings. C. A. Atkinson and John L. Webster, for defendant Allen. M. L. Hayward, Edward J. Murfin, and John L. Webster, for defendant Humphrey.

POST, J. This is an impeachment proceeding under the provisions of section 14, art. 3, of the constitution. The articles of impeachment are three in number, containing in all twenty-one different specifications. However, before the final submission of the case, the first six and the twelfth specifications under article 3 were abandoned by the managers, representing the legislature, and do not call for notice in this opinion. The following is a summary of the several articles of impeachment and specifications thereunder:

Article 1. That respondents, as members of the board of public lands and buildings, did not "faithfully and properly disburse" the sum of \$40,000, appropriated to build a cell house at the penitentiary by the legislature of 1891. Specification 1: That respondents,

as members of said board, carelessly, negligently, and willfully appointed William H. Dorgan superintendent and agent to buy material and superintend the construction of the cell house, knowing that he was the agent of Mosher, the prison contractor; whereby said Dorgan charged the state \$1 per day for convict labor on the said cell house, which could have been procured for 40 cents per day, whereby the state was defrauded. Specification 2: The respondents, as members of said board, placed in the hands of Dorgan, as agent, large sums of money in advance of payments made by him, and without adequate security, and without assurance that the same would be expended for the benefit of the state; whereby the state was defrauded. Specification 3: That Dorgan purchased stone and other material at rates exorbitant and beyond what the same could have been purchased for in open market, and that he returned false and fraudulent accounts, charging these excessive prices, and for excessive quantities; and that the respondents, as members of the board, negligently, willfully, and corruptly accepted and audited said accounts; whereby the state was defrauded. Specification 4: That Dorgan used about \$232 of said money for labor and material for the use of Mosher, and which did not go into the cell house; and the respondents, as members of said board, negligently, willfully, and corruptly accepted vouchers therefor, knowing the same had not been used in the cell house; whereby the state was defrauded. Specification 5: That Dorgan charged for labor of convicts which had not been performed, and respondents, as members of the board, negligently, willfully, and corruptly audited and allowed his accounts; whereby the state was defrauded. Specification 6: That in Dorgan's account were various items fraudulently charged, and no vouchers therefor, and which respondents, as members of said board, negligently, willfully, and corruptly audited, and whereby the state was defrauded. Specification 7: That Dorgan was intrusted with money to expend and disburse according to his own judgment; and that, after Dorgan was superseded by Hopkins, his successor, the board, and respondents, as members thereof, willfully, carelessly, and negligently failed to require a settlement and accounting with him, Dorgan.

Article 2. That respondents, as members of the board of public lands and buildings, unlawfully, willfully, and corruptly received and misappropriated to their own use moneys of the state which came to them as members of the board. Specification 1: That respondents, as members of said board, did so receive and misappropriate \$500. Specification 2: That the respondents, as members of said board, did unlawfully, willfully, and corruptly misappropriate \$200 of said money, by paying same to Daniel Hopkins, who was not entitled to same.

Article 8. That respondents, as members of said board, had supervision and control over the state institutions, and were responsible for the disbursements of the funds therefor, and negligently, willfully, and corruptly allowed accounts for coal furnished for the use of the insane asylum at Lincoln without proper examination thereof. Specification 7: That the contractor, the Whitebreast Coal & Lime Company, for the month of October, 1890, furnished 346,000 pounds of coal; for November, 1890, 642,000 pounds; for December, 1890, 862,000 pounds; for January, 1891, 378,700 pounds; for February, 1891, 497,300 pounds; and for March, 1891, 470,000 pounds,—and rendered its account to the board for coal delivered for said months as follows: For October, 1890, 400,000 pounds; November, 1890, 1,244,000 pounds; December, 1890, 1,480,000 pounds; January, 1891, 1,086,000 pounds; February, 1891, 1,240,000 pounds; March, 1891, 1,040,000 pounds; and that on April 10, 1891, the board carelessly, negligently, and willfully approved the account, after deducting 80,000 pounds. Specification 8: That the board let a contract to Betts, Weaver & Co. to furnish supplies for the quarter commencing April 1, 1891, and that said contractors furnished for April, May, and June, 1891, 1,262,800 pounds of coal, but rendered an account for 2,870,700 pounds, and the board carelessly, willfully, and negligently approved said account, without proper examination and verification. Specification 9: That the board let the contract for coal to the Whitebreast Coal & Lime Company for the quarter commencing July 1, 1891, and that said company furnished coal to the asylum as follows: July, 1891, 385,000 pounds; August, 1891, 391,000 pounds; September, 1891, 308,000 pounds; but rendered accounts for July, 1891, 882,000 pounds; August, 1891, 983,000 pounds; September, 1891, 918,000 pounds; and the board carelessly, willfully, and negligently approved said accounts. Specification 10: That the board let contracts for supplies to Betts, Weaver & Co. for the quarter commencing October 1, 1891, and that said contractors furnished coal as follows: For October, 1891, 501,500 pounds; November, 1891, 673,000 pounds; December, 1891, 761,000 pounds; but rendered account for October, 1,434,000 pounds; November, 1,480,000 pounds; December, 1,495,000 pounds; and the board, without examination and verification, carelessly, willfully, and negligently allowed the same. Specification 11: That the board let the contract for coal to the Whitebreast Coal & Lime Company for the quarter commencing January 1, 1892, for the asylum. That the said company furnished coal as follows: For February, 1892, 674,000 pounds, but returned an account for 930,600 pounds; and that the board allowed said account willfully, negligently, and carelessly, and without properly examining and verifying the same.

The answers of the respondents are substantially the same, and may be summarized as follows:

In addition to the duties of their respective departments, each is a member of numerous boards, to which are attached varied and important duties. That the board of public lands and buildings, during the years 1891 and 1892, were charged with the construction of 10 public buildings, costing in the aggregate over \$225,000, and the disbursement of appropriations for current expenses exceeding \$800,000; so that it was impossible for said board to more than exercise a general supervision over the various public interests. Specification 1: That in the construction of the cell house it was necessary to employ a superintendent; that Dorgan was considered a suitable person for that trust, and deemed to be honest and capable, and his appointment was the result of their deliberate judgment, acting in good faith, for the best interests of the state; that the employment of convict labor was by them deemed expedient; that the men employed were mostly skilled workmen, and the rate allowed for their services—one dollar per day—was not excessive. Specification 2: It was necessary for the board to advance to the superintendent sums of money to defray current expenses as the only way to pay for the work without delay, and is the customary way of disbursing money for public work; and the same was advanced in good faith, upon estimates made by the said Dorgan, and upon the bond given by him in the sum of \$10,000. And they deny that the state has been defrauded on account of said transaction in any sum whatever. Specification 3: They have no knowledge that Dorgan presented any fraudulent or false vouchers, and deny that they willfully, negligently, or corruptly audited accounts without attempting to verify the correctness thereof. That the settlement of Dorgan's account was postponed for the production of vouchers, and awaiting the result of an investigation, then in progress, by reason of which said accounts had not been audited and settled; and deny that the state has been defrauded thereby. Specification 4: Allege that the \$232 expended for fire brick and clay was for the setting of a boiler, the property of the state, to be used for heating the cell house in question, which was both lawful and expedient; and deny that the state has been defrauded. Specification 5: Deny that they negligently, willfully, corruptly, or otherwise allowed any fraudulent or false charge for convict labor, and further say that in all cases they required a verification by the warden of the accounts for convict labor, and deny that the state has been defrauded, as therein charged. Specification 6: A denial of substantially all of the allegations thereof. Specification 7: Allege that the board delayed final

settlement with Dorgan for good and sufficient reasons, as more fully set forth in answer to specification No. 3.

Article 2. Specification 1: That during the construction of the cell house various questions arose with respect to the kind of cells to be selected therefor, the different systems of ventilation, and other questions pertaining to the sanitary condition of the prison. That the lessee of the penitentiary was by law bound to furnish 80 cells at his own expense, and had notified the board of his readiness to construct or furnish them according to any plan adopted by the state. That, being entirely without experience in the construction or management of prisons, and desiring to fully discharge their duty to the state, they determined to visit and personally inspect certain recently constructed and well-regulated institutions in other states. That they, in company with the warden, visited said prisons, some seven in number; also the Panly Jail & Cell Works, of St. Louis, Mo., using the sum of \$500 of the cell-house fund for the purpose of defraying their expenses, in addition to considerable of their private funds, which were required for that purpose; and that the action in question was prompted alone by a conviction of duty to thus obtain the information necessary for their guidance in the discharge of the duties of the state. Specification 2: In the month of October, 1891, the board used the further sum of \$200 out of the cell-house fund to defray the expenses of the chaplain and warden of the penitentiary in attending a session of the National Prison Congress, organized to encourage humanitarian methods of conducting prisons, and the reformation of the criminal classes. That, in so applying the money in question to the purpose named, their motives were to protect the public interests alone.

Article 3. Specification 7: The items for coal for October, November, and December, 1890, were unpaid by the former administration for want of funds, and these items, with items for coal for January, February, and March, 1891, were by the officers of the asylum presented to the legislature of 1891, and the same allowed and ordered paid by the said legislature, and an appropriation made therefor. The respondents are not guilty of misdemeanor relating thereto. Specifications 8, 9, 10, 11: When respondents were inducted into office—January 9, 1891—they had no especial knowledge of the amount of coal and other supplies required for the public institutions; that a superintendent, steward, and bookkeeper had been appointed by the governor for the Lincoln asylum, and who had long held said offices; that said officers had all given bond and taken an oath to faithfully discharge their duties, and were by the respondents deemed honest and capable; that in allowing bills for coal they relied, as they had

the right to do, upon the certificate of the superintendent that said bills were correct, and that the coal therein called for had in fact been furnished.

The foregoing is believed to be a fair statement of the issues, and which are presented more in detail than would have been deemed necessary or proper in an ordinary action or proceeding. When we have "cleared away the rubbish," to use a homely phrase, and stripped this case of the features which are wholly irrelevant, or at most but incidental, to the real controversy, we find the questions involved to be few, and by no means difficult of solution. In the first place, it should be remembered that the purpose of this investigation is to determine whether the respondents have been guilty of misdemeanor in office, and not an action on their official bonds, or to state an account between the state of Nebraska and Dorgan or parties furnishing coal for the use of the asylum at Lincoln. It should also be borne in mind that the only charges with respect to the cost or value of the cell house are those contained in the 3d, 5th, and 6th specifications under article 1; but, as the proofs are confined to specifications 5 and 6, they alone will be examined. Volumes might be written on the subject of the cost and value of the different walls as well as the roof and foundation of the cell house, also the amount of labor and material furnished therefor by Dorgan and Hopkins, respectively, and in the vain attempt to reconcile the estimates of the many witnesses who have testified on that question. I am satisfied that it was a mistaken sense of duty which prompted us to permit first the state, and afterwards the respondents, to introduce evidence of that character. The result is that we have consumed days, and even weeks, in hearing proofs wholly irrelevant to the real issues of the case. It may be further said that the evidence on that subject is of the most unsatisfactory character, even for expert testimony. For instance, according to my recollection, no two of the state's witnesses agree as to the length or height of the exterior walls of the structure, and differ more than \$14,000 in their estimate of its present value. With the foregoing observation, I will dismiss the subject of the present value of the cell house, and proceed to consider the several charges in their order.

Preliminary to an examination of the charge contained in specification 1 of article 1, it should be observed that on the 22d day of October, 1877, the penitentiary grounds and convict labor were leased by the state to W. H. B. Stout for the period of 10 years, and by an act approved March 2, 1887, said contract, having been assigned to C. W. Mosher, was extended for 10 years from October 1, 1889. It is further provided by said act that Mosher shall receive 40 cents per day for each convict as full compensation

under said contract. At the time of the appointment of Dorgan to superintend the construction of the cell house he was the agent and manager of Mosher, the lessee of the penitentiary, and charged with the duty of subleasing the prison labor. In view of that fact, his selection by the board as the representative of the state, knowing, as will hereafter appear, that it would be obliged to depend upon Mosher for labor to carry on the work, is highly censurable, and should, to say the least, be characterized as unbusinesslike, and utterly wanting in that intelligent regard for the interests of the state which the law demands of public officers under like circumstances. It is true, according to the evidence, that Dorgan was recommended to the board by reputable parties, and previous to his resignation no charges had ever been made, within the knowledge of respondents, affecting his character or fitness for the position. That fact, while it may to some extent extenuate, will not excuse, his selection for so important a trust. But has the state been defrauded thereby, as charged? The answer to that question depends upon whether the labor could have been procured for less than the amount allowed. In this connection, it is proper to examine the provision for the cell house, which is found in the general appropriation act of 1891 under the title "Penitentiary," and is in the following language: "Building new cell house by days' work, forty thousand dollars." The motives of the legislature are not involved in this controversy, yet the appropriation in question might with equal propriety have been entitled "An act for the relief of C. W. Mosher," since it is a palpable fact that he was beyond the reach of competition. The rules of the prison forbid the employment of free laborers within its walls, hence the contractor was practically able to dictate the wages to be paid by the state. There is, however, no evidence tending to prove that the labor could have been procured on terms more advantageous to the state, or that the amount charged—\$1 per day—is excessive. It is true, convict labor has been let to some of the subcontractors at the prison as low as 40 cents per day, but such employment has been for a term of years, and the employers have in every such case been subjected to the additional expense of costly machinery. It is also shown that the state had on two previous occasions employed convict labor, allowing therefor \$1 per day. The state's witnesses who testify on the subject all agree in placing the value of the labor per day at figures largely in excess of the rate charged therefor. The wrong to the state in that regard consists in the charging for labor not rendered, which will be considered hereafter, rather than the rate per day. The charge in that specification is, therefore, not sustained by the proofs.

2. The charge in the second specification is

the advancing to Dorgan of money out of the cell-house fund before the labor therefor had been performed, or the material furnished, without adequate security. It is not charged that such advancements were made corruptly, or even negligently. It should be mentioned in this connection that upon the appointment of Dorgan he was required to give a bond in the sum of \$10,000, conditioned that he would faithfully discharge his duties, and account for all moneys which might come into his hands. That bond is admitted to be good and ample security for any amount now due to the state. Nor does it appear that he was at any time intrusted with money in excess of the amount of the bond aforesaid. On the 1st day of June, 1891, Dorgan presented to the board an estimate of which the following is a copy: "Estimate No. 1. For work done and material furnished during the month of May, 1891, for cell house at penitentiary: Cut stone, \$1,000; concrete, \$750; excavating, \$350; material on hand, not used, \$4,000; balance due contractor, \$6,100. The above estimate was made by me this 1st day of June, 1891, and I hereby certify that the amount of work done and materials furnished by said contractor are true and correctly stated and set forth in the above estimate, and that the said estimate is made in the manner and according to the plans and specifications mentioned in the contract with the said state and said contractor. [Signed] W. H. Dorgan, Superintendent." Accompanying said estimate was a voucher for \$6,100, as follows: "The State of Nebraska to W. H. Dorgan, Dr. For material used in building new cell house per estimate No. 1, hereto attached, \$6,100. Examined and approved June 1, 1891, by the Board of Public Lands & Buildings, and account to be charged to appropriation for penitentiary new cell house. [Signed] A. R. Humphrey, President. [Signed] John C. Allen, Secretary." Upon the approval of the above voucher a warrant was issued in his favor for the amount named therein. In like manner he was allowed \$8,000 August 3, 1891, \$8,000 October 5, 1891, \$5,000 December 7, 1891, and \$5,000 March 7, 1892; making a total of \$32,100, of which \$6,300 was turned over by him to Hopkins on the appointment of the latter. It may be assumed that the sums above enumerated were all advanced by the board before the procuring of the labor or material therefor; but, as the charge involves no issue of fraud or negligence, the only question necessary to examine is whether the advancing of the money aforesaid is a violation of any positive law.

The only provisions to which we have been referred as bearing upon the subject are section 22, art. 3, and section 9, art. 9, of the constitution, which are copied in the order named: "Sec. 22. Money—How Drawn from Treasury. No allowance shall be made for the incidental expenses of any state officer except the same be made by general

appropriation, and upon an account specifying each item. No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon; and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution. The auditor shall, within sixty days after the adjournment of each session of the legislature, prepare and publish a full statement of all moneys expended at such session, specifying the amount of each item, and to whom and for what paid." "Sec. 9. Claims upon Treasury. The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state before any warrant for the amount allowed shall be drawn: provided, that a party aggrieved by the decision of the auditor and secretary of state may appeal to district court." In my judgment, neither of the above provisions are applicable. The provision for the cell house invested the board with a discretion with respect to the money appropriated therefor, which, in the absence of fraud or mistake, is a sufficient justification of the act charged. The above constitutional restrictions were intended to limit the payment of claims to those for which specific appropriations have been made. But while the advancing of money appropriated to a disbursing officer, or board, as in this case, is of doubtful wisdom, because liable to abuse, it is not prohibited by any express provision of the constitution or necessary implication therefrom. There are also numerous legislative precedents for the action of the board, a few only of which need be noticed. For instance, by chapter 115, Laws 1885, \$15,000 were appropriated for an exhibit at the New Orleans Cotton Exposition, to be drawn by the governor, who was made the sole disbursing officer, and to be spent at such times and for such purposes as, in his own judgment, was deemed expedient. By an act approved February 6, 1891, \$100,000 were appropriated for the relief of "the people in the drouth-stricken districts" of the state, and a board, designated therein as a "relief commission," authorized to draw and disburse the money so appropriated. By an act approved March 27, 1891, \$50,000 were appropriated for an exhibit at the Columbian Exposition, to be drawn and expended by a commission created by said act upon estimates to be followed in a reasonable time by a detailed statement and vouchers. But a case in point is the impeachment of Melville in 1806 on the charge of drawing funds as treasurer of the navy before they were needed for public use. In that case the house of lords submitted to the judges of common pleas two ques-

tions, viz.: First, whether it was unlawful to draw public money in advance of the time it was needed for public use, but for the purpose of having it for that use; second, if such act was an offense. Both questions having been answered in the negative, the accused was acquitted. 29 How. State Tr. 1469. There exists in my mind a grave doubt as to the constitutional authority of a state board to audit claims against the state; but, assuming, as do the managers, that such power exists, I do not doubt that they may lawfully place money in the hands of a superintendent, to be used by him for the purpose designated in the appropriation, in the absence of a special provision to the contrary, after adopting proper precautions for the protection of the state.

3. With respect to specification No. 3 it may be said that the bills rendered for stone are grossly in excess of the reasonable or market value thereof, through the negligence, incompetency, or fraud of the superintendent. The latter, it is disclosed, contracted with Atwood & Co. for the necessary stone, to be delivered on the cars at Cedar Creek, Cass county, or other points not more remote from Lincoln, agreeing to pay 8 cents per 100 pounds for common rubble, 16 cents per cubic foot for dimension stone, and 35 cents per cubic foot for stone "plugged to size,"—that is, drilled and blasted according to designated measurements. It also appears that Atwood & Co. purchased all of the dimension stone from J. W. Zook and E. D. Van Court, of Nemaha county, paying therefor 10 cents per cubic foot; also a portion of the rubble at 4 cents per 100 pounds; and which was all billed to the state, and paid for at the contract price. The price paid by Atwood & Co. it is shown is a trifle below the market value of the stone, but the difference does not exceed two cents per cubic foot. Zook testifies also that he received a written inquiry from Dorgan, previous to the contract of the latter with Atwood & Co., concerning the price of stone, and in reply quoted the prices above named; but which is denied by Dorgan. There is, however, no evidence that the board, or the respondents individually, or any of them, participated in or had any knowledge of such frauds or overcharges. Nor was such a contention made at any time by the managers during the trial, except perhaps with respect to specification No. 1 of article 2, which will be noticed hereafter. On the other hand, their conduct is entirely consistent with good faith and honesty of purpose, although, it may be admitted, indicating a lack of judgment, and a proper degree of diligence under the circumstances. There was certainly nothing upon the face of the bills rendered by Atwood & Co. calculated to excite suspicions in the minds of persons not familiar with the price of stone, and it is not difficult to

conceive how they might easily have borne the scrutiny of more exacting and cautious officers than the state board. By the proofs, under this specification, is presented the vital question in the case, viz. whether the respondents are impeachable for failing to detect and prevent the alleged frauds against the state; or, as a broader statement of the same proposition, what, under our constitution, amounts to an impeachable misdemeanor? It is safe to say that no question of greater importance has ever been submitted for the consideration of this court, and in its solution we have endeavored to adopt the rule best sanctioned by authority, and which is just alike to the state and its servants. It is sufficient for our purpose at present to say that we are constrained to reject the views of Prof. Dwight, Judge Curtis, and other advocates of the doctrine that an impeachable misdemeanor is necessarily an indictable offense as too narrow, and tending to defeat, rather than promote, the end for which impeachment as a remedy was designed, and not in harmony with the fundamental rules of constitutional construction. On the other hand, the contention of counsel for the state that the term "misdemeanor in office" is not susceptible of a legal definition, but that every such proceeding should be determined upon the facts in the particular case, is, to say the least, strikingly illogical. There is one fact which cannot fail to impress the judicial mind from an examination of our constitution, viz. that the provision for the trial of impeachments before the supreme court was to insure a strictly judicial investigation according to judicial methods. It cannot be successfully maintained that this court has succeeded to any of the political functions of the senate as a court of impeachment under the first constitution. The former practice has been justly condemned on account of its political, and, it must be confessed, too frequent partisan, character; but the substitution of a judicial oligarchy for the form of democracy is not to be commended as a measure in the interest of reform. As said by Judge Story: "It is so incompatible with the genius of our institutions that no lawyer or statesman would be inclined to countenance so absolute a despotism and practice which would make that a crime at one time or in one person which would be deemed innocent at another time or in another person." Story, Const. (5th Ed.) § 797. And Senator Davis, in Johnson's Impeachment, (volume 3, page 157,) said: "But the position that the senate, when trying an impeachment, is a law to itself, is bound by no law, may decide the case as it wills, is illimitable and absolute in the performance of certain restricted judicial functions, in a limited government is revoltingly absurd." The sound rule, and the one approved by the most emi-

nent jurists and statesmen of this country, lies midway between the two extremes. Judge Lawrence, in his brief for the managers in Johnson's Impeachment, 6 Amer. Law Reg. (N. S.) 641, states the rule thus: "The result is that an impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty by an act committed or omitted, or without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose." Senator Doolittle, in the same case, (page 240,) said: "But to say that a high public officer, with good motives, and with an honest intent to obey, though he mistake the meaning of the statute, can be found guilty of a high crime or misdemeanor, which shall subject him to the heaviest punishment which can fall upon a public man in high office, is to assert a doctrine never before heard in any court of justice." Senator Fessenden, in the same case, (page 30,) referring to the argument that the term "misdemeanor in office" could not be accurately defined, said: "Granting, for the sake of argument, that the latter construction is the true one, it must be conceded that the power thus conferred might be liable to a very great abuse, especially in times of high party excitement, when the passions of the people are inflamed against a perverse and obnoxious public officer. If so, it is a power to be exercised with extreme caution when you once get beyond the line of specific criminal offense." And in Pom. Const. Law, 602, it is said: "Wherever the president or vice president or any civil officer has knowingly and intentionally violated the express terms of the constitution or of a statute which charged him with an official duty to be performed without a discretion, and wherever, a discretion being left, within the bounds of which he has an ample choice, he exercises that discretion in a willful and corrupt manner, or even in a rash and headstrong manner, unmindful of the ruinous consequences which his acts must produce, he is impeachable." It may be safely asserted that where the act of official delinquency consists in the violation of some provision of the constitution or statute which, if denounced as a crime or misdemeanor, or where it is a mere neglect of duty, willfully done, with a corrupt intention, or where the negligence is so gross, and the disregard of duty so flagrant, as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office. But where it consists of a mere error of judgment, or omission of duty, without the element of fraud, and where the negligence

is attributable to a misconception of duty, rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state.

4. Another question, closely allied to the one last discussed, is the character of the duties imposed upon the board of public lands and buildings, such as the selection of a superintendent of construction for the cell house, and in the auditing of accounts against the state. It has been suggested that such duties are analogous to those of ordinary trustees, and that the respondents are therefore impeachable for a failure to exercise such a degree of diligence as is required of ordinarily prudent men under like circumstances. That proposition is certainly indefensible, either upon reason or authority. It has been repeatedly decided by this court, and may be regarded as the settled law of the state, that duties of the character enumerated are quasi judicial. For instance, in *Brown v. Otoe Co.*, 6 Neb. 115, a carefully considered case, *Lake, C. J.*, approves of the following language: "We have, after much reflection, and upon due consideration, reached the conclusion that the board of commissioners, in passing upon claims, act in a judicial capacity." In *Bish. Noncont. Law*, 785, 786, quasi judicial functions are thus defined: "When the law in words or by implication commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the functions are termed 'quasi judicial.'"

5. Another rule, so well settled as not to admit of controversy, is that public officers are not liable even in a civil action for judicial acts, however erroneous, unless they are shown to have acted willfully or corruptly. The cases which recognize that rule are so numerous that it is impracticable to cite them at length in this opinion, but they will be found in the notes under section 713, *Throop, Pub. Off.*, and *Mechem, Pub. Off.* 639, 640. See, also, *Steph. Dig. Crim. Law*, art. 119; *Whart. Crim. Law*, (9th Ed.) 1572; *Impeachment of Scroggs*, 8 How. State Tr. 163, 190; *Bish. Crim. Law*, 290, 400. It follows from what has been said that the action of the board in selecting Dorgan to superintend the construction of the cell house, and in allowing the bills contracted by him, was in character essentially judicial. Their fault was a mere error of judgment, not involving either moral turpitude or gross and willful neglect of duty, and does not, therefore, amount to a misdemeanor in office.

6. Another question which is suggested in this connection is the character of this proceeding, viz.—whether it is to be regarded as a civil action or as a criminal prosecution for the purpose of the production and the quantum of proof to warrant a conviction. It may be safely asserted that the decided

weight of authority in this country and England, if, indeed, there exists a diversity of opinion on the subject, is that impeachment in that respect must be classed as a criminal prosecution, in which the state is required to establish the essential elements of the charge beyond a reasonable doubt. *Blackstone* (4 Comm. 250) thus defines the proceeding: "But an impeachment before the lords by the commons of Great Britain in parliament is a prosecution of the already known and established law, and has been frequently put in practice, being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand interest of the whole kingdom." In the *Impeachment of Belknap*, Senator *Wright* used the following language: "Because it does not satisfy me upon this point beyond a reasonable doubt, and because it is quite wanting in everything like directness and force, * * * I feel bound to vote, 'Not guilty.' " Language of similar import was used by Senators *Christianscy*, *Booth*, *Oglesby*, and others. But we are fortunately not without judicial authority on the subject. In the *Impeachment of Barnard* (1872) the judges of the court of appeals of New York sat with the senators, and appear to have been consulted upon all doubtful questions. Chief Justice *Church*, (page 2070,) speaking upon the subject under consideration, said: "If I felt warranted in balancing the evidence, and in determining that question in a civil action, I might come to the conclusion that the evidence of payment was not reliable; but we are here in a criminal case, where the respondent is entitled to the benefit of every reasonable doubt, both upon the facts and the law, and I cannot say that the evidence which has been produced is not sufficient to create some doubt." Judge *Andrew* (page 2071) said: "I shall vote 'Not guilty' upon this article, upon the principle that this defendant is entitled to every reasonable doubt, and that that doubt as to his guilt, according to the charge, exists in my mind upon the evidence in the case." Like views were expressed by other judges, but there was no dissent from the opinions above quoted. And in *State v. Buckley*, 54 Ala. 599, impeachment is defined as a criminal proceeding without the right of trial by jury. It is not alone in form, but also in substance, a criminal prosecution. As said by Senator *Sargent* in *Belknap's Case*, (page 87:) "A sentence of disqualification is a humiliating badge affixed to high crimes and misdemeanors in office." While we have in this country no technical attainder working a corruption of blood, the sentence of disqualification to hold or enjoy any office of honor, profit, or trust which is provided by our constitution in case of conviction by impeachment is within the primary definition of the term. It is the extinction of civil rights and capacities, a mark of infamy by means of which the offender be-

comes attinctus or blackened. Rap. & L. Law Dict. tit. "Attainder;" 1 Blash. Crim. Law, 966, 970, and notes. The allegation that the respondents acted willfully and corruptly being without support, it follows that there is a failure of proof with respect to specification No. 3.

7. The 6,000 fire brick and 6 barrels of fire clay described in specification 4 were used in the resetting of two boilers belonging to the state, and which are to be used in the heating of the new cell house. The contention of the managers is that it was the duty of Mosher, the lessee of the penitentiary, to reset these boilers at his own expense. The provision in the act of 1877 under which the lease was executed is that the lessee shall pay "all penitentiary expenses, including salaries of officers and other help, the heating of buildings, boarding and clothing convicts." The contract is in the following language: "Said Stout agrees to board and clothe all such convicts in the manner prescribed by law, and to pay and defray all expenses necessarily incurred in maintaining said penitentiary, * * * and to restore said buildings, yards, and grounds at the end of said term in as good condition as they now are, reasonable wear and tear, loss by fire, etc., excepted." Whether, under the above provisions, the lessee was, at his own expense, bound to set boilers for a building not in existence and not contemplated when the contract was executed, is, to say the least, a debatable question. Nor are we now called upon to review the action of the board for the purpose of determining whether their construction is the sound one. It is sufficient that they acted in good faith.

8. It appears that from January 20 to February 1, 1892, inclusive, work on the cell house was suspended for want of material, and the convicts assigned to that work remained idle. It appears further that Dorgan, the superintendent, rendered a bill for their labor at one dollar per day during all of said time. He attempted to justify his action by reference to a custom to charge subcontractors for the labor of convicts from the time of their assignment, unless sick or disabled. This explanation merely proves the wisdom of the scriptural saying that one cannot serve two masters. Dorgan was appointed to employ laborers by the day, and not to make time contracts for labor; in other words, the state was not a subcontractor, and was liable only for labor actually performed. But the state board relied upon the time book kept by the warden and his subordinates, who were in the habit of keeping time for the lessee and the several subcontractors; and in this instance, following the custom above referred to, daily charged to the state all the men who had been assigned to the cell house. The bill, therefore, was allowed in the belief, upon apparently reliable evidence, that the services had been

rendered as charged, and their action is therefore not impeachable.

9. The only specific charge in specification 6 is the crediting of Dorgan for money expended without requiring the production by him of vouchers therefor. The method adopted by the board in dealing with Dorgan was substantially as follows: With each estimate made by the latter he would file with the board the original bills rendered to him for stone and other material, also receipted expense bills for freight, and at the same time exhibit his canceled checks, payable to the order of the parties furnishing labor, material, etc. Such checks, after being examined, were returned to Dorgan, but are all in evidence, except two, which are admitted to have been lost or mislaid. There was in reality no settlement or statement of the account between them, settlement by mutual understanding having been deferred until the termination of Dorgan's employment. While we may not be able to commend the course of the respondents as prudent and sagacious business men, they are not to be convicted because we may differ with them in judgment or because they may fall short of our standard of efficiency and diligence under like circumstances.

10. The only charge in specification No. 7 is the failure to make final settlement with Dorgan. The respondents all testify that soon after the appointment of Hopkins they received information which led them to question Dorgan's honesty. That they had no means of ascertaining the truth with respect to such charges, and, inasmuch as the grand jury of Lancaster county had entered upon an investigation thereof, they decided to defer action, in order to avail themselves of any information derived by that means as well as from other sources. The delay, it is apparent, does not constitute a misdemeanor in office, but was for the best interest of the state.

11. We come now to a consideration of the charges under article 2, the first of which is the conversion to their own use by the respondents of \$500 of the cell-house fund. In this connection it is necessary to again examine the appropriation in question. It is doubtful if the history of the state presents another such an instance of reckless legislation as the appropriation of \$40,000, without direction even as to the quality or dimensions of the building provided for, or as to the manner in which the money should be drawn or disbursed. There is no authority in the act for the procuring of material or plans and specifications. As to all matters except labor, the board are required to exercise their discretion. In the exercise of that discretion they might lawfully have employed a supervising architect, skilled in the construction of prisons, and familiar with improved systems of ventilation and other methods of bettering the sanitary condition

of such institutions; and for such service they might lawfully have expended several times the amount above named. They were advised by the attorney general that it was lawful to use a part of the cell-house fund to defray the cost of visiting other prisons in order that they might better discharge their duty to the public. Whether or not such advice was technically correct is not the test of their liability in this prosecution. If they in good faith construed the law as authorizing them to use a part of that fund for the purpose named, there is no precedent in this country for declaring their offices forfeited because we might in a proper proceeding feel constrained to reverse their ruling, and place a different construction upon the act. It is in evidence that no itemized account of their expenses was ever filed with the board, or submitted to the legislature; but each of the respondents and the warden testify that the money was all expended for traveling expenses and other necessary cost of the trip, and that, in addition to the \$500 used for that purpose, each expended from \$15 to \$40 of his private funds. According to their testimony, they were absent about two weeks; that the three respondents had free transportation from Lincoln to St. Louis and from Chicago to Lincoln, and that the warden rode on a pass from Chicago to Lincoln. We are, on this evidence alone, asked to find that their legitimate expenses were less than \$500, and draw the inference that they converted a part of that amount; in other words, that they are guilty of embezzlement. It should be remembered, in the first place, that this is a criminal prosecution, and we are not to enter upon the field of conjecture in search of a theory upon which the respondents may be pronounced guilty; second, they are not contradicted by any evidence whatever. They were not even subjected to a cross-examination regarding the items expended. I must not be understood as holding that upon an accounting they may not be chargeable with a part or all of the \$500 in question; but a finding of willful conversion in this case must rest upon suspicion alone, or at most a mere probability, and upon evidence insufficient to support a verdict in a civil action.

12. Substantially the same reasoning is applicable to the charge contained in the next specification, viz. the allowance of \$200 out of the cell-house fund to defray expenses of the chaplain and warden of the penitentiary as delegates to the prison congress at Pittsburgh. In my opinion, that expenditure was outside of the scope of the authority of the board, and they are liable to the state for the money so advanced. In other words, they cannot, as to that amount, claim immunity on the ground that their action was in its nature judicial. Such act, however, falls far short of a misdemeanor in office. They acted from motives of hu-

manity, without thought or possibility of gain or advantage to themselves, which is alone a sufficient defense. I am convinced that the alleged frauds at the penitentiary and the asylum for the insane were the real inducements for this prosecution, and that the two charges under article 2 are mere incidents, which would not, in the minds of the legislature, have justified the impeachment of the respondents.

13. The specifications under article 3 all relate to overcharges for coal at the asylum, and the questions presented thereby have been fully discussed in the consideration of specification 3, art. 1. But, in view of the importance of the case, it is deemed proper to examine some of the remaining specifications. It should be mentioned in this connection that the superintendent of the asylum had held the position for many years by appointment from the governor. He was a man of high character and standing, and whose integrity was never questioned during the trial. It was his duty to order supplies for the asylum, and he was presumed to know what amount thereof had actually been delivered. In allowing bills for coal the respondents, following the practice which had prevailed for many years, required the superintendent to examine all accounts, which were rendered in the form of vouchers, and, when found correct, to "O K" them; that is, to certify that they were correct, and that the supplies charged had been delivered. Following is the form of certificate which accompanied each coal voucher: "Hospital for the Insane, Lincoln. * * * I certify that the within account is just and correct, and that it is a proper and necessary expense, and has not been paid. W. M. Knapp, Superintendent." At the regular monthly meeting of the board said vouchers were examined, and the prices charged therein compared with the contracts in pursuance of which the supplies were furnished. If they were found to correspond, and the extensions correct, they were allowed; but if they lacked the certificate of the superintendent, or if there was discovered therein any substantial error, they were rejected. It was not only impracticable, but manifestly impossible, for the respondents to scrutinize every item thus certified to them by the heads of the 11 institutions under their charge. It is not seriously denied that the board may, within reasonable limits, rely upon the statements of the superintendents. It is argued, however, that the excessive amount of the coal bills for the year 1891 was alone sufficient notice to the board of the frauds alleged. It is evident that outrageous frauds were perpetrated upon the state during the period covered by the charges, and that the vouchers certified by the superintendent were, through his negligence or credulity, grossly in excess of the amount of coal actually furnished, although

the amount of such overcharge cannot be accurately determined from the proofs. It may be admitted, too, that, had the total amount of the coal bills for that year been presented for allowance at any one meeting, the extravagance thereof was such as to have challenged their attention, notwithstanding the certificates of the superintendent, and their confidence in his watchfulness and integrity. But the vouchers were presented for allowance at monthly meetings, and, in view of the hundreds of bills examined at each meeting, in the disbursement of \$450,000 yearly for current expenses and \$225,000 for the erection of public buildings, it is not surprising that the excessive charge for coal at the one institution should have escaped detection. There is another fact which is worthy of notice. Coal bills amounting to over \$12,000 for the last quarter of 1890 (which was prior to the term of office of either respondent) and the first quarter of 1891 remaining unpaid, the appropriation for that biennial period having been exhausted, they were submitted to the legislature of 1891, and by it referred to the proper committees for investigation and report; and by an act approved April 6, 1891, the sum of \$12,000 was appropriated for the payment of said bills, whereupon they were certified to by the superintendent, and allowed by the board. In specification No. 7, relating to the overcharge during said period, it is stated, in substance, that the coal delivered was 2,996,000 pounds only, while the bills rendered by the contractor amounted to 6,886,000 pounds, and which was allowed by the board after deducting 80,000 pounds, leaving a net overcharge of 3,410,000 pounds in six months. The aggregate of the bills rendered during the remaining nine months of that year is \$113,700 pounds or 1,627,700 pounds more than the amount approved by the legislature for the six months in question. The overcharge for the first three months of the respondents' term of office, which the legislature failed to detect, was 2,020,000 pounds, while for the remaining nine months, according to the specifications, it is less than twice that amount. It is not contended that negligence of the legislature, however gross, would excuse the willful disregard of duty by the respondents, but there is force in the argument that the appropriation in question is in the nature of a legislative assertion of the reasonableness of the charges, and that, since the respondents are admitted to have acted in good faith, they are not chargeable with frauds by the contractor, of such character as to escape detection when subjected to the scrutiny of an unfriendly legislature. The appropriation of money for the payment of the bills named was a legislative approval of the accounts under the circumstances of the case, and a complete justification of the action of the board in ordering them to be paid. So that the legislature of 1893 is

placed in the illogical and paradoxical position of impeaching the state board for an act which was expressly authorized, if not in terms commanded, by the legislature of 1891. True, the respondents might have justified a refusal to pay the bills, if tainted with fraud to their knowledge; but having, in good faith, carried out the direction of the legislature, it cannot be said that such act amounts to a misdemeanor in office within any modern definition of the term.

The other specifications under article 3 all relate to overcharges for coal at the asylum, and what has been said with reference to the other like charges applies with equal force to them. The vouchers were all presented to the board in the usual course of business, at the regular monthly meetings, bearing the certificates of the superintendent. They were all compared with the contracts on file, and allowed without any knowledge or suspicion on the part of the board that the coal called for had not been delivered. Every controversy is important to the parties immediately concerned, and this is no exception. But the questions whether these respondents or others shall serve the people, and the effect of a conviction upon them, are of small concern compared with the principle involved. It is useless to indulge in platitudes with regard to public trusts, or the binding obligations of an oath of office. A favorite argument in state trials 300 years ago was that, if the accused should be acquitted of the misdemeanor charged, no one was impeachable, and the fact that it was frequently employed during this trial proves that history repeats itself. It was then, as it is now, the plea of necessity, the argument used when reasons were wanting. According to the definition of official misdemeanors contended for by the state, and which must be adopted to warrant a conviction, it will be within the power of an aggressive majority of the legislature at any future time to secure the removal of an obnoxious officer.

It has been truly said that impeachment is a heroic remedy, to be resorted to in extreme cases. The only precedents which tend to sustain the position of the managers are early cases in England, while the law of impeachment was in a state of evolution, and which have never been recognized as authority in this country. It may also be asserted as a fact known to every student of English constitutional history that the decadence of impeachment as a remedy in England dates from about the time the house of lords became illustrious for the learning and character of its members, and that it is now practically obsolete in that country. As said by Prof. Dwight, (6 Amer. Law Reg. [N. S.] 282:) "The dramatic period of English history has passed away. There have been no impeachments for fifty years, and doubtless will be none of special importance unless a revolution takes place." And the

words of the late Justice Miller, in speaking of Johnson's impeachment, are quite as applicable to this: "It may also be said that, in view of the invitation which a successful result in that effort to convict and remove him would have held out in future times to exasperated majorities in the legislative body opposed to the president and his manner of exercising the functions with which he is charged by the constitution, to get rid of a president against whom such personal hostility existed, the country is fortunate in the fact that the great impeachment failed." Miller, Const. 172. It is better that the state should be confined to the remedy afforded by the Criminal Code and civil action on the bonds of its officers than an alternative so dangerous and so liable to abuse as impeachment for technical violations of law, errors of judgment, mistake of fact, or even neglect of duty such as disclosed by the proofs in this case. It follows from the views expressed that the evidence fails to establish the essential facts charged in the several articles of impeachment, and that a judgment of not guilty should be entered in favor of each respondent. Judgment accordingly.

NORVAL, J., concurs.

MAXWELL, C. J., (dissenting.) In 1891 one C. W. Mosher was receiving from the state 40 cents per day for the board, clothing, care, and attention of each convict in the penitentiary. He was also entitled to their labor, and the convicts were hired out to various persons at the rate of about 40 cents per day for each convict. In 1891 an appropriation was made "for building a new cell house by days' work, \$40,000." This, like all other appropriations, was for "so much thereof as may be necessary;" that is, a sum total of \$40,000 was appropriated, with the condition that only so much thereof as was necessary should be drawn. This is a condition of all appropriations in this state. The warden seems to have protested against the employment of persons outside of the penitentiary to construct the building, on the ground that it had a demoralizing effect on the convicts. The result was that the respondents agreed that the building in the main was to be constructed by convict labor. W. H. Dorgan was Mosher's superintendent at the penitentiary, and had full authority to hire the convicts to any person who desired to employ them. Daniel Hopkins was the warden of the penitentiary from May 5, 1891, to about March 1, 1892. He recommended Dorgan to the respondents as a suitable person on behalf of the state to superintend the construction of the cell house. Dorgan testified as to his relations to Mosher as follows: "Answer. Well, I looked after all the business connected with it; that is, all his interests at the prison. That would include all kinds of supplies, subletting the men, and looking after

his business in general." The order making the appointment is as follows: "The construction of the cell house for the penitentiary, as provided for in the general appropriation bill, wherein \$40,000 has been appropriated for that purpose by the 22nd legislature, to be done by days' labor, being under consideration, Hill moved that Dorgan be employed by the board as superintendent of construction, with power to purchase material for construction and employ laborers for building, subject to approval of the board. Seconded by Allen. Motion carried. Allen moved that Dorgan be required to furnish bond for the faithful performance of duty in the sum of \$10,000. Seconded by Hill. Carried. On motion of Allen, the salary of Dorgan as superintendent was fixed at \$50 per month, to begin from this day." Mr. Dorgan gave bond with approved securities in the sum of \$10,000. He was not a builder, and possessed no practical knowledge of building or building material. The new cell house is the east wing of the penitentiary, and is substantially similar in all respects to the west wing of the main building. That new wing is 220 feet in length by 45 feet in width and about 38 feet in height. Being directly east of the main building, no wall was necessary at the west end, and there was a wall about 22 feet in height on the north, and also on the east of the new wing, which it was intended to use as the north and east walls, and raise the same to the desired height. So that at that time the only walls supposed to be necessary were the south walls, and, in addition, to raise the east and north walls to the height of the other walls, and put a roof on the building, with ceiling preparatory to receiving cells. This, however, will be discussed later. The board seem to have given Dorgan no directions in regard to the building, but left him to do as he pleased. Soon after his appointment, Dorgan entered into a contract with S. H. Atwood & Co. for stone for the building, the price being 35 cents per cubic foot for "dimension stone, plugged to size." This was defined by the witnesses as stone split from layers of the proper thickness by drilling holes in the rock and driving wedges therein. For another quality of rock he paid Atwood & Co. 16 cents per hundred pounds, and still another, 8 cents per hundred pounds; the rock to be delivered at Cedar Creek, or at other points not more distant from Lincoln; the freight to be paid by the state. Dorgan, according to his statement, made no inquiry of others as to the price of stone. A large part of the stone was in fact purchased by Atwood & Co. of J. W. Zook, of Nemaha county, and delivered on board of the cars at Johnson, in that county, at from 3 cents per hundred pounds for rubble to 10 cents per cubic foot for dimension stone plugged to size. Zook testifies that Dorgan wrote to him about the price of stone some time be-

fore he sold to Atwood & Co.; that he had lost the letter. He says: "Answer. He asked the price of stone delivered at Lancaster. Question. What did you tell him? A. I told him I sold stone, delivered on board the cars at the switch, at 10 cents a foot, and if I delivered it on board the cars at Lancaster the freight would be added; and that is what the letter contained. Q. Do you remember about what time that was? Was it before or after the time you sold the stone to Atwood? A. As near as I can remember, that was about a week before Atwood came down there." He also testifies: "A. I have been in the stone business about ten years. Q. What has been the uniform market value of this dimension stone free on board the cars at that point? A. Ten cents a foot, and I sold some dimension stone for even less money than that. If I get 10 cents I consider I was getting a fair price." He testifies, in effect, that he wrote to Dorgan to that effect before Atwood & Co. purchased the stone from him, and that he inclosed the letter in an envelope, duly stamped, and containing his business card, asking for a return of the letter if not called for, and that it was never returned. Dorgan, while attempting to deny that he received the letter, does not deny absolutely that he did receive it. On cross-examination he testifies: "Question. My memory is that I asked you if you had received any letters from J. W. Zook, of Nemaha county, relative to stone from that point? Answer. No; I don't think that I did. Q. You don't think that you received any letters? A. No. Q. You were subpoenaed to bring them, but you don't think you received any? A. I have no such letters in my possession, and I don't think I ever had." This is far short of an unequivocal denial. Atwood & Co. also purchased a quantity of stone from Van Court and Keys, in Nemaha county, for the penitentiary, at a slight advance over the price paid Zook. But, suppose Dorgan's denial is unequivocal, still the probabilities are that Zook sent the letter to Dorgan, as he testified. Dorgan was anxious to justify his purchases of stone, and to shield the respondents. He pleads ignorance of the price of stone as a justification for paying more than twice as much as it could have been purchased for. His ignorance on that point has the appearance of being assumed, and to admit that he had received the letter would, in effect, be a confession that he did know the price. On the other hand, Zook is a disinterested witness of fair appearance. He was anxious to find a market for his rock. He testifies fully and unequivocally that he sent a letter, duly stamped, to Dorgan, at Lancaster, where Dorgan received his mail, offering to furnish stone at 10 cents per cubic foot for dimension plugged to size, and 3 cents per hundred pounds for rubble, all free on board the cars at Johnson, Nemaha county; that this letter had his return card on it, and that it never was returned. That this testimony is true

there is not a shadow of a doubt, and it, with other things, shows how utterly unreliable is Dorgan's testimony.

The purchases of stone from Atwood & Co. are as follows:

Auburn Stone.

453.64 ft. at 35 cents per ft.....	\$ 158 77
3,145.92 ft. at 35 cents per ft.....	1,101 07
2,208.27 ft. at 35 cents per ft.....	772 90
316,500 lbs. dimen., 3,165 ft., at 16 cents	506 40
	<u>\$2,539 14</u>

Cedar Creek Stone.

2 cars, no weight or quality.....	\$ 50 00
958,900 lbs. rubble at .08.....	575 34
120,400 lbs. footing at .08.....	96 32
111,400 lbs. crushed at 1.10.....	45 38
85,700 lbs. coping at .16.....	137 12
68,500 lbs. dim. at .10.....	68 50
124,000 lbs. rubble at .08.....	99 20
187,100 lbs. rubble at .08.....	149 68
76,000 lbs. dim. at .10.....	76 00
29 4-9 ft. at .74.....	7 00
197,200 lbs. rubble at .08.....	157 76
67,200 lbs. rubble at .08.....	53 76
598,700 lbs. rubble at .08.....	478 96
318,400 lbs. rubble at .08.....	254 72
	<u>\$2,249 74</u>

Johnson Stone.

281,700 lbs. dim. 2,817 ft. at .16 per ft.	\$ 450 72
311,800 lbs. dim. 3,118 ft. at .16 per ft.	598 88
90,050 lbs. dim. 900½ ft. at .16 per ft.	158 48
34,000 lbs. dim. 340 ft. at .16 per ft.	54 40
649,100 lbs. dim. 6,491 ft. at .16 per ft.	1,038 56
	<u>\$2,201 04</u>
	<u>\$6,939 92</u>

Price of Stone Paid by Hopkins to Atwood & Co.

Rough Ashler, 1,332 ft. at 16 cents per ft.	\$ 213 12
Dimension, 4,640 4-5 ft. at 35 cents per ft.	1,624 28
	<u>\$1,837 40</u>

Total paid to Atwood for stone \$8,827 32

The amount so paid to Atwood & Co. was about twice as great as the same quality and kind of stone could have been purchased for in the open market, and the state thereby lost, while Dorgan was superintendent, more than \$3,000; and, as Hopkins continued to receive stone under the Dorgan contract, the loss to the state exceeded \$4,000.

On the 1st day of June, 1891, Mr. Dorgan made what he calls an estimate for \$6,100, as follows:

Estimate No. ———.

For work done and material furnished during the month of May, 1891, for cell house at penitentiary:

Cut stone	\$1,000
Concrete	750
Excavating	350
Material on hand, not used.....	4,000
Balance due contractor.....	100

The above estimate was made by me this 1st day of June, 1891, and I hereby certify that

the amount of work done and materials furnished by said contractor are true and correctly stated and set forth in the above estimate, and that the said estimate is made in the manner and according to the plans and specifications mentioned in the contract with the said state and said contractor. W. H. Dorgan, Superintendent.

Signed in my presence, and sworn to before me, this _____ day of _____, A. D. 18—.

Approved by the board of public lands and buildings. _____, Secretary. _____, President.

General Fund.

The State of Nebraska, to W. H. Dorgan, Dr.

For material used in building new cell house per estimate No. 1, hereto attached \$6,100

Examined and approved, June 1, 1891, by the board of public lands and buildings, and account to be charged to appropriation for penitentiary new cell house. A. R. Humphrey, President. John C. Allen, Secretary.

This was approved and warrant drawn for the amount. He also at the same time submitted the following account:

Lincoln, Neb., June 1st, 1891.

Mr. W. H. Dorgan, Supt., in Account with Prison Contract.

To 357 days at \$1.00.....	\$ 357 00
To 26 days team at \$3.00.....	78 00
Lumber for stone shed.....	100 00
Carpenter work	18 00
6 wheelbarrows, at \$1.50.....	9 00
Nails and mason line.....	9 95
1/2 dozen squares.....	3 00
1/2 dozen shovels.....	6 00
2 car stone.....	50 00
Excavating	350 00
Switching and unloading 14 cars...	56 00

Received payment, prison contract.. \$1,036 95

A similar estimate for June, 1891, for \$8,000, was made on the 3d day of July, 1891, and similar account filed, which were approved and warrant drawn. The third estimate and account were filed October 5, 1891, for \$8,000, and were approved and a warrant issued thereon. The fourth estimate and account, for \$5,000, were filed and approved December 7, 1891, and warrant drawn. The fifth estimate and account were filed March 7, 1892, and a warrant issued. It will be seen that he had thus drawn from the treasury upon these various estimates the sum of \$32,100, without so far as appears a single voucher from the persons who had furnished the labor or material, or their assigns. Section 19, art. 4 of the constitution provides: "The commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general shall form a board which shall have general supervision and control of all the buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes; and shall perform such duties, and be subject to such rules and regulations, as may be prescribed by law." Section 4, c. 83, art. 7, Comp. St., provides: "The said board shall have power, under

the restrictions of this act, to direct the general management of all the said institutions, and be responsible for the proper disbursement of the funds appropriated for their maintenance, and shall have reviewing power over the acts of the officers of such institution, and shall, on the part of the state, at regular meetings, as hereinafter directed, audit all accounts of such officers, including the accounts of the commissioner of public lands and buildings, except his salary. Sec. 5. At the regular meeting of the board it shall be their duty to examine the accounts of the public officers contemplated in this act, and to determine whether the same are entitled to be paid out of the moneys appropriated for the purpose of maintaining the institutions, for which they are charged, and, if correct, shall approve the same, which approval shall be signed by the president and countersigned by the secretary, under the date of such action; and, if the accounts be incorrect, exorbitant, or not entitled to payment from such appropriations, the same shall be disapproved, and returned to the claimant, such board keeping a record of the same. Sec. 6. When the accounts above mentioned have been filed with the board, and shall have been audited and approved by them, the auditor of public accounts is hereby authorized and directed, upon the presentation to him of such accounts so authenticated, to issue his warrant on the treasurer against the proper fund or appropriation for the amount therein stated to the claimant or his assignee. And no accounts coming under the provisions of this act shall be entitled to payment until they have been so approved by the said board." Section 6, c. 83, art. 3, provides: "All persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled, and allowed, within two years after such claim shall accrue; and in all suits brought in behalf of the state no debt or claim shall be allowed against the state as a set-off but such as has been exhibited to the auditor, and by him allowed or disallowed, except in cases where it shall be proved to the satisfaction of the court that the defendant at the time of trial is in possession of vouchers which he could not produce to the auditor, or that he was prevented from exhibiting the claim to the auditor by absence from the state, sickness, or unavoidable accident: provided, the auditor shall in no case audit a claim or set-off which is not provided by law." Section 8 requires all warrants, vouchers, etc., to be preserved in the office of the auditor. Section 2, art. 8 of the same chapter requires the auditor to keep an account of all claims presented to him for an examination and adjustment, and provides for appeals by any party aggrieved. All claims against the state are to be presented to

him, and must have his approval, before a warrant can be issued. This means the primary claims of those persons who furnish the goods, labor, etc. It is true in expenditures contracted by the board of public lands and buildings they must approve—that is, certify—all vouchers for such expenditures before the auditor can be required to act upon them. This is a precaution to prevent frauds by requiring the board that contracted the debt to certify that the claim is correct. It does not change the character of the voucher, however, as that is to be for the original claim. *State v. Moore*, (Neb.) 54 N. W. Rep. 866.

In the case at bar the respondents, on mere estimates, and without vouchers, allowed Dorgan to draw money at his pleasure. The board itself could not draw money from the treasury except upon proper vouchers, and it had no authority to authorize Dorgan to do so. Should the mode adopted in this case become the rule, every precaution for the protection of taxpayers would be broken down, the constitution and statutes set at naught, and money unlawfully and in defiance of law taken from the treasury. The testimony of Hopkins shows that at the time he was appointed superintendent, on March 16, 1892, Dorgan had built the south wall and one-third of the east wall, and that was substantially all that was done. Hopkins testifies on cross-examination: "Question. How far had the cell house progressed at the time you took charge as superintendent? Answer. The north wall of the cell house was completed, and part of the east. Q. Do you mean the north or south wall? A. I should say the south wall of the cell house. Q. And a part of the east wall? A. And a part of the east wall; yes, sir. Q. The north wall had not yet been torn down? A. No, sir. We hadn't commenced on that. I should have said the south wall. Q. Was the south wall clear up? A. Yes, sir. Q. How far was the east wall? A. Why, it was perhaps one-third." He also testifies that "the grates were put in the south wall, and the door was hung also,—the large door." This testimony does not seem to be denied. The experts called to place values upon the several walls of the building, and the whole as it now stands, differ greatly. The five called from Lincoln all place the values of the several parts, including material, very much lower than the experts from Omaha. Thus Mr. Bullock, of Lincoln, placed the value of the south wall at \$6,472, while Mr. Cootes, a builder of Omaha, estimated the value complete, in round numbers, at \$10,402.35. He also estimates the east wall complete at \$2,797.95. It is difficult to reconcile the various estimates of the experts, as it would seem there should not be so much difference in estimated values. Perhaps, in arriving at an approximate value, it would be well to take the average of the estimates, which would

be \$8,437.18, for the south wall complete. Cootes estimates the value of the east wall complete at \$2,797.95, one-third of which would be \$910.89. Therefore all the work performed under Dorgan's superintendence, had it been performed by free labor, would have been worth \$9,348.07, but, having been almost wholly performed by convict labor, the actual cost could not, even at \$1 per day for convicts, have exceeded \$8,000. It also appears that there were plans and details prepared, for which it is claimed \$350 were paid. There was some stone on hand. The amount thereof does not clearly appear. It could not have been very large, however, because Hopkins, after he became superintendent, purchased stone of Atwood & Co., as heretofore stated, to the amount of \$1,837.35. At the time Dorgan ceased to be superintendent all the stone that was supposed to be necessary was sufficient to complete the east wall, and to raise the north wall to the same height as the south wall. But suppose we estimate the stone on hand at \$2,000, and value the south wall at \$10,000, and the aggregate of the work, had it been performed by citizen labor, would be \$13,260, which would include everything, and for this Dorgan had received \$32,100, and as there were no funds in the treasury, the amounts were drawing interest at 7 per cent. But the work on the south and east walls was almost wholly performed by convict labor. The testimony shows that convicts would perform from one-half to two-thirds as much labor as was performed by citizens; so that the actual cost of the wall, including superintendence, must have been very much less than the above estimate. In March or April, 1892, after Hopkins was appointed superintendent, he removed the cap stones from the top of the north wall, when it was discovered that there were no binders in the wall, and that the mortar possessed no adhesiveness, was worthless, and that it would be unsafe to build on it. The respondents were thereupon consulted, and found it necessary to consent to the tearing down of the wall and rebuilding the same, and this was done under Hopkins' direction. Dorgan had nothing to do with this, or putting on the roof; and all evidence as to the cost and value of the north wall, roof, etc., are not in issue in this case, nor of the building as it now stands, as there is no charge against Hopkins. Dorgan returned to Hopkins the sum of \$6,331.15. Dorgan has received and has retained \$25,768.85. The state was charged \$1 per day for the convicts, although other contractors paid but 40 cents. It was alleged that the state had the choice, and that the men selected for the state were experienced stone masons, and therefore more valuable than the average convict. This is shown to be true of 8 or 10 of those employed, but not generally. M. D. Welch, president of the Western Manufacturing Company, testified

that he employed ordinarily about one-half of the convicts. "Question. You have practically carte blanche as to the selection of the men? Answer. Yes, sir. Q. You have your pick of the men in the penitentiary? A. Well, that is to say, I don't take cripples or diseased men if I can help it, nor short-time men. Q. You take long-time men; good, strong, healthy fellows? A. Yes, in my business I want to pick a man that when he gets familiar with the work he will be worth something. It takes some time to learn them." He also testifies that he pays 40 cents per day for each convict employed, and furnishes them tobacco, candles, chewing gum, etc., in addition. The wages paid by him appear to be the ordinary wages, and the proof fails to show that on any contract that continued for a considerable time were greater wages paid. There are charges that more days' work were charged to the state than were rendered. That some such were charged there is no doubt, but the extent of such charges cannot be determined, although the amount paid was considerable. There would seem to be no reason why the state should be charged a greater rate than 40 cents per day, and with a capable, intelligent, disinterested superintendent of the work and proper effort of the respondents no more need have been paid for the convicts who worked for the state. The appointment of Dorgan, whose interests were altogether with Mosher, is entirely unjustifiable. If the board was busy, as it claims to have been, there was all the more necessity for the appointment of a capable, disinterested superintendent, who could be relied upon to look after the business and interest of the state. No ordinarily prudent man would have appointed Dorgan to fill the position of superintendent, nor placed in his hands tens of thousands of dollars; and it is not surprising that the state has suffered serious loss. It seems that Hastings was absent when Dorgan was appointed; that he had selected a disinterested party, named Davey, and had promised him the position. But after his return he visited the penitentiary, and claims to have found everything satisfactory and right, and concluded to retain Dorgan. No man can serve two masters, and this case has proved no exception to the rule. That there were frauds in the flour contracts there is no doubt, but the extent of such frauds it is difficult to determine. Thus, in January and February, 1892, the flour was weighed, it is claimed, and the only record preserved was the stubs of the weigh checks, and they are lost. There is also proof that the drayman was in the habit of leaving a number of sacks of flour at a designated place on the way to the asylum. The charges under these heads are fully sustained.

2. It appears that while Dorgan was possessed of the money in question, he, at the request of the respondents, paid to Hopkins \$200, to enable him and Elder Howe to

visit the Prison Congress at Pittsburgh, Pa. Soon afterwards the board received from him \$500 of the money belonging to the state to visit various points to enable them to choose the best cells. This was charged to the cell-house fund. These appropriations are justified upon the ground that the state would be benefited thereby, and that, therefore, it was a proper expenditure. Section 22, art. 3, of the constitution provides: "No allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriation, and upon an account specifying each item. No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon; and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever either by joint or separate resolution. The auditor shall, within 60 days after the adjournment of each session of the legislature, prepare and publish a full statement of all moneys expended at such session, specifying the amount of each item, and to whom and for what paid." This provision declares that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon." The legislature makes appropriations. It is for it, composed, as it is, of the representatives of the people, to say what is for the interest of the state, and requires the expenditure of money. Unless it grants the authority, there is none. If an officer or a number of them can take one dollar without an appropriation, and be justified in doing so, he or they may take all that there is in the treasury, if, in their view, the state will be benefited thereby. Money taken without an appropriation is taken not only without law, but in defiance of it; and, if the principle is once established, would lead to gross frauds and speculations. Suppose trustees having the care of property, and receiving the rents and profits, should desire to visit distant points, to enable them to administer the estate with wisdom and prudence, and thereby benefit it, could they charge this expense upon the owner or beneficiaries without their consent lawfully expressed? No more can they do so in this instance. The state, through its legislature, must give its assent to an expenditure, otherwise the party must pay it out of his own pocket. No voucher was filed with any officer showing the amount expended, nor any attempt to comply with the law. In addition, to this, the cell house is not ready for the cells even now; therefore there was no emergency. But under no view of the case can the expenditure be justified; and the fact that on one or two previous instances such expenditures were made which do not seem to have been

known but tend to show the lax methods that seem to have prevailed with the board wherever the expenditure of money was concerned. It also appears that the legislature made an appropriation of \$1,000 for the traveling expenses of the board. It is true Mr. Allen testifies that \$500 of this sum has been expended. He also testifies that all the members had passes, so their railroad fare was nothing. So far as he stated the visits to the various institutions by the board, the expenditures should not have exceeded \$100, and probably did not. If the board desired to travel on official business, it would seem that this was the fund for that purpose. It appears also that Dorgan used \$234 to reset the bolters in the prison, a charge which properly belonged to Mosher, and should have been paid by him.

In addition to the ordinary provisions in appropriation bills, that of 1891 contained the following: "Sec. 3. Each state officer, and each board entitled to draw against the appropriation provided for in this act, shall keep an itemized account of all expenditures made by them, and report the same, with vouchers, to the finance committee of the next legislature; and no officer of institutions and no state officer shall incur any indebtedness beyond the amount appropriated in this bill, except to prevent disaster." The testimony shows that the respondents made no attempt to comply with these provisions. The charges are fully sustained.

3. The testimony tends to show that gross frauds were committed in the delivery of coal at the Lincoln Insane Asylum. The respondents claim to have been ignorant of these frauds until about September, 1892. It appears that from the 1st day of October, 1890, to the 26th day of March, 1891, the Whitebreast Coal & Lime Company furnished coal for the asylum, and were allowed therefor the sum of \$11,551.95. To cover this claim an appropriation of \$12,000, or so much thereof as might be necessary, was made, and the claim was certified to the auditor by the respondents. The coal was alleged to have been delivered on the cars at asylum switch, but the number and initials of the cars on which it was alleged the coal was delivered are not given in a single instance. Dr. Knapp testifies, in effect, that he did not believe the amount of coal charged had been delivered. His book-keeper testified to substantially the same facts. Neither of them, however, communicated their suspicion to the respondents. Knapp afterwards approved the vouchers, and they were approved by the respondents, and the warrants issued. The fact that an appropriation had been made to pay for this coal was not an adjudication of the claim, as the legislature cannot adjudicate claims. *State v. Babcock*, 22 Neb. 38, 33 N. W. Rep. 711. The very large amount of coal charged—sufficient to have supplied all the asylums in the state for the time charged—certainly

should have put the respondents upon inquiry. The reports for coal from the other public institutions were before them, and, unless fraudulent vouchers were sent in from them also, of which there is no claim, a comparison should have shown the fraud. No examination was made, however. A specimen is seen in a voucher for July, 1891, as follows:

General Fund. State of Nebraska. Hospital for the Insane to Whitebreast Coal & Lime Co., Dr.

July	4.	32,000 pea,	@	\$1 72...	\$ 27 52
"	6.	40,000 pea,	@	1 72...	34 40
"	7.	2,050 canon,	@	6 90...	7 07
"	8.	112,000 pea,	@	1 72...	96 32
"	10.	82,000 lump,	@	2 59...	106 19
"	10.	41,000 pea,	@	1 72...	35 26
"	11.	40,000 lump,	@	2 59...	51 80
"	14.	41,000 lump,	@	2 59...	53 00
"	14.	40,000 pea,	@	1 72...	34 40
"	15.	2,720 canon,	@	6 90...	9 38
"	16.	40,000 pea,	@	1 72...	34 40
"	20.	86,000 lump,	@	2 59...	111 37
"	22.	2,680 canon,	@	6 90...	9 24
"	23.	42,000 lump,	@	2 59...	54 39
"	24.	112,000 pea,	@	1 72...	96 32
"	25.	7,000 pea,	@	1 72...	60 20
"	28.	104,000 pea,	@	1 72...	89 44

\$910 79

I hereby certify that the above account is for supplies actually furnished the above-named institution. [Sign here.] Whitebreast Coal & Lime Co. Jon. T. Dorgan.

Examined and adjusted. —, Auditor Public Accounts. Per —, Deputy.

Approved: —, Secretary of State. Per —, Deputy.

Received of T. H. Benton, auditor of public accounts, warrant No. —. [Sign here also.] Whitebreast Coal & Lime Co. Jon. T. Dorgan.

Duplicate.

Hospital for the Insane, Lincoln, 7/31, 1891. I certify that the within account is just and correct, and that it is a proper and necessary expense, and has not been paid. W. M. Knapp, Superintendent.

Examined and approved August 3rd, 1891, by the board of public lands and buildings, and account to be charged to appropriation for fuel and lights. —, President. J. C. Allen, Secretary.

Indorsed: Nebraska Hospital for the Insane, Lincoln, Nebraska. Voucher No. —. \$910.79. Warrant issued on account of fuel and light to Whitebreast Coal & Lime Co. T. H. Benton, Auditor of Public Accts.

Betts, Weaver & Co. seem to have adopted the Whitebreast style of vouchers in November, 1891. The voucher for December, 1891, is as follows:

General Fund. State of Nebraska. Hospital for the Insane to Betts, Weaver & Co.

To 434,500 tons pea,	\$1 70.....	\$ 738 22
To 3,131,200 tons lump,	2 70.....	848 72
To 14,780 tons canon,	6 00.....	86 33

\$1,671 28

Approved, Jan. 4th, 1892.

Other vouchers in that form were approved.

Contracts for coal were made every three months, and the Whitebreast Coal & Lime Company and Betts, Weaver & Co. seem to

have monopolized the business. From October 1, 1890, to December 31, 1891, and the month of February, 1892, the amount of coal alleged to have been delivered to the asylum at Lincoln was 17,551,907 pounds, and the amount actually received, so far as the evidence shows, was 7,589,600 pounds, leaving a shortage of 9,962,307 pounds, which cost \$12,855.47. The proof fails to show that the respondents in any manner profited by these frauds. The respondents introduced evidence tending to show that last October they submitted the whole matter to the grand jury of Lancaster county, and thereby sought to bring the guilty parties to justice. It is but fair, however, to state that Gov. Boyd requested them to lay the matter before the grand jury, and it is evident that the matter had acquired such publicity it could not be avoided. On this trial they in effect deny the frauds, or that if such existed, they had any notice thereof in any form, and therefore are not chargeable therewith. They seem also to exhibit no very friendly sentiments towards the witnesses by whom these frauds were proved, and certainly show no disposition to aid in procuring proof of the same. Some reliance is placed on the approval of the asylum officers by the governor in his message of January, 1891. This no doubt is entitled to considerable weight, but it could not in any manner excuse the respondents from the exercise of reasonable care in the examination of the asylum vouchers. In addition to this, the land commissioner, in December, 1890, in his report to the governor, which is in evidence, says, (page 86:) "Under the existing system of furnishing supplies, the appropriation funds are too frequently used in keeping with that conception of charity which declares that it 'hideth a multitude of sins.' Items for luxuries, privileges, and conveniences that are alone enjoyed by the officials and their friends are too often cloaked in a claim for 'board and clothing, fuel and lights,' or some one of the other necessary funds appropriated for maintenance of the institution."

It is contended by the respondents that the business in their respective offices has so increased that it is impossible to give attention to many of the details of business that come before them, and that, therefore, they are excusable. It is true there is a large amount of business in each of the offices named. This is a large and growing state, and business in all departments is constantly increasing. In the office of the land commissioner, however, there are ten clerks and one deputy, which, with the principal, make twelve persons; in the office of the secretary of state, one deputy and two clerks,—four persons in all; in the attorney general's office, one deputy and stenographer. If these officers need additional assistance, if they will present their claim to the legislature, through the gov-

ernor, no doubt the desired increase would be granted. These facts must be known to the respondents, and, as no such application was made, it must be because it was not considered necessary. The business of the state, however, must be conducted in a reasonably prudent and careful manner, otherwise the result would be chaos. Suppose a merchant or business man should urge the want of time to look after his business, and therefore neglected it, the result would not be uncertain. No defense of this kind can be entertained.

4. Are these acts grounds for impeachment? Section 5, art. 5, of the constitution provides: "All civil officers of this state shall be liable to impeachment for any misdemeanor in office." It may be well to inquire first what are the duties of public officers? Each one, before entering upon his duties, is required to take an oath that he will "faithfully and impartially perform the duties of his office according to law and to the best of his ability." An officer is bound to exercise ordinary care,—such as an ordinarily prudent man would exercise in the management of his own affairs. The respondents are to quite an extent trustees. They let contracts and certify claims each year to the amount of nearly \$1,000,000. Now, shall this work be performed faithfully to the best of the ability of each as he has sworn to do, or shall it be neglected, and no examination made? There is considerable conflict in the authorities as to what constitutes an impeachable offense. Under the common law the grounds of impeachment are "high crimes and misdemeanors." In a number of cases under this law it has been held that the cause of accusation must be a crime punishable under the criminal law. In England impeachment has been to some extent considered a mode of trial to punish crime, although a judgment of guilty was no bar to an indictment and conviction for the same offense. In this country, while some of the cases hold that, to constitute an impeachable offense, it must be such as could be punished under the criminal law, yet in the majority of cases it is held that this requirement is unnecessary, and we are constrained to adopt the latter view. Judge Lawrence, in 6 Amer. Law. Reg. (N. S.) 649, in discussing the meaning of the word says: "The word 'misdemeanor' has a common law, a parliamentary, and a popular sense. In a parliamentary sense, as applied to officers, it means maladministration or misconduct, not necessarily indictable." "Misdemeanor is conduct" and misdemeanor is misconduct in the business of his office. It must be in matters of importance, and be of a character to show a willful disregard of duty. Now, do the acts above recited constitute misconduct in office? We are not without authority in this state on that point. Thus, in *Minkler v. State*, 14 Neb. 181, 13

N. W. Rep. 330, a county surveyor, who acted on the honest belief that he had a right to remove section corners erected by the government to conform to the field notes, was found guilty of maladministration of his office, and removed. In *State v. Oleson*, 15 Neb. 247, 18 N. W. Rep. 45, the relator was removed from the office of sheriff for official misdemeanors, and the judgment was affirmed. It is true the principal question in this court was the jurisdiction of the county commissioners to try the cause, but the character of the offense was also to some extent involved. In *State v. Meeker*, 19 Neb. 444, 27 N. W. Rep. 427, the respondent was removed from office by the county board of Saline county for certain alleged violations of the law, and while an appeal was pending in this court compelled him to deliver over the books of the office to the person appointed in his stead. In these cases there was no hesitancy on the part of this court to hold that these judgments of removal were valid. Among the grounds mentioned in the statute for removal from office are habitual or willful neglect of duty. Comp. St. c. 18, art. 2, § 1. An examination of the constitutional provisions of a number of the western states will show that misdemeanor is cause for impeachment. Thus section 1, art. 7, of the Wisconsin constitution provides for impeaching "all civil officers of this state for corrupt conduct in office, or for criminal misdemeanors." Section 7, art. 6, of the constitution of Indiana declares that "all state officers shall, for crime, incapacity, or neglect, be liable to be removed from office either by impeachment or by a joint resolution of the general assembly." Section 30, art. 6, of the constitution of Illinois provides that "the general assembly may, for cause entered on the journals, upon due notice and opportunity for defense remove any judge upon concurrence of three-fourths of all the members of each house. All other officers in this article mentioned shall be removed from office on prosecution and final conviction for misdemeanor in office." Section 197 of the constitution of North Dakota provides for impeachment for "misconduct, malfeasance, crime, or misdemeanor, or habitual drunkenness, or gross incompetency." Section 4, art. 16, of the constitution of South Dakota is the same. Section 28, art. 2, of the constitution of Kansas provides for impeachment for any misdemeanor in office. Section 20, art. 3, of the constitution of Iowa provides "for impeachment for any misdemeanor or malfeasance in office." The constitution of Colorado specifies high crimes and misdemeanor or malfeasance in office." Section 474. Other states provide for substantially the same causes. The provision in the constitution of this state is broader than that of any of the states named except Kansas. Under our constitution any gross misconduct in

office is cause for impeachment. It would be a violation of the oath of office and of the officer's duty. In that respect our constitution is much broader than the common-law term "high crimes and misdemeanors." But even at common law the offense need not necessarily be a crime punishable by the criminal law. Alexander Hamilton, in No. 65 of the *Federalist*, says: "The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself." Hamilton's views are generally adopted in this country. In the early part of the present century impeachment was the ordinary mode of removing objectionable officers. Thus in Massachusetts and some other states county officers, and even justices of the peace, were impeached. In many, if not all, of the states at the present time the statutes provide for a simple direct proceeding in an action in the nature of impeachment against certain officers who are guilty of misconduct in office; and impeachment is but one of the remedies for that purpose, and in this state, as applied to a state office, is the sole remedy. The causes, however, which would cause the removal of a county officer on the ground of misconduct in office would seem to be sufficient against a state officer.

The claim that there was no willful disregard of law in the penitentiary cell house is clearly shown to be unfounded. The respondents' duty to the state was, in the first instance, to appoint a capable, efficient superintendent, who would protect the rights of the state; second, see that the state received as fair treatment as other contractors in the employment of convicts and purchase of materials, and to exercise a general supervision over the work; and, third, to permit no money to be drawn except on original vouchers of the persons primarily entitled to the money, or their assignees. In all these respects there was a failure to discharge their duty. The claim that they knew nothing against Dorgan is entitled to no weight whatever. They did know that he represented the party who could, and probably would, profit by his being superintendent. Indeed, the argument they were able to hire him cheaper than a disinterested party is an admission of his unfitness, as it shows that he was drawing full pay for his services from Mosher at the same time. In addition to these facts, each allowance of an estimate without a voucher was a violation of a duty by the respondents, by which they wrongfully and willfully permitted Dorgan to draw money from the treasury. Some attempt was made to prove usage as a defense to some or all of these charges. But the authorities are uniform that usage cannot be proved to contradict the ex-

pressed terms of a contract, or where it would result in violating some positive requirement of statute. Rog. Exp. Test. 271, 272, and cases cited. It is very clear that proof of usage cannot be considered, otherwise we might be asked to sanction the usage at the asylum switch. Considerable stress is laid upon the good faith of the respondents in committing these acts. This question was before this court in *Cobbey v. Burks*, 11 Neb. 161, 162, 8 N. W. Rep. 386, in an action for taking illegal fees. It is said: "The penalty imposed by this act may be incurred by exacting fees which are supposed at the time to be legally demandable. By the very words of the prohibitory clause the taking is the gist of the offense. Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him with an unusual attention, clearness, and precision. On any other principle a conviction would seldom take place, even in causes of the most flagrant abuse, for pretexts would never be wanting." It may be said that, the people having elected these men, their will should be respected, and they should not be ousted for the offenses charged. In every vote I have given in this court I have favored carrying out as far as possible the will of the people as expressed through the ballot box, but the same constitution which provides for the election of officers and for a discharge of the duties of the officers also provides for declaring the office vacant in case of serious, willful misconduct; in other words, where the officer fails to faithfully perform the trust committed to his hands. The doctrine has been applied in equity from time immemorial. Thus, if a trustee misbehaves in any way to the detriment of the estate, he may be removed. *Ex parte Reynolds*, 5 Ves. 707. So if he refuse or neglect to execute the trust it is cause for removal. In *re Mechanics' Bank*, 2 Barb. 446; *De Peyster v. Clendinning*, 8 Paige, 295; *Perry, Trusts*, 419, and cases cited. This rule has been applied by this court against inferior officers in a number of instances. Thus, in *Brock v. Hopkins*, 5 Neb. 231, it was held that a clerk of the district court was liable for damages occasioned by his negligently and carelessly taking insufficient security; while, if he exercised a reasonable degree of care in the performance of his duty, he was not liable. In *Fox v. Meacham*, 6 Neb. 531. It was held that where a justice of the peace violates the law, and abuses his authority, to the injury and damage of another, he and his sureties are liable on his bond for such damages. I know of no reason why the same rule which would hold a county officer liable for damages or guilty of an offense for which he might be removed should not be applied

to the state officers. The charge in both cases is substantially the same, viz. misconduct in office. If a county officer is guilty no one will urge as a reason for condoning the offense that the accused was elected to the office, and that the people would be deprived of his services by his removal; and I know of no good reason why the same rule should not be applied where the officer is elected by the entire state.

It is said respondents acted judicially in approving accounts, and therefore are not liable for their acts. The able attorneys for the respondents made no claim of this kind, and therefore it is evident they did not rely upon it. If, in approving accounts, they act judicially, in order to protect them there are three things which must concur: (1) The claim must be one they are authorized to audit; (2) it must be presented in the form of a bill or voucher showing the debt, and what it is for, otherwise the board would be like a judge passing upon a matter not before him, such as a matter not put in issue; and (3) the statute makes it their duty to investigate every claim. The protection accorded to a judge against a private action does not apply when he is on a trial under specific charges of impeachment. Even a judge of this court could not plead protection against such charges. In such case his conduct and general manner of conducting his business may be inquired into, and, if he is found guilty of misconduct on any of the charges, he may be declared guilty. But no judicial officer is protected when he exceeds his authority, and these respondents very clearly in all that they are charged with acted either without authority of law or in excess of such authority. But, in my view, their duties are not judicial. In the proper sense they do not allow accounts. They merely investigate, or should investigate, the vouchers, and the several items thereof, to see that they conform to the contract. In other words, the duty of the board is to let contracts in a specified manner, and, when vouchers are presented under such contracts, which upon examination are found to be correct, they are to certify the same to the auditor. The certificate is not a final order from which an appeal would lie, and is not a judicial act. It will not be seriously contended that an officer who negligently and improperly certifies a fraudulent account which it was his duty to investigate, or who unlawfully draws money from the treasury, is protected from the consequences of his acts; and, so far as I am aware, no case so holds. The rule announced in the case, seems to me, would have protected Tweed from prosecution. Yet we know that he was tried and convicted for obtaining money from the city of New York upon fictitious claims allowed against the city by the proper authorities, and suit was also brought in behalf of the people to recover the money so obtained. In *People v. Tweed*, 63 N. Y. 199, the petition alleges that Tweed was pres-

ident of the board of supervisors of the county of New York, and "procured various pretended claims to be made up, purporting to be liabilities, amounting in the aggregate to \$6,198,957.85, specified in a schedule annexed, which were presented, and by the procurement of said conspirators were certified to by the three auditors named," etc., and it was held that the action could be maintained.

Proof was introduced on behalf of the respondents to show that Dorgan, Knapp, and others had given bonds to the state. It is evident that none of these bonds will cover the actual loss to the state, and, even if enforced, would be an inadequate remedy. But the giving of a bond by an officer does not exempt him from the performance of his duty, nor relieve those who superintend his acts from a faithful supervision of the same. The law imposes the duty of supervision with "a reasonable degree of care." The duty of an officer is stated by Judge Lake in *Brock v. Hopkins*, supra, that he exercise a reasonable degree of care in the performance of his duty. It seems to me the respondents wholly failed in the performance of their duties in the cases specified in these charges, whereby the state, during the 10 months that Dorgan was superintendent, lost a large sum of money,—probably not less than \$15,000, and \$234 for resetting the boilers,—which was not a debt of the state, together with the sums drawn to Hopkins and Howe to go to Pittsburgh and the respondents to go to St. Louis; in all, \$934. The overpayments for coal, all in 16 months, exceed \$12,000. An ordinarily prudent man would have required the vouchers to be in proper form, giving the numbers and weights of the several cars. There are telephones in all of the public buildings, so that it would have taken but a moment to make the proper inquiries in regard to the coal, and protect the interests of the state, but, so far as the proof shows, such inquiries were not made in a single instance. A public officer, like any other servant, should be faithful to his employer, to see that in all matters under his control the master shall not be defrauded; in other words, he shall be faithful to his trust, not as an eye servant, but in the sight of God. That is in effect the oath that each officer takes to faithfully perform his duty. Our public institutions should be conducted on business principles, and without fear, favor, or favoritism; and no money should be drawn from the treasury except in strict pursuance of law.

If the court should approve, or even condone, the conduct of the respondents in these cases, the influence of the decision will be felt in every department of business in the state, as tending to weaken the sense of faithfulness of public officers and employes, and in every way prove detrimental to the best interests of society. There are an abundance of men in the state who can, and, if the opportunity is given by their selection to the offices filled

by the respondents, will, faithfully look after the interests of the state; and, as the respondents have failed in that regard, the charges are well taken, and should be sustained. I therefore vote "Guilty as charged." I fear the result of the decision, if adhered to, will be to open a door to the grossest of frauds in the public institutions of the state. A number of the witnesses for the state testified as if under constraint, and there seemed to be powerful influences affecting some of them, aside from the immediate friends of the respondents at work in their favor. The respondents, of course, are not responsible for these influences, but it is my duty to mention them.

STATE v. HILL

SAME v. BENTON.

(Supreme Court of Nebraska. June 5, 1893.)

STATE OFFICER—IMPEACHMENT—AFTER TERM OF OFFICE.

1. The power of impeachment conferred by the constitution upon the legislature extends only to civil officers of the state, and this power cannot be exercised after the person has gone out of office.

2. Private citizens are not amenable to impeachment.

3. The legislature has no authority to prefer articles of impeachment against ex-officials. (Syllabus by the Court.)

Original actions before the supreme court, brought for impeachment of Thomas H. Benton, late auditor of public accounts, and for impeachment of John E. Hill, ex state treasurer. Dismissed.

P. H. Barry, C. D. Casper, and Geo. R. Colton, Managers. Geo. Doane, S. B. Pound, W. L. Greene, and G. M. Lambertson, for prosecution. R. D. Stearns and John H. Ames, for defendant Benton. J. H. Broady, for defendant Hill.

NORVAL, J. The above-entitled cases present for decision the same question, and, for the sake of brevity, will be considered and disposed of together.

The legislature, on the 7th day of April, 1893, adopted articles of impeachment against the respondent Thomas H. Benton, late auditor of public accounts, charging him with having committed certain official misdemeanors while he was discharging the duties of the office aforesaid. On the 6th day of April, 1893, articles of impeachment against the respondent John E. Hill, ex state treasurer, for misdemeanors in office, alleged to have been committed by him during the time he was treasurer of the state, were adopted by the legislature. The articles of impeachment against each of the respondents were presented to and filed in this court on the 10th day of April, 1893. Subsequently a plea to the jurisdiction was filed by each respondent, the two being substantially alike, which alleges, in effect, that this court should not

take further cognizance of said articles of impeachment exhibited and presented against him, because the respondent, at the time of the adoption of the same, and when the first resolution of impeachment against him was presented to the house of representatives, and at the time of the investigation which led up to said impeachment, as well as at all times since, and for a long time before, the first action in relation to said impeachment was taken and had, was not an officer of this state, but that he then was, and ever since had been, and now is, a private citizen of the United States and of this state; that the office to which he had been elected, and which he had filled, expired on the first Thursday after the first Tuesday in January, 1893, and that at the general election in 1892 his successor was duly elected, who qualified, was inaugurated, and installed into the office, as the successor of the respondent, on the 14th day of January, 1893, and that not until long after the date last aforesaid was the investigation commenced which resulted in said impeachment.

The question presented for our investigation is this: Should the plea to the jurisdiction be sustained? The proposition, stated in a different form, is: Has the legislature the power to prefer articles of impeachment against a party after his term of office has expired, he at the time of such impeachment being a private citizen, and not an officer of the state? The question is now for the first time submitted to this court for its consideration and judgment. An examination of the provisions of the constitution of Nebraska on the subject of impeachment is necessary in order to arrive at a correct decision. By section 14, art. 3, of the constitution the exclusive power of impeachment is conferred upon the two houses of the legislature when in joint convention. The section also declares that "a notice of an impeachment of any officer other than a justice of the supreme court shall be forthwith served upon the chief justice by the secretary of the senate, who shall thereupon call a session of the supreme court to meet at the capitol within ten days after such notice to try the impeachment. A notice of an impeachment of a justice of the supreme court shall be served by the secretary of the senate upon the judge of the judicial district within which the capitol is located, and he thereupon shall notify all of the judges of the district court in the state to meet with him within thirty days at the capitol, to sit as a court to try such impeachment, which court shall organize by electing one of its number to preside. No person shall be convicted without the concurrence of two-thirds of the members of the court of impeachment, but judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, profit, or trust in this state; but the party impeached, whether convicted or acquitted,

shall nevertheless be liable to prosecution and punishment according to law. No officer shall exercise his official duties after he shall have been impeached and notified thereof, until he shall have been acquitted." Section 5, art. 5, provides that "all civil officers of this state shall be liable to impeachment for any misdemeanor in office." Section 3, art. 16, reads as follows: "Drunkennness shall be cause of impeachment and removal from office." The foregoing sections contain every provision to be found in the constitution relating to impeachment. That instrument designates the persons who may be impeached, namely, "all civil officers of this state." It likewise specifies the grounds for impeachment. The constitution does not, in express terms, say that a private citizen can be impeached, nor does it contain words from which such an inference can be drawn. On the other hand, it is plain that the legislature has no power to impeach a person who has never held any public office in this state. It is civil officers who are amenable to impeachment. Section 5, art. 5, so declares. None others were intended to be included by the framers of the constitution. This is clearly manifest from the language of the instrument. Section 5, art. 5, makes any misdemeanor in office an impeachable offense; and section 3, art. 16, declares that drunkenness shall be cause for removal from office. These are the only grounds for impeachment enumerated in the constitution. Thus it will be seen that acts committed by a person while in office are alone impeachable. The provisions of section 14, already quoted, are not only in harmony with this construction, but they give strength to it. That section specifies the tribunals which shall try impeachments, and the person upon whom notice of the proceedings shall be served. It requires "that notice of an impeachment of any officer other than a justice of the supreme court shall be served upon the chief justice by the secretary of the senate, who shall thereupon call a session of the supreme court to meet at the capitol within ten days to try the impeachment." It is further provided that, in case of the impeachment of a justice of the supreme court, notice thereof must be served upon a judge of the district court of the county in which the capitol is located, and such impeachment is to be tried before all of the judges of the district courts in the state. While the constitution makes ample provision for the trial of articles of impeachment, exhibited by the legislature against officers, it neither designates the tribunal which shall try impeachment proceedings against a private citizen, nor does it specify the person to whom notice in such a case shall be given. No power is conferred by the constitution upon this court nor upon any other tribunal, either in direct terms or by implication, to try an impeachment proceeding against a person who has never held an office. In Great Britain all subjects of the realm,

whether in or out of office, are impeachable; but such rule does not prevail in this country. Here none but public officers are subject to impeachment. Story, Const. § 790; 9 Amer. & Eng. Enc. Law, 953.

Judge Story, in his valuable Commentaries on the Federal Constitution, after quoting section 4, art. 2, of that instrument, which reads: "The president, vice president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors,"—says: "From this clause it appears that the remedy by impeachment is strictly confined to civil officers of the United States, including the president and vice president. In this respect it differs materially from the law and practice of Great Britain. In that kingdom, all the king's subjects, whether peers or commoners, are impeachable in parliament; though it is asserted that the commoners cannot now be impeached for capital offenses, but for misdemeanors only. Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual grounds for this kind of prosecution in parliament. There seems a peculiar propriety—in a republican government, at least—in confining the impeaching power to persons holding office. In such a government all the citizens are equal, and ought to have the same security of a trial by a jury for all crimes and offenses laid to their charge, when not holding any official character. To subject them to impeachment would not only be extremely oppressive and expensive, but would endanger their lives and liberty by exposing them, against their wills, to persecution for their conduct in exercising their political rights and privileges. Dear as the trial by jury justly is in civil cases, its value as a protection against the resentment and violence of rulers and factions in criminal prosecutions makes it inestimable. It is there, and there only, that a citizen, in the sympathy, the impartiality, the intelligence, and incorruptible integrity of his fellows, impaneled to try the accusation, may indulge a well-founded confidence to sustain and cheer him. If he should choose to accept office, he would involuntarily incur all the additional responsibility growing out of it. If impeached for his conduct while in office, he could not justly complain, since he was placed in that predicament by his own choice, and in accepting office he submitted to all the consequences. Indeed, the moment it was decided that the judgment upon impeachments should be limited to removal and disqualification from office, it followed, as a natural result, that it ought not to reach any but officers of the United States. It seems to have been the original object of the friends of the national government to confine it to these limits; for in the original

resolutions proposed to the convention, and in all the subsequent proceedings, the power was expressly limited to national officers." The foregoing quotation is now generally accepted as a correct exposition of the law. We see no escape from the conclusion in this state, under the provisions of our constitution that the power of impeachment extends exclusively to public officials. Where there has been no official guilt, the remedy by impeachment will not lie.

It is urged by counsel for the managers that ex-officers are liable to impeachment for official misdemeanors committed while in office; that jurisdiction attaches immediately upon the commission of an impeachable offense; and that the expiration of the official term does not deprive the legislature of the power to impeach, or the court to try. It cannot be said that there is any provision of the constitution which expressly confers the authority to impeach a person after he is out of office; while section 5, already quoted, designates the persons who may be impeached as "all civil officers of this state." This language is unambiguous. It means existing officers,—persons in office at the time they are impeached. Ex-officials are not civil officers within the meaning of the constitution. Jurisdiction to impeach attaches at the time the offense is committed, and continues during the time the offender remains in office, but no longer. The necessary implication of the provisions in section 14, art. 3, of the constitution, that "judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, profit, or trust in this state," is that the offending party must be in office at the time the impeachment proceedings are commenced. In case of impeachment, either one of two judgments can be pronounced, namely, removal from office, or removal and disqualification to hold office. It is obvious that there can be no judgment of removal where the party was not an officer when impeached. It is claimed by counsel for the managers, as we understand their argument, that a judgment of disqualification can be entered without a judgment of removal. All will concede that disqualification to hold office is a punishment much greater than removal; so that, if the construction contended for by counsel is the true one, then, in case the person impeached is out of office, he is liable to a more severe penalty than might have been inflicted upon him had he been impeached before he went out of office. We cannot believe that the members of the convention who framed the constitution so intended. Judge Story, in discussing the question whether a person can be impeached after he has ceased to hold office, at section 803 says: "As it is declared in one clause of the constitution that judgment in cases of impeachment shall not extend further than a removal from office, and disqualifica-

tion to hold any office of honor, trust, or profit under the United States, and in another clause, that the 'president, vice president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanors,' it would seem to follow that the senate, on the conviction, were bound in all cases to enter a judgment of removal from office, though it has a discretion as to inflicting the punishment of disqualification. If, then, there must be a judgment of removal from office, it would seem to follow that the constitution contemplated that the party was still in office at the time of impeachment. If he was not, his offense was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued, with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offense, when the most important object for which the remedy was given was no longer necessary or attainable; and, although a judgment of disqualification might still be pronounced, the language of the constitution may create some doubt whether it can be pronounced without being coupled with a removal from office."

A number of decisions by courts of impeachment, both in England and in this country, have been cited by counsel for the managers to sustain the proposition that a person whose term of office has expired, and who is no longer in office, is subject to impeachment. Two English cases have been mentioned,—those of Warren Hastings and Lord Melville. While it is true that each was impeached long after he had ceased to hold the office which he occupied at the time of the commission of the offense charged, yet no plea to the jurisdiction was or could be raised, for the obvious reason that parliament is omnipotent. As all persons in England—those in as well as those out of office—are subject to impeachment, the Cases of Hastings and Melville are not in point.

The next case is that of William Blount, who was a United States senator from Tennessee. He was expelled by the senate for official misdemeanor, and was subsequently impeached by the house of representatives for the same act. He pleaded that a senator is not a civil officer, within the meaning of the constitution, and also that he was not a senator when the articles of impeachment were adopted. His plea was sustained upon the first ground alone, and therefore the ruling in that case is not an authority either way on the question before us.

Judge Barnard was impeached in the state of New York, during his second term, for acts committed in his previous term of office. His plea that he was not liable to impeachment for offenses occurring in the first term was overruled. Precisely the same question was raised in the impeachment proceedings against Judge Hubble of Wisconsin, and on

the trial of Gov. Butler, of this state, and in each of which the ruling was the same as in the Barnard Case. There was good reason for overruling the plea to the jurisdiction in the three cases just mentioned. Each respondent was a civil officer at the time he was impeached, and had been such uninterruptedly since the alleged misdemeanors in office were committed. The fact that the offense occurred in the previous term was immaterial. The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired, and he is no longer in office, that object is attained, and the reason for his impeachment no longer exists; but, if the offender is still an officer, he is amenable to impeachment, although the acts charged were committed in his previous term of the same office.

The only other decision to which we have been referred is the Belknap Case. The house of representatives impeached William W. Belknap for acts committed while secretary of war. On the day the articles of impeachment were adopted, but prior to their adoption, Mr. Belknap resigned, and his resignation was accepted by the president. Before the trial the respondent interposed a plea to the jurisdiction, on the ground that he had ceased to be an officer before he was impeached. The question was ably argued, and the senate of the United States, sitting as a court of impeachment, overruled the plea by a vote of 37 to 29. At the close of the trial Mr. Belknap was acquitted. The senators who voted against conviction, the record shows, did so upon the express ground that the house of representatives had no jurisdiction to impeach him, and the senate was without jurisdiction to try him, inasmuch as he had ceased to be a civil officer. So, instead of the Belknap Case being an authority in favor of jurisdiction in the cases at bar, it should be regarded as an adjudication against the proposition. The reason jurisdiction should not be entertained in the cases against Benton and Hill is much stronger than in the Belknap Case. There the respondent resigned his office on the very day he was impeached, for the sole purpose of escaping impeachment. In objecting to the jurisdiction, he took advantage of his own acts. Here Benton and Hill ceased to be officers by reason of the expiration of their official term. They did nothing to defeat jurisdiction.

But, independent of authorities or precedents, if we do not misconceive the meaning of the constitution, there is no room for doubt that ex-officials are not impeachable, since civil officers alone are enumerated in that instrument as subject to that remedy. The term "officer" cannot properly be applied to a person who is not at the time in the holding of an office. When a person ceases to hold an office, he immediately becomes a private citizen.

Reference has been made to certain sections of the Criminal Code, which provides

for the punishment of sheriffs and other officers for official misconduct, and the question is asked whether the offending officer must be punished while he is in office or not at all? We answer, No. But the same rule does not apply to impeachments, for the reason stated by another: "The two remedies have totally distinct aims. One remedy is given against a crime, and the other against a position; one is for the punishment of an offender, the other for the purification of the public service; one is meant to reform a criminal, the other is meant to reform an office." Again, the penalty provided in the sections alluded to is entirely different from that in cases of impeachment. In the former, the sentence may be either fine or imprisonment or both, while in the latter the judgment, in case of conviction, shall not extend further than removal from office, and disqualification to hold office. Further, the statute fixes the period in which prosecutions shall be commenced for violations of the criminal laws of the state; therefore any criminal prosecution can be brought within that time, even though the accused occupied an official station when the offense was committed, but is no longer in office.

At the argument our attention was called by counsel for the managers to sections 8, 9, c. 19, Comp. St. 1891, which read as follows: "Sec. 8. An impeachment of any state officer shall be tried, notwithstanding such officer may have resigned his office, or his term of office has expired; and, if the accused person be found guilty, judgment of removal from office, or disqualifying such officer from holding or enjoying any office of honor, profit, or trust in the state, or both, may be rendered as in other cases. Sec. 9. An impeachment against any state officer shall be tried, and judgment of removal from office or of disqualification to hold office may be rendered, notwithstanding the offense for which said officer was tried occurred during a term of office immediately preceding." The contention of counsel is that the foregoing provisions not only grant the power to try, but to prefer charges of impeachment against, a person who has held office, after the expiration of his term. We are not aware of any rule governing the construction of statutes which would justify such an interpretation. The sections quoted have reference to the trial of an impeachment, and the Code defines a trial to be "a judicial examination of the issues, whether of law or of fact, in an action." Code, § 279. The trial of a criminal case does not include the returning of an indictment by the grand jury, or the filing an information by the county attorney. The trial of a civil suit does not embrace the filing of a petition and other pleadings, or the issuance of a summons. So, when the statute declares that "an impeachment of any state officer shall be tried," it means what it says, and nothing else. The meaning of section 8 is that, where a state officer has been impeached during his term, he shall be tried, and, if found guilty,

judgment shall be rendered, even though he may have resigned, or his term of office has expired, after the articles of impeachment were exhibited against him. To hold that it confers power upon the legislature to prefer charges after the resignation of the officer, or the expiration of his term, would be a strained and unnatural construction of the language employed. The statute does not say that a person may be impeached after he has resigned, or his term has expired; nor does it contain words which can reasonably be said to warrant such an interpretation. Section 9 provides for the trial of an impeachment of a state officer for an offense occurring during his term of office immediately preceding. It contemplates that the impeachment proceedings shall be commenced while the offender is yet in office. The respondents being out of office at the time the proceedings for their impeachment were instituted, the legislature had no power to impeach them, and this court has no jurisdiction to try them. The proceedings are therefore dismissed. Judgment accordingly. The other judges concur.

STATE v. LEESE.

(Supreme Court of Nebraska. June 5, 1893.)
IMPEACHMENT OF STATE OFFICER—JURISDICTION—
AMENDMENT OF ARTICLES.

1. The constitution of this state confers the sole power of impeachment upon the senate and house of representatives, in joint convention, and the legislature cannot delegate that power to others.

2. Where the legislature has adopted articles of impeachment, which have been filed in this court, no amendment thereof, in any matter of substance, can be made by the managers appointed by the legislature to prosecute the impeachment. The authority to adopt and present other or amended articles of impeachment or specifications rests alone with the joint convention of the two houses of the legislature.

3. For want of jurisdiction, the proceedings are dismissed.

(Syllabus by the Court.)

Original action before the supreme court, brought for impeachment of William Leese, ex attorney general, for misdemeanors committed while in office. Dismissed.

G. M. Lambertson, G. W. Doane, S. B. Pound, and W. L. Greene, for the State.
John M. Stewart, for defendant.

NORVAL, J. The legislature of this state, at its last session, adopted and presented to this court articles of impeachment against William Leese, ex attorney general, charging him with misdemeanors in office during the period he was attorney general of the state. Within the time fixed by the court therefor, the respondent answered the articles of impeachment exhibited and presented against him, and to each and every specification therewith. Subsequently the managers appointed by the legislature to

prosecute the charges asked leave to amend, in matter of substance, certain of the specifications in said articles of impeachment, to which proposed amendments the respondent at the time objected. At the hearing the application to file amended specifications was denied, and we will now briefly state the reasons for the conclusion then reached.

Section 14, art. 3, of the constitution, declares that "the senate and house of representatives, in joint convention, shall have the sole power of impeachment, but a majority of the members elected must concur therein. Upon the entertainment of a resolution to impeach by either house, the other house shall at once be notified thereof, and the two houses shall meet in joint convention, for the purpose of acting upon such resolution, within three days of such notification," etc. By the foregoing provision the exclusive power of impeachment is conferred upon the legislature. Both houses of that body are required to meet in joint convention to act upon a resolution to impeach a state officer for any misdemeanor in office, and such a resolution can only be adopted or carried by the affirmative vote of at least a majority of all the members elected to the legislature. The authority thus given carries with it the power of the senate and house of representatives, under like restrictions, to adopt suitable articles and specifications in support of their impeachment, and likewise the authority to adopt and present additional or amended articles or specifications whenever it is deemed proper or expedient so to do. But such power can no more be delegated by the joint convention to a committee or managers of impeachment, appointed by it, than the legislature can confer authority upon a committee composed of members of that body to enact a law, or to change, alter, or amend one which has been duly passed; and in neither case does the right exist. Impeachment is in the nature of an indictment by a grand jury. The general power which courts have to prevent the amendment of pleadings does not extend to either indictments or articles of impeachment. The uniform holding of the courts, except where a different rule is fixed by statute, is that when an indictment has been filed with the court no amendment of the instrument, in matter of substance, can be made by the court, or by the prosecuting attorney, against the consent of the accused, without the concurrence of the grand jury which returned the indictment. *People v. Campbell*, 4 Parker, Crim. R. 386; *Gregory v. State*, 46 Ala. 151; *Johnson v. State*, Id. 212; *McGuire v. State*, 35 Miss. 366; *State v. Sexton*, 3 Hawks, 184; *State v. McCarty*, 2 Pin. 573; *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. Rep. 781. We have no hesitancy in holding that the managers have no power or authority to change in any material matter the specifications contained in the articles of impeach-

ment exhibited against the respondent. If they could do that, it necessarily follows that they could exhibit new articles of impeachment or specifications, preferring charges against the respondent not included in the original accusations made against him, and which the sole impeaching body, the joint convention of the legislature, might have rejected, had they been submitted to it for consideration. To hold that the managers of impeachment have the right to do that would be to disregard both the letter and spirit of the constitution. In reaching the conclusion stated above, we have carefully considered and given due weight to the last paragraph of the articles of impeachment, which reserves to the senate and house of representatives of the state of Nebraska, in joint convention assembled, "the liberty of exhibiting at any time hereafter any further articles or other accusations or impeachments against the said William Leese, late attorney general of the state of Nebraska." All that can be reasonably claimed for this provision is that the joint convention of the two houses of the legislature reserved the right to adopt other and additional articles of impeachment against the respondent. But the legislature has not preferred other or further accusations against him, nor does the clause above mentioned attempt to confer such authority upon the managers of impeachment. If it had done so, as we have already seen, it would be repugnant to the letter and spirit of the constitution.

There is another question disclosed by the record, although not raised by the respondent, which is decisive of the case, and that is that the legislature had no power to prefer the articles of impeachment against the respondent, and that this court has no jurisdiction to try the accusations made against him. William Leese, when the impeachment articles were adopted, was not an officer of the state. He had ceased to be attorney general more than two years prior to that time, by reason of the expiration of the term for which he had been elected. Therefore, for the reasons stated in the opinion in the Cases of Benton and Hill, 55 N. W. Rep. 794, (filed herewith,) the respondent was not liable to impeachment for any misdemeanors in office which he may have committed while he was attorney general. The proceedings against him are for that reason dismissed. The other judges concur.

PARISEAU v. BOARD OF EDUCATION OF PUBLIC SCHOOLS OF CITY OF ESCANABA.

(Supreme Court of Michigan. June 30, 1893.)

SCHOOL BOARD—RESIGNATION OF MEMBER—
ESTOPPEL.

Relator, a member of a school board, tendered his resignation to the president of the

board, was nominated for alderman, and was present at a caucus at which one M. was nominated to fill the vacancy caused by his resignation. One C. was also nominated for the same office. Relator was defeated as alderman, and C. was elected, and so declared by the common council. Relator then attempted to withdraw his resignation. *Held*, that relator is in no position to claim a seat in the board, though the resignation from such office should have been tendered to the common council.

Application for mandamus by Alexander Pariseau against the board of education of the public schools of Escanaba. Denied.

Carey & White, for relator. Cahill & Osterlander, for respondent.

LONG, J. Relator asks the writ of mandamus to compel the respondent to rescind a motion adopted by it May 3, 1893, declaring one James R. Champ entitled to the seat on said board held by relator, and to compel the respondent to admit him as a member of the board. In the petition it is claimed that relator was duly elected a member of the board at a charter election held in that city in April, 1892, for two years; that he duly qualified and acted as a member of the board until prevented by the action of the board, seating Mr. Champ in his place. He further sets up in his petition that he contemplated resigning his office, and handed his written resignation to the president of the board, but before it was acted upon he withdrew it, and it was returned to him. He further shows by his petition that the charter of the city of Escanaba provides that all resignations from office shall be made to the city council, subject to its approval and acceptance, and that he never offered any resignation to that body; that the city clerk, without authority, acting upon information and belief, caused notice to be published before the election, in April, 1893, that there would be an election to fill a vacancy, and the election was held for that reason. That he has performed the duties of the office since his election, in April, 1892, was present at the meeting of the board, ready to take part in its proceedings, but was prevented by the board adopting the resolution unseating him, and seating Mr. Champ. It is admitted by the answer that the charter of the city provides that one school inspector from each ward shall be elected annually for the term of two years, and to hold their offices until their successors are elected and qualified, and that such inspectors shall constitute the board of education. Act No. 241, Local Acts 1891. It is also admitted that under the provisions of the charter the resignations of officers shall be made to the common council, which consists of the mayor and aldermen, subject to its approval and acceptance. It is also admitted that relator was duly elected a member of the board in 1892, and acted as such until the meeting of the board held in March, 1893. It

is alleged in the answer that in March, 1893, and prior to the holding of caucuses for the nomination of city and ward officers, the relator placed in the hands of the president of the board of education his written resignation from the board, and became a candidate for alderman of his ward, was nominated by his party, and accepted such nomination, had his name printed upon the ballot as such candidate, and was voted for as such alderman in April, 1893; but was defeated for that office; that relator participated in the caucus, and that in said caucus one Magnus Mattson was nominated for school inspector to fill the vacancy caused by relator's resignation; that prior to the holding of said caucuses the president of the board gave notice to the city clerk that an election would be held to fill such vacancy, and the clerk, acting upon such information, gave notice of such election; that Mr. Champ was also nominated in a caucus held for the nomination of city and ward officers, and was duly elected; that these votes for candidates for the office of city and ward officers were canvassed by the common council of the city, and Mr. Champ declared elected to the office of school inspector, and he was admitted as a member of the board of education.

It is conceded that under section 18, c. 4, of the charter of Escanaba, vacancies occurring in the board of education are to be filled by the board itself. It is therefore contended by the relator—First, that the election by the electors of the city was void for the reason that the board alone had the right and power to fill the vacancy. If there was a vacancy; second, that the relator never tendered his resignation to the body authorized to act upon or accept it, and therefore no vacancy had occurred, to be filled even by the board itself. The question, however, is presented, whether the relator is now in a position to raise these questions. He did tender his resignation to the president of the board, and it is apparent that he knew that his successor was nominated and presented to the electors as a candidate for the place. He took part in the caucus, and was himself a candidate for another office before the caucus, receiving a nomination at its hands. He knew the election was to be held to fill the vacancy, and acquiesced in that. The votes cast for the office were returned to the common council, canvassed by it, and the result declared,—that Mr. Champ was duly elected. The board of education, acting upon that declaration, admitted Mr. Champ as a member. The relator then, for the first time after the tender of his resignation, set up a claim that his resignation was to the wrong body, and that the election of Mr. Champ was void. This must be presumed to be the first knowledge the board had of the relator's claim, from the fact that it is nowhere shown when he withdrew

his resignation, or that the board had any knowledge of his claim till then. It is true that by the provisions of the charter his resignation should have been tendered to the common council, but the clerk of the city had been advised that there was to be a vacancy, and, acting in good faith, published the notice of election. The vote was taken, and the council acted upon it, declaring Mr. Champ elected. This was equivalent to an acceptance of the relator's resignation, under the circumstances, by the council. The vacancy, by this act, was then declared, even if the relator is in a position to set up the claim of want of vacancy, and, though the election by the people may not be considered as giving Mr. Champ a right on the board, yet the action of the board after the vacancy thus occurred legally seated Mr. Champ, as the board, in case of a vacancy, had a right to fill it. We think the circumstances are such, even if this was not the legal effect of the action of the common council and the board of education, that the relator is not in a position to set up a claim to a seat on the board. It was his own action that brought about this state of affairs, and there is no showing that the board has not acted in the utmost good faith. The writ should also be refused on another ground. Mr. Champ took his seat on the board after his election, and has been exercising the duties of the office since. He is not made a party to these proceedings, and the effect of the order asked would be to oust him from the office. *Mandamus* is not the proper proceeding to oust him. *People v. Detroit*, 18 Mich. 338; *School Dist. v. Root*, 61 Mich. 373, 28 N. W. Rep. 132; *Frey v. Michie*, 68 Mich. 323, 36 N. W. Rep. 184; *Hailgren v. Campbell*, 82 Mich. 258, 46 N. W. Rep. 381. The writ must be denied. The other justices concurred.

BIRDELL MANUF'G CO. v. BROWN
et al.

(Supreme Court of Michigan. June 23, 1893.)

CONTRACT OF AGENCY—CONSTRUCTION—BREACH
BY AGENT—PROMISE TO INDEORSE.

1. Defendants were agents of plaintiff corporation for the sale of clover hullers, under a contract by which they were to obtain full settlement for every machine before delivery to the purchaser, and to guaranty payment for each machine. Defendants obtained one machine from plaintiffs for a purchaser on time, but failed to have a settlement with him before sale. The purchaser refused to pay for the machine, as being defective, and four months after the sale returned it to defendants, who notified plaintiff. The latter made no reply, and over a year later defendants sent the machine to plaintiff, which refused to receive it. The purchaser was able to pay for the machine, but plaintiff did not try to collect the price from him. *Held*, that defendants were not liable for the price of the machine, but merely for any loss which might accrue to

plaintiff by reason of their failure to obtain a prompt settlement, as required by their contract.

2. An action may be maintained for breach of a promise to indorse made upon sufficient consideration.

Error to circuit court, Kent county; William E. Grove, Judge.

Action by the Birdsell Manufacturing Company against Frank E. Brown and others. Judgment for plaintiff, and defendants bring error. Reversed.

Ward & Ward, for appellants. Stuart & Knappen, for appellee.

McGRATH, J. Defendants were acting as plaintiff's agents for the sale of clover hullers at Grand Rapids, under a written agreement dated December 29, 1888, by the terms of which defendants agreed "to receive, and take good care, by storing under shelter, of all machines sent to them as such agents; and, should any machine sent to them remain unsold at the end of the season, to store the same under cover until the next season, or return the same to plaintiff. To take all orders on blanks furnished by the party of the first part, and to have the same properly filled and signed, showing property statement of purchaser, and to use all due diligence in ascertaining the correctness of such property statements, and to forward said orders without delay for acceptance or rejection. To receive the purchase price of all machines sold as aforesaid, whether in money or notes, and to forward the same to the said party of the first part promptly, and at the time of settlement of each sale. That all moneys and notes and other securities taken for said clover separators (or parts thereof) are to be received by defendants in a fiduciary capacity, and not otherwise, and so accounted for; and said moneys, notes, and securities are in no case to be used or appropriated by defendants, but are to belong (as soon as received by defendants) exclusively to plaintiff, and to be promptly remitted to them as each settlement is made. To invariably have full settlement with the purchaser before the delivery of each machine, or any part thereof. To be personally responsible for any neglect of the faithful performance of any of the requirements embraced in this agreement. To sell only at such prices and on such terms as plaintiff shall direct, and hereby guaranty payment for machines sold, unless said defendants shall, before sale, send an order to plaintiff, with property statement of the purchasers thereon, and such order shall be accepted by them. Such order shall be in the form of a proposal, and may be accepted or rejected by said plaintiff." On October 3, 1889, defendants sent a telegram to plaintiff at South Bend, Ind., as follows: "Will you ship one huller, two January's time, good

paper, our indorsement? Answer quick when can ship." On the same day plaintiff replied: "Will ship huller on that time, and can ship next Monday. Instruct us." Defendants on the same date gave the following instructions: "Ship the huller Monday next, as stated." The huller was shipped on October 7th, and on that date plaintiff sent to defendants the following bill: "Clover-Huller Department. South Bend, Ind., Oct. 7, 1889. Brown & Sehler, Grand Rapids, Mich., in commission account with Birdsell Manufacturing Co. Order No. 2,969. Machine No. 13,999. One No. 1 clover huller, trucks, and stacker, 9½ pulley, \$470. Commission 20 per cent., payable at time, and in same proportion as we receive our money, per contract. For * * * terms, * * *. If sold on time, sale to be made subject to our approval, per contract. Transferred from * * *." The huller was delivered to the person for whom it was obtained, one Van Amburg. The notes were not obtained from the purchaser. On November 14, 1889, defendants wrote plaintiff as follows: "Gentlemen: The last huller shipped us does not seem to work right, and we are unable to get settlement for it. We are no experts on huller business, but the party we sold to had worn out one of your hullers before, and said that he had no trouble whatever in cleaning the seed; but with this he cannot get the seed through the sieve, keeps a man at the sieve all the time, and then it will run over so that they have to stop and clean it out. If the man is not there all the time, it will load up and run over. Think will have to send a man who understands his business, to see what can be done with it, before we can get settlement. Any time about the 20th of the month will be all right for him to come, as the man is sick now, and would rather not start under a week. Let us hear from you by return mail what day a man can come, so that we can write him to be ready." On November 19, 1889, plaintiff replied as follows: "Gentlemen: You wrote us the other day that you needed an expert to look after one of your hullers. You also spoke about the party being sick who wanted help, and that he will not likely be able to work before the 20th. The weather being so bad, and the party sick, it will be best for you to telegraph us when everything is ready for starting the machine. You say he has trouble about getting the seed through the sieve. Do you mean the recleaner or the wire shoe? It is quite likely that if he would lower the tail board as low as possible behind, and put on plenty of wind, he will have no trouble whatever about the shoe clogging up. Tell him he need not be uneasy about blowing over seed. If the trouble is with the recleaner, perhaps the screens need washing off. They get dirty or gummy, and

the holes thereby become too small for letting the seed through properly. If the cylinder concaves are properly adjusted, and the tail board kept down behind, and plenty of wind let on, we have no doubt but that everything will run all right. It is quite likely that some of his belts are too loose. We inclose cut with one of the belts marked in red ink. If he will keep this belt good and tight, and the fan belt also tight, we are quite sure he will need no expert." On November 22, 1889, defendants wrote again to plaintiff as follows: "Gentlemen: Answering yours of Nov. 19th, would say that it will be necessary to send a man to see to this huller, as the customer has got balky. You can send a man at any time within a week if it stops raining, and we will see then what can be done." After this letter was written, and on November 30th, one Altland, a representative from the home office, visited Grand Rapids, saw defendants, and also Van Amburg. At that conversation Van Amburg told Altland that he would not settle for the machine until it was made to give satisfaction. Altland says: "I proposed to Van Amburg that we could try the machine, and he agreed to it, and set the 27th day of December for us to be here, to have an expert to show how the machine would work." On December 7, 1889, plaintiff wrote defendants as follows: "Gentlemen: Our Mr. E. W. Altland reports that Mr. McCord does not expect to start up his huller again until between Christmas and New Years. If convenient, we wish you would notify us either by letter or wire about three days before he desires to start the machine, giving the exact day, if possible, and we will have some one there to see that it operates properly. From what Mr. Altland says we are satisfied that the trouble lies exactly where we wrote you in our last letter. All that will be necessary in this case will be to lower the concave, or take out all of the teeth except one row, if the clover is dry enough, and then lower the tail board at the rear end of the machine, and turn on plenty of wind. If that is done, the shoe will be kept clean, and the huller will work to everybody's entire satisfaction." To this letter defendants replied, December 8th, as follows: "Gentlemen: The arrangement your Mr. Altland made with Mr. Van Amburg is that they were to start the huller on Friday between Christmas and New Years, and that you were to have a man there at that date." On December 14, 1889, defendants again wrote to plaintiff as follows: "Gentlemen: Mr. Van Amburg, who has the huller that is unsettled for, called yesterday, to let us know that since he had been away from home there had another huller come in, and done all of the work in his neighborhood, including the job that the machine was to have been tried on. He says that there is no

use in talking, if he should keep the huller, he could never get work to do with it in that country again. He makes a proposition to deliver the huller back here, lose his freight, and pay \$50 for what he has damaged it. This, he says, is all that he will or can do. He is perfectly responsible for a dozen hullers, and we have had a great amount of deal with him, and always found him perfectly straight; but he is very headstrong and set in his way, and when he gets an idea that a thing is not right it is impossible to change it. If you wish to accept his proposition, you may have the \$50, and carry the huller in stock here until another year. He will clean the huller up; and, as it has never hulled but a few days, thinks it is not damaged. We should judge that this would be the best way out of the trouble, but if you have any other idea in the matter, perhaps you had better send Mr. Altland back here to talk to him, as we have done all we possibly can to get the settlement. Please let us hear from you by return mail, so that we can close the matter up one way or the other." On December 16, 1889, plaintiff replied, refusing to accept the proposition, and stating that "the facts of the case are that the machine was shipped to you, for we did not know whom, on October 7th last, which we did on a telegraph order from you, in which you stated that you would indorse the paper. We heard nothing further in regard to this machine until November 14th, under which date you wrote us that the machine did not seem to work as it should, and that you were unable to get settlement for same. You also stated that the trouble seemed to be in the mill. When Mr. Altland called upon you recently he reported fully in regard to this matter, and said that there was not the least doubt in the world but what the machine was all right. He also further stated that Mr. Van Amburg now expects to quit the threshing business on account of his eyes, and says, were it not for this, he is of the opinion that Mr. Van Amburg would not take the position he has in the matter. To sum up this matter as above stated: The machine was sent without any order, and on your guaranty, and we shall look to you for the payment for the huller, on your guaranty on the paper taken for it. We regret very much that this matter has taken the shape that it has, and are inclined to the opinion that, had you taken Mr. Van Amburg's order for the machine, or settled for it when he took it, this action on his part would have been avoided." To this letter defendants replied as follows: "Gentlemen: Yours of the 16th is at hand, and contents noted, and in answer to same will say that ours of the 14th was not a request, as you seem to take it, but was merely a statement of what Mr. Van Amburg's proposition was, and what our idea of the matter was. * * * As

for Mr. Van Amburg's quitting the threshing business, will say that he hasn't the least idea of doing so. As we wrote you before, Mr. Van Amburg intended to have the machine tried on the Friday between Christmas and New Years. He was here in the city on jury at the time this agreement was made, and, when he went home at the end of the week, found that another machine had got in and done the work, so that there is no job left to try it on. As regards our ordering the machine, will say that we don't go back on ordering the machine, nor on making good our order, but until you make the machine work satisfactorily or fulfill your guaranty, you will not be able to get pay for it. * * * If you wish to have anything done with Mr. Van Amburg you can send one of your representatives to interview him." In March, 1890, Van Amburg, between two days, took the huller back to Grand Rapids, and left it in front of defendants' place of business. After it had remained there for some time, defendants, to protect it, placed it under cover. After this, and in April, plaintiff's agent, Altland, again visited Grand Rapids, and, with the knowledge of the disposition made of the huller, called upon Van Amburg in person and alone, and demanded a settlement for the huller, but Van Amburg refused to pay. On November 13, 1890, defendants wrote to plaintiff as follows: "Gentlemen: There still remains in stock here, belonging to you, the No. 1 huller formerly ordered for Mr. Van Amburg. We notified your Mr. Altland when here last winter that Mr. Van Amburg had returned the huller, and asked to have an order for shipment of the huller. We have, according to contract, stored the machine under cover up to the present time, and have never received an order from you for the return of the machine. We now consider that we have stored the machine longer than our contract requires, and we now need the store room. The machine is here, subject to your order, and, according to terms of contract, we trust you will give us shipping orders for this at once, as we do not think we should be called upon to store it longer." No reply was made to this letter, and in August, 1891, defendants shipped the huller back to plaintiff, but plaintiff refused to receive it, and what became of it does not appear. This suit was then brought.

The court instructed the jury as follows:

"(1) The evidence in the case does not show that there was a sale from the plaintiffs to the defendants of this clover huller; but it does show, under the construction which I feel bound to place on the agreement, namely, the telegrams in connection with the contract of agency, that these defendants, in sending forward the telegram that was first read, acted as the agents of the plaintiffs in this suit. * * *

"(2) In this contract of agency there is a provision that the party of the first part—that is, the plaintiffs in this suit—agreed to furnish to the said parties of the second part—that is, the defendants in this suit—such number of clover separators manufactured by the said party of the first part as the said party of the second part may be able to sell as their agent prior to January 1, 1890; the said party of the first party reserving to themselves the right, in case they shall not be able to fill all orders sent them by the party of the second part, to restrict said party of the second part to such number of machines as they may be able to supply, even though the terms and conditions of orders received at the office may be accepted and acknowledged, and shipment promised. This provision in the contract, as well as the fact that resort is had to the mode of business between the parties to construe that phrase of the first telegram, to which I have called your attention, among other things, has led me to the conclusion to interpret and construe these telegrams together with this original contract, and to hold that whatever contract was made in reference to this huller was by the defendants, as agents with the plaintiffs, as their principal; in other words, that it was on their part done, and on the part of the plaintiffs understood as done, with reference to their duties as agents, and under this contract of agency.

"(3) If there is any recovery by or on the part of plaintiffs in this suit, it must be under the fourth count of the declaration; and the fourth count charges these defendants, as agents, under the agreement that was put in evidence of the contract of agency. It sets forth the agreement. It sets forth that contract of agency. It sets forth as a part of the agreement that the plaintiffs at the special instance and request of the defendants. It sets forth that on, to wit, the 4th day of October, 1889, 'in consideration that the said plaintiffs at the special instance and request of the said defendants would deliver to them, the said defendants, on the 7th day of October, 1889, at Grand Rapids, in the state of Michigan, aforesaid, one of the plaintiffs' number one clover hullers, on the terms that defendants should accept said huller at a certain price, to wit, at the price of four hundred and seventy dollars, and would have full settlement with the purchaser thereof for the same before the delivery to him, and take in payment therefor the two promissory notes of the purchaser thereof, each for one-half of said amount, and one of said notes to become due on January 1, 1890, and the other of said notes to become due on January 1, 1891, and both to be indorsed by defendants and delivered to plaintiffs, to wit, within sixty days from October 3, 1889; and the said defendants then and there on the day and year last aforesaid, undertook and promised the plaintiffs to take, sell, settle, and pay for said clover huller according-

ly.' That is the agreement set forth in this count of the declaration substantially; and then it is averred that, in reliance upon this agreement and undertaking on the part of the defendants, the plaintiffs did, on the 7th day of October, deliver to the defendants said clover huller, on the terms and conditions aforesaid, and that the defendants sold and delivered it to William Van Amburg. Now follows the allegation in the declaration as to the breach by the defendants of the agreement set forth in the declaration. And the allegation of breaches of that agreement is as follows: 'That the said defendants, not regarding their said promise and undertaking, but contriving and intending to deceive said plaintiffs, did not have full settlement, or any settlement, with said purchaser, to wit, William Van Amburg, for said huller, before the delivery thereof to him, but, on the contrary, delivered it to him, said Van Amburg, without any settlement whatever; and said defendants did not, although often requested so to do, take from said purchaser, to wit, said Van Amburg, and deliver to plaintiffs, the promissory notes above mentioned, or any notes whatever, for said clover huller, although more than sixty days have elapsed since the delivery of said huller to said defendants, and the same by them to said Van Amburg; but without authority, and contrary to the express direction of said plaintiffs, said defendants received back said huller from said Van Amburg, and attempted to relieve him, said Van Amburg, of all liability therefor.' Substantially the averments of the breaches of the agreement relied upon by the plaintiffs are the neglect to have a settlement before the delivery of the machine; the neglect to take notes for the payment from the purchaser, and indorse them and deliver them to the plaintiffs within sixty days; and the averment that without authority, and contrary to the express directions of the plaintiffs, the defendants received the huller back, and attempted to relieve Van Amburg of all liability therefor. Now, it is under this count of the declaration that the plaintiffs must recover, if they recover at all; and the claim on the part of the defendants is that this machine, being a clover huller manufactured by the plaintiffs, and sold by the plaintiffs, through their agents, the defendants, to Van Amburg, and delivered to Van Amburg, carried with it an implied warranty that it was reasonably fit for the purpose for which it was designed, and that it was not reasonably fit for that purpose; in other words, that it would not do the work that a clover huller is intended to do,—would not do it properly. And it is further claimed on the part of the defendants that they, as agents, did all that was required of them under this contract; and that, as soon as they ascertained that the machine had been tested, and that it was claimed by the purchaser, Van Amburg, that it would not perform the work, they notified the plaintiffs.

and gave the plaintiffs an opportunity to send a man forward here and put the machine in working order, and make it work if it would. Undoubtedly the plaintiffs had a right to such a notice, and had a right to have the opportunity, when informed that the machine would not do the work, to attempt to put it in working order to make it work. And there is a question for you to consider in this case whether or not they were afforded sufficient opportunity—reasonable opportunity—so to do; and upon the part of the defendants, that Mr. Van Amburg gave timely notice to them, and that they gave the notice to the plaintiffs. It is claimed on the part of the plaintiffs that they were not afforded a reasonable opportunity; that, in fact, they were prevented.

"(4) Now, it is a rule of law that, in the case of a sale of machinery, such as a clover huller, an implied warranty accompanies it that the machine is reasonably fit—suitable—to do the work for which it is designed and sold. The questions in this case, then, are whether or not this machine was reasonably fit to do the work for which it was intended, and the burden is upon the defendants, so far as that is material to the issue, to show that this huller was so imperfect that it could not reasonably be made to do the work for which it was intended.

"(5) The averments in the declaration in regard to the neglect of the defendants to make settlement, and to take these notes, are, under the testimony, fully established. There was no settlement made. It is a conceded and undisputed fact in the case that there was no settlement, and also an undisputed fact in the case that no notes were taken. The huller came here, and it was delivered to Van Amburg on his oral order that he gave in the first instance. He tested it, and he claimed that it did not do the work. The plaintiffs claim that it would do the work if they had an opportunity to give it a fair trial. Now, these averments, that I say are undisputed, do not render the defendants liable, unless their breach of them caused the damage that the plaintiffs have sustained,—unless the injury which the plaintiffs claim resulted or followed so that the defendants are liable. It would not make very much difference whether the settlements were had and notes taken or not if the purchaser was perfectly solvent, and payment could be enforced against him; and, if there was a sale in this case to Van Amburg that would bind Van Amburg, then the plaintiffs in this case could enforce it against Van Amburg, and the mere omission to take the notes, or to have settlement at the time, would not be the cause of any damage.

"(6) But it is claimed in this case on the part of the plaintiffs that, if Van Amburg was liable at all, these defendants released him from the liability by receiving back (they being agents of the plaintiffs) and by

accepting this huller on Van Amburg's claim that it did not fulfill the implied warranty which I have mentioned, and therefore on that they seek to recover against these defendants for a breach of their duty on this contract as agents. Now, if you find from the testimony that this machine could be reasonably made to do the work for which it was intended, then Van Amburg would have no right to return it. That alone would not be sufficient to entitle the plaintiffs to recover in this action,—merely finding that Van Amburg had no just reason to return it. Merely finding as a fact that the machine was not capable of doing the work for which it was intended would not be sufficient to entitle the plaintiffs to recover in this action, in my judgment; because, if he had not any right to return it, they could easily enforce the sale against him, and he would be the proper man to sue and recover from, in my judgment. But if, in addition to finding, if you should find it to be a fact, that the machine could not be reasonably made to do the work for which it was intended,—if, in addition to that, you should also find that these defendants, without authority from the plaintiffs, or contrary to their express directions, received the huller back from Van Amburg, and attempted to relieve Van Amburg of all liability therefor, and did relieve him by accepting it back,—then the defendants are liable. And I think as a matter of law, if Van Amburg set up the claim that the machine did not fulfill the implied warranty, that it was not capable of doing what it was intended to do; if on that claim he sought to return it, and did return it, to the defendants, and they accepted it,—then Van Amburg would be released. The plaintiffs would be bound by that act of their agent. Van Amburg would be released; and, if these defendants did not have just cause for releasing him, they would render themselves liable. In other words, if the machine could be reasonably made to do its work by the plaintiffs, and they had not omitted opportunity, when it was afforded them, to do it, then there would be no right to return it. The defendants claim,* however, that they did everything that they could; that they tried to get a settlement; that they acted as agents for their principal, and kept in mind the interest of their principal as well as their own; and they claim that the testimony shows that the huller would not do the work. If you find, then, these two propositions in favor of the plaintiffs: if you find that the machine could be reasonably made to do the work, and that these defendants accepted it back when they ought not to have done it, had not any right to do it, and relieved Van Amburg from liability,—then your verdict will be for the plaintiffs; otherwise not.

"(7) A Juror: I would like to ask a question, if not improper. Would it be consid-

ered, in law, any acceptance of it back in the manner in which it was returned according to the evidence? The Court: Well, in that regard, if you find from the evidence that the machine was returned by Van Amburg, and left in front of or near the premises of the defendants without their consent, without their knowledge; that they notified the plaintiffs of its return; that they took it under cover merely for the purpose of protecting it and sheltering it, under the provision in the contract which required them to shelter machines kept over,—it would not be an acceptance that of itself; but, in determining whether or not there was an acceptance, consider all of the efforts that were made on the part of the defendants to make a collection for the machine. You may consider whether any communication or interview was had between them and Van Amburg, or any understanding whatever between them, in that regard, and what they did in regard to sending the machine back, and the time it was sent back,—all these facts and circumstances."

The learned circuit judge was right in holding that whatever contract was made in reference to the huller was made by defendants as agents for plaintiff. That relation was at no time changed, nor was the relation between plaintiff and Van Amburg altered by the failure on the part of defendants to observe secret instructions. Van Amburg seems to have been financially responsible. This record contains no evidence of collusion between defendants and Van Amburg; nothing that is not consistent with entire good faith on the part of the defendants. If plaintiff has suffered any damage, it would seem to be because it has not pursued Van Amburg. Defendants could not be held as indorsers upon a mere promise to indorse. If, however, the promise to indorse is made upon a sufficient consideration, an action may be maintained for the breach. 2 Pars. Notes & B. 15; 1 Daniel, Neg. Inst. § 689a; Tied. Com. Paper, 264; Fenn v. Harrison, 3 Term R. 757; Moxon v. Pulling, 4 Camp, 50; Bank v. Houston, 1 Har. (Del.) 225; French v. Turner, 15 Ind. 59. If defendants were liable under the agreement fixing the terms of the agency, they were liable as guarantors. The claim against Van Amburg belonged to plaintiff, and not to defendants. Even the authority to sue must have proceeded from plaintiff, and any suit brought against Van Amburg must have been brought in the name of plaintiff. Plaintiff's remedy against defendants was for a breach of agreement. The measure of plaintiff's damage, as against Van Amburg, was the price of the machine, while, as against defendants, it was confined to the injury sustained by failure to follow instructions. The difficulty here grows out of the attempt to make the agents primarily liable, and to cast upon them the purchaser's burden, in addition to that arising out of the agreement of agency. Defendants' guaran-

ty was not against litigation, nor against claims that the machines were not up to the implied warranty. The same defense could be made to an action on the notes. Defendants, on November 14, 1889, notified plaintiff that they had been unable to get a settlement with Van Amburg. Plaintiff made no objection on that ground until a month afterwards, but in the mean time sent on their adjusting agent, who made a distinct arrangement with the purchaser to be present on December 27th, and made a trial of the machine. If Van Amburg had no defense, or did not furnish an opportunity for the trial, or if he desired to avoid the contract, plaintiff was fully advised of all the facts. Defendants were not insurers against that situation. The remedy against Van Amburg was simple. Plaintiff alone could pursue it. Instead of pursuing Van Amburg, plaintiff, on December 16, 1889, notified defendants that it would look to them for the value of the machine. Why? Not because defendants had not collected in advance the contract price, but simply because Van Amburg had not given, and defendants had not required, the notes in advance. The huller was at this time in Van Amburg's possession, and remained in his possession some three months thereafter. The matter rested until some time in March, 1890, when Van Amburg, between two days, brought the machine to Grand Rapids, and left it exposed in front of defendants' premises. After some time, defendants, to protect the machine, put it under cover. It cannot be contended that this act on the part of defendants was a release of Van Amburg. Plaintiff was notified of this move, and its representative afterwards saw Van Amburg, and demanded a settlement for the huller. Nothing further was done until November 13, 1890, when the letter of that date was written to plaintiff. No reply was made, and in August, 1891,—one year and ten months after the sale, and nine months after the letter of November 13, 1890, was written,—defendants shipped the huller back to plaintiff. Plaintiff had made no move against Van Amburg, nor against any one. Indeed, it had written to defendants, one year and nine months before this time, that it did not intend to look to Van Amburg, but to them, for the value of the machine. Defendants had written to plaintiff for instructions, and had waited nine months for a reply. Plaintiff cannot now be heard to say that this act of defendants made them liable to it for the value of the machine. Defendants were entitled to instructions, if plaintiff desired to save its rights as against Van Amburg, after having announced that they did not intend to pursue him, and plaintiff cannot now be heard to say that this act of defendants made them liable to it for the value of the machine. The judgment is reversed, and a new trial granted. The other justices concurred.

STRADLEY v. PAILTHORP, Circuit Judge.
(Supreme Court of Michigan. June 30, 1893.)
**FORECLOSURE AGAINST CORPORATION—FAILURE OF
COMPANY TO DEFEND—INTERVENTION BY STOCK-
HOLDER—DISCRETION OF COURT.**

A stockholder of a corporation filed a verified petition to set aside an order pro confesso entered in an action to foreclose a mortgage against the corporation, and for leave to intervene and answer. The petitioner alleged fraud and collusion between the mortgagees and the company's directors, but stated no facts on which his charges were based. The answer tendered was not sworn to, and on the hearing many of the assertions of fraud therein were contradicted by the record evidence produced. *Held*, that it was not an abuse of discretion to deny the petition.

Petition by John G. Stradley for a writ of mandamus to compel Charles J. Pailthorp, as circuit judge, to vacate an order denying petitioner leave to intervene in an action by Amos J. McClung, trustee, to foreclose a mortgage against the St. Mary's Falls Water-Power Company, in which petitioner is a stockholder. Writ denied.

Lawrence T. Bedford, (John C. Donnelly, of counsel,) for relator. John H. Goff and George A. Cady, for respondent.

GRANT, J. The relator is a stockholder in the St. Mary's Falls Water-Power Company, a corporation organized under the laws of this state. He petitions for the writ of mandamus to compel respondent to vacate an order denying him leave to intervene in a suit in equity wherein Amos J. McClung, as trustee, is complainant, and said water-power company is defendant. Said company issued bonds to the amount of \$41,000, and executed a mortgage, to secure them, to Mr. McClung, as trustee. The company defaulted in its payments, and Mr. McClung, at the request of the bondholders, filed a bill in equity to foreclose the mortgage. The bill was filed October 2, 1891. The company made no defense, and an order pro confesso was duly entered March 15, 1892. June 18, 1892, the petitioner filed a petition in the circuit court, praying that said order pro confesso be set aside, and that he be allowed to intervene in answer to the bill of complaint filed therein. At the same time he tendered an unsworn answer, charging fraud and collusion between the bondholders and the directors of the company, and that the bonds were fraudulently issued. His petition to intervene was duly sworn to, but in it his charges of fraud and collusion are based entirely upon information and belief, and it contains no facts upon which his charges are made. In his proposed answer he denies that the bonds were issued for the purpose of purchasing or paying for any right of way, or in pursuance of any resolution of the company; alleges that they were issued for the fraudulent purpose of creating a debt against said company; that the money obtained for said bonds was not used for the purpose of buying a right of

way, and that the secretary of the company was not a stockholder at the time he signed the bonds; that the purchase of an additional right of way was not authorized by a vote of the stockholders or directors, nor were the bonds so authorized. He also alleges that the banks, who are holders of some of said bonds, are not bona fide innocent purchasers and holders; that the chief officers of the banks were stockholders in the company; and that some of the officers of the banks were also directors in the company. The answer then proceeds to allege misconduct, mismanagement, and misappropriation of the fund on the part of the directors of the company. To this petition to intervene, Mr. McClung filed a sworn answer, to which were attached copies of the proceedings of meetings of the stockholders and directors at which the mortgage and bonds were authorized, and also a sworn statement of the expenditures of the money received on the bonds, and a copy of the certificate of the stock of the secretary, showing that he was a director of the company. The respondent returns that it was admitted by petitioner's solicitor, in open court, upon the hearing of the petition, that the water-power company actually sold the bonds in question, and received the money therefor. He also returns that he became satisfied, from an examination of the petition and answer, and the papers filed in connection therewith, that the mortgage and bonds were valid, and in every way lawful, regular, and duly authorized; that their issue was ratified by the stockholders May 20, 1890; and that they were given, sold, and bought in good faith, for a valuable consideration, and that the proceeds thereof were received, and applied to the purposes authorized in the issue thereof. The record evidence produced at the hearing of the petition was directly contradictory of many of the assertions made in the proposed answer. The respondent also says, in his return, that he denied the application because it appeared from the evidence that justice would be promoted by so doing.

The relator, all this time, was a resident at Sault Ste. Marie. He was a director in one of the banks which purchased \$5,000 of the bonds. He was editor or proprietor of a newspaper in which the notices of the various proceedings were published. Previous to filing the petition in this case, he had filed a bill in chancery charging the directors with the mismanagement, etc., above referred to. That suit is still pending. Of course the misappropriation of the funds would not affect the validity of the bonds, unless the bondholders were parties to such misappropriation. In cases of this character the facts claimed as a basis of a charge of fraud should be specifically and fully set forth in the pleadings. Legal proceedings will not be restrained upon statements made upon information and belief. When a party desires to restrain such proceedings, and especially after a delay, when he appeals to the conscience

and discretion of the court, he should place before it the sworn statements of those who are cognizant of the facts, and make their affidavits upon actual knowledge. If it should be said that the case involves large interests, it will be replied that all the more is it the duty of the party applying to be heard, and to secure the delay and stay of the proceedings, to state facts which will convince the court that he has a meritorious case, and that his delay is excused. We do not think that the respondent abused the discretion reposed in him by the law, and the writ must be denied, with costs. The other justices concurred.

ARBUCKLE et al. v. REAUME et al.
(Supreme Court of Michigan. June 30, 1893.)
NOTE GIVEN ON SUNDAY—VALIDITY—CONFLICT OF LAWS.

A note executed and delivered in Michigan on Sunday, in payment of goods sold and delivered there, though payable in Ohio, where the vendors live, is governed by the laws of Michigan, and is void, under How. St. § 2015.

Error to circuit court, Monroe county; Edward D. Kinne, Judge.

Action by John M. Arbuckle and others against Albert D. Reaume and others on a note. Judgment for plaintiffs. Defendants appeal. Reversed.

Ira G. Humphrey, for appellants. Landon & Lockwood, for appellees.

LONG, J. This action was brought to recover upon two promissory notes. The notes were dated November 4, 1889. They were executed and delivered to the plaintiffs' agent in this state, but payable at plaintiffs' office, at Toledo, Ohio. The defendant Peter Donnelly pleaded the general issue, and denied the execution of the notes. The other defendants did not appear, and were defaulted. It was admitted that, while the notes bore date as of Monday, they were in fact executed and delivered to the agent of the payee in this state on Sunday. The court below ruled that, though the notes were executed and delivered in this state on Sunday, yet, the testimony showing that the office of the plaintiffs was in Ohio, and the contract to be performed there, that they were not void, under section 2015, How. St., as the laws of Ohio, and not of Michigan, governed the transaction; and judgment was given in favor of the plaintiffs. It was not shown upon the trial what the statute laws of the state of Ohio were. The only contention upon this record is whether the question is to be determined by the law of the place where the notes were executed and delivered or by the laws of the state where made payable. The notes were given for machinery. The contract of sale was made in this state, and the property delivered here. The notes were taken by the plaintiffs' agent on the delivery of the machinery; the

whole transaction being closed on Sunday. How. St. § 2015, provides: "No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play, on the first day of the week. The foregoing provisions shall not apply to work of necessity and charity, nor to the making of mutual promises of marriage, nor the solemnization of marriages. And every person so offending shall be punished by fine not exceeding ten dollars for each offense." In *Adams v. Hamell*, 2 Doug. (Mich.) 73, it was held by this court that a note made on Sunday was void, under the provisions of the statute of 1833, which is similar to the provisions of How. St., above quoted. In *Tucker v. Mowrey*, 12 Mich 378, this court, approving *Adams v. Hamell*, said: "The statute not only makes it a penal offense, but takes away the legal capacity of the parties to make a contract on that day; and, whether the supposed contract has been executed or remains executory, we think the rights of the parties are to be determined as if no such contract had ever been made." The court below was in error in holding that the note could be enforced here by reason of being made payable in Ohio. Parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the state. It is an elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any rights founded upon or growing out of the illegal transaction. 7 Wait, Act. & Def. p. 114; *Myers v. Meinrath*, 3 Amer. Rep. 371. The judgment must be reversed, and a new trial ordered. The other justices concurred.

COURTRIGHT v. COMMON COUNCIL OF VILLAGE OF NEWAYGO.

(Supreme Court of Michigan. June 30, 1893.)

INTOXICATING LIQUORS—BOND OF HOTEL PROPRIETOR AS DEALER—TWO BARS UNDER ONE LICENSE.

3 How. St. § 2283c6, prescribes the form of bond required of a retail liquor dealer, which recites, inter alia, that "whereas, the above-named principal proposes to carry on the business of * * * at * * *, in the county of," etc. Held, that a city council could not refuse to approve the bond of the proprietor of a large hotel, as a retail liquor dealer, because such bond designated such hotel, giving its name, as the place where he proposed to carry on the business, and because he had been operating, and proposed to operate, two bars in the hotel, under one license.

Petition by William Courtright for writ of mandamus to compel the common council of the village of Newaygo to approve relator's bond as a retail liquor dealer. Writ granted.

George Luton, for relator. William D. Fuller, for respondent.

McGRATH, J. This is an application for a mandamus to compel respondent to approve relator's bond as a retail dealer in liquors. Relator is carrying on a hotel known as "The Courtright," having a frontage of 175 feet on Main street, and which is wholly occupied by relator. It is insisted by respondent that relator has for some years operated, and now proposes to operate, two separate bars in said hotel,—one on the first floor, and one in the basement,—both of which have independent entrances from the street, and also from the alleys in the rear of the hotel, and both of which are accessible from the hotel office. The bond described the place at which the business is to be carried on, as "at the Courtright," and respondent insists that the description is not sufficiently specific to prevent the maintenance of both bars under one license. The form of the bond required by the law of 1887 is set forth in the act,¹ and contains the following recital: "Whereas, the above-named principal proposes to carry on the business of * * * [and describing the place of business] at * * *, in the county of * * *." The place of business of relator is the hotel known as "The Courtright," and that description includes any room within the curtilage. The statute recognizes the fact that other lines of business are often carried on upon the same premises within which the liquor business is or is to be carried on, and makes a distinction in its restrictions between the room in which liquors are kept for sale, and the place within which the business is carried on. Section 14² makes it unlawful to permit any student or minor to play at cards, or any game of chance, in any part of any building in which liquors are sold, while section 15³ makes it unlawful to allow any minor to visit or remain in any room where liquors are sold, unless accompanied by his father or other legal guardian. Section 17⁴ provides that all saloons, restaurants, bars in taverns or elsewhere, and all other places, except drug stores, shall be closed on certain days, and during certain hours. In *Goff v. Fowler*, 3 Pick. 300, defendant was licensed as an inn-keeper, and it was insisted that such license did not extend to a building detached from the house proper, but it was held that the detached store was a dependency. In *Com. v. McCormick*, 150 Mass. 270, 22 N. E. Rep. 911, it was held that a license to sell in a "one and a half story building" imported an authority to sell anywhere in such building. In *City of St. Louis v. Gerardi*, 90 Mo. 640, 3 S. W. Rep. 408, the Planters' House occupied one-half of a square, and had three street fronts, and a bar at each of the front

entrances. The bars were screened off by partitions, and had direct communication, by means of doorways, with the office, rotunda, and restaurant. The ordinance provided that application for licenses should be made in writing, and should state specifically where the dramshop was to be kept, and that "all licenses issued under this ordinance shall be kept posted up in some conspicuous place behind the bar, and as near the center thereof as possible." Held, that the place at which the dramshop was to be kept was the Planters' House; that the bar is simply the means of carrying on the business, and, where it is kept at the designated place, the mere fact of the licensee erecting more than one bar at such place, so connected, would not render him guilty of a violation of the ordinance. See, also, *Salt Co. v. Wilkinson*, 8 Blatchf. 30; *Hochstadler v. State*, 73 Ala. 24; *Com. v. Stratton*, 150 Mass. 188, 22 N. E. Rep. 893; *Com. v. Jones*, 142 Mass. 573, 8 N. E. Rep. 603; *Com. v. Barnes*, 140 Mass. 447, 5 N. E. Rep. 252; *State v. Moody*, 95 N. C. 656. Section 8 of the act provides that upon filing the bond the principal shall not be allowed to sell "in any other building or place than that specified in the bond without giving notice, and executing another bond." This language would seem to exclude the idea that the principal cannot sell elsewhere in the same building, and that if he should change the location of his bar to another room in the same building he would be obliged to give a new bond. This section is discussed in *People v. Brown*, 85 Mich. 119, 121, 48 N. W. Rep. 158, and the language used is, "one place of business." The bond requires a description, not of the room or rooms, but of the place of business. In the present case the entire premises are occupied by one proprietor. They have a well-known designation. They are connected by doorways, as are the rooms in which the bars are located. The whole is one place, with one proprietor. The statute imposes the tax, not upon the amount of the business, nor upon each bar, but upon the business of selling liquor at the place of business designated. The mandamus must issue as prayed. The other justices concurred.

PEOPLE v. JACKMAN.

(Supreme Court of Michigan. June 30, 1893.)

CRIMINAL LIBEL.—WHAT CONSTITUTES.—COMPLAINT
—PLEADING.—DUPLICITY.—EVIDENCE.

1. A complaint for criminal libel set out three articles, which were published in three consecutive issues of defendant's newspaper, and alleged that the first article intended to charge that complainant had an arm broken under disgraceful circumstances; the second, that complainant bore upon his person the marks of adventures at institutions of a disreputable character; and the third, that a statement by a certain doctor that complainant's arm had been broken while being ejected

¹ 3 How. St. § 2283c6. ² 3 How. St. § 2283d7.

³ 3 How. St. § 2283d8. ⁴ 3 How. St. § 2283e.

from a house of ill fame was true. *Held* that, as interpreted by the pleader, each article charged a disgraceful act within the meaning of the statute punishing criminal libel, and consequently that the complaint was bad for duplicity. Grant, J., dissenting.

2. It was proper to introduce extrinsic matter into the complaint to explain the nature of the charge complained of, where its meaning would otherwise have been doubtful.

3. In setting out the explanation of the doctor as to the cause of complainant's broken arm, which was referred to in the third article, it was not necessary to give the doctor's exact words.

4. Under Act No. 210, Pub. Laws 1885, which makes it a misdemeanor to falsely and maliciously impute to another by word or writing an infamous or degrading act, a complaint which charges defendant with publishing in a newspaper that complainant's arm was broken while being ejected from a house of ill fame charges a degrading act.

5. Evidence that the facts alleged in the complaint as libelous had for a long time been currently reported and believed in the community, and that they had been so reported to defendant, was properly excluded.

Exceptions from circuit court, Marquette county; John W. Stone, Judge.

George C. Jackman was convicted of criminal libel, and excepts. Exceptions sustained.

The other facts fully appear in the following statement by GRANT, J.:

The respondent was convicted of criminal libel under Act No. 210, Pub. Acts 1885. Section 1 reads as follows: "That any person who shall falsely and maliciously, by word, writing, sign, or otherwise, accuse, attribute, or impute to another the commission of any crime, felony, or misdemeanor, or any infamous or degrading act, or impute or attribute to any female a want of chastity, shall be deemed guilty of a misdemeanor, and, upon conviction thereof for the first offense before any court of competent jurisdiction, shall be punished by a fine not exceeding one hundred dollars and costs of prosecution, or imprisonment in the county jail of the county in which such conviction shall be had, not exceeding ninety days, or both such fine and imprisonment, in the discretion of the court." Section 2 provides that no justice of the peace shall have jurisdiction to try any person for a second or subsequent violation, but that when one is charged with a second violation the justice must hold an examination, and bind the accused over for trial in the circuit court if he finds probable cause. 3 How. St. §§ 9315, 9315a. The portions of the three articles published in the Times, the newspaper edited by respondent, under the dates of October 20th, 21st, and 22d, and set forth in the information, are as follows:

October 20th: "The would-be humorous article in yesterday morning's Mining Journal concerning the gasoline explosion in 'Berney, Black & Co.'s sweat box' establishment on Saturday evening accused the editor of the Times of being sore, and endeavoring to do 'some roasting' himself. In that (as in thousands of other things) the 'monopoly sheet' was

mistaken, and once more jumped at conclusions. 'Tis true the editor of the Times was the unlucky victim who was seated in the 'infernal machine,' and received a terrible roasting, but when the editorial item referred to was written he was unable to write or think of anything but his physical injuries. The author of that item is not classed as the editor of the Times, and does not desire to 'roast' anybody, but while misfortune reigns he will endeavor to do business at the old stand. It is well understood that accidents will at times occur, but the one of Saturday night was far more honorable than being 'rotten-egged,' or having an 'arm broken,' of which the victims of both desire but little said."

October 21st: "The Times is not the only paper in Marquette at the present time that has been so unfortunate as to be represented by persons who do tricky things on the sly. But it intends to retain on its staff only such as can show a clean record for the past as well as present life, and no man upon it can rise to the dignity of managing editor whose history is identified with institutions of a disreputable character, even if he does not bear upon his person the marks of adventure at such places."

October 22d: "In '1873,' while driving along a beautiful thoroughfare in Wisconsin, two vehicles collided, and, strange as it may seem, one person, an innocent, (?) peaceable, law-abiding citizen, was hurled to the ground, and received an injury, the marks of which he will carry to his grave. Again, strange as it may seem, the facts have just been explained. There was no 'ice in the wheels,' and why the collision should occur is a mystery. It is fortunate that in this age of the world excuses are numberless, and even at the eleventh hour a sinner may try and seek redemption in various forms. About three years ago Dr. Goerr (whom the victim of the above-claimed accident ridiculed as being a fakir) explained to the people of Marquette how the accident did happen, and produced \$1,000 as a proof of his assertions, but the 'Wisconsin unfortunate' had neither money nor disposition to dispute the charge until after the doctor had left the city. Our 'Wisconsin granger,' who brought nothing to this city aside from a brazen face, a vile tongue, contempt for his fellow men, and a hue and cry for monopoly, cannot expect, after eighteen years have elapsed, to try and pawn off such an unfortunate tale on an innocent public."

The complaining witness, Mr. Russell, editor of the Mining Journal, met with an accident some years before these publications, in which his arm was broken. After the article of October 21st in the Times, Mr. Russell published an article in the Journal, stating how the accident occurred. The article of October 22d in the Times was written in reply to this. The information contained appropriate innuendoes, explaining the mean-

ing of the article, but did not set forth the exact language claimed to have been used by Dr. Goerrs in his speeches to the people of Marquette. Respondent was convicted in both the justice's and circuit court. In the circuit court his counsel moved to quash the information for the following reasons: (1) Extrinsic matter should not have been introduced in the complaint; (2) complaint is bad for duplicity; (3) the articles published are not libelous in themselves; (4) while complaint recites the statements of Dr. Goerrs, it does not allege that libel was published of and concerning that matter. This motion was overruled.

H. O. Young, Pros. Atty., for the People.
Peters & Shaul, for defendant.

GRANT, J., (after stating the facts.) 1. The extrinsic matter introduced into the complaint was for the purpose of explaining the character and nature of the charge made in the publications complained of. It was not only proper, but essential, that the pleader should state this, where the meaning would otherwise be doubtful. The article of October 22d referred to an explanation made by Dr. Goerrs. The pleader stated that the respondent meant by this language to say that Dr. Goerrs "had told and explained to the people of Marquette correctly and truthfully that the arm of said Russell had been broken while the said Russell was being ejected from a house of ill repute in Oshkosh, Wisconsin." This was sufficiently definite, and it was not necessary to set forth the exact language claimed to have been used by Dr. Goerrs. The respondent fully understood the charge referred to, for one of his defenses was that he believed it to be true.

2. The complaint is not bad for duplicity. The three articles may fairly be construed together as making one charge and forming one offense. Not until the publication of the third article is any direct reference made to the specific charge that Mr. Russell's arm was broken in a house of ill fame, or to the specific charge made by Dr. Goerrs. The third article made clear what was meant by the first two, and thereby rendered the offense complete.

3. It requires no argument to show that the complaint charges an offense within the meaning of the statute. The act charged was degrading, and the complaint alleges that it was made falsely and maliciously.

4. We think the complaint not open to the objection that it does not allege that the libel was published of and concerning the charge made by Dr. Goerrs. The reference in the third article to the statement made by Dr. Goerrs rendered clear the meaning which before had been doubtful. It showed that the degrading act charged in the articles was that Mr. Russell was in a house of ill repute, and was ejected therefrom. By the publication respondent gave credit to the charge,

and stated that it was true, and intended to do so. All that remained for the pleader to do was by the proper explanatory words to put the meaning beyond doubt, so that the respondent should know what he was required to meet.

5. Respondent offered to show by a witness that the facts alleged in the complaint as libelous had for a long time been currently reported and believed in the community, and that these facts had been so reported to him. This testimony was correctly rejected. The law does not permit persons to publish that one has been guilty of criminal, infamous, or degrading acts, based upon public rumors or current belief. The respondent made no effort to determine the truth of the charge, nor upon the trial did he offer to prove its truth. In the heat of a newspaper controversy of no concern or interest to the public he published an article defaming the character of a citizen. Such conduct has no excuse, either in law or morals. There were no justifiable ends to be accomplished by such publication. I think there is no error upon the record, and the court below should be directed to proceed to judgment.

HOOKER, C. J. Jackman was prosecuted for libel. The complaint and warrant (which take the place of an information) allege the publication of three articles in the issues of defendant's newspaper, upon three consecutive days. The theory of the prosecution is that these articles, taken together, charge the complainant with a disgraceful act, viz. of being at a house of prostitution in Wisconsin. The defendant's counsel claim that each publication constitutes a separate and distinct charge. The first says, in speaking of complainant and his business partner: "It is well understood that accidents will occur, but the one of Saturday night was far more honorable than being rotten-egged, or having an arm broken, of which the victims of both desire but little said." The second says: "The Times [defendant's newspaper] intends to retain on its staff only such as can show a clean record for the past as well as the present life, and no man can rise to the dignity of managing editor whose history is identified with institutions of a disreputable character, even if he does not bear upon his person the marks of adventure at such places." The third says, in substance: "In 1873, while driving * * * in Wisconsin, two vehicles collided, and, strange as it may seem, one person, an innocent, (?) law-abiding citizen, * * * received an injury, the marks of which he will carry to the grave. Again, strange as it may seem, the facts have just been explained. * * * About three weeks ago Dr. Goerrs (whom the victim of the above-claimed accident ridiculed as being a fakir) explained to the people of Marquette how the accident did happen, and produced \$1,000 as proof of his assertions, but the 'Wisconsin unfortunate'

had neither money nor disposition to dispute the charge until after the doctor had left the city. Our 'Wisconsin granger,' who brought nothing to the city aside from a brazen face, a vile tongue, contempt for his fellow men, and a hue and cry for monopoly, cannot expect, after eighteen years have elapsed, to try and pawn off such an unfortunate tale on an innocent public." The complaint alleges that some years before the publication complained of the complainant was injured, and his arm broken, by being thrown from a wagon in Fond du Lac, Wis., and that three years before making the complaint, at a public gathering of a large number of the citizens of Marquette, said injury was referred to in a public speech by a Dr. Goerrs, who then and there falsely gave the citizens of Marquette to understand, and charged indirectly, that said injury was occasioned by the forcible ejection of plaintiff from a house of prostitution in Oshkosh. The information charges that the first of the articles was intended to charge that plaintiff had had an arm broken under dishonorable and disgraceful circumstances. It charges that the second publication was intended "to charge and give it out to be understood by the readers * * * that the plaintiff did bear upon his person the marks of adventures at institutions of a disreputable character." It charges that the third publication meant that the statement of said Dr. Goerrs that plaintiff's arm had been broken while he was being ejected from a house of prostitution was true. Each publication, as interpreted by the pleader, charges a disgraceful act, within the meaning of the statute. The information is therefore open to the objection of duplicity. 1 Bish. Crim. Proc. §§ 432-442; Tiff. Crim. Law, 380. Under this information and general verdict of guilty, it is possible that the jurors did not agree upon the commission of one and the same offense. Upon other points we concur in the opinion of Mr. Justice GRANT. The conviction should be set aside, and a new trial ordered.

McGRATH, LONG, and MONTGOMERY, JJ., concurred with HOOKER, C. J.

CRAFT v. PARKER, WEBB & CO.

(Supreme Court of Michigan. June 30, 1893.)

NEGLIGENCE—SALE OF SPOILED MEAT—EVIDENCE
—QUESTIONS FOR JURY.

1. In an action against a company for selling a piece of spoiled bacon, which made plaintiff sick, it was error not to permit one of defendant's employes to answer whether he knew of any spoiled "meats" that were sold by defendant about the time of plaintiff's purchase.

2. It was error not to permit an employe to testify whether he had seen meat that was spoiled, and unfit for use, prepared by defendant to be sold about the time of plaintiff's purchase.

3. It was a question for the jury whether defendant was negligent in the sale of the spoiled bacon.

4. It was a question for the jury whether plaintiff was negligent in eating the bacon after he had smelt peculiar odors arising from it, when cooked.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by Ezra Craft against Parker, Webb & Co., a corporation, for negligence in selling spoiled meat which made plaintiff sick. Judgment for defendant, and plaintiff appeals. Reversed.

Sloman, Moore & Duffie, for appellant. Willard M. Lillibridge, for appellee.

LONG, J. Plaintiff brought suit in an action on the case for negligence in selling a piece of rolled spiced bacon, which he alleges was spoiled, and unfit for food, and from the effects of which he became sick. The court below directed verdict in favor of defendants, on the ground that there was no negligence shown on the part of the defendants, and also that the plaintiff was guilty of contributory negligence.

We think the case should have gone to the jury. Defendants carry on a wholesale and retail business of selling meats in the city of Detroit. On July 8, 1891, plaintiff's brother bought from them, at the retail counter, a roll of spiced bacon. It was taken to the plaintiff's house, where he boarded, and part of it cooked for breakfast. Plaintiff's brother had the first slice, which seemed to be all right. Later in the morning, plaintiff's wife cut off some more from the roll, and cooked it for plaintiff. The wife noticed a peculiar odor from it, but claims she thought it was the spices. Plaintiff also noticed the odor, and a peculiar taste, and claims that he also thought it was the spices. Soon after eating it he became quite sick. He sent for a physician, who pronounced that he was suffering from some kind of poison. Plaintiff then examined the balance of the meat, opened it, and says that it was very rank, and the smell of it was like that of a carcass. A witness for plaintiff also testified that a short time previous to that she purchased some spiced bacon of defendants, cooked it, and her husband became sick. She opened that roll, and found it spoiled. She returned it to one of the clerks at the retail counter, and told him of its condition. He took it back, and gave her other meat in its place. John Stabler, a witness for plaintiff, testified that he had worked for defendants, but left their employ just before this meat was sold. He testified that he had seen old pickle drippings from the upper floor upon bacon piled upon a lower floor, and that defendants' foreman had the bacon removed; that some rolls of bacon were badly molded, and the foreman directed that they should be taken to the smokehouse, and smoked over again. Robert Craft, a brother of the plaintiff, had worked for defendants, and was in their employ at

the time the bacon was sold to plaintiff. He was asked: "Do you know of any spoiled meats that were sold there, over the counter, during the month of July, about the time you procured this piece of spiced bacon that was put on the counter there for sale for private consumption, in the regular course of their business, and that was unfit for food, being spoiled and discolored?" Under defendants' objection, the witness was not permitted to answer. John Stabler was also asked: "What can you say as to whether or not you have seen meat that was spoiled, and unfit for use, prepared in this place to be sold on the market about last summer, or the early part of last winter?" This was also ruled out. The answers to these questions should have been permitted. The question to Mr. Craft fixed the time the sale was made to plaintiff, and, with some testimony fixing the keeping for sale of spoiled meats at about that time, the plaintiff should have been permitted to show other meat kept for sale prior to that time. The defendants were keepers of a retail meat market, engaged in the business of selling meats for food, and were bound to use due care to see that the meats were fit for human consumption. *Hoover v. Peters*, 18 Mich. 51. It was proposed to be shown, however, that they were not only careless in preparing their meats, but their servants had actual knowledge of the unfitness of the meat for food, and yet sold it.

It was a question for the jury whether the defendants were so careless that they should be held responsible for the consequences of their own acts, or the acts of their servants. A dealer who sells food for consumption impliedly warrants that it is fit for the purpose for which it is sold. If, in addition to this implied warranty, it is found that he was negligent in selling meats that were dangerous to those who ate them, he would be liable for the consequences of his act, if he knew it to be dangerous, or, by proper care on his part, could have known its condition. *Bishop v. Weber*, 139 Mass. 411, 1 N. E. Rep. 154. These are questions for the jury, and not for the court.

The question is also for the jury to determine, whether the plaintiff exercised due care on his part in partaking of the meat when he observed the odors arising from it after it was cooked. The judgment must be reversed, and a new trial ordered. The other justices concurred.

TOMPKINS et al. v. FORRESTAL et al.

(Supreme Court of Minnesota. June 30, 1893.)
MUNICIPAL CORPORATIONS—CONTRACTORS' BONDS
—ACTIONS—PARTIES—NOTICE.

1. Statutes which change the rule as to parties necessary to the determination of controversies will take effect upon prior as well as subsequent contracts or transactions, and the actions arising therefrom.

2. That part of Sess. Laws 1891, c. 55, § 15, (Charter of the City of Duluth,) which authorizes any person who has not been paid for labor performed or for materials furnished to a contractor with the city, to bring a suit in his own name against said contractor and his bondsmen, applies to actions brought to enforce a liability upon a bond executed under the provisions of the original charter, (Sess. Laws 1887, c. 2, subc. 5, § 5.)

3. The notice to the city prescribed in said section 15 is no part of the plaintiffs' cause of action, and it was error for the court below to pass upon the question of service of such notice, in its findings, as a question of fact. Proof of service need not be made until after judgment has been ordered.

4. In the case at bar the findings of fact proper were all in plaintiffs' favor, but, on a finding that proof of service of notice to the city had not been made, judgment was ordered against the plaintiffs. They then notified the city in form, waited until more than 20 days had expired, and, upon proof of such notification, and proof that the city had not intervened or appeared in the action, moved the court to strike out the finding last referred to, and its conclusion of law, and to insert in lieu of the latter an order for judgment in plaintiffs' favor. This motion was denied. *Held*, that it should have been granted.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Stearns, Judge.

Action on a bond by W. H. Tompkins and others against William Forrestal and others. Defendants had judgment, and plaintiffs appeal. Reversed.

White, Reynolds & Schmidt, for appellants.
Edson & Edson, for respondents.

COLLINS, J. The bond to the city of Duluth on which plaintiffs brought this action in their own names bore date May 20, 1890, and was therefore executed under the provisions of the statute then in force. Section 5, subc. 5, City Charter, (Sess. Laws 1887, c. 2.) The plaintiffs contend that their action was properly brought, because brought in accordance with the provisions of an amendment to said section 5, found in Sess. Laws 1891, c. 55, § 15, and the first question for determination is whether that part of the amendatory statute which confers upon one who has performed labor or has furnished material upon a contract with the city, and has not been paid, the right to bring a suit in his own name upon the bond, has application to bonds executed prior to the amendment. Under the statute as it existed when the bond was given it was held, in *Bank v. Heney*, 40 Minn. 143, 41 N. W. Rep. 411, that the bond was designed for the benefit of laborers as well as the city, and was intended to secure their wages, but it was also held that the city alone was the proper party to maintain an action to enforce the liability. It follows that, unless the provisions of the act of 1891 can be applied to cases arising upon bonds executed prior to its passage, these plaintiffs have no standing in court; the remedy is exclusively in the hands of the city. The rights of laborers and material men, and the liabilities of these respondents

as sureties upon the contractors' bond, were fixed and established by the statute of 1887. The former had the right to look to the sureties upon the bond for payment in case the contractors failed to pay for labor performed or materials furnished in the performance of the contract; in other words, they had a beneficial interest in the bond from the time they commenced to furnish materials, which interest was available in an action to enforce the liability. To be sure, the remedy was enforceable in a specified manner, and only by means of an action brought in the name of the city, although it might not have the slightest interest in the result of the controversy. This requirement of the law, introduced, probably, for the convenience and protection of all who might have a cause of action against the bondsmen, was nothing more than a form or method of procedure, provided for the determination of a controversy arising out of the contract bond, and in no manner did it affect the rights or the liability of either party. By the statute of 1891 this form or method of procedure to enforce a liability arising upon such bonds was changed, and authority was conferred upon laborers and material men to maintain actions in their own names. Instead of making the city the party plaintiff to the controversy, the statute gave to the real, plaintiff authority to directly prosecute the action. No attempt was made to change the nature or the extent of an existing remedy so as to affect or impair the rights or liabilities of the parties as fixed and established when the bond was executed. The statute of 1891 dealt with the method of procedure only, and no person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. So, when a new statute deals with the method of procedure only, it applies, *prima facie*, to all actions,—those which have already accrued and those of the future. *Suth. St. Const.* § 482; *Green v. Biddle*, 8 *Wheat.* 1. It is well settled that statutes which change the rule as to parties necessary to the determination of controversies will take effect upon prior as well as subsequent contracts or transactions and the actions arising therefrom. *Wade, Retro. Laws*, § 214; *Augusta Bank v. Augusta*, 49 *Me.* 507; *Hepburn v. Curtis*, 7 *Watts*, 300; *Crawford v. Bank*, 7 *How.* 279. Before this amendment of 1891, the position of plaintiffs and all other persons similarly situated was not unlike that of an assignee of a chose in action at common law. Suit to enforce a right would have to be brought in the name of another. But upon the passage of the statute now in force, requiring all actions to be prosecuted in the name of the real party in interest, we do not imagine that any one seriously questioned the right of an assignee to bring suit in his own name upon a chose in action, although he had acquired it prior to the enactment of the statute, which radically changed the com-

mon-law rule, and gave an entirely new remedy. The rule laid down in *Giles v. Giles*, 22 *Minn.* 348; *Wilson v. School Dist.*, *Id.* 488; *State v. Wabholz*, 28 *Minn.* 114, 9 *N. W. Rep.* 578; and other cases,—that, unless the contrary clearly appears to have been intended by the legislature, statutes should be construed to be prospective, and not retrospective, in their scope and operation,—is not pertinent to the facts here, because the amendment related solely to the method of procedure for the enforcement of an existing obligation and liability.

On the trial the court below found in plaintiffs' favor on all of the issues presented by the pleadings, and also found as a fact "that there is no evidence in this case that the city of Duluth ever had any notice of the pendency of this action." Based on this finding, undoubtedly, its conclusion of law was that these respondents were entitled to judgment against plaintiffs for their costs and disbursements. This was error. The statute (section 15, *supra*) requires that, at the time suit is brought by a person in his own name against a contractor and his bondsmen, notice that the suit has been commenced shall be given to the city. This notice must contain certain details, and no judgment shall be entered in any such action, unless the plaintiff shall prove to the satisfaction of the court that this notice was served upon the city 20 days before the time of the trial. The statute further provides for the filing of a complaint in intervention by the city, if deemed advisable, within said 20 days, for the benefit and protection of others who may be in need of recourse upon the bond. It clearly appears from an examination of the law that the giving of this notice to the city is no part of a plaintiff's cause of action, for it need not be given until 20 days prior to the time of trial. It follows naturally that it was not incumbent upon the plaintiffs to prove upon the trial that such notice had been given, nor should the fact have been passed upon by the trial court. Judgment could not have been entered, however, until the fact had been shown to the satisfaction of the court, and this could have been done at a time subsequent to the filing of the findings. It does not appear from the record before us that a notice was served on the city before the trial, but afterwards, and after the findings had been made, plaintiffs' counsel caused such notice to be served. They then waited more than 20 days, and upon an affidavit of service, and an affidavit that the city had not filed its complaint in intervention, and had not appeared in said action in any way, duly moved the trial court for an amendment to its findings, striking out that portion which referred to the service of notice upon the city, and inserting one by which the exact amount due to plaintiffs would be stated, and also for a proper change in its conclusion of law. This motion was denied, when it

should have been granted. The failure to serve the notice prior to the trial was a mere irregularity, which cannot be permitted to defeat recovery upon a just claim. The notice was subsequently given, and that it was simply formal, and of no real importance, is shown by the fact that the city authorities had no complaint in intervention to file, and evidently had no interest in the action. If the city had seen fit to file such a complaint, the plaintiffs would probably have been obliged to again try their case, but nothing more serious than this could have resulted. As judgment should have been entered as demanded in the complaint, the case is remanded, with directions that such a judgment be now entered. Order reversed.

VANDEBURGH, J., took no part.

OLSEN v. PETERSON.

(Supreme Court of Minnesota. June 16, 1893.)

EXECUTION SALE—RIGHT TO SECOND CERTIFICATE.

The right to apply for and have a second certificate of sale upon execution from the officer making such sale in certain cases, which was given by chapter 19, Gen. Laws 1862, survived the repeal of that chapter, and was saved to the purchaser by section 4, c. 121, Gen. St. 1866.

(Syllabus by the Court.)

Appeal from municipal court of Duluth; Winje, Special Judge.

Action by Nelson Olsen against John Peterson to recover earnest money paid by plaintiff on a contract for the purchase of certain real estate. The plaintiff alleged that defendant's title, which was based on the sheriff's certificates set out in the opinion, was defective, and could not be made good. Defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action. The opinion states the facts. From an order overruling his demurrer, defendant appeals. Reversed.

James H. Collins, for appellant. J. J. Squier, for respondent.

VANDEBURGH, J. A certificate of sale of the real estate in question upon execution, and in due form, was executed by the sheriff who made the sale on the 10th day of July, 1864. This certificate was not, however, recorded until August 4, 1865. Subsequently, however, on the 10th day of September, 1870, the person who made the sale executed another certificate of the sale—as late sheriff—of that date, and recorded on that day. The statute in force when the sale was made (Gen. Laws 1862, c. 19) provided that such certificates should be void if not recorded in 20 days, but also provided that the person holding such void certificate might have from the officer making the sale another certificate upon paying the stipulated fee, and this without limitation as to the time within which the application therefor should be made. This

chapter of the Laws of 1862 was, however, expressly repealed by chapter 122, Gen. St. 1866, and the provisions of the latter upon the same subject were prospective in their operation. Hence the respondent argues that in this case the right to apply to the ex-sheriff for a second certificate had lapsed at the time it was executed, because there was then no statutory authority for it, and, the first certificate having been complete and regular in form, the officer was functus officio; and he also contends that the right to such certificate was not saved to the purchaser by the provisions of chapter 121, Gen. St. 1866. By section 4 of that chapter it was provided that such repeal should not affect any right accruing, accrued, or established. That provision was certainly intended to cover cases of this kind. The right to a second certificate, if required, was as clearly granted by the act of 1862 as to the first. It was a right to a sheriff's deed, passing the title, and not a mere remedy for the enforcement of such right. It existed when the General Statutes took effect, and is fairly within the saving clause referred to. The certificate executed in 1870 was therefore valid, and the title passed upon the record thereof.

Order reversed.

DALLEMAND et al. v. SWENSEN.

(Supreme Court of Minnesota. June 28, 1893.)

APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY—HARMLESS ERROR—COSTS.

1. An assignment of error calling in question the correctness of the findings of a court is of no avail when it specifies no particular findings, but is applicable alike to several.

2. Certain objectionable evidence considered as harmless because it could not have influenced the court in its findings of fact.

3. Proof of disbursements held sufficient for taxation of costs.

(Syllabus by the Court.)

Appeal from municipal court, city of Minneapolis; Mahoney, Judge.

Action by Albert Dallemund and others against Peter P. Swensen, to recover personal property. Plaintiffs had judgment, and defendant appeals. Affirmed.

Geo. B. Robinson, for appellant. Rea & Hubashek, for respondents.

DICKINSON, J. This action was prosecuted by the respondents to recover certain personal property which the defendant, as sheriff of Hennepin county, had levied upon as the property of one Allen, under a writ of execution issued upon a judgment recovered against Allen and others by the business firm of Janney Bros. The plaintiffs claimed to be the owners of the property, and that it was in the possession of Allen, as their bailee, for the purpose of sale. The defendant claimed that Allen was the owner. The court, trying the case without a jury, found, among several other things,

that the plaintiffs were the owners, and directed judgment in their favor.

The defendant's third assignment of error is too general to be of any avail. *Smith v. Kipp*, (Minn.) 51 N. W. Rep. 656; *Moody v. Tschabold*, (Minn.) 53 N. W. Rep. 1023. It does not point to any particular findings of the court as being erroneous. It is applicable alike to all.

The testimony referred to in the first and second assignments of error, to the reception of which the defendant objected, was not properly admissible, but it was of such a nature that it cannot reasonably be supposed to have affected the decision of the court as to the facts in issue.

There is no merit in the claim that the proof of the necessary disbursements upon which costs were taxed was insufficient.

Order and judgment affirmed.

VANDEBURGH, J., did not participate.

**STATE ex rel. DULUTH BELT LINE RY.
CO. v. DISTRICT COURT OF ELEVENTH JUDICIAL DISTRICT.**

(Supreme Court of Minnesota. June 28, 1893.)

RAILROAD COMPANIES—TAXATION.

A railroad company organized for and doing the business of an ordinary railroad, transporting passengers and freight, held subject to taxation only in accordance with chapter 11, Gen. Laws 1887,—that is, by the rule of percentage on its gross earnings,—although the road is only three miles in extent, the cars being operated by a steam locomotive over two miles of the road, and by cable up a steep ascent of one mile.

(Syllabus by the Court.)

Certiorari in the name of the state at the relation of the Duluth Belt Line Railway Company against the district court, eleventh judicial district, to review certain proceedings for the enforcement of tax assessments against relator's property. Judgment for relator.

Walter Ayers, for relator. Chas. C. Tear, Co. Atty., for respondent.

DICKINSON, J. For the year 1891 taxes were assessed upon the personal property of the relator in the county of St. Louis in accordance with the general system of taxation, the tax being based upon the assessed value of the property. The tax becoming delinquent, and proceedings being instituted to recover judgment therefor under the statute, the relator interposed its answer in the district court. Its defense was that it was subject to taxation only in accordance with the method prescribed in chapter 11, Gen. Laws 1887, and the law of 1873 therein referred to; that is, by the rule of percentage on its gross earnings. Upon trial the court found that the relator was liable to the tax as assessed, and judgment was entered for

its recovery. By writ of certiorari the matter is brought here for review.

It appears from the findings of the court that the relator is a corporation organized, under the provisions of title 1 of chapter 34 of the General Statutes, exclusively for railroad purposes. During the year 1891 it was operating about three miles of railway in the county of St. Louis, on two miles of which the transportation was by steam locomotive power, and for one mile it was by means of a cable up a steep ascent. Both passengers and freight were thus transported. The company made no report of its gross earnings to the state treasurer for the year 1891, and paid no percentage thereof as a tax. The facts of the case are not very fully disclosed by evidence nor in the findings of the court, and our decision is to be understood as strictly limited to the case as here presented. There is nothing in the case indicating that this line of road is not an ordinary commercial railroad, unless it be the facts of its limited extent, and that, where it runs up a steep ascent, the power is applied by cable instead of a locomotive. It does not appear that the road is in any sense a street railway, or that its operations, or the purposes of its organization, are in any way connected with street travel, or with the use of the streets. In brief, it is, as we must assume, a railroad company. In the ordinary sense of the term, organized for and doing the business of such corporations. We see no reason why the statute (chapter 11, Gen. Laws 1887) was not applicable as the law with respect to the taxation of the property of this corporation. The validity of the act is not called in question. By its terms, "any railroad company owning or operating, or which may hereafter own or operate, any line or lines of railroad in this state," is required to pay a percentage of its gross earnings, as specified in that act and in the statute of 1873, therein referred to, "in lieu of all other taxes." We cannot construe the plain and unrestricted terms of this law so as to exclude this railroad from its operation. The law in terms applies to "any railroad company," (perhaps meaning only ordinary commercial railroads, and not street railways.) and it can make no difference, as respects the applicability of the statute, whether the railroad is three miles in extent or three hundred. It does not appear in this case whether the railroad is to be further extended, or whether the three miles constructed are all that was contemplated, so that it is now completed. Perhaps that would make no difference in the result.

The fact that the relator had not made a return of its gross earnings, as contemplated by the statutes referred to, does not affect the case. The manner and rule of taxation are determined absolutely by the law, and such neglect of the relator did not change the law, nor render it inapplicable, nor justify

tify resorting to another, even though it be the ordinary system of taxation, instead of that prescribed by the statute, as respects railroad companies.

These considerations lead to the conclusion that the tax upon an assessed valuation of the property of the relator was not authorized by the law applicable to and controlling the case, and the judgment must be reversed.

VANDEBURGH, J., did not sit.

BOWERS v. SCHULER et al.

(Supreme Court of Minnesota. June 29, 1893.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED—“PARTY TO THE ACTION”—PLEADINGS—MOTION TO MAKE DEFINITE.

1. The term “party to the action,” as used in Gen. St. 1878, c. 73, § 8, means a party to the issue to which the testimony relates, and not merely a party to the record.

2. The interest in the event of the action which disqualifies a person as a witness under this section must be a direct and immediate pecuniary interest adverse to that of the party against whom his testimony is offered.

3. Motion to require a pleading to be made more definite and certain held to have been properly denied.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Ensign, Judge.

Action for partition by Lizzie Bowers against Sarah Schuler and others. Defendants had judgment, and plaintiff appeals. Affirmed.

N. A. & H. G. Gearhart, (Lord & Norton, of counsel,) for appellant. Cash, Williams & Chester, for respondents.

MITCHELL, J. The only question of any importance in this case arises over the construction of Gen. St. 1878, c. 73, § 8, which provides that “it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person, relative to any matter at issue between the parties.” The principal point is whether the term “any party to an action” is meant to include every one who is a party to the record, or only those who are parties to the issue to which the testimony relates. In view of the last clause of the section, limiting the incompetency of the witness to matters relative to the issue between the parties, we are of opinion that the statute refers only to those who are parties to the issue. The word “parties,” as there used, we think evidently refers to the party prohibited from testifying, and the party

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against whom the testimony would operate if admitted. This construction is in harmony with the spirit and purpose of the statute, for no good reason can be suggested for excluding the testimony of one who, although a party to the action for some other purpose, is not a party to, or interested in, the issue to which his testimony relates. In the present case the issue to which the testimony of George Tischer related was exclusively between plaintiff and the defendant John Tischer. Although a necessary party to the action of partition, because the admitted owner of an undivided half of the premises, he was not a party to, and had no interest in, the issue between the plaintiff and John as to the title to one-sixth of the other undivided half. It is suggested that, inasmuch as he had mortgaged, and then conveyed, an interest in the premises which he might have had as heir of his mother, through whom plaintiff also claims, as warrantor of the title he was interested in the result of the issue between plaintiff and John. In the first place, it does not appear that he was warrantor of the title. But, if he was, his interest in the determination of the issue would be in favor of, and not adverse to, the plaintiff; and it can hardly be necessary to observe that, when a witness is produced to testify against his interest, the rule that interest disqualifies does not apply. What has been said as to the testimony of George is equally applicable to that of Fred Tischer. There is nothing in the suggestion that George was interested in the event, because, if plaintiff succeeded, there would be a partition or sale of the premises, which would not be the case if she was defeated. This is not a direct pecuniary interest in the event of the cause, which alone disqualifies a witness. *Perine v. Grand Lodge*, 48 Minn. 82, 50 N. W. Rep. 1022.

2. Irrespective of the somewhat discretionary nature of the action of the district court upon motions of this kind, we have no doubt whatever that the court was right in refusing to require the answer to be made more definite and certain. A pleading is subject to such a motion only where its allegations or denials are so indefinite or uncertain that the precise nature of the charge or denial is not apparent. But the uncertainty or indefiniteness here complained of is not as to what the answer alleges, or what issues it tenders, but as to what particular evidence the defendant might produce in support of it, and what the plaintiff sought was, in effect, to require him to plead the evidence. *Lee v. Railroad Co.*, 34 Minn. 225, 25 N. W. Rep. 399; *Todd v. Same*, 37 Minn. 358, 35 N. W. Rep. 5.

Order and judgment affirmed.

CITY OF WABASHA v. SOUTHWORTH.

(Supreme Court of Minnesota. June 29, 1893.)

DEFECTIVE SIDEWALKS — DUTY TO REPAIR — PAYMENT OF DAMAGES BY CITY AND RECOVERY FROM PROPERTY OWNER.

1. Where a cellar way, trapdoor, scuttle, or the like is put in a public sidewalk for the convenience of the abutting property, as between the owner and the city, the duty of maintaining it in a safe condition devolves upon the former, and he cannot release himself of this duty by merely abandoning the use of the structure. He can only do so by removing it and restoring the sidewalk to its original condition.

2. If, through the negligence of the property owner, the structure becomes unsafe, and injury results, for which the city is liable because of neglect of its duty to keep its streets in a safe condition for travel, it may, upon payment of damages to the person injured, recover over from the owner by whose fault (as between him and it) the injury was occasioned.

3. The mode of procedure provided by the charter of the city of Wabasha (Sp. Laws 1889, c. 13, subc. 7, § 16) is not exclusive, but the city may pay the damages, without suit, and then recover over in an action against the property owner.

4. Evidence held sufficient to justify a finding that the defendant negligently suffered and permitted a trapdoor over a hatchway in a sidewalk to become decayed and insecurely supported so as to become unsafe for travel.

(Syllabus by the Court.)

Appeal from district court, Wabasha county; Start, Judge.

Action by the city of Wabasha against Asahel D. Southworth to recover the amount plaintiff was required to pay one Schinzel for injuries sustained by a defective sidewalk along defendant's premises. Plaintiff had judgment, and defendant appeals. Affirmed.

J. F. McGovern and Gould & Snow, for appellant. John W. Steele and Lloyd W. Bowers, for respondent.

MITCHELL, J. If the findings of fact were justified by the evidence, there is nothing new or doubtful in the law governing this case. In order to entitle the plaintiff to recourse on the defendant for the money which it had paid in settlement of the claim of Schinzel for injuries sustained by reason of the defective sidewalk, it was necessary to establish—First, that the city was liable to Schinzel by reason of negligence in the performance of its duty to the public to keep its streets in safe condition; and, second, that defendant was also liable to Schinzel by reason of his negligence in constructing or maintaining the nuisance in the street which caused the injury. If these two facts were established, then the right of the city to recourse against the defendant is not, and could not successfully be, denied.

There is nothing in the point that the mode of procedure prescribed by the city charter (Sp. Laws 1889, c. 13, subc. 7, § 16) is exclusive, and that the city's only remedy was to let the claim of Schinzel go to judgment against both it and Southworth, pay the judgment, and then enforce it against Southworth.

This, like similar provisions in other charters, is designed to aid and not to hinder cities in dealing with such claims, so that the liability of a third party may be determined and enforced in the same action in which that of the city is determined and enforced. The only effect of the city's settling the claim without such judgment was that the questions upon which the liability of Southworth depends were left open. See *Jones v. City of Minneapolis*, 31 Minn. 230, 17 N. W. Rep. 377; *Clark v. City of Austin*, 38 Minn. 457, 38 N. W. Rep. 615; *Mill Co. v. Wheeler*, 31 Minn. 121, 16 N. W. Rep. 698.

The court found that the city might, by the exercise of ordinary care, have known of the unsafe condition of this sidewalk in time to repair it before the accident occurred. This finding, which is not assailed, settles the question of the city's liability to Schinzel.

Passing over the finding to the effect that this hatchway in the sidewalk was originally constructed in a negligent and unsafe manner, (which we think was justified by the evidence,) the court further found that the defendant knew, or by the exercise of ordinary care might have known, of the existence and character of this hatchway and covering at the time he purchased the property; also, that for more than a year prior to the accident he had negligently suffered and permitted this covering or trapdoor over the hatchway to become decayed and insecurely fastened and supported, whereby the sidewalk over the excavation underneath became and was unsafe for ordinary travel. That the first part of this finding was supported by the evidence is beyond question. Indeed, we think the evidence was such as to require a finding that defendant had actual knowledge of the existence and character of this hatchway as long ago as the date of his purchase of the undivided half of the abutting property in 1873. Nor in our opinion is there any more room for doubt as to the sufficiency of the evidence to justify the latter part of the finding. The defendant maintained this hatchway in the street by allowing it to remain there, with knowledge of its existence. The fact that he had not used it for some years is immaterial, and the claim that he had relieved himself from responsibility by abandoning it is without merit. Having been constructed in the street for the convenience of his abutting property the only way he could relieve himself from the duty of keeping it in repair was to restore the street to its original condition by filling up the excavation and replacing the stringers under the sidewalk. *Nichols v. City of Minneapolis*, 33 Minn. 430, 23 N. W. Rep. 868.

The negligence of the defendant in the maintenance of this hatchway or cellar way we place upon his lack of ordinary care in not taking reasonable precautions to keep it in safe condition, and not upon the ground that all excavations, basement or cellar ways,

scuttles, and the like, made or constructed in the street without affirmative municipal license, are per se unlawful, and nuisances. Numerous reported cases, both in this country and England, show that it has been assumed, time out of mind, in accordance with a custom of long standing, that, even in the absence of any express license, this is a legitimate use of the street for the convenience of abutting property, provided it be exercised in a proper and safe manner, and consequently that the property owner is not an absolute insurer against all injuries resulting from the existence of such things in the street, but is only responsible for negligence or want of reasonable care in their construction or maintenance. This we deem the correct view of the law on this subject. See *Fisher v. Thirkell*, 21 Mich. 1.

But such structures having been placed in the street for the convenience of the abutting property, it stands to reason that, as between the property owner and the city, the duty of maintaining them in a safe condition devolves on the former. Defendant was bound, in the exercise of ordinary care, to take notice of the fact that wood will decay. *Landru v. Lund*, 38 Minn. 538, 38 N. W. Rep. 699. The fact that the planks forming the cover of this hatchway showed no signs of decay on the upper side did not justify the defendant in assuming, without inspection, that they and the stringers on which they rested had not, in the 18 years or more that they had been there, become rotten underneath, where they were excluded from the sun and subjected to constant moisture. Leaving these planks, which were a part of a public sidewalk, over an excavation five or six feet deep, with the middle stringers of the sidewalk cut away, the only support of the planks being at the two ends, the support at the inner end next the building being only about an inch in width of a perishable wooden stringer, and failing to inspect them for all these years, to ascertain their condition, constituted a state of facts that abundantly justified the court in finding that defendant was guilty of negligence. The defendant, however, sought to escape liability by attempting to show that he had rented the premises to certain tenants, and that they, and not he, were responsible for the maintenance of this hatchway and cover; and the refusal of the court to make a finding as to the possession and occupancy of the premises by these tenants before and at the time of the accident is assigned as error. Without considering the points that the pleadings raised no such issue, and that according to the findings of the court this cover to the hatchway was already in an unsafe condition before the date of the lease to the tenants, it is enough to say that there was not a particle of evidence that the lease included the cellar or the hatchway.

There is no merit in defendant's seventh assignment of error. Of course, the city was

not liable to Schinzel for his attorneys' fees as such, but the \$150 in this case was paid to his attorneys as part of the amount which the city had agreed with him to pay in settlement of his claim against it for damages. In legal effect, it was paid to Schinzel, and as long as it was paid for his benefit, and in settlement of his claim against the city, it was wholly immaterial to whom the money was actually paid over; the aggregate amount paid out in all being within the amount for which the city and the defendant were liable to him. As we do not discover any error in the record, the judgment appealed from must be affirmed.

WRIGHT v. CITY OF ST. CLOUD.

(Supreme Court of Minnesota. June 29, 1893.)

DEFECTIVE SIDEWALK — INJURIES TO TRAVELER — KNOWLEDGE OF DEFECT — CONTRIBUTORY NEGLIGENCE.

If a person, with full and present knowledge of the defective condition of a sidewalk, and of the risks incident to its use, voluntarily attempts to travel upon it, when the defect could easily, and without appreciable inconvenience, have been avoided by going around it, he is not in the exercise of reasonable care, but must be presumed to have taken his chances, and if injury results he cannot recover from the city.

(Syllabus by the Court.)

Appeal from district court, Stearns county; Searle, Judge.

Action by Mary A. Wright against the city of St. Cloud to recover for personal injuries received from a fall on defendant's sidewalk. Plaintiff had judgment, and defendant appeals. Reversed.

M. S. Taylor, for appellant. Geo. H. Reynolds, for respondent.

MITCHELL, J. This was an action to recover damages for personal injuries caused by the alleged negligence of the defendant, in permitting snow and ice to accumulate and remain upon a public sidewalk so as to render it unsafe for travel. The only question is whether the evidence justified the verdict. The accident occurred in the latter part of February, in the residence part of the city, about seven squares from its business center. Abutting this part of the sidewalk there was unoccupied property about 80 feet in width. On either side the occupants had kept the sidewalk in good order, but opposite this property the snow had not been removed during the entire winter, and the result was that it had gradually accumulated to the depth of from one to two feet, through which pedestrians had trodden a narrow, irregular path. As the result of successive falls and drifting of snow, and alternate thawing and freezing, in connection with the continual travel, this path had become quite rough, uneven, and icy, having gradually grown worse as the winter advanced. As different witnesses described it,

"It had hollowed out, and left ridges;" "the humps, holes, and hollows were quite noticeable;" "It had hollowed out places sort of sidling and saucer shaped;" "was full of holes and hummocks from two to four inches deep;" "the bottom was uneven and sidling." These and similar descriptions clearly photograph in the mind of any one familiar with such things a distinct picture of the irregular and uneven path trodden by pedestrians through snow as frequently seen on neglected sidewalks, in the winter time, in the residence portions of most towns, the condition of which grows gradually worse as the winter advances. About noon on a somewhat cold, but bright and pleasant day, the plaintiff was traveling this walk, on her way home from church. She had not traveled this side of the street that winter, and had no previous knowledge of its condition. On reaching this part of the walk she admits that she looked at it, and saw its condition before she started across. She says she "had no idea it was as bad as it was," but it is impossible, under the circumstances, that she did not see and understand its general character, and the consequent difficulty in traveling it, and the danger of slipping and falling in doing so. In fact she admits that she saw these ridges and hollows, and that it occurred to her, the minute she reached it, that it was a dangerous place to walk. She knew that the sidewalk on the opposite side of the street (on which her residence was) was in good condition, and that she could entirely avoid the danger by retracing her steps 100 feet to a street crossing, and going over to the other side of the street; but instead of doing so she proceeded, and, in going across, slipped and fell, and sustained the injuries complained of. The defendant's contentions are (1) that there was no evidence of its negligence; and (2) that the evidence conclusively showed that the plaintiff was guilty of contributory negligence.

Except in Michigan, where it is held that the liability of municipalities for defective streets is purely statutory, and where the same statute applies alike to cities and rural townships, the general, if not universal, doctrine, is that the duty of a city to exercise reasonable care to keep its sidewalks in safe condition for travel is not limited to structural defects, but extends also to dangerous accumulations of ice and snow. This is implied, if not decided, in *Henkes v. City of Minneapolis*, 42 Minn. 530, 44 N. W. Rep. 1028. In this climate, and in this new state, the duty of cities with respect to ice and snow must necessarily be somewhat limited, and care should be taken that they be not held to a degree of diligence beyond what is reasonable, in view of their situation. What reasonable care might require in a milder climate or in an older country, where cities are more compactly built, might be too high a standard in this climate, for new cities,

often embracing within their limits much territory that is more rural than urban. All that is required is reasonable care under all the circumstances, and, in determining whether a defect is actionable, consideration must be had, not only to the danger to be apprehended from it, but also to the practicability of remedying it. No inflexible rule can be laid down as to the condition in which reasonable care requires a city to keep its streets and sidewalks, with respect to ice and snow. This must depend, in a measure, on climate, amount of travel, means at command for making repairs, and other varying circumstances. But conceding, what we think the evidence tends to show, that the city was negligent, we think it also appears clearly that the plaintiff herself was lacking in ordinary care. We have held, in common with every other court, that the mere fact that a person attempts to travel a highway after notice that it is out of repair is not necessarily negligence; that this depends on circumstances. *Erd v. City of St. Paul*, 22 Minn. 443; *Estelle v. Village of Lake Crystal*, 27 Minn. 243, 6 N. W. Rep. 775; *Kelly v. Railway Co.*, 28 Minn. 98, 9 N. W. Rep. 588; *McKenzie v. City of Northfield*, 30 Minn. 456, 16 N. W. Rep. 264; *Nichols v. Minneapolis*, 33 Minn. 430, 23 N. W. Rep. 868. But none of these cases were altogether analogous in their facts to the present one. In all of them it will be found either that the traveler had no other practicable road, and had either to pass over the defective way, or abandon his journey, or that, although aware that the road or walk was out of repair, he had no knowledge of the existence of the particular defect which caused the injury, or that the accident occurred in the dark, and that the traveler, although having previous knowledge of the situation, had not presently in mind the existence of the defect, or the consequent risk. But in the present case, while plaintiff might not have known of the existence or location of any particular hollow or hole in this path, it is very clear from her own testimony that she had full and present knowledge of the precise condition of this part of the sidewalk, and of the risk incident to traveling over it. The only risk was that of slipping and falling, and that was perfectly patent to any one of ordinary intelligence. She simply overestimated her own ability to travel across it without falling. There was no necessity of her going over the defect, but she could have easily, and without appreciable inconvenience, have avoided it, by going across to the other side of the street, where the walk was perfectly safe. Under such circumstances she was not in the exercise of reasonable care, but must be presumed to have taken her chances, and having done so, and an injury having resulted, she cannot recover from the city. No different rule as to contributory negligence, or assumption of risks, whichever it is called, is to be applied

from that which would be applied to any other case; and, if the plaintiff had exercised half as much care for her own safety as she exacts from the city for the safety of travelers, the accident would never have occurred. *Wilson v. City of Charlestown*, 8 Allen, 187; *Schaefer v. Sandusky*, 33 Ohio St. 246; *Horton v. Inhabitants of Ipswich*, 12 Cush. 488; *City of Quincy v. Barker*, 81 Ill. 300. Judgment reversed.

NELSON v. CARLSON.

(Supreme Court of Minnesota. June 29, 1893.)

RESCISSION OF CONTRACT—FALSE REPRESENTATIONS—NEW TRIAL.

1. In an action for the rescission of a contract of exchange of real property on the ground that the defendant falsely and fraudulently pointed out to plaintiff one lot as the land that was to be conveyed to him, while the lot in fact conveyed was an entirely different one, the right of plaintiff to a rescission depends, not upon whether the lot pointed out was worth more than the one actually conveyed, but upon the fact that he did not get the property which it was represented that he was getting.

2. *Knappen v. Freeman*, 50 N. W. Rep. 533, 47 Minn. 491, followed to the effect that, where a party seeks the aid of a court to rescind a contract, it is not necessary that he should have previously attempted a rescission, or made any tender to the other party, except where such tender is necessary to put the other party in default.

3. Motion for a new trial on the grounds of "accident and surprise" and of "newly-discovered evidence" held to have been properly denied.

(Syllabus by the Court.)

Appeal from district court, Chisago county; Crosby, Judge.

Action by Anders Nelson against Peter A. Carlson to rescind a contract. Plaintiff had judgment, and defendant appeals. Affirmed.

R. P. Hoskyn, for appellant. J. P. Nelson, for respondent.

MITCHELL, J. This was an action for the rescission of an executed contract of exchange of properties, the plaintiff having executed to defendant a conveyance of certain land in the village of Franconia in consideration of a conveyance by the latter to the former of a house and lot in the city of Minneapolis. The ground on which a rescission is asked is the alleged false and fraudulent representations of defendant, or rather of his agent through whom the trade was made, by which one house and lot was pointed out to plaintiff as the property which it was proposed to convey to him, and which he supposed he was getting, while the property actually conveyed to him was an entirely different house and lot. If such was the fact, (and the court has so found on what we deem sufficient evidence,) this was good ground for rescis-

sion, provided it was seasonably asserted by plaintiff after the discovery of the fraud. The assignments of error predicated upon the admission of evidence as to the relative values of the two houses and lots in Minneapolis, or upon the absence of evidence of the value of the Franconia land, are without merit. The right of the plaintiff to a rescission depended, not upon the fact that the property pointed out to him was worth more than the property which was conveyed to him, but upon the fact that he did not get the property which it was represented that he should get. Hence the question of relative values was wholly immaterial, unless it might possibly have some bearing upon the question of a motive on part of defendant or his agent to deceive the plaintiff. The value of the Franconia property was equally immaterial, and for the same reason. It may be true, as suggested by defendant, that to entitle plaintiff to a rescission it must appear that he parted with something of value; but this land will be presumed to be of some value, but how much that was, whether great or small, is not important. If false and fraudulent representations were made to plaintiff, and he relied upon them in making the trade, it does not lie in the mouth of defendant to say that he was negligent in relying on them, or that, before the contract was executed, facts were brought to his notice that ought to have put a reasonably prudent man upon inquiry as to their truth or falsity. This is sufficient answer to some suggestions made by defendant's counsel upon the argument.

One of the main points made by defendant is that plaintiff was not entitled to the relief asked because he had not before suit tendered a reconveyance of the property which he had received. This point is fully covered by the case of *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. Rep. 533, where it is said that when a party seeks the aid of a court to rescind a contract it is not necessary that he should have previously attempted a rescission, or that he should have made any tender to the other party, except where such tender might be necessary to put the party in default. What he ought to do, and must do, to reinstatement the other party in statu quo as a condition of the rescission, is then for the court to determine. All that is required to justify a rescission by the court is that the contract is one that a court of equity will cancel or rescind on the ground alleged, that such ground of rescission exists, and that plaintiff has not lost this right by affirmance, laches, or otherwise. In the present case the order for judgment was erroneous in that it provided unconditionally for a cancellation of the deed from plaintiff to defendant, while it ought to have been upon condition of plaintiff's reconveying to defendant. But there is no assignment of error which cov-

ers this. It was doubtless a mere inadvertence on the part of the trial court, which would have been, and may still be, corrected on mere suggestion of the mistake.

After the trial and decision of the case the defendant changed his attorneys, and this, like a change of physicians, naturally enough suggested a change of treatment; and thereupon the defendant moved upon affidavits for a new trial upon the grounds of accident and surprise and of newly-discovered evidence. The accident and surprise is based upon the following alleged state of facts: Upon the trial defendant testified that "Charles Swenson brought the trade about. He was agent for Nelson [plaintiff] and me." So far as the record shows, the trial proceeded throughout upon the assumption or conceded fact of Swenson's agency for defendant. Defendant now swears that, although he speaks and understands the English language in ordinary conversation sufficiently to transact business generally, he does not understand the meaning of a great many English words; that, when testifying, he did not correctly understand the meaning of the word "agent;" and, in substance, that he did not mean to convey the idea that Swenson was his agent in this transaction, but merely that he "had been" in some others. It would never do to grant a new trial on any such ground as this. If the defendant did not fully understand the purport and effect of his own testimony, his attorney presumably did, and allowed the trial to proceed to a close without any suggestion that defendant had misspoken himself, and without any attempt to correct his mistake, if any was made.

The alleged newly-discovered evidence is equally insufficient as a ground for a new trial. It consists of alleged acts of affirmance on the part of plaintiff in treating the property conveyed to him as his own, by collecting rents of the tenants, and by attempting to trade it off. Without going into details, it is sufficient to say that this was a line of defense that would naturally have suggested itself to defendant before the trial, and called for diligence on his part in order to ascertain the facts bearing upon such a defense. But there is no sufficient showing of diligence in this regard on part of defendant. Moreover, most of the facts constituting the alleged newly-discovered evidence are denied by the rebutting affidavits on part of the plaintiff. Under all the circumstances, there was no error in refusing a new trial on this ground. The defeated party is usually apt to think that he could make a stronger case on another trial, and, in order that there be an end of litigation, new trials should be very cautiously and sparingly granted on the ground of newly-discovered evidence.

Order affirmed.

TILLENY v. WOLVERTON et al.

(Supreme Court of Minnesota. June 29, 1893.)

RES JUDICATA—MOTION FOR NEW TRIAL—OBJECTIONS TO FINDINGS.

1. Where, upon an appeal from an order denying a new trial, the order is affirmed, all questions that might have been raised on that appeal are res adjudicata, and will not be considered on an appeal from the judgment entered on the verdict or finding.

2. The objection that the conclusions of law are not justified by the findings of fact may be raised on a motion for a new trial; following former decisions.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Lochren, Judge.

Action by Lydia A. Tillyen against Jacob A. Wolverton and others to cancel a sale of land. Defendants had judgment, and plaintiff appeals. Affirmed.

For reports on former appeals, see 48 N. W. Rep. 908, and 52 N. W. Rep. 909.

C. H. Rossman, for appellant. Koon, Whelan & Bennett, for respondents.

MITCHELL, J. This case has already been here twice on former appeals. 46 Minn. 256, 48 N. W. Rep. 908; 52 N. W. Rep. 909. The last appeal was from an order denying a new trial. After the affirmance of that order by this court, judgment was entered in the court below on the findings, and this appeal is from that judgment.

It is well settled that where, upon an appeal from an order denying a new trial, the order is affirmed, all questions that might have been raised on that appeal are res adjudicata, and will not be considered on an appeal from the judgment entered upon the verdict or findings. *Schleuder v. Corey*, 30 Minn. 501, 16 N. W. Rep. 401; *Adamson v. Sundby*, (Minn.) 53 N. W. Rep. 761. Every question attempted to be raised on this appeal might have been, and in fact was, raised on the appeal from the order denying a new trial. The only question which counsel claims is open to him now is that the conclusions of law were not justified by the findings of fact. This question, he contends, was not properly before the court on a former appeal, because not a ground for a new trial. Whatever may be the rule in other jurisdictions, it has long been the common practice, sanctioned by this court, to consider and pass upon this point on a motion for a new trial, and, if the conclusions of law are wrong, to modify them. The practice, although admitted not to be strictly logical, has been sanctioned as convenient and as long settled. *Ames v. Richardson*, 29 Minn. 330, 13 N. W. Rep. 137; *Coolbaugh v. Roemer*, 32 Minn. 445, 21 N. W. Rep. 472; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. Rep. 9. See, also, *Wilson v. Richards*, 28 Minn. 337, 9 N. W. Rep. 872. But, even if the point was still open, there is nothing in it. A careful examination of the allegations of the answer, which the court findings were

all true, will show that the findings are made more full and explicit than counsel assumes them to be. Counsel is also in error in assuming that it was necessary that the plaintiff should, before ratifying the sale made by defendant as her agent, have had full knowledge of all the details as to the extent of the interest of the agent in the proposed purchase. The important and material fact for her to know was that her agent was interested as purchaser in the proposed sale of her property, and therefore that his interests did or might conflict with hers. If, with knowledge of this fact, she saw fit to approve of the sale, deliver her deed, and accept the purchase money without inquiry to the extent of his interest, or as to the details of the arrangement between him and the other purchasers, she must be deemed to have deliberately ratified upon the knowledge she had without caring for more. Judgment affirmed.

VANDERBURGH, J., absent, took no part.

BAKER v. TAYLOR.

(Supreme Court of Minnesota. June 29, 1893.)

EVIDENCE—DECLARATIONS OF DECEDENT—REPLEVIN—WHEN LIES—ESTOPPEL.

1. Certain evidence held admissible as the declarations, against interest, of a person since deceased.

2. The mere fact that the owner of property has intrusted the possession of it to another will not estop him from asserting his ownership against one who purchases from the bailee in the belief that such bailee was the owner.

(Syllabus by the Court.)

Appeal from district court, Otter Tail county; Searle, Judge.

Action in claim and delivery by Charles D. Baker against James Taylor. Plaintiff had judgment, and defendant appeals. Reversed.

O. C. Haupt and Parsons & Brown, for appellant. Mason & Hilton and E. E. Corliss, for respondent.

MITCHELL, J. Action of claim and delivery to recover possession of a colt. Plaintiff claims possession under three several chattel mortgages executed by one Dibbs in October, 1886, November, 1886, and September, 1888, respectively. The dam of the colt in question formerly belonged to one Mortimer Taylor, the real defendant in the action, (as whose agent the defendant claims possession,) and was by him sold to Dibbs in April, 1886, two or three weeks before the colt was foaled. The claim of the defendant is that when Mortimer Taylor sold the mare to Dibbs he reserved the unborn colt, which it was agreed should remain his property, but that Dibbs should raise it for him for an agreed compensation. Dibbs died shortly after the execution of the last mortgage to plaintiff. From the time of its birth the

colt remained in the possession of Dibbs, on his farm, until the time of his decease, since which time it seems to have remained there, in the possession of his widow, until taken possession of by defendant, shortly before the commencement of this action. Upon the trial, defendant offered to prove statements made by Dibbs in the spring and summer of 1886, after he had bought the mare, and before the execution of any of the mortgages to plaintiff, to the effect that he had bought the mare, but did not get the colt; that he did not own it; that Taylor had reserved it, etc. Part of this evidence the court admitted, against plaintiff's objection; but subsequently, upon counsel for defendant stating that they did not expect to prove that plaintiff had any knowledge of these statements of Dibbs, the court excluded the remainder of the evidence, and directed a verdict for plaintiff.

It seems to us that this evidence was admissible as declarations, against interest, of a person since deceased. It was clearly within all the conditions requisite for the reception of such evidence: (1) The declarant was dead; (2) the declaration was against the pecuniary interest of the declarant at the time; (3) the declaration was of a fact of which the declarant was immediately and personally cognizant; (4) and the declaration was made, not only ante litem motam, but also before the declarant had executed any of these mortgages, and when there was no motive to falsify. The rule admitting such evidence is an exception to the general rule excluding hearsay evidence, and owes its adoption to the desire of the courts to prevent a failure of justice in cases when perhaps the facts could not otherwise be shown. It rests upon the improbability of falsehood in the statement, it being considered that the regard that men have for their own interests will be sufficient security for the truthfulness of such statements. 1 Greenl. Ev. § 147 et seq.; H'gham v. Ridgway, 10 East, 109, and notes; 3 Smith, Lead. Cas. (9th Ed.) 1628 et seq.; County of Mahaska v. Ingalls, 16 Iowa, 81; Hosford v. Rowe, 41 Minn. 245, 42 N. W. Rep. 1018. The learned trial judge seems to have excluded the evidence upon the theory that inasmuch as the colt was in Dibbs' possession when plaintiff took his mortgages the latter would be protected, as a bona fide purchaser, unless he had notice of Dibbs' want of title; and the argument of plaintiff's counsel proceeds upon substantially the same theory. The proposition amounts to just this: If the owner of property delivers possession of it to another for any purpose, even as a naked bailment, and the bailee sells it to another, who buys honestly, believing him to be the owner, the vendee can hold the property as against the rightful owner. Of course, such is not the law. No doubt the owner of property may, by his conduct, so clothe another with the indicia of ownership, and the right to dispose of it, that he would

be estopped from asserting his actual ownership against an innocent purchaser for value; but this estoppel will not be created by merely intrusting the possession of personal property to another. *Greene v. Dockendorf*, 18 Minn. 70, (Gil. 66); *Warder, Bushnell & Glessner Co. v. Rublee*, 42 Minn. 27, 43 N. W. Rep. 569. It is not necessary at this time to point out how far the evidence in this case fell short of establishing the essential elements of an estoppel, beyond suggesting that it nowhere appears that plaintiff, when he took his mortgages, had the slightest knowledge that Dibbs had ever had any interest whatever in the dam of this colt, or that in taking his mortgages he relied on anything as to Dibbs' title to the colt, except the bare fact that it was in his possession. In view of the small amount involved, and the further fact that the circumstances disclosed by the evidence tend to cast suspicion on the bona fides of defendant's claim, we regret to be compelled to reverse; but in excluding the evidence offered, and in directing a verdict for the plaintiff, the court fell into error. Order reversed.

VANDERBURGH, J., absent, took no part.

SOUKUP v. TOPKA.

(Supreme Court of Minnesota. June 29, 1893.)

DEED—CONSTRUCTION—LIMITING ESTATE.

A deed conveyed two adjoining tracts of land, and immediately following the description of the last tract contained the words "for a road to and from said premises first above described." *Held*, that these words, of themselves, were not sufficient either to limit the grant of the second tract to an easement, or to create a condition subsequent.

(Syllabus by the Court.)

Appeal from district court, Scott county; Brown, Judge.

Action by Frank Soukup against Thomas Topka. Defendant had judgment, and plaintiff appeals. *Affirmed*.

F. C. Irwin and J. W. Lane, for appellant. Southworth & Collier, for respondent.

MITCHELL, J. Plaintiff's last assignment of error is unavailing, both because it is too general and indefinite, and also because there were no exceptions to the rulings complained of.

The only point raised by the other assignments of error is that the conclusions of law are not justified by the findings of fact. Upon the findings, which are all we can consider, the only question is the construction of the deed from Smith & Snow to defendant's grantor, Brazda. This deed, for the consideration of \$400, conveys, first, a tract of land 82 feet long, from north to south, by 40 feet wide, from east to west, and then adds, "and the said parties of the first part do hereby also grant to the said party of the second part a strip of land described as fol-

lows, to wit, [then follows description of a tract 183 feet long, from north to south, and 12 feet wide, from east to west,] for a road to and from said premises first above described." The question is whether, in view of the clause italicized, this deed conveyed an absolute fee, a conditional fee, or a mere easement, in the tract last described. This has to be determined from the language of the deed itself, unaided by anything else, unless it be the fact, ascertainable from the descriptions, that the last-described tract, beginning 101 feet further south, extends north along and adjoining the whole east line of the tract first described. The trial court decided in favor of the defendant, holding that the deed conveyed an absolute fee. The plaintiff's contention is that it conveyed only an easement for purposes of ingress and egress to and from the tract first described. None of the cases cited by him are analogous. In *Sanborn v. Minneapolis*, 35 Minn. 314, 29 N. W. Rep. 128, the conveyance expressly declared, not only that the land was deeded for alley purposes, but also that the grant should be null and void whenever the premises ceased to be kept for these purposes. Moreover, what is still more important, the grant was to a named grantee "and others who may own property along the within described alley," which was entirely inconsistent with that exclusive control and dominion over property consequent upon ownership in fee. In *Flaten v. Moorhead*, (Minn.) 53 N. W. Rep. 807, where the deed provided that the land thereby conveyed was "to be forever held and used as a public park," while we did not decide whether this conveyed a conditional fee or a mere easement, the controlling considerations, aside from the language of the deed, which led us to hold that it did not convey an absolute fee, were that the grantee was a municipal corporation, and the consideration named in the deed merely nominal. In *Robinson v. Railroad Co.*, 59 Vt. 428, 10 Atl. Rep. 522, the conveyance was to a plank-road corporation "for the use of a plank road." The principal reasons assigned for holding that this clause limited the grant to an easement were that the land conveyed was a strip through the grantor's entire farm; that the grantee was already in occupation of the premises; that the only possible use to which it could put the premises was for its road; and that the consideration expressed in the deed was grossly inadequate for a grant in fee. In the present case all these extrinsic facts are absent. The deed in terms conveys, not an easement in the land, but the land itself, with an attempted restriction upon its use, if it be considered such, which is entirely consistent with the passing of the fee. There is nothing in the deed reserving to the grantor any use of, or dominion over, the land; and the rule is that, if the grant be of the uses of and dominion over land, it carries the land

itself. 3 Washb. Real Prop. (5th Ed.) 406. This clause as to the purpose for which the land was conveyed is altogether too equivocal in its meaning, and as to the object of its insertion in the deed, to so qualify the previous language of the instrument conveying the land as to limit the grant to an easement. According to all the authorities this deed would be held to convey the fee, and the clause referred to construed as, at most, an attempt to attach a condition subsequent to the grant. 2 Washb. Real Prop. (5th Ed.) 314; Coburn v. Coxeter, 51 N. H. 158; Vail v. Railroad Co., 106 N. Y. 283, 12 N. E. Rep. 607. As counsel rest their whole case upon the proposition that the deed conveyed only an easement, and do not make the point that if it conveyed a fee it was only a conditional one, we have no occasion to consider that point further than to say that the clause referred to would not, of itself, create a condition subsequent, within the doctrine of Farnham v. Thompson, 34 Minn. 330, 26 N. W. Rep. 9, where the subject of conditions subsequent was discussed at length and the authorities fully reviewed. Judgment affirmed.

BOYER v. ST. PAUL CITY RY. CO. et al. (Supreme Court of Minnesota. June 30, 1893.)
STREET RAILWAYS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence in this case held sufficient to warrant the submission of the question of the negligence of the respective parties to the jury. (Syllabus by the Court.)

Appeal from district court, Ramsey county; Otis, Judge.

Action for personal injuries by Paul Boyer against the St. Paul City Railway Company and others. There was a judgment of nonsuit, and, from an order granting a new trial, defendants appeal. Affirmed.

McCafferty & Noyes, for appellants. E. S. Thompson and John C. Bullitt, Jr., for respondent.

VANDEBURGH, J. This action against the defendants, for a personal injury, sustained by plaintiff, was dismissed at the trial because the court deemed that the plaintiff was clearly shown to be guilty of contributory negligence by the evidence. On a review of the evidence upon a motion for a new trial the trial court became convinced that the question was one for the jury, and accordingly granted a new trial. The plaintiff, who lived in Wisconsin, was a stranger in the vicinity, and unacquainted with the street-car lines between St. Paul and Minneapolis. On the 11th day of June, 1892, in company with a friend, he boarded a street car running between the cities named, early in the evening of that day. On the way a severe storm of wind and rain arose, and continued with increasing severity until the car reached a point on Washington avenue,

in the city of Minneapolis, between Second and Third streets, where the car was stopped by the storm. The electric current was turned off, and the lights went out. The motoneer or driver notified the conductor that he could not go ahead, for the reason that he could not see, on account of the storm, and that the hail and rain were driving in his eyes. The car was crowded, and the plaintiff and his companion, who were standing up, exposed to the storm, thereupon left the car, and, with an umbrella raised, started across the street. In doing so, they stepped upon a parallel track, and plaintiff was knocked down and injured by a car coming from an opposite direction, which he did not see or hear, on account of the storm and darkness. It also appears, according to his testimony, that he did not know where they were, nor that there was a double track on the line, nor see the track in question, which was covered with water at the time. We do not think his evidence in respect to his knowledge of the risk was necessarily incredible, under all the circumstances. The storm, darkness, the noise of the car he was on, and his position thereon, with a crowd, might have prevented him from noticing the cars on the parallel track, or from knowing of the existence of the double track. Notwithstanding plaintiff's failure to watch out for another street car, the question of his contributory negligence was for the jury. *Shea v. Railway Co.*, (Minn.) 52 N. W. Rep. 902.

2. The evidence tended to show that the car which struck and injured the plaintiff was running at a very high rate of speed,—15 or 25 miles an hour. The jury might very properly find such rate of speed to be dangerous, and the question of defendants' negligence was very clearly for them. The storm and darkness also imposed the additional duty of caution while proceeding on a street where pedestrians might be expected to be crossing at any time in the evening. Order affirmed.

MERCANTILE NAT. BANK OF CLEVELAND v. PARSONS et al.

(Supreme Court of Minnesota. June 29, 1893.)

BONA FIDE PURCHASERS—NOTICE AS TO GRANTEE'S TITLE.

1. The fact that a grantee in a deed is described as "trustee" is notice to one who takes title under the deed that the property is or may be held under a trust of some description, and puts him upon inquiry as to the existence and nature of the trust. But held, that in this case the defendant used due diligence in following up the inquiry, and was justified in purchasing upon the faith of the information received.

2. To render the knowledge of the individual corporators the knowledge of the corporation it must be the knowledge of all of them.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Pond, Judge.

Action by the Mercantile National Bank of Cleveland, Ohio, against J. Burton Parsons and others. Defendants had judgment, and plaintiff appeals. Affirmed.

J. M. Gilman and Munn, Boyeson & Thygeson, for appellant. A. T. Brewer, Benton, Roberts & Brown, and Frank Healy, for respondents.

MITCHELL, J. While some of the findings of fact and conclusions of law of the trial court are probably erroneous, yet, in view of other facts found, these are not material, for, in our judgment, the whole case comes down to the single question whether the South Market Company was a purchaser in good faith, for value, without notice of plaintiff's mortgage. The deed of the property from Fletcher having been taken in the name of Crowell with the knowledge and consent of the Cleveland Farming Company, no enforceable trust in its favor resulted from the fact that it paid the consideration. Gen. St. 1878, c. 43, § 7. It may be that the property would have been charged with a constructive trust in favor of the creditors of the company, but that is a question between them and Crowell, which is not involved in this suit. The fact that Crowell was designated "trustee" in the deed, without naming the beneficiary, or stating the nature of the trust, was, of course, insufficient to create any trust; and it can hardly be necessary to suggest that a trust could not be ingrafted on to this conveyance by parol evidence. Gen. St. 1878, c. 41, § 10. Hence the testimony of Crowell that he held the land in trust for the farming company was incompetent, and, even if admitted without objection, proved nothing. Hence, under the deed from Fletcher, Crowell was, as against the farming company, the absolute owner of the property. But we fail to see why his subsequent declaration of trust in favor of Parsons and Handy was not valid, and did not establish an enforceable trust as against him or any one purchasing from him with notice of it. It is not important whether Crowell received any consideration for this declaration of trust. He had a right to give away his property if he saw fit. If he received no consideration, then it stood as an executed gift, and, as it seems to us, the trust became a mere passive one, which vested in Parsons and Handy, each, the legal title to one undivided third of the property. But whether they took a legal or only an equitable title is immaterial, for an equitable interest is mortgageable equally with a legal one. Nor is it at all material that plaintiff did not know of this declaration of trust when it took its mortgage from Parsons. If it took the mortgage without examining the title, the mortgage nevertheless covered whatever interest Parsons in fact had in the premises. Hence plaintiff's mortgage from Parsons was valid as between the parties,

and will take priority over the subsequent conveyance from Parsons to the market company, unless the latter is protected as a purchaser in good faith for value whose conveyance was first recorded. The record of the mortgage from Parsons to plaintiff, without the record of the declaration of trust by Crowell in favor of Parsons, would not be constructive notice to any subsequent purchaser from Crowell, because not in the chain of title; and, as this declaration of trust was not recorded, the case comes down to the question whether the fact that Crowell was, in the deed from Fletcher, described as "trustee," was sufficient to put the market company on inquiry, and, if so, whether the investigation it made and the information it received was such as a reasonably prudent man would have acted on without further inquiry. It is a familiar doctrine that a purchaser is chargeable with notice of facts recited in deeds under or through which he takes title; and while the word "trustee" in a deed gives no notice of the name of the beneficiary, or of the character of the trust, yet it does give notice of a trust of some description, which imposes the duty of inquiry as to its character and limitations; and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry would presumably have led.

But the court finds that the market company, before and at the time of the conveyance to it by Crowell, was informed by Crowell that the farming company had paid the entire consideration for the property so conveyed to him, and that he then held the title thereto in trust for the use and benefit of the company, and that he was disposing of the property for the purpose of closing up its business; that in reliance upon such notice, and believing the fact to be that the farming company was desirous of disposing of the property by and through Crowell, then holding the title thereto for such purposes, the market company purchased and paid for the property. We have carefully examined the evidence, and are fully satisfied that it abundantly justified these findings. In fact the testimony of Crowell and of Benton (who, as its president, transacted the business in behalf of the market company) to that effect stands uncontradicted. The facts thus found constituted due diligence in following up the inquiry suggested by the word "trustee" in the deed, and the information received was, under the circumstances, such as to render it unnecessary, in the exercise of reasonable care, to make further inquiries as to the possible rights of any one, at least other than of the farming company. As the deed gave no indication as to who the possible beneficiary was, the only persons of whom inquiry could or would naturally be made were the grantor and the grantee. If Fletcher, the grantor, had been inquired

of, presumably the market company would have been informed, as the facts were, that the consideration was paid by the farming company, and at its direction the deed made to Crowell. There is nothing, however, to suggest that Fletcher knew of the subsequent declaration of trust by Crowell in favor of Parsons and Handy. The other person of whom inquiry could be made was Crowell, who made a statement of the situation, which, especially in view of the fact that the farming company had paid the consideration for the property, was reasonable and natural, and one upon which a prudent man would have been justified in acting without inquiry whether possibly some one other than the farming company might not be the beneficiary. Under the circumstances, the conclusion at which any one would naturally have arrived would have been that, for convenience, the title had been put in Crowell, in trust (perhaps not enforceable, because not in writing) for the farming company, which paid the consideration; and it can make no difference whether the information was given by Crowell in response to inquiry or volunteered to induce the market company to make the purchase. And while it is true that the possibility that a false or incompetent answer may be given is no excuse for not making inquiry, yet a false answer or a reasonable answer given to an inquiry made may dispense with the necessity of further inquiry. All that is required of a party who is put upon inquiry is good faith and reasonable care in following up the inquiry which the notice given him suggests. As the information given by Crowell suggested an interest in the property on the part of the farming company, it is quite possible, had there existed an enforceable trust in favor of that company, and its limitations and restrictions had been such that Crowell had no power to convey, that, as to the farming company, the market company would have been chargeable with notice of these facts, of which presumably the latter would have been informed upon further inquiry of the former. But there was nothing in the information received of Crowell that would have suggested to any man of ordinary prudence that Parsons and Handy individually had any interest in the land, especially as they themselves were promoting and negotiating for this very conveyance by Crowell to the market company. The court also finds that the market company never had any knowledge or information of any character of the existence of this declaration of trust until November, 1891,—nearly a year after its deed from Crowell was executed and recorded. As applied to Benton, its president, who transacted the business in its behalf, this finding is unquestionably justified by the evidence. Counsel for plaintiff claims that Benton was chargeable with actual notice, because this declaration of trust and

the mortgage from Parsons to plaintiff were contained in an abstract of title of the property which he had procured, and which he did not, but ought to have, examined. We do not see that one who obtains an abstract of title, and then buys, without examining it, is in any worse position than one who buys without obtaining an abstract at all. But we do not understand the evidence as counsel seems to. We understand Benton's testimony to refer to the abstract brought down to the date of the conveyance by Fletcher, and not to the one brought down to the fall of 1891, after he learned of the claim of the plaintiff. Moreover, the declaration of trust could not have been on any abstract at the time of the conveyance to the market company, for it was not on record.

It is also claimed that the market company is chargeable with notice of plaintiff's rights, because Crowell, Handy, and Parsons had actual knowledge of them, and that, as they were corporators of the market company, their knowledge was its knowledge. Had these three constituted all the corporators of this company, there might have been something in this point, and that is as far as any authority cited by plaintiff goes. But in this case there were other corporators, who were taking and paying for stock in the corporation, who had no such notice. Generally, and for most purposes, a corporation is a legal entity distinct from the body of its stockholders; and, in any event, to render the knowledge of the individual corporators the knowledge of the corporation, it must be the knowledge of all the corporators. The suggestion that the market company was not a purchaser for a valuable consideration is without merit. The issuing of paid-up stock of the corporation in payment of the property of itself constituted a valuable consideration.

Order affirmed.

SMITH v. BARCLAY et al.

(Supreme Court of Minnesota. June 29, 1893.)

GARNISHMENT—CLAIMS OF THIRD PERSONS—PARTIES—PRACTICE—EVIDENCE—RIGHT TO JURY TRIAL—WAIVER.

1. Where the money or property in the hands of a garnishee is claimed by a person not a party to the action, the mode of procedure is governed by Gen. St. 1878, c. 66, § 174, and not by section 175.

2. The affirmative in maintaining his right to the property is on the claimant, who must serve the first pleading in the nature of a complaint, setting up his claim, to which the plaintiff may answer.

3. Under a simple issue of ownership the plaintiff may prove any facts tending to impeach the validity, as to him as creditor, of any transfer of the property from the defendant to the claimant; and it is not necessary in such a case for the plaintiff, in his answer to the claimant's complaint, to allege, what has been already alleged or appears in the action, that he is a creditor of the defendant, and has attached the property by garnishment.

4. The conduct of the claimant on the trial of this action *held* to have amounted to a waiver of the right to a jury trial, if any such right existed.

(Syllabus by the Court.)

Appeal from district court, Otter Tail county; Baxter, Judge.

Action by Ernest N. Smith, administrator of the estate of Lafayette H. Smith, deceased, against William H. Barclay and others. From the judgment rendered, Retta Barclay and another appeal. Affirmed.

Mason & Hilton, for appellants. John E. Greene, (Mahnken & Green and William T. Blair, of counsel,) for respondent.

MITCHELL, J. It having appeared that the money attached in the hands of the garnishee was claimed by Retta Barclay and Fred L. Barclay, the wife and son of the defendant William H. Barclay, the court ordered that they be brought in and made parties defendant to the action, and that plaintiff have leave to serve a "supplemental complaint" against them and the garnishee. The plaintiff thereupon served such a complaint, the substance of which was that the garnishee had in its possession a certain sum of money belonging to William H. Barclay, but which he had deposited in the name of his wife and son, for the purpose of defrauding his creditors, and putting it beyond their reach. The garnishee answered, admitting that it had the money, and averring a willingness to pay it over to whomsoever the court should decide was entitled to it. Retta and Fred L. Barclay also answered, denying the material allegations of the supplemental complaint, and alleging generally that the money in the possession of the garnishee belonged to them. When the case came on for trial of this issue the defendants (Retta and Fred L. Barclay) first moved for judgment on the pleadings, and then objected to the reception of any evidence, on the ground that the "supplemental complaint" did not state a cause of action against them. The motion and objection were both overruled, and the correctness of this ruling presents the first question on this appeal.

The particular ground of the objection to the complaint proceeds upon the theory that the proceedings were in the nature of an action to set aside the transfer of this money by the judgment debtor, William H. Barclay, to his wife and son, as being in fraud of his creditors, and therefore that the complaint was defective in not alleging that plaintiff was a creditor of William H. Barclay at the time of such alleged fraudulent transfer. Some confusion has arisen out of the informal practice adopted by counsel, apparently acting under a mistaken idea that the mode of procedure prescribed by Gen. St. 1878, c. 66, § 175, applies to a case where some third person, not a party to the action, claims the money or property in the hands of the garnishee. But it will be readily seen that the provisions of that section have ref-

erence only to cases where the garnishee himself does not answer truthfully, or where he himself claims title to the money or property by conveyance or transfer that is void as to the creditors of the defendant, and consequently that the supplemental complaint provided for is one against the garnishee only in order to charge him. Cases where the funds or property in the hands of the garnishee are claimed by some one else are provided for and governed by section 174 of the same chapter. It provides that such claimant may, on his own application, be permitted to appear in the action, and maintain his right; and if he does not voluntarily appear notice may be given him to appear, or be barred of his claim. The provisions of the statute are not full or explicit as to the mode of procedure, but it is very clear that they do not contemplate the serving of any pleading by the plaintiff in the first instance against the claimant. All that is provided for is the service upon him of a notice to appear and maintain his right. The affirmative in maintaining this right is on him, and it is his place to serve the first pleading in the nature of a complaint in intervention, setting up his claim, to which, if necessary, the plaintiff may answer. *Donnelly v. O'Connor*, 22 Minn. 309; *Shoe Co. v. Ladd*, 32 Minn. 381, 20 N. W. Rep. 334. See, also, *McMahon v. Merrick*, 33 Minn. 262, 22 N. W. Rep. 543. In this case counsel have just reversed the natural and proper order of pleading. The "answer" of the claimants, which should have been the first pleading, and more properly called a complaint, amounts to a mere general allegation of ownership, without indicating the source of title, while the "complaint" of plaintiff, which ought to have been an answer, amounts, in effect, to a denial of this, and an allegation that the money is the property of the original defendant, but deposited by him in the bank in the name of the claimants merely for the purpose of putting it beyond the reach of his creditors. Under such simple issue of ownership we think a plaintiff may prove any facts tending to impeach the validity, as to him as a creditor, of any transfer of the attached property from the original defendant to the claimants; and, without deciding what he may be required to prove on the trial, we are of opinion that he is not required to allege in his answer to the claimant's complaint, what is already alleged in his own complaint, or appears in the proceedings in the action, that he is a creditor of the defendant, and has attached the property by garnishment. The very notice to the claimant to appear and maintain his right to the garnished property implies and presupposes this. We think that it has never been the practice for the plaintiff to make any such allegations in his answer to the claimant's complaint, and that to hold it necessary would be a surprise to the profession.

2. When the case was called for trial "a jury was impeached by the court for the trial of special issues only." This appears to have been done by the court on its own motion, but without objection by either party. No special issues or specific questions of fact were framed by the court, or suggested by counsel. After the evidence closed, the claimants asked the court to submit three specific questions of fact to the jury. This the court refused to do, and discharged the jury, and proceeded to make findings of fact and conclusions of law as on trial of a cause by the court. It is assigned as error that the claimants were thus improperly denied the right of trial by jury. It is not necessary to decide whether they were entitled as a matter of right to a jury trial, for, if they were, we are clearly of opinion that what occurred on the trial amounted to a waiver. At the commencement of the trial the court evidently proceeded upon the theory that it was a "court case," but in which the court might, in its discretion, order some specific questions of fact to be tried by a jury. To this view of the matter the claimants assented by not objecting, and, after the evidence closed, they themselves proceeded on this same view in asking that certain specific questions of fact be submitted to the jury. Having themselves acted on this theory of the law, and allowed the court to do so without objection, they cannot now be heard to assert, what they never asserted in the court below, that it was a "jury case," and that they were entitled to a jury trial as a matter of right. It can hardly be necessary to add that, if the case was triable by the court, if, from the developments on the trial, the judge changed his mind, and concluded that it was inexpedient to submit any specific questions to a jury, there was no error in discharging the jury and trying the case himself. Order affirmed.

JOHNSON v. NORTHWESTERN TEL. EXCH. CO.

(Supreme Court of Minnesota. June 29, 1893.)

NEGLIGENCE—EVIDENCE—RES JUDICATA.

1. Held, that the evidence was not such as to require a finding that the falling of a telephone pole was caused by the manner in which certain guy wires were removed.

2. Also, that all other questions in the case are res adjudicata, under the decision in a former appeal.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Pond, Judge.

Action for personal injuries by August Johnson against the Northwestern Telephone Exchange Company. Plaintiff had judgment, and defendant appeals. Affirmed.

Eustis & Morgan, for appellant. Henry Ebert and C. A. Ebert, for respondent.

MITCHELL, J. After full examination, we are of the opinion that the record contains nothing which at all changes the legal aspect of this case from what it was when here before, and that every question now presented, except perhaps as to state of the evidence upon the question whether the pole would have fallen had Shadwell removed the guys from his building in a proper manner, is res adjudicata, under the decision on the former appeal, (48 Minn. 433, 51 N. W. Rep. 225.) The pole which broke was a "corner pole" situated at an angle in the street, and was subject to the lateral strain of 114 No. 14 line wires strung on the cross-arms, and drawn taut to prevent sagging. The evidence was practically undisputed that the pole was entirely insufficient to bear this strain, unless supported by guys, or some other similar means of support. The defendant, for the purpose of showing that it did its duty in the premises, introduced evidence proving that it had, with the license of Shadwell, extended guy wires from the top of the pole to his building on an adjacent lot, and that as thus guyed the pole was perfectly safe, and would not have fallen; that Shadwell cut the guys; and that this was the immediate cause of the falling of the pole. For the same purpose, defendant also introduced evidence tending to prove that Shadwell had not revoked the license a reasonable time before cutting the guys to enable it to secure the pole by other means, and hence that his act in cutting the guys was unlawful, for the consequences of which it was not responsible. On the other hand, the plaintiff introduced evidence tending to prove, and from which the jury might have found, that, a reasonable time before cutting the guys, Shadwell had revoked the license, and required defendant to remove the guys from his building, but that it neglected to do so, or to secure the pole by other means. It is contended that this evidence was inadmissible under the pleadings, and that to admit it was to permit the plaintiff to recover upon a different cause of action from that alleged, which was that the defendant negligently suffered and permitted this pole "to become rotten and worn out, and not of sufficient strength" to bear the weight and strain of the wires strung upon it. It will be observed that the plaintiff only followed the line of proof adopted by the defendant itself. But an examination of the opinion of this court on the former appeal will show that the admissibility of this evidence under the pleadings is really res adjudicata in this case. It was there held that, upon the expiration of a reasonable time after the revocation of the license, Shadwell had a right, as to defendant, to remove the guys from his building; that it became the duty of the defendant, within a reasonable time after the license was withdrawn, to make the pole safe by other means, and that the omission to do so would constitute negligence; that after the

license was withdrawn the defendant was in the same situation as if it had never been granted,—in other words, being bound to know that Shadwell had a right to remove the guys, and might do so, the defendant, in omitting to adopt other methods of making the pole safe, stood in exactly the same position as if it had in the first instance erected the pole, and strung its wires thereon without the support of any guys. Under this view of the law the admissibility of the evidence under the pleadings must be apparent.

The defendant further contends that the evidence shows that the pole would not have fallen, even with the guys removed, had Shadwell removed them in a proper and reasonably prudent manner, viz. instead of cutting them, and thus throwing the strain on the pole suddenly, attaching blocks so as to release the strain gradually. The proposition of law predicated on this premise is that, even if defendant was bound to anticipate that Shadwell might remove the guys, it was not required to anticipate that he would do it in an improper and negligent manner, and is not responsible for the consequences of his negligence, which, it is claimed, constituted an independent intervening cause, which alone was the proximate cause of plaintiff's injury. Inasmuch as defendant asked for no instructions to the jury on this point, and as no such question was submitted to their consideration in the court's charge,—to which no exception was taken, except to the refusal to direct a verdict,—the question is not in the case, unless the evidence was such as to require a finding in accordance with defendant's contention. While some of defendant's witnesses testified that in their opinion the pole would not have fallen, had Shadwell let the strain come upon it gradually, in the manner suggested, yet in our opinion there was abundant evidence in the case to justify the jury in finding that the inevitable consequence of removing the guys, in any possible manner, without supplying their place with other supports, would have been the falling of the pole. Indeed, when we take into account the great lateral pressure resulting from that number of wires upon a corner pole only 14 inches in diameter at the ground, of comparatively brittle wood, and whose power of resisting the tensile strain on one side, and the compressive strain on the other side, had been materially reduced by dry rot extending from the circumference inward two or three inches, it seems to us that the great preponderance of the evidence is to the effect that the pole must necessarily have fallen when the guys were removed. As already suggested, every other question in the case is *res adjudicata*, under the decision on the former appeal, and it is an established rule in all courts that they will never reverse themselves in the same case except on reargument allowed on petition before the case is remanded to the lower court. On the

former appeal this court held "that, if the pole was likely to fall with the wires cut, then it might be negligence towards those passing in the street to cut them without warning. But that his [Shadwell's] negligence contributed to the injury does not absolve the defendant. Suppose the jury had found, as the evidence would have justified, that but for the cutting of the wires the pole would not have fallen, and that it would not have fallen, with the wires cut, but for the neglect of the defendant, after the license was revoked, to make the pole safe,—in other words, that it was the co-operation of defendant's negligence and Shadwell's act that produced the injury,—then it would be a case of concurring negligence, in which case each party guilty of negligence is liable for the result. The negligence of each is a proximate cause, when the injury would not have occurred but for that negligence." Personally, I am not prepared to commit myself to the correctness of this doctrine, as applied to the facts of this case. Undoubtedly, defendant was bound to foresee that Shadwell might remove these guys, but it could not anticipate that he would do it negligently, so as to allow the pole to fall in the street without warning to passers by. But negligence, not wanton, cannot ordinarily be said to be the proximate cause of an injury, when the negligence (which could not have been reasonably anticipated) of another independent human agency has intervened, and directly inflicted the injury. Hence I am not clear but that, on the state of facts supposed, the negligence of Shadwell would be the sole proximate cause of injury. But, however that may be, the question was settled on the former appeal, and on the second trial the court followed the exact lines laid down by this court. Order affirmed.

VANDERBUGH, J., absent, took no part.

STATE ex rel. REA v. KINMORE et al.

(Supreme Court of Minnesota. June 30, 1893.)

STATE PUBLIC SCHOOLS — ADMISSION — JURISDICTION OF PROBATE COURT — SUFFICIENCY OF PETITION — HABEAS CORPUS.

1. Where in a petition or application to the probate court, signed by two of the county commissioners, under the provisions of Gen. Laws 1889, c. 167, § 11, (the act relating to a state public school,) the only averment in relation to the situation or condition of the child mentioned is that he belongs "to one of the classes enumerated by the statutes of the state as admissible" to such school, the probate court does not acquire jurisdiction to proceed against the child or its natural or legal guardians.

2. Notwithstanding the terms of Gen. St. 1878, c. 80, § 22, the jurisdiction of the tribunal whose judgment is involved over the person detained and the subject-matter may be inquired into at all times on habeas corpus, but the writ cannot have the force or operation of a writ of error or certiorari on appeal, nor is it designed as a substitute for either.

(Syllabus by the Court.)

Appeal from district court, Lyon county; Webber, Judge.

Proceedings in habeas corpus in the name of the state at the relation of Clyde W. Rea against Sanford Kinmore and another for the possession of a child. Relator had judgment, and defendants appeal. Affirmed.

Wheelock & Sperry, for appellants. Chas. W. Main and Geo. W. Somerville, for respondent.

COLLINS, J. This is a habeas corpus proceeding, brought before us on appeal by respondent from a judgment entered in district court awarding the custody of the child in question to the relator, its father. From the return made to the writ of habeas corpus, and from the record of the proceedings had in the court below, it appears that in the year 1892 the child had been received into the state public school at Owatonna in accordance with the provisions of Gen. Laws 1885, c. 146, as amended by Gen. Laws 1889, c. 167, and had then been transferred to respondent's family, as authorized by section 13 of said chapter 146. It is disclosed that the steps which led to the placing of the child in the public school were initiated by the filing with the probate judge of Lyon county of an application or petition signed by two of the commissioners of said county, in which they stated that "Jessie Rea, a female child between two and fourteen years of age, a resident of said county, is, in their opinion, a child belonging to one of the classes enumerated by the statutes of the state of Minnesota as admissible to the state public school, and is sound in body and in mind, and is entitled to admission into said state public school; and we do request an examination of said child by said court as to such alleged condition, and, should said child be found by said court to belong to one of the classes enumerated by the statutes as admissible to said state public school, that an order be made declaring said child to be in said alleged condition, and that she be sent to and admitted into the state public school, according to law." Attached to this was the written consent of the mother of the child that the application or petition be granted. We have quoted this document in full, that it might be readily seen how defective it was in the essential things required to be stated under the provisions of section 17 of said chapter 167. Evidently the statute contemplates that the commissioners shall state that the child named by them is dependent upon the public for support, or that it is in a state of habitual vagrancy or mendicancy, or that it is ill treated, and in peril of life, health, or morality, by continued cruel personal injury, or by the habitual intemperance or grave misconduct of the parents or of the guardians. The application or petition in question is otherwise open to criticism, but we do not hesitate to say that when such a

document contains nothing more specific in reference to the situation or condition of the child named than did the one at bar it is inadequate, and insufficient upon which to act. The probate court cannot thus acquire jurisdiction to proceed against the child or its natural or legal guardians. The defect is not mere irregularity or informality, but is wholly jurisdictional.

It is argued that, as the child was received by the school officials, and detained by the respondent by virtue of the final judgment of a competent tribunal having jurisdiction of the subject-matter, the writ of habeas corpus is not available, because of the provisions of Gen. St. 1878, c. 80, § 22. Statutes similar to our own, relating to what may be inquired into under this writ, have often been construed by the courts. The broad current of numerous decisions will go to show that the jurisdiction of the tribunal whose judgment is involved over the person detained and the subject-matter may be inquired into at all times on habeas corpus, though mere informality, error, and irregularity cannot be. To bar the applicant from a discharge from arrest by virtue of a judgment or decree or execution thereon, the court in which the judgment or decree was given must have had jurisdiction to render such judgment. It matters not what the general powers and jurisdiction of a court may be. If it act without authority in the particular case, its judgments and orders are mere nullities; not voidable, but simply void, protecting no one acting under them, and constituting no hindrance to the prosecution of any right. *State v. West*, 42 Minn. 147, 43 N. W. Rep. 845; *Elliott v. Peirsol*, 1 Pet. 328; *People v. Liscomb*, 60 N. Y. 559. But the writ of habeas corpus cannot have the force and operation of a writ of error or certiorari on appeal, nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities which render a proceeding voidable only, but with those radical defects which render it absolutely void. A distinction between a proceeding or judgment which is void and one that is voidable only, for error, is recognized in the cases, and must be observed. See *State v. Sheriff*, 24 Minn. 87; *In re Williams*, 39 Minn. 172, 39 N. W. Rep. 65. Nothing more need be said in order to sustain the judgment appealed from, which is affirmed.

VANDERBURGH, J., took no part herein.

PAWLAK v. GRANOWSKI.

(Supreme Court of Minnesota. June 30, 1893.)

SPECIFIC PERFORMANCE—EVIDENCE—DEMAND—
STATUTE OF FRAUDS.

1. Findings of fact held justified by the evidence.

2. Where the consideration in a contract for the sale of land, which appeared to be a sale for cash, is paid at the time of the sale

the vendee is entitled to his deed presently upon demand.

3. No formal demand is necessary, where it is waived, or the contract is repudiated by the vendor.

4. To take the case of a parol contract for the sale of land out of the statute, on the ground of the possession of the vendee, such possession must be with the consent, express or implied, of the vendor, and in pursuance of the contract.

(Syllabus by the Court.)

Appeal from district court, McLeod county; Cadwell, Judge.

Action for specific performance of a land contract by Stephen Pawlak against Michael Granowski and another. Plaintiff had judgment, and defendant Granowski appeals. Affirmed.

McClelland & Tift, for appellant. F. R. Allen and Little & Nunn, for respondent.

VANDEBURGH, J. This action is brought for specific performance of an alleged contract for the sale and conveyance of two village lots in the town of Silver Lake, McLeod county. Judgment was ordered for the plaintiff for the conveyance of one lot, and compensation for the value of the other, which had been conveyed away to the defendant Danek before this action was brought. No objection is made to the form of the judgment, but defendant Granowski denies that plaintiff is shown to be entitled to any relief.

1. The first assignment of error involves the sufficiency of the complaint, which is denied on the special grounds that the terms of the contract, as alleged, are not sufficiently definite, and no demand for a conveyance was made before the commencement of this action. But the complaint shows that it was a cash transaction. The money was paid down, and the plaintiff was presumptively entitled to the deed presently; and it also appears that the defendant Granowski and his wife repeatedly promised to make the same, and, though frequently asked by plaintiff to execute the same, they have never done so. Besides, as respects the demand, they, by their answer, utterly deny and repudiate the contract, and therefore a formal demand would be useless.

2. As respects the allegations and proof of the payment of the taxes by the plaintiff after the purchase, the evidence was proper, and of some value, between the parties, as tending to prove the assertion of ownership in connection with plaintiff's alleged possession. It is not prejudicial error to refuse to strike out irrelevant or immaterial matter in a complaint at the trial, because the question can only become material when the evidence is offered; and as the question of plaintiff's right to recover back the taxes, with the purchase money, is not involved in this appeal, and the evidence was proper for the purposes we have indicated, it is evident that there was no error in the ruling complained of.

3. Objections were overruled by the court to several questions which were perhaps objectionable in form,—that is, leading,—but this was a question in the discretion of the trial court, and does not touch the merits of the appeal. There was no error in admitting the testimony of John Pawlak as to what the parties said about the sale in his presence, and the value of this testimony could easily be estimated by the jury, taken in connection with his subsequent statements.

4. There is sufficient evidence in the case to support the finding of fact by the trial court that the contract was made substantially as claimed by the plaintiff, and the purchase price paid as alleged. The evidence in plaintiff's behalf is clear and explicit, and shows, also, that both defendant and his wife admitted that they had sold the lots to plaintiff, and promised to sign a deed of the premises, and that subsequently defendant Michael admitted that he had signed it.

5. We may therefore assume, under the evidence and findings, that the contract was fully completed on plaintiff's part, and that nothing remained but the formal execution of the deed which was expected within a reasonable time, when it could be conveniently done. And it is sufficiently evident from the evidence in plaintiff's behalf that he made the improvements in question with the understanding that he was entitled to and did take possession as equitable owner, and that they were made with the implied consent, at least, of the defendant Granowski. We think the finding of the trial court that the improvements were made under and in pursuance of this contract, and in reliance thereon, is sustained by the evidence, and that the findings of fact warrant an order for judgment in plaintiff's favor. The plaintiff has not, therefore, failed to make a case, as respects these essential conditions, entitling him to relief. Order affirmed.

MOE v. CHESROWN.

(Supreme Court of Minnesota. June 30, 1893.)

TRESPASS ON LAND—PAROL EVIDENCE—DAMAGES.

1. Where, in an action of trespass, the title to real estate is directly in issue, it cannot be established by parol evidence.

2. Possession of the real estate in controversy here held sufficient to justify a recovery of nominal damages.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Pond, Judge.

Action by Arnt B. Moe against Frank S. Chesrown. Plaintiff had judgment, and defendant appeals. Affirmed.

O. E. Brame, for appellant. McHale & Abell, for respondent.

VANDEBURGH, J. This is an action of trespass for injuries to real property, of which plaintiff alleges he was the owner and in possession. Since the question of plain-

tiff's title was directly in issue, it could not be proved by parol; hence it was improper to allow the plaintiff to testify generally that he was owner. But he proved that he was in possession at the time of the injury, and he was entitled to nominal damages, at least, for an injury to the possession by reason of the trespass; and the plaintiff recovered only one dollar, which will be treated as nominal damages. No court would disturb the judgment for that amount as being in excess of nominal damages. The evidence of plaintiff's possession will therefore sustain the judgment, notwithstanding the error complained of. It is not necessary to consider the other points raised by the appellant. In so far as they are important or material they have been considered and decided in other cases at the present term. Judgment affirmed.

ABBOTT v. CHAFFEE.

(Supreme Court of Michigan. June 30, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — FAILURE OF ASSIGNEE TO GIVE BOND — RIGHT TO ATTACK FRAUDULENT CONVEYANCES.

In trover by the assignee of a mortgage on a stock of goods, it appeared that plaintiff's assignor bought the goods from an insolvent debtor, paying him cash, and giving him notes for the balance of the price, one of which was to be delivered at a stated time, if there had then been no litigation about the property. Thereupon the assignor resold the stock of goods to the debtor, being given the mortgage under which plaintiff claimed, and being allowed to retain certain articles of property. *Held*, that defendant, to whom the debtor subsequently made an assignment for the benefit of creditors, and who took no title because of his failure to give bond, could not insist that the transfer was in fraud of creditors, the latter not complaining.

Error to circuit court, Ingham county; Rollin H. Person, Judge.

Action by John Abbott against Frank Chaffee. There was a judgment for plaintiff, and defendant brings error. Affirmed.

This is an action of trover, brought by the plaintiff to recover from the defendant the value of goods which the plaintiff claims he was entitled to the possession of under a chattel mortgage which was given by one Elijah D. Kitchen to one Francis M. Dodge upon the 31st day of December, 1886, which was, on the 12th day of January, 1887, duly assigned to the plaintiff.

S. L. Kilbourne, for appellant. Frank L. Dodge and R. A. Montgomery, for appellee.

LONG, J. This case was in this court at the October term, 1890, and is reported in 83 Mich. 256, 47 N. W. Rep. 216. On a new trial in the circuit court, verdict was again directed in favor of the plaintiff, and judgment was thereupon entered for \$519. Defendant brings error.

It appears from the defendant's testimony that the mortgage given was without consid-

eration. The circumstances under which the defendant obtained the property for which the action of trover is brought are: That Mr. Elijah D. Kitchen was in the dry goods business at North Lansing. He became indebted for stock purchased for his store to various parties in the sum of about \$3,000. Finding it difficult to meet his obligations when due, he applied to Mr. Francis M. Dodge for a loan of about \$2,000. After some talk Dodge proposed, instead of loaning the money, to purchase the stock if he could get it cheap enough. Kitchen then told him of his indebtedness. After looking over the stock, Dodge proposed to give him \$2,000 for it. The arrangement was concluded, and a bill of sale given by Kitchen to Dodge of all the stock, store, fixtures, etc. Dodge paid \$100 down, gave a note for \$400 at three months, and a note of \$500 for six months. He delivered to Kitchen these two notes. He also made a note of \$1,000, due in nine months. This he did not deliver, but put it in the bank, to be delivered to Kitchen in nine months if no litigation about the stock was had. At that time Dodge gave as a reason why he would not loan the money that litigation might arise over the stock, and when he put the \$1,000 note in the bank it was not to be delivered if any litigation was had over it. He told Kitchen that he thought litigation would arise over the stock by the creditors. Dodge took possession of the store on the same day, and took about \$50 worth of the goods out of the stock. On the next day, or the day after, Mr. Kitchen wanted to undo what had been done, and take back the stock. It was finally agreed by Dodge that he might do this, and it was arranged that Dodge might keep the \$50 worth of goods, and have a horse, harness, and buggy which Kitchen owned, and take a chattel mortgage on the stock of goods for \$400; and for this consideration he would give up the bill of sale, and turn the goods back to Kitchen. Dodge claims he resold the stock to Kitchen for the above property. The arrangement was made by which Kitchen got the goods back. Kitchen thereupon made the assignment mentioned in the former opinion of this court, for the benefit of his creditors.

The question presented upon the record is whether, conceding all that defendant's testimony tends to show, he has any defense to the action. Is he in the position to set up the fraudulent character of the transaction between Kitchen and Dodge, if it was fraudulent as to creditors? The statutory assignment had failed, as held in the former opinion, by reason of not giving the bond required, and in consequence the legal title did not pass to the defendant under the assignment. It is contended by defendant that he holds the money arising from the sale of the goods for the creditors of Kitchen, and by reason of that he may set up the defense of fraud against the mortgage; that no

consideration passed for it. On the other hand, it is claimed by the plaintiff that the resale of the goods by Kitchen to Dodge was a sufficient consideration for the mortgage. We think the defendant is not in a position to set up the fraud, if one in fact was perpetrated upon Kitchen's creditors. No creditors are complaining, and the transfer from Kitchen to Dodge was valid between the parties. This being so, there was no sufficient consideration for the mortgage. The defendant does not occupy a position to the property or to the creditors of Kitchen such as entitles him in a court of law to contest the validity of the mortgage. Judgment affirmed. The other judges concurred.

PEOPLE v. FLYNN.

(Supreme Court of Michigan. June 30, 1893.)

RAPE — EVIDENCE — INSTRUCTIONS — VOLUNTARY CONFESSION — WHAT CONSTITUTES — QUESTION FOR JURY.

1. The theory of the prosecution, on a trial for rape, was that the prosecuting witness and E., another girl, attended a dance together, where they met defendant and one A.; that the girls permitted them to take them home in a buggy, but instead of going home they started in another direction; that E. jumped from the buggy and escaped, but the prosecuting witness was forcibly taken to a secluded spot, and subjected to sexual intercourse by both young men, under threats of personal violence. The defense was that the intercourse was voluntary. *Held*, that evidence of E. that the last she knew of the prosecuting witness after jumping from the buggy she was "hollering" for help was admissible as part of the *res gestae*.

2. And for the same reason, her testimony as to which way the buggy went after she got out was admissible.

3. There was no error in allowing E. to testify that after jumping from the buggy she was at police headquarters a while, where nothing was said as to what happened there.

4. Defendant, while in jail, and in the presence of the girls, told the sheriff that he had intercourse with the prosecuting witness. The sheriff swore that the statement was voluntary. Defendant did not testify as to the interview. *Held*, that it was for the jury to say whether the statement was voluntary.

5. The statements of the prosecuting witness as to her consent to the intercourse, and as to the force used, made at the jail, in the presence of defendant, were admissible.

6. It was proper to ask the prosecuting witness whether she believed they intended to kill her.

7. It was also proper to ask her whether the intercourse caused her pain.

8. The question whether she had experienced her monthly period was proper in connection with her statement that she found blood on her drawers after the intercourse.

9. It was also proper to ask her why she did not struggle against defendant.

10. An instruction that if defendant aided and assisted A. to commit rape upon the prosecuting witness he was guilty of the offense was proper.

Error to circuit court, Kalamazoo county; George M. Buck, Judge.

Wilbur Flynn, impleaded with Lemuel Allen, was convicted of rape, and brings error. Affirmed.

Volney H. Lockwood, for appellant. A. A. Ellis, Atty. Gen., and George P. Hopkins, Asst. Pros. Atty., for the People.

HOOKER, C. J. The defendant was convicted of the crime of rape. The alleged victim, Lizzie Schroeder, together with one Minnie Ebans, attended a dance together, where they met the defendant and one Lemuel Allen, who is impleaded with him. The theory of the prosecution is that the young men induced these girls to permit them to take them to the girls' homes in a buggy, but that instead of doing so they went in another direction. The Ebans girl jumped out of the buggy, and escaped, but the Schroeder girl was forcibly taken to a secluded place, and subjected to sexual intercourse by both of the young men, under threats of personal violence. The defense assert that the intercourse was voluntary.

Upon the trial, Minnie Ebans was sworn as a witness for the people. She testified that she got out of the buggy, and went to a house, and that the last she knew of Lizzie she was "hollering" for help when she (Minnie) was getting out of the buggy. "Question by Prosecuting Attorney: That was after you got out of the buggy? Answer: Yes, sir. (Objected to by Mr. Lockwood as irrelevant and immaterial.)" The court committed no error in overruling this objection. The fact was a part of the *res gestae*. The same may be said of the testimony in answer to the question, "Which way did the buggy go after you left?" This witness testified that she saw no more of the boys or buggy that evening, but that when she reached home Lizzie was at the witness' house. She was asked where she went before going home, and she stated that she was at police headquarters for about half an hour. She was asked nothing about what she did there, nor did she attempt to state. We see no error in permitting this testimony. The conduct of both girls immediately after the transaction might reasonably be the subject of scrutiny.

The defendant was subsequently confined in the jail, where the girls were taken by the sheriff, to whom Lizzie had stated that Flynn did not have intercourse with her. A conversation occurred there between the sheriff and the girls in the presence of Flynn. At this time Flynn stated to the sheriff that he had intercourse with the Schroeder girl. The sheriff, who had been told by her that Flynn had not had intercourse with her, turned to her, and asked her if it were true, and she said it was. The sheriff then said, "Why didn't you tell me this yesterday?" to which she responded that "she was ashamed to confess it to him." The sheriff then asked her if she consented, and she said she did, whereupon he replied, "Well, then you were perfectly willing that Mr. Flynn should have intercourse with you?" She said, "No, I wasn't." The Eb-

ans girl then said, "Lizzie don't understand what you mean by consent." This last remark was objected to and stricken out. The sheriff then explained to her that if she consented she would be as guilty as Mr. Flynn, so far as the act was concerned, and then she said she did not consent; that she was not willing; it was against her will that they had intercourse with her. "Question. Did she say anything on that occasion, Mr. Dix, about the reason she permitted it?" Under objection the witness stated: "Answer. She then showed me the marks on her neck, where Mr. Allen had choked her, and thrown her down. She said she was afraid to refuse Mr. Flynn, for fear she would receive the same treatment, as he had threatened her previous to this. Flynn made no further remarks on it." Similar testimony was given by the Ebans girl. This testimony was objected to, for the reason that it was hearsay, and immaterial, and that the admission of Flynn that he had intercourse with the Schroeder girl was not voluntary. The sheriff stated that the statement was voluntary, and there is nothing to show that it was not. Flynn did not testify about the interview. It was therefore for the jury whether his statements were voluntary. It had no special significance, for Flynn admitted the intercourse upon the stand. The statements of Lizzie in the presence of Flynn were admissible, in connection with Flynn's failure to deny them. She stated the fact of the intercourse which he had already admitted. She gave as a reason that she feared him because of his threats, which he did not deny. This failure to deny the charge of threats was a matter for the jury. The court committed no error in permitting the witnesses to testify against the objection that she had disobeyed the order of the court. The record shows that she did not disobey the order. The remarks of the prosecutor to the court in opposition to the objection did not prejudice the defendant, for there is nothing upon which to base the presumption that the witnesses had been doing anything improper while in company with the other witnesses. The witness Lizzie Schroeder was asked, "Whether you believed that they intended to kill you." And again, "Will you state whether it [the intercourse] caused you pain?" And again, "I will ask you whether or not you had experienced what is known as your 'monthly period.'" And again, "State why you did not struggle against Mr. Flynn." It is plain that all of these questions were admissible. The one in relation to menstruation was in connection with her statement that she found blood upon her garments after the act. This covers the objections to the rulings of the court upon the introduction of evidence.

Some questions are raised upon the charge. The court instructed the jury, in substance,

that if Flynn aided and assisted Allen to commit rape upon this girl, he was guilty of the offense. That is undoubtedly the law. The court gave the eighth request to charge offered by the prosecution, as follows: "I further instruct you, gentlemen, as requested in the people's eighth request as modified: The jury are instructed that it was not necessary for the complaining witness to tell her mother at once of the alleged rape upon her; and if the jury believe from the evidence that the defendant is guilty of the crime charged in the information, and that she by reason of the threats made to her by her ravishers and the treatment that she had received was induced thereby to refrain from informing her mother what had taken place, then the complaining witness would be excused from not communicating the knowledge of the injury to others. That is true, gentlemen. At the same time it is true that you may take into account, in determining the truth of Lizzie Schroeder's story, the circumstances whether she did or did not make complaint of it afterwards, and how recently. You may take that into account in connection with all of the facts and circumstances of the case. If you find that she did not complain of it because nothing of the kind happened, why, then, of course you would so consider it. If you find that she made no complaint because of the feelings of terror and mortification induced by what had happened to her, then, of course, she would be excused for not making the complaint." Also the tenth, as follows: "I also instruct you as requested by the people in their tenth request. If the jury find from all the evidence in the case that the respondent, Flynn, was acting in concert with his codefendant, Allen, and that while they were so acting in concert and together either or both of them, by the use of threats or other conduct calculated to intimidate the complaining witness, and that such threats and other conduct resulted in placing complaining witness in fear of great bodily harm, and that by reason thereof the respondent had sexual intercourse with said complaining witness, the jury find that she did not resist by reason of the threats and other conduct referred to, and the fears engendered thereby, but that said intercourse was against her will,—against the will of the said complaining witness,—then you should convict the respondent. Before proceeding to instruct you further, gentlemen, on my own motion I will give you certain instructions, which have been verbally requested by counsel for the respondent to give you." The jury was also instructed as follows, viz.: "I am also requested by counsel to instruct you that to constitute the crime of rape force must be used to overcome resistance of the woman to the sexual act; and that where no force is used the crime is not rape, even though the intercourse is against the will of the woman with whom the intercourse is had. I instruct you in con-

nection with what has already been said to you upon that subject." "To authorize a conviction for rape the jury must believe that the offense was accomplished by force, and against the will of the woman; and that there was the utmost reluctance and resistance on her part, or that her will was so overcome by fear that she did not dare to resist. And in this case, if the jury find that sexual connection was had with the witness, Lizzie Schroeder, and that Lizzie Schroeder was unwilling to submit to such intercourse, but finally consented or yielded through mere weakness of will, without any threats being made, or without fear of consequences if she resisted, then the offense would not be rape." "But if the jury find that sexual intercourse was had with said Lizzie Schroeder, and that she did not willingly submit to such intercourse, but submitted because of threats made against her if she did not yield to such intercourse, and through fear and apprehension of dangerous consequences or great bodily harm, and that her mind was so overpowered by fear that she did not dare to resist, then the offense would be rape, although she may have made little or no physical resistance to such connection." "I am also requested by counsel for respondent to instruct you that if you find that the act of intercourse by consent could have produced the injury, then it does not follow that the act of intercourse was by force, because of the injury. That would be true, gentlemen,—that, if the injury would have resulted from consent, then it would not follow that force was used because of the injury. You may, however, take in consideration the injury as one fact or circumstance tending to aid you in determining whether the intercourse was forcible or by consent." "But if you do not find that the respondent's statement with reference to the intercourse be true, you should then examine, consider, and determine whether such intercourse was by Lizzie Schroeder's consent, or whether it was accomplished by so working upon her fears that she did not dare to resist; and, if the latter, what part or share the respondent had or took in the transaction. If, as you have already been told, she did not resist because she did not want to resist, and was not then under the influence of any fear of the consequences if she did resist, then the offense charged was not committed, and you should acquit the respondent. But if, on the contrary, you find that Allen and respondent, acting in concert, took the girl, Lizzie Schroeder, by force to the place where the intercourse took place, and there, by means of threats of great bodily harm, so overcame her will that she did not dare to resist for fear of the consequences if she resisted, and then and there had carnal intercourse with her, while she was under the influence of such fear, and that the respondent as well as Allen took

part in every step and stage of the transaction, then the respondent should be convicted." "It is claimed by the people, and admitted by the respondent, that both Flynn and Allen had intercourse with Lizzie Schroeder on the occasion referred to in the information and in the testimony in the case. As you have already been instructed, if a rape was committed by Allen, as charged in the information, and that the respondent knowingly and purposely assisted Allen in the commission of such rape, then the respondent as well as Allen would be guilty of the offense, without regard to the fact of the defendant Allen having intercourse with her. If, however, you should find that Allen did not commit a rape on the witness Lizzie Schroeder, then defendant should not be convicted. Or, if you find that Allen did commit a rape on the witness Lizzie Schroeder, but that respondent took no part in such offense in any way, either by making threats or assisting Allen in forcibly taking the girl to the place where the rape was committed, with the intent that she should be forcibly ravished, or in any other of the ways mentioned in these instructions, then the respondent should be acquitted. But if you find that the respondent as well as Allen made threats against the girl, Lizzie Schroeder, and that on such threats she was so put in fear of great bodily harm that she did not dare to make resistance to either Allen or the respondent for fear of the consequences if she resisted, and that while she was under the influence of such fear of great bodily harm the respondent had intercourse with her, then the respondent should be convicted. In determining what was the character of the intercourse which is alleged to have taken place between Allen and Lizzie Schroeder and between respondent and Lizzie Schroeder, and whether such intercourse amounted to rape or not, and in deciding what share respondent took in the affair, you should, of course, take into account all of the evidence in the case, and consider the testimony of each witness as to any fact in the light of all the surrounding circumstances, and in the light of all the other evidence in the case, giving to each piece of testimony just such weight as you think it is entitled to, and then respond to the convictions which the evidence in the case taken as a whole makes on your minds." Several exceptions were taken to the foregoing quotations from the charge, but, taken together, these instructions state the law applicable to the case correctly.

Exception was also taken to the explanation of "a reasonable doubt." The language used was substantially the same as that approved in the case of *People v. Finley*, 38 Mich. 482. We find no error in the record, and the judgment must therefore be affirmed. The other justices concurred.

JUDSON et al. v. DUFFY.

(Supreme Court of Michigan. June 30, 1893.)
**ADVERSE POSSESSION—WHEN QUESTION FOR JURY
 —SUFFICIENCY OF EVIDENCE.**

In ejectment, where defendant claimed under a deed from B., and relied on the adverse possession of himself and grantor, there was evidence that in 1861 B. employed a farmer to look after the land; that the farmer did substantially nothing more than drive his cattle there at times to pasture, and authorized two men to cut the grass; that the land was used by the neighborhood as a pasture, and that any one who chose cut the grass; that the supervision of the farmer ended in 1876 or 1878; and that the land remained unoccupied until 1882. *Held*, that the evidence of adverse possession was not sufficiently "clear and cogent" to allow the question to go to the jury.

Error to circuit court, Ingham county; Rollin H. Person, Judge.

Ejectment by James B. Judson and Washington G. Wiley against John Duffy. Judgment for defendant, and plaintiffs bring error. Reversed.

Cahill & Ostrander, for appellants. Thomas E. Barkworth, for appellee.

HOOVER, C. J. Plaintiffs, being owners of the government title to the premises in controversy, bring ejectment against defendant, who entered into possession in November, 1882, under a deed from one Baldwin, who was a grantee under void tax titles. The only defense made is that of adverse possession. The case was tried by jury, and a verdict for defendant was rendered, upon which judgment was duly entered, and plaintiffs appeal.

Where title to land is sought to be divested upon no better claim than occupancy it can be justified only by clear and cogent proof upon each of the essential elements of adverse possession. *Yelverton v. Steele*, 36 Mich. 62; *Pendill v. Society*, (Mich.) 55 N. W. Rep. 384. And until each of these is supported by something more than an inference the question should not be submitted to the jury. When there is evidence upon each of them which, if believed, can be said to establish adverse possession, the case should go to the jury. The evidence shows that in 1861 Baldwin employed one Poxson, a neighboring farmer, to look after the land,—to protect his timber; giving him five dollars, and telling him that he could have the marsh grass. Beyond paying the taxes, this was all that Baldwin did. Under this arrangement, Poxson did, substantially, nothing more than to drive his cattle there sometimes to pasture, and to authorize two men to cut grass. The significance of these acts is materially lessened by the facts that the land was a wild swamp lot, unfenced, used by the cattle of the neighborhood as a common, and that grass was cut by any one who chose, without molestation by Poxson. Poxson testifies that: "I went around the land with Baldwin, and showed him the line,"—and continues: "I didn't do much of anything about it. No one

stole off the timber then, but I looked after it for Mr. Baldwin." His looking after it was not sufficient to prevent wood roads being cut by persons taking hay. This supervision by Poxson, such as it was, came to an end in 1876 or 1878, after which he paid no attention to the land, and there is no evidence that any one did. There is evidence that one or both of the men whom Poxson authorized to cut grass continued to do so, and that Baldwin's son paid taxes. But it is equally clear that the land remained unoccupied for several years, until in 1882 the defendant entered upon it. This testimony was all admissible, but falls short of that "clear and cogent proof" which permits the divestiture of title to land. Some of the cases seem to have given rise to the assumption that adverse possession becomes a question for the jury when there is any admissible evidence tending to establish it, but we understand the rule to be that until the evidence reaches the required degree of clearness and cogency (which is manifestly a question for the court) there is nothing to go to the jury; and it is a clear duty of courts to protect the rights of landholders from the danger of capricious verdicts by refusing to allow consideration of the question of adverse possession by a jury until evidence sufficient to make a prima facie case, under the rule laid down in the case of *Yelverton v. Steele*, has been introduced. The jury should have been directed to render a verdict for the plaintiffs. Judgment reversed.

LONG and GRANT, JJ., concurred with **HOOVER, C. J.** **MCGRATH** and **MONTGOMERY, JJ.**, concurred on the ground that the possession was interrupted for several years.

TILLOTSON v. WEBBER.

(Supreme Court of Michigan. June 16, 1893.)
PUBLIC LANDS—GRANT TO RAILROAD—SELECTION BY STATE AGENT—LAND-OFFICE RECORDS—EXEMPLIFICATION—TOWNSHIP TAXES—VALIDITY.

1. Act Cong. June 3, 1856, granted certain lands to the state of Michigan to aid in constructing the Amboy, Lansing & Traverse Bay Railroad; and the state, by Sess. Laws 1857, No. 126, accepted the grant. Both acts provided for the selection of the land by an agent to be appointed by the governor, the state act providing for his nomination by the railroad company, but neither act required the selection or report of the agent to be preserved or filed. *Held*, that the list of lands filed with the land commissioner by the company, and approved by the secretary of the interior, would be presumed to have been properly selected, after it had been certified as true and correct by the land commissioner, and the secretary of the interior had approved it as such.

2. An exemplification from the records of the land office of a list of lands selected by the agent of the state under a railroad grant is not insufficient because it includes only the lands in such list which are involved in the case at issue, it appearing that such a certification complies with the practice of the land office.

3. In ejectment, where plaintiff asserts

title under a railroad land grant, defendant, claiming under a tax deed, cannot attack the regularity of the proceedings under the grant by which the government's title was divested, since the validity of the tax deed is dependent on the government having parted with the title, and it will be assumed that the taxes for which the land was sold were assessed to plaintiff or his grantors.

4. Where land is conveyed to "Ashbel Green, of New York" and is subsequently conveyed by "Ashbel Green, of the township of Fallsades, in the county of Bergen, and state of New Jersey," such grantee and grantor will be presumed to be the same person.

5. Plaintiff may maintain ejectment for wild and unoccupied land against one claiming under a tax deed paid for, procured, and recorded by the latter.

6. On an appeal from a judgment asserting the invalidity of a tax title the appellate court will not be confined to a consideration of the grounds for the decision pointed out by the lower court.

7. A tax sale is void if any portion of the tax for which it was made was illegal.

8. A tax for the contingent and poor funds of a township is void if voted by the township board without first having been submitted to the voters.

9. Under Comp. Laws 1871, § 1002, providing for the delivery to the township treasurer of a copy of the tax roll, with the school and library taxes in one column, "the highway taxes in another," and "the township taxes in another," taxes raised for roads or bridges under the authority of section 477, subd. 15, or section 1219, cannot be blended in the same column with the township taxes.

Error to circuit court, Saginaw county; John A. Edget, Judge.

Ejectment by Levi Tillotson against William L. Webber. Judgment for plaintiff, and defendant brings error. Affirmed.

The following is a copy of the contract referred to in the opinion: "This agreement, made this twenty-ninth day of April, A. D. eighteen hundred and eighty-four, between Levi Tillotson, Jerome K. Stevens, and Julius K. Rose, all of the city and county of Saginaw, state of Michigan, witnesseth as follows: Whereas, the said Tillotson has this day purchased from Ashbel Green, of New York city, state of New York, for the joint benefit of said Tillotson, Stevens, and Rose, the following lands, viz., [here follow descriptions of various parcels in different counties,] for the sum of four thousand dollars, (\$4,000,) said money having been paid by said Tillotson, it is agreed between the parties hereto that all money advanced by each of them shall bear interest at the rate of seven (7) per cent. per annum, and also that each and every one of them shall be entitled to and receive pay for all services and expenses in the matter of purchase and sale of said lands. Said Tillotson agrees that he will advance all moneys which may be needed to clear up and pay all taxes and assessments now or hereafter on said lands. Whenever enough of said land has been sold, and money enough received on the same, to repay the several parties hereto the amounts advanced by them, in money or otherwise, together with the interest on the same, then and at such time all the

lands remaining unsold shall be divided equally between the parties hereto, share and share alike. This agreement is binding on the heirs of the parties hereto. All losses, if any, on said investment, are to be borne equally by the parties thereto. Signed and delivered this twenty-ninth day of April, eighteen hundred and eighty-four. In presence of Jerome K. Stevens, Julius K. Rose, Levi Tillotson."

L. T. Durand, for appellant. G. W. Davis, for appellee.

HOOKER, C. J. The plaintiff brought an action of ejectment to try his title to certain wild and unoccupied lands. He bases his claim to them upon a conveyance from the Amboy, Lansing & Traverse Bay Railroad Company to one Henry Day, while defendant claims title under an auditor general's deed for delinquent taxes for the years 1874 to 1880, inclusive, excepting those for the year of 1875. A large number of assignments of error appear in the record, which can be conveniently considered upon the following questions: (1) Does plaintiff's record evidence show a valid conveyance from the federal government to Ashbel Green? (2) Is the identity of Ashbel Green aforesaid, as the grantor plaintiff, established by competent evidence? (3) Had Rose and Stevens an interest which affected plaintiff's right of recovery? (4) Was defendant's connection with the land such as to subject him to an action of ejectment? (5) Questions involving the validity of defendant's tax deed.

Plaintiff's title: By act of June 8, 1856, (11 U. S. Stat. 21,) congress granted certain lands to the state of Michigan, to aid in the construction of the Amboy, Lansing & Traverse Bay Railroad. The state accepted this grant, and in turn granted the lands to the railroad company, by Act 126, *Sess. Laws* 1857. The effect of this legislation has been settled by this court, so far, at least, as to determine that the title of the United States was divested, and that, when earned, the railroad company might select any land within the prescribed limit of 6 miles, if not 15 miles. *Johnson v. Ballou*, 23 Mich. 388. The documentary proof in this case shows (1) the acceptance required by section 5 of the act of 1857; (2) the filing of the maps required by section 6 of said act; (3) the certificate of the governor that two sections, of 20 consecutive miles, of the road, were completed, whereby the company became entitled to select and sell 240 sections of land; (4) the appointment by the governor of Amos Gould as agent to select lands for the company; (5) the selection of the lands in question by the company, on file in the land commissioner's office, at Lansing, over the signature of its president, with the confirmation of the board of control; (6) the filing of a list containing the lands in

question, as selected, in the office of the secretary of the interior, with the approval of said secretary; (7) the conveyance by the railroad company of the lands in question to Henry Day. It would seem that the appointment of the agent, and the certificates of the completion of the road, made by the governor; the selection of the lands, and filing of the list, by the company, with the commissioner of the state land office; the certification of the same by the state land commissioner to the secretary of the interior, and his approval,—ought to be sufficient proof that the railroad company had complied with the requirement of the law to the satisfaction of the state and federal governments, if, indeed, it did not preclude their questioning the same. It is true that objection was made to the introduction of the several documents by which plaintiff sought to prove these things, but we think them all admissible.

Objection is made that the selection of the land is not shown to have been made by the agent appointed by the governor, as required by both the federal and state acts. The latter provided for the nomination of the agent by the railroad company. No express provision required the preservation or filing with the state or federal departments of any selection or report of the agent, and the list filed with the land commissioner by the company, and approved by the secretary of the interior, may be assumed to have been properly selected, especially as it appears to have been acted upon; the land commissioner having certified to the list as a true and correct list of the lands selected by the agent of the state of Michigan, and the secretary of the interior having approved it as such.

Perhaps the most serious point raised related to the authentication of the certified copy of the lists of lands selected by the agent, and filed in the office of the secretary of the interior. The point to the objection seems to be that the certificate warrants the inference that the list of lands is not complete. It seems to be the practice of such department to certify a document, so far as it applies to the particular property involved, and in this case the list included only the land in question here. To have certified the whole list would have made unnecessary expense, and incumbered the record with voluminous papers of no value. The same practice prevails in certifying field notes of surveys. See *Gilman v. Riopelle*, 18 Mich. 158; *Lacey v. Davis*, 4 Mich. 150,—where it is held that authentication according to the practice of the department makes papers admissible, though not certified in accordance with our statutes. Without deciding that these proceedings are necessarily conclusive against the federal or state governments upon the question of the title of the railroad, it is not too much to say that, in the absence of any proof to the contrary, they are *prima facie* evidence; and whether this title could

be controverted by any one may be doubted, (see *Railroad Co. v. Davison*, 65 Mich. 438, 37 N. W. Rep. 537.)—especially by persons not claiming title under some other grant from the government. Furthermore, when the defendant asserts title in himself, under his tax deed, he asserts that the government has parted with the land; otherwise, it would not have been subject to taxation, and his tax deed would fail. If we accord to the tax deed all the weight as evidence that can be claimed for it, viz. that it is *prima facie* evidence that the lands were taxable, and, therefore, that the government had parted with its ownership, it does not militate against plaintiff's claim, while, if the proceedings showed that the lands were assessed in the name of the plaintiff, the plaintiff and defendant would be in the attitude of parties claiming under a common grantor, and under the well-established rule it would be unnecessary to go behind plaintiff's title. *Eames v. McGregor*, 43 Mich. 313, 5 N. W. Rep. 408. And in the absence of such evidence of assessment to the plaintiff or his grantors we are not called upon to assume that the taxes upon which defendant bases his claim arose upon an imaginary title emanating from the government, when a *prima facie* one is shown, which is consistent with defendant's alleged title. *Eaton v. North*, 20 Wis. 449. This view disposes of the many assignments of error which pertain to this branch of the case, for while there were other documents than those mentioned, offered to prove this title, and admitted against objection, they were unnecessary, and may be disregarded, inasmuch as the court might properly have said to the jury that Ashbel Green had title to the property.

The identity of Ashbel Green: In October, 1861, Henry Day conveyed the premises to "Ashbel Green, of New York." In 1884, "Ashbel Green, of the township of Palisades, in the county of Bergen, and state of New Jersey," conveyed the premises to the plaintiff. Plaintiff showed by one Rose that he knew Ashbel Green, who made this deed, and that at one time he told him he lived in New Jersey. This evidence was clearly hearsay, and not admissible. But in the absence of any testimony to the contrary there was ample evidence to warrant the conclusion of the identity of the Ashbel Green who was the grantee of Day, and him who was the grantor of the plaintiff. The proximity of the township of Palisades to the city of New York, and the well-known custom of residents of neighboring hamlets to do business in said city, together with the testimony upon the subject, were quite sufficient. See *Goodell v. Hibbard*, 32 Mich. 47; *Eames v. McGregor*, 43 Mich. 313, 5 N. W. Rep. 408, cited by counsel for plaintiff. The defendant was not injured by the testimony. This appears to have been the view entertained by the circuit judge.

What was the interest of Rose and Ste-

vens? Defendant sought, on cross-examination, to draw out some evidence tending to show that two men, named, respectively, Rose and Stevens, had an interest in the land, upon the claim that this would affect plaintiff's right to recover. This appears to have been upon the theory that they should have been made parties plaintiff, or that it would limit plaintiff's recovery to an undivided interest, or possibly defeat it altogether, if Rose and Stevens were entitled to exclusive possession. He claimed to expect to show that one of them had charge of the land, or paid some taxes, under a contract which was produced, a copy of which is appended. We think that this contract did no more than to create an equitable interest in Rose and Stevens, and there was no offer to show any other right to possession, while it seemed to be conceded that the lands were wild and unoccupied. Under these circumstances the exclusion of the contract and testimony was proper.

Was defendant's claim such as to properly subject him to an action? In view of the zeal of defendant in defending his tax title, we think little hesitation should be shown in holding that it was. Repeated decisions have, however, set the question at rest. He admitted that he paid for, procured, and caused to be recorded, the tax deed under which he is here claiming title. *Anderson v. Courtright*, 47 Mich. 161, 10 N. W. Rep. 183; *Hoyt v. Southard*, 58 Mich. 432, 25 N. W. Rep. 385; *Heinmiller v. Hatheway*, 60 Mich. 391, 27 N. W. Rep. 558; *Murray v. Hudson*, 65 Mich. 676, 32 N. W. Rep. 889.

This, in our opinion, disposes of all the questions involved, except those arising upon the tax deed.

The plaintiff claims that if the record shows facts sufficient to invalidate the tax proceedings for each and every of these years the deed must be held void, while the defendant contends that this court will only so hold upon grounds pointed out by the circuit judge. He asserts that no defect in the tax of 1876 was pointed out by the judge. It is a convenience to this court to have the question of law upon which it must pass specifically pointed out by the trial court, as has been said in *Demill v. Moffat*, 45 Mich. 410, 8 N. W. Rep. 79, and other cases. But we understand that these cases go no further than to hold that the trial judge should clearly show the question of law that takes the case from the jury. This must be understood to be restricted to reasonable limits. In *Demill v. Moffat*, Mr. Justice Cooley said: "Was he [the trial judge] of opinion that the plaintiffs had given no evidence tending to prove their heirship?"

* * * Did he think adverse possession was satisfactorily made out? * * * Did he think the defendants had proved title out of Thorn through the alleged deed to Hamilton? * * * But we need not proceed from point to point in the case, and endeavor to

surmise on what ground the plaintiffs were turned out of court. * * * In other words, we are invited to review the case upon all the facts." In this case the court held that the tax proceedings for each year were void, and the judge was particular to give his reasons for so holding in regard to the tax for each year except 1876. This raises the legal question whether the facts in the record show the tax proceedings for the several years void, and it has frequently been held that the result of the case here cannot depend upon right reasons for his ruling having been given by the trial judge. It is settled law that if any portion of the tax is void the sale based thereon is void. *Rogers v. White*, 68 Mich. 10, 35 N. W. Rep. 799; *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. Rep. 672. *Hall v. Kellogg*, 16 Mich. 135. Tax titles for the years 1874, 1876, 1877, 1878, 1879, and 1880 are involved. Included in the township tax for the year 1874 were the sums of \$300 for contingent fund, and \$200 for poor fund. The record shows that the voters voted a number of items at the annual township meeting, but these items do not appear to have been submitted to them, or in any way mentioned. Subsequently the township board voted them. This was unauthorized. The power of the board to raise money for these purposes depended upon the neglect or refusal of the voters to do so, and unless the proposition was submitted to them they cannot be said to have done either. *Harding v. Bader*, (Mich.) 42 N. W. Rep. 942; *Manufacturing Co. v. Echtnaw*, 81 Mich. 416, 45 N. W. Rep. 1010. The roll for the year 1876 shows excessive taxes to have been levied against one parcel of the land, amounting to nearly seven cents, and against the other amounting to nearly eight cents. Under repeated adjudications this is sufficient to render the deed invalid, so far as it is based upon the tax for that year. The rolls for several years show large amounts charged against the land in the column headed "Township Tax." It can be accounted for only by assuming that the general highway tax is included. The law in force at that time provided that the annual township meeting might, upon the estimate of the highway commissioner, vote to raise a sum not exceeding one-half of 1 per cent. upon the aggregate valuation of the township, according to the assessment roll of the preceding year, for roads and bridges, the same to be levied and collected in the same manner as other township expenses. *Comp. Laws 1871*, § 1269. Again, section 477, subd. 15, provides that the board of supervisors may authorize a township to raise by tax a sum not exceeding \$1,000 in any one year, to build or repair any roads or bridges in the township, or in the use of which the township may be interested, to be assessed and collected in the same manner as other township taxes are now assessed and collected by law. *Comp. Laws 1871*, § 1269.

Section 1002 provides for the delivery of the copy of the roll, with taxes carried out, with the school, library, two-mill, and schoolhouse taxes, in one column, the highway taxes in another, the township taxes in another, etc., "and if other taxes are at any time required by law they shall be placed in another column." This section applies to all taxes raised, and is sufficiently broad to cover all that may be raised. Its requirements are intended to afford taxpayers the means of ascertaining the purposes to which the taxes paid are to be applied, and such statutes are mandatory. *Case v. Dean*, 16 Mich. 12. This statute distinguishes highway taxes from township taxes. Money raised under the first of these provisions has been held to be rightly included in the highway column, (*Silsbee v. Stockle*, 44 Mich. 561, 7 N. W. Rep. 100, 367,) and that raised under the second would seem to be on the same footing. The blending of the township and highway taxes, even were it proved beyond the realm of conjecture, would be a violation of the law. To hold otherwise would, in view of the case of *Silsbee v. Stockle*, leave it optional with the supervisor to put these taxes in the highway or township column. This disposes of the tax titles for the years 1877, 1878, 1879, and 1880, and the deed must therefore be held to have conveyed no title to the defendant. It follows that the trial judge committed no error in directing a verdict for the plaintiff. Judgment affirmed. The other justices concurred.

HITCHCOCK v. HOSMER, Judge.

(Supreme Court of Michigan. June 30, 1893.)

JUDGMENT RECOVERED BEFORE JUSTICE — FILING TRANSCRIPT IN CIRCUIT COURT — SUBSEQUENT STAY BEFORE JUSTICE.

How. St. § 6949, provides that, when a transcript of a judgment recovered before a justice of the peace is filed in the circuit or district court, it shall have the same effect as a judgment rendered therein, and may in the same manner be enforced, discharged, and canceled, and that execution may be issued thereon in the same manner as if execution were to be issued by the justice; and section 6993 provides that, after filing and docketing such transcript, all executions shall be issued out of the circuit or district court, and the power of the justice in respect to such judgment shall cease. *Held*, that the filing of such transcript divests the justice of jurisdiction, and prevents the party against whom the judgment was entered from thereafter entering a stay with the justice. McGrath and Long, JJ., dissenting.

Application by Allison L. Hitchcock for a writ of mandamus to compel George S. Hosmer, circuit judge, to vacate an order granting a motion to set aside a judgment docketed in his court, the same having been recovered before a justice of the peace. Writ granted.

Bowen, Douglas & Whiting, for relator.
W. B. Jackson, for respondent.

MONTGOMERY, J. The sole question presented in this case is whether the filing of the affidavit for transcript with the justice of the peace, and the filing of such transcript in the circuit court after the expiration of five days from the rendition of the judgment, and before a stay of execution had ever been entered with the justice, operates to divest the justice of jurisdiction of the cause, and to prevent the party against whom the judgment was entered from thereafter entering a stay with the justice. We think this question should be answered in the affirmative. Section 6947, How. St., (Act No. 173, p. 239, Laws 1885,) provides that whenever an execution may, by law, be issued upon any judgment rendered by a justice of the peace for \$20 or over, exclusive of costs, the party in whose favor such judgment shall have been rendered may proceed to take steps to file a transcript in the circuit court. Section 6948 provides for the filing of such transcript with the clerk of the circuit court, and section 6949 is as follows: "Such judgment shall have the same effect as a judgment rendered in the circuit or district court, and may in the same manner be enforced, discharged, and canceled; and execution may be issued thereon against both the surety and the person against whom the judgment was rendered, or either of them, in the same manner as if execution were to be issued by the justice." Section 6993 provides: "Whenever a transcript of a judgment rendered by a justice of the peace shall have been filed and docketed by the clerk of the circuit or district court for the county, all executions thereon shall be issued out of and under the seal of such circuit or district court, and the power and authority of the justice in respect to such judgment shall cease." We do not see any ambiguity or uncertainty in the language employed in these sections. At the expiration of five days from the rendition of the judgment execution "may by law be issued." The transcript may therefore be taken out and entered. This is done, and the case docketed in the circuit, and the "power and authority of the justice in respect to such judgment shall cease." The learned circuit judge took a different view, and set aside the judgment docketed in the circuit. In this, we think, he was in error, and the writ requiring the correction of this error should issue.

HOOKE, C. J., and GRANT, J., concurred.

McGRATH, J., (dissenting.) Relator recovered judgment before a justice of the peace against one Pokriefka, March 7, 1893. On March 13, 1893, relator took a transcript from the justice, filed the same in the circuit court, and an execution was issued thereon. March 14, 1893, Pokriefka filed with the justice a stay of execution. On March 23, 1893, Pokriefka moved the circuit court for an

order recalling said execution and vacating the judgment in the circuit. The circuit judge granted said motion, and this is an application for a mandamus directing the circuit judge to vacate said order. Section 3802, Comp. Laws 1857, (How. St. § 6963,) provides that the party against whom any judgment shall be recovered may stay the execution thereon by filing security with the justice within five days after the justice shall be authorized to issue execution thereon. Section 3798, Comp. Laws 1857, (How. St. § 6959,) provides that in the cases mentioned in section 3797, Comp. Laws 1857, (How. St. § 6958,) and in suits commenced by attachment, "execution shall, on application of the person in whose favor the judgment was rendered, be issued forthwith, unless such execution may be and is stayed." Section 3799, Comp. Laws 1857, (How. St. § 6970,) provides that executions shall issue, except in the cases mentioned in the two preceding sections, at the expiration of five days after judgment, unless execution shall be stayed, and that execution shall not issue sooner without the consent of the debtor, or the proof in the next section specified. Section 3800, Comp. Laws 1857, (How. St. § 6961,) provides that upon a certain showing execution shall issue immediately, unless the same be stayed. Section 3806, Comp. Laws 1857, (How. St. § 6947,) makes provision for recalling an execution issued within ten days in case a stay be filed. Section 3786, Comp. Laws 1857, provided that a judgment creditor should be entitled to a transcript "whenever an execution shall be returned unsatisfied in whole or in part." Section 3832, Comp. Laws 1857, (How. St. § 6993,) provides that upon the filing of the transcript in the circuit "the power and authority of the justice in respect to such judgment shall cease." In 1867, How. St. § 6947, was enacted, to take the place of section 3786, Comp. Laws 1857. The amended section provides that "whenever an execution may by law be issued upon any judgment" plaintiff shall be entitled to a transcript upon filing an affidavit setting forth that there is not sufficient goods and chattels liable to execution to satisfy said judgment. This section was further amended in 1885, and at the same time two new sections were added, providing that "whenever execution may by law be issued upon any judgment rendered by a justice of the peace" the judgment creditor may, upon a showing made by affidavit, have a transcript, which he may file with any other justice within the state. If section 6947 is to be given the construction and effect contended for by relator, then, in any case where a party in whose favor a judgment is rendered before a justice may obtain an execution within the ten days, he may obtain a transcript, file the same in the circuit or with another justice, and prevent a

stay. Such a construction would defeat the intention of the legislature as clearly expressed in the other sections referred to. It is true that under the sections above referred to executions may "by law be issued" "forthwith," or "immediately," or after the time within which an appeal may be taken has expired, but such executions issued before the ten days shall have expired, within which a stay may be filed, are by law subject to recall. The execution may be issued, but it is issued subject, by express statutory provisions contained in the very act providing for its issue, to that infirmity. The amendment of 1867 was intended to avoid the delay consequent upon the return of executions the life of which was 60 days. It simply substitutes the affidavit of the party for the return of the officer. It does not in express terms except the emergency executions which may by law be issued under the sections referred to, yet it contains no provisions recognizing the affidavits upon which such executions may be issued, nor does it contemplate that the affidavit therein provided for shall contain the proof of emergency. The other provisions of this act contemplate that the control of the justice over judgments shall be absolute, except in cases of appeal, until the lapse of the 10 days. None of the amending acts contain a repealing clause. The title of the act of 1867 is "An act to amend section 3786, in relation to transcripts of judgments rendered by justices of the peace." All parts of the act must be considered together. The object of the amendment is apparent. It does not purport to interfere with or cut off the right to stay execution, or to divest the justice of control during the 10 days. If, therefore, a construction can be given to its language which will harmonize it with the other provisions of the act, and avoid repugnancy, that construction should be adopted. To that end general words or language may be restricted. The legislature could not have intended that the right to an execution which, when obtained, was subject to a stay and to recall, could be made the basis for a transcript which, when granted and filed in the circuit or with another justice, would cut off the right to a stay. The language, "whenever an execution may by law be issued," must be held to mean an execution subject to no infirmities, and without liability to recall,—an execution which may by law be issued after the 10 days during which security may be filed and execution stayed. Such a construction gives effect to all parts of the act, recognizes the clear and evident purpose of the amendment, and preserves a right which the other provisions of the act are carefully framed to protect.

The mandamus should therefore be denied.

LONG, J., concurred with McGRATH, J.

RANDALL v. GARTNER, Judge.

(Supreme Court of Michigan. June 30, 1893.)

LIMITATION—RUNNING OF STATUTE—AMENDMENT OF DECLARATION—EFFECT—PLEADING—MOTION TO COMPEL ELECTION.

1. Where a demurrer is sustained to the declaration in an action for libel because several causes of action are alleged in one count, and leave being given, plaintiff files an amended declaration setting forth each cause of action in a separate count, it is error to compel him to strike out all counts of the amended declaration based on articles published more than two years before leave to amend was given, if the same were not barred when the original declaration was filed, since the filing of the amended declaration is not the commencement of the new action, but a continuation of the original one.

2. It is error, in such case, to compel plaintiff to elect one count in the amended declaration on which he will proceed to trial, and to strike out all the other counts, since he had the right to join all of his causes of action in one declaration, if he could recover on each in separate suits in the same form of action.

Mandamus by James A. Randall against George Gartner to compel defendant to vacate an order. Writ granted.

John Atkinson, for relator. Dickinson, Thurber & Stevenson, for respondent.

LONG, J. The relator commenced suit in the Wayne circuit court against the Evening News Association on September 27, 1890, for libel. Defendant demurred, setting up several causes of demurrer. In March, 1891, the demurrer was argued, and on February 10, 1892, the court sustained the demurrer, with costs, giving the plaintiff 20 days within which to amend. The cause was removed to this court, and reversed as to costs, and granting leave to the plaintiff to amend without costs. The original declaration counted upon a great many libelous articles, all of which were set out in one count. On September 19, 1892, plaintiff filed an amended declaration, selecting 20 of the articles included in the original declaration, and setting forth each one in a separate count. December 13th, following, defendant moved the court below for an order striking from the amended declaration each of the counts therein which were based upon articles alleged to have been published more than two years before the amended declaration was filed, for the reason that under the original declaration, which contained but one count, the plaintiff could rely upon but one cause of action, and that it was not competent to bring in by amendment, as independent causes of action, such articles as, at the time of the amendment, were barred by the statute of limitations. On February 20, 1893, an order was made, directing that plaintiff, within 20 days, elect upon which of the counts of the amended declaration, based upon a single libelous article set forth in the original declaration, he will proceed, in lieu of the count in the original declaration, and that when such election shall

be made all of the counts of the amended declaration, based upon articles which, at the time of the allowance of the right to amend the original declaration, had been published more than two years prior to the granting of such right to amend the original declaration, be stricken from the amended declaration, and that the defendant have 20 days thereafter to plead. This proceeding is for mandamus to compel the court below to vacate the above order.

The court below was in error in holding that any of the published articles embodied in the original declaration was barred by the statute. These articles were declared upon in the original declaration, but we held that they were not well pleaded, by reason of their being set out in one count. They were not barred by the statute at the time the original declaration was filed, and the filing of the amended declaration was not the commencement of a new suit, but the continuation of the suit originally commenced, and did not introduce a new cause of action.

The court was also in error in requiring the plaintiff to elect the count upon which he would proceed to trial, and to strike out the other counts. He had a right to proceed upon all the counts. These articles were published upon different days, and may each constitute a cause of action. There is no reason, however, for saying that he may not join the several causes of action, and have them all tried in one suit. It is settled that plaintiff may join all his causes of action in one declaration, if, in separate suits, he could recover on each in the same form of action. *Tregent v. Maybee*, 54 Mich. 226, 19 N. W. Rep. 962. See, also, 1 Chitty, ¶1. 199, 222; 1 Tidd, Pr. 11, 12; *Coryton v. Lithebye*, 2 Saund. 117a-117d; *Craft v. Boite*, 1 Saund. 246a; *Savile v. Jardine*, 2 H. Bl. 532. The writ must issue, as prayed. The other justices concurred.

WHITE v. McQUEEN.

(Supreme Court of Michigan. June 30, 1893.)

FALSE IMPRISONMENT—ARREST WITHOUT WARRANT—JUSTIFICATION BY OFFICER—PLEADING—PROBABLE CAUSE—QUESTION FOR COURT.

1. In an action against a sheriff for false imprisonment, a defense that a felony had been committed, and that defendant had reasonable grounds to believe that plaintiff was guilty, and consequently arrested him, must be specifically pleaded, and cannot be shown under a plea of not guilty.

2. In an action for false imprisonment it appeared that a newspaper article stated that plaintiff and some companions boarded a street car, when drunk, and refused to pay their fare; that the conductor and motorman attempted to put them off, when a fight ensued, and a lady passenger became frightened, jumped from the car, and was injured. Held, that there was nothing in the article to justify an arrest without a warrant on the ground that a felony had been committed under How. St. §§ 9274, 9275, which make it criminal will-

fully and maliciously by act or intimidation to impede or obstruct the regular operation of a railroad.

3. Where the facts are admitted, probable cause is a question of law for the court.

Error to circuit court, Kent county: Allen O. Adsit, Judge.

Action by Silas White against John McQueen for false imprisonment. Judgment for defendant, and plaintiff brings error. Reversed.

Myron H. Walker, for appellant. L. G. Rutherford, for appellee.

GRANT, J. Defendant is the sheriff of Kent county. He caused the arrest of plaintiff August 2, 1891, which was Sunday, and imprisoned him in the county jail until the following day, when he was brought before a justice of the peace, and charged with being disorderly, under an ordinance of the city of Grand Rapids. He was tried upon August 4th, and acquitted. Defendant had no warrant for his arrest. Plaintiff then instituted this suit to recover damages for false imprisonment. The declaration is in the usual form. The plea was "not guilty." Defendant claimed to have arrested plaintiff upon suspicion that he was guilty of a felony. It appears from the evidence that on the Saturday evening previous an altercation had occurred upon a street car between the conductor and two motormen; that during the fight a lady had jumped from the car, and was reported to be seriously injured; and that no arrests were made that night of any of the persons engaged in the fight. The defendant testified that between 8 and 9 o'clock Sunday morning the turnkey of the jail reported to him that there was a riot on East Fulton street by a lot of colored people, and that a lady was killed or nearly killed; that some one had telephoned that there had been a row and a fight on a street car, and that this woman had received serious injuries in consequence of the fight, and thought the authorities ought to take these people in charge. Defendant then went to the office of the street-railway company, and saw Mr. Chapman, who had telephoned to the jail for him. Chapman gave him the names of six persons, including the plaintiff, who, he said, had been engaged in the fight, and wanted him to arrest them. Mr. Chapman told him that these persons had undertaken to run the car; had used profane language; that the conductor undertook to eject some of them from the car; that they all plighted on the conductor, or two conductors, got one of them down, and hammered him; that this lady had gotten off of the car, or jumped off the car, in some way; that she was in a critical condition, and presumed she would die; that he, Chapman, wanted these people taken that day, for if she died they would skip out, and there would be trouble in getting them. On the strength of this information defendant sent two deputies to arrest the plaintiff and

the others who are reported to have been engaged in the affair. Defendant thought, but was not positive, that he saw an account of the affair in one of the Sunday morning papers. Plaintiff was a coachman for Dr. Barth. He was found by the officers at his customary work at the barn about 1 o'clock P. M., and promptly told them his name, whereupon he was immediately taken to jail. The case was submitted to the jury upon the theory that if the plaintiff had probable cause to believe, from the information which he received, that a felony had been committed by the plaintiff, he was justified in making the arrest without a warrant. The court instructed the jury that assault with intent to do great bodily harm, and manslaughter, were felonies. But the crime to which he specifically called their attention was obstructing the operations and business of the street-railway company, under How. St. §§ 9274, 9275. Under the first section it is made a crime for any person to willfully and maliciously, by any act, or by means of intimidation, impede or obstruct the regular operation and conduct of the business of any railroad company, etc. The second section makes it a crime for two or more persons willfully and maliciously to combine and conspire together for the like purpose. The punishment provided by the first section may be imprisonment in the state's prison for a period not exceeding one year; and under the second section for a like imprisonment not exceeding two years. The court instructed the jury that if the facts conveyed to the defendant justified him in believing that an offense under this statute had been committed, and that the plaintiff was guilty thereof, then he was justified in making the arrest.

The judgment must be reversed for two reasons:

1. The defense that the defendant had probable cause to believe that plaintiff had been guilty of a felony was inadmissible under the pleadings. Notice of this defense should have been given. Mr. Chitty says: "Whoever assaults or imprisons another must justify himself by showing specially to the court that the act was lawful. And a plea, justifying the arrest of the plaintiff, on the ground that a felony has been committed, and that there was reasonable ground to suspect and accuse the plaintiff, must distinctly state the specific reasons for suspecting the plaintiff. These are positive rules of law in order to prevent surprise on the plaintiff at the trial by the defendant then assigning various reasons and causes of imprisoning the plaintiff of which he had no notice, and which consequently he could not be prepared to meet at the trial on the plea of not guilty, on fair and equal terms with regard to the evidence and proof of facts." 1 Chit. Pl. 501; Wade v. Chaffee, 8 R. I. 224; Boynton v. Tidwell, 19 Tex. 118. It is manifestly of more importance to the plaintiff that he should be informed by the

plea of the facts relied upon for his arrest without a warrant than when he is arrested upon a warrant which he has the right to see and read when he is arrested. No case than the present better illustrates the necessity of this rule. When brought into court after his imprisonment he was charged only with a misdemeanor, viz. the violation of a city ordinance. For this offense he could not legally be arrested without a warrant. He had a right to presume that this was the offense for which he was arrested the day before.

2. When an officer in arresting fugitives from justice, and those whom he honestly believes have been guilty of a felony, has acted in good faith, and after such an investigation as the circumstances permitted him to make, he will be protected in his action, and will be relieved from the consequences of a false imprisonment. This is required for the protection of society, and to prevent the escape of criminals. So far as appears upon this record, the defendant acted mainly upon the information conveyed to him by Chapman. If he read the newspaper article, (and the judge in his charge assumed that he did,) there was nothing in that to indicate that plaintiff and his companions had been guilty of a felony. The article stated that plaintiff and his companions were very drunk when they boarded the car; that they refused to pay their fare; that they used vile language, which annoyed the passengers; that they refused to get off when asked; that they showed fight when the conductor proceeded to put them off; that the motorman came to his rescue, and with his crank knocked one of the colored men from the car; that the conductor ejected the other; that one of the colored men jumped on again; that he was bleeding profusely, and using vile and filthy language; that when he refused to get off the conductor knocked him from the car with a rock; that the passengers then commenced to jump from the car; and that among those who jumped was a lady, but that she fortunately fell away from the car, and escaped death; and that the names of the colored men were not known to the police, but that they had a good description of them, and, unless they left the city, they would probably be identified. There was nothing in this statement to show that the plaintiff and his companions had been guilty of a violation of the statutes above quoted, or of any felony whatever. There was therefore nothing in it to justify the arrest without a warrant. When the facts are conceded, probable cause is a question of law, which the court must determine. *Pol. Torts*, 192, 193; *Perry v. Sulier*, 92 Mich. 72, 52 N. W. Rep. 801; *Huntington v. Gault*, 81 Mich. 155, 45 N. W. Rep. 970. Under this record the court should have directed the jury that there was no probable cause for the belief on the part of the defendant that plaintiff had been guilty of a felony. For

these reasons the judgment must be set aside, and a new trial ordered. The other justices concurred.

SHERLOCK v. STUART, Mayor, et al.
(Supreme Court of Michigan. June 23, 1893.)
POLICE POWER—INTOXICATING LIQUORS—LICENSES
—MANDAMUS TO OBTAIN.

1. Under the police power of the state the legislature may confer upon municipalities the right to determine, in licensing the sale of intoxicants, the places where saloons may be kept, and to determine that question on each application.

2. The Grand Rapids city charter gives the common council power "to enact such ordinances, by-laws, and regulations as they deem desirable, * * * to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof," and that no person shall engage in such occupation, within the city limits, without a license. *Held*, that the charter authorized an ordinance requiring an application for a license to be made to the common council, and prescribing the conditions precedent to its consideration by the council, and conferred on the council power to determine each individual application as far as the location and suitability of the saloon were concerned. *McGrath and Long, JJ.*, dissenting.

Mandamus by James Sherlock against William J. Stuart, mayor, William A. Shinkman, clerk, and the city of Grand Rapids. Writ denied.

Morse, McGarry, and McKnight, for relator. Wm. Wisner Taylor, City Atty., for respondents.

GRANT, J. The charter of the city of Grand Rapids confers upon the common council the power "to enact such ordinances, by-laws, and regulations as they deem desirable, * * * to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof." It further provides that "no person shall engage in or exercise the business or occupation of a saloon keeper within the limits of said city until he is first licensed as such by the common council, under such penalty as the common council may by ordinance prescribe." In conformity with its charter the common council enacted an ordinance, the first section of which reads as follows: "No person shall engage in the business of saloon keeping, in any house or place within the limits of this city, without first having obtained a license for that purpose from the common council." Section 2 of the ordinance reads as follows: "Every person desiring to keep a saloon in the city shall, before a license is obtained for that purpose, make an application in writing to the common council for such license, stating the number or location of the saloon where the business for which the license is asked is to be carried on, which application must be accompanied with a recommendation signed by at least

twelve reputable and respectable citizens of this city, certifying that the applicant is well known to them, and is of means and qualified to keep a saloon, and is of good reputation, fame, moral character, and an orderly person. Such applicant shall also, before receiving his or her license, pay into the city treasury such sum for said license as the common council shall annually fix for that purpose, and take the treasurer's receipt therefor, and also a fee of fifty cents for issuing such license. Such applicant shall also, before receiving said license, execute a bond to the city of Grand Rapids, in such sum and with such sureties as shall be approved by the common council, conditioned that such applicant shall keep and maintain an orderly and well-regulated saloon during the continuance of his or her license, and shall pay all fines imposed and costs therewith assessed upon him or her, according to law, for a violation of any provisions of this ordinance. Said license, when issued, shall state the number or location of the saloon, as designated in the application, and shall not be transferred to any other part of the city without the consent of the common council; and no license issued as aforesaid shall extend beyond the first Monday in May next after the issue of the same." The relator presented his petition to the council under this ordinance, and the council, by a majority vote, granted the license. The mayor, under the power conferred on him, vetoed this action of the council, and no further action thereon has been taken. The relator now asks this court to compel the respondent to issue the license. The reason given by the mayor for his veto is that the place specified in the petition is unsuitable for a saloon. He presented this reason at length in his message, from which it appears that he has acted in entire good faith, and not from mere caprice, or arbitrarily.

It is contended that the power conferred upon the common council should be exercised by a general ordinance fixing districts or limits within which saloons may be kept, and that the council does not possess the power to hear and determine each individual case. The principle upon which is based the regulation of the liquor traffic is found in the police power of the state. No one possesses a natural, inalienable, or constitutional right to keep a saloon for the sale of intoxicating liquors. "To sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling," Black, *Intox. Liq.* §§ 46, 48. By the constitution of 1850 such sales were absolutely prohibited. By the amendment of 1876 the prohibitory clause was removed from the constitution, and the power vested in the legislature to deal with the traffic as it deemed expedient and wise. In some counties of the state the traffic is now prohibited, while in the others it is regulated by the general law of 1887, and by the char-

ters of municipal corporations. The legislature may now determine who may carry on the business, and the time when, and the place where, it may be carried on. It is manifest that the welfare of society requires that this business should be in the hands of reputable, law-abiding persons. It is notorious that the low, the vicious, and the criminal are often engaged in it. The people, under our constitution, have the right to prohibit such persons from engaging in it. The restrictions and conditions upon it are entirely within the discretion of the people, through the legislature. "It is not for the courts to determine its expediency, or, as said by Mr. Cooley in his work on Constitutional Limitations, 'to run a race of right, reason, and expediency with the legislative branch of the state government.'" Robison v. Haug, 71 Mich. 42, 38 N. W. Rep. 668; Cooley, *Const. Lim.* 597. "If the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases." *Ex parte Christensen*, 85 Cal. 208, 24 Pac. Rep. 747; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. Rep. 13. The system, in this state, is not purely a tax system. The fee to be paid as a condition precedent to entering upon the business is called a "tax," but there are other conditions precedent which are inconsistent with a purely tax system. These provisions partake of the character of a license. It is said by Black: "Any law which requires certain acts, other than the mere payment of the tax, to be done by the party, as a prerequisite to his right to enter upon the pursuit of the trade in question, and makes it a penal offense to engage in the business without such formalities, is in reality a license law, no matter whether it be called a 'tax,' or by any other name." Black, *Intox. Liq.* § 108. In Ohio a law nearly parallel in its provisions with the act of 1887 was held to be a license, and not a tax law, and therefore void under the constitution of Ohio. *State v. Hipp*, 38 Ohio St. 199; *Butzman v. Whitbeck*, 42 Ohio St. 223. Mr. Justice Campbell, in commenting on the law of 1887, calls this provision "the tax or license for doing business." *Robison v. Miner*, 68 Mich. 552, 37 N. W. Rep. 21. Under this comprehensive police power of the state it is, in my judgment, too clear for argument that the legislature may confer upon municipalities the right to determine the places where saloons may be kept, and to determine that question upon each application. The legislature may also enact that only reputable persons shall be allowed in the business, and to authorize the municipalities to determine the question of fitness. If the state possesses this right, the power to determine these questions must, in the first instance, be lodged in the municipality, or some board representing it, or in some other body or court. There is no presumption that the persons charged with this duty will not perform it, or that they will abuse the discretion given them.

Other considerations than the mere locality must often enter into the determination of the suitability of the place for a saloon. If the building be so arranged as to render violations of the law easy, or if it is to be kept in connection with a house of prostitution, or if it be not situated upon a street or alley, or if it be in one of the upper stories of a building, or in a part of the city occupied for residence only, or near a school, these would certainly afford good reasons for rejecting the application. Mr. Cooley says: "The state has also a right to determine what employments shall be permitted, and to forbid those which are deemed prejudicial to the public good. * * * The general rule, undoubtedly, is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person, or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class, while leaving them open to others. Some employments, for example, may be admissible for males, and improper for females; and regulations recognizing the impropriety, and forbidding women engaging in them, would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be, regulated. And some employments, in which integrity is of vital importance, it may be proper to treat as privileges merely, and to refuse license to follow them to any who are not reputable." Cooley, *Const. Lim.* (6th Ed.) 742. In the unreported case of *Van Dann v. Uhl*, Mayor of the City of Grand Rapids, decided October 29, 1891, (no opinion being filed,) the precise question in the present case was involved, and the writ was denied. It is said in *Black on Intoxicating Liquors*, (section 170:) "The rule obtains in a few of the states that if a person who desires a liquor license brings himself within the terms of the law, by complying with all the statutory preliminaries, and possessing the requisite moral and other qualifications, he is entitled, as a matter of law, to be licensed, and the license cannot be withheld from him. But in far the greater number of states the doctrine is now well settled that the court or board charged with the duty of issuing licenses is invested with a sound judicial discretion, to be exercised in view of all the facts and circumstances of each particular case, as to granting or refusing a license applied for." See, also, the authorities there cited: *In re Hoover*, 30 Fed. Rep. 51; *Sparrow's Petition*, 138 Pa. St. 116, 20 Atl. Rep. 711; *U. S. v. Ronan*, 33 Fed. Rep. 117; *Perkins v. Ledbetter*, (Miss.) 8 South.

Rep. 507; *Batters v. Dunning*, 49 Conn. 479; *Allstock v. Page*, 77 Va. 386.

In this case the common council enacted an ordinance requiring application to keep a saloon to be made to it, and prescribing the conditions precedent to its consideration by the council. This places no limitation upon their discretion, but only prescribes a mode of procedure. I think the ordinance is clearly authorized by the charter, and that its plain intent is to confer upon the council the power to determine each individual application, so far as the location and suitability of the place are concerned. The veto of the mayor was based entirely upon the unsuitableness of the place. Relator has been treated in the same way, and for the same reason, as was another who applied for a license in this same building. The place was in the rear part of the building, fronting upon Monroe street. A thin board partition separates the room where the saloon is to be kept from the front room. Application was made to keep a saloon in this building, designating it as "No. 48 Monroe Street," but was unanimously rejected by the council. The return alleges that this application is made in the interest of the former applicant. The mayor and the council are more familiar with the place and its surroundings, with its interior arrangements, with the purposes for which the entire building is to be used, and with all the circumstances of the case, than we can possibly be. When the mayor and council have in good faith exercised the discretion conferred upon them by the law, courts cannot review it. There is nothing in this case showing any abuse of discretion, or the arbitrary exercise of power. The action of the mayor, therefore, can only be reviewed by the common council. The question in *People v. Furman*, 85 Mich. 110, 48 N. W. Rep. 169, was whether the general liquor law of 1887 repealed all prior acts of the legislature inconsistent therewith, general as well as local. The power of the legislature to confer, by subsequent legislation, upon municipal corporations, the right to deal with the liquor traffic in a manner not provided for in the general law, is too clear to require argument. This right was conferred upon the city by a subsequent act. Writ denied.

HOOKER, C. J., and MONTGOMERY, J., concurred.

McGRATH, J., (dissenting.) This is an application to compel the mayor and city clerk of Grand Rapids to issue a license to carry on a saloon at No. 80 Waterloo street, in a block located on the corner of Waterloo and Monroe streets. Relator presented his bond to the common council, and that body approved it, and recommended that the license be granted. The mayor vetoed the action of the common council, giving as his reason that an application had been before made,

by one Johnson, for a license to keep a saloon at 48 Monroe street, (the Monroe street front of the same building,) which called forth a remonstrance, and the application was rejected; that it seems to be the almost universal opinion that "this is an unsuitable place for a saloon, and, aside from that, there are reasons which seem to justify its refusal. We are chosen to enforce the laws, and to see that no advantage is taken of us, where the laws can be evaded. In this case there is only a temporary board partition separating the room on Monroe street from the room where the saloon is to be kept, and immediately upon the license being received this partition can be taken down, and the saloon opened up on Monroe street; and there is no power possessed by the city, or its officers, to prevent running it at the place where they have refused, unanimously, to have it located. We should make it sure this would not happen. Again, I am convinced that this application is in the interest, if not for the use, entirely, of Mr. Johnson, and Mr. Johnson himself states to me that he expects to open a restaurant on the second floor, in case the billiard tables are moved out, as they may be, and to fit up sleeping rooms on the third floor, with an inside stairway from the saloon to this restaurant. We would be putting it beyond the power of the officers to compel compliance with the laws." Section 10 of the charter of Grand Rapids provides that the common council "shall have power, within said city, to enact, make, continue, establish, modify, and repeal such ordinances, by-laws, and regulations as they deem desirable, within said city, for the following purposes: * * * To license and regulate the keeping of hotels, taverns, and other public houses, groceries, and keepers of ordinaries and victualing, and other houses or places for furnishing meals or food; restrain, license, and regulate saloons, and regulate and prescribe the location thereof." The ordinance provides that "no person shall engage in the business of saloon keeping in any house or place within the limits of this city without first having obtained a license for that purpose, from the common council. Every person desiring to keep a saloon is required by this ordinance to make an application in writing to the common council, stating the number and location of the saloon, accompanied with a recommendation, signed by at least twelve reputable and respectable citizens of the city, certifying that the applicant is of good reputation, fame, moral character, and an orderly person." No ordinance has been enacted, fixing any districts, prescribing the location of saloons, or how they shall be separated from other apartments, or how the building shall be otherwise occupied. It will not be contended that the charter power to license includes the power to prohibit either hotels, taverns, public houses, groceries, or saloons. The right to sell liquor, under certain restrictions and

conditions, is made lawful by statute, and the statute expressly provides by what method counties may exercise the prohibitory power. The power to license is conferred as a mere incident of the power to regulate. When the liquor business is carried on within the restrictions established by the legislature, and such additional restrictions as may be lawfully imposed by local authority, its rights should be respected and protected by courts as carefully, and to the same extent, as those of any other business. *People v. Scranton*, 61 Mich. 244, 28 N. W. Rep. 81; *Amperse v. City of Kalamazoo*, 59 Mich. 78, 26 N. W. Rep. 222, 409. The power to regulate assumes the existence of the traffic. Suppression is not regulation, but prohibition. The words "regulate" and "prohibit" are not synonymous. *People v. Gadway*, 61 Mich. 285, 28 N. W. Rep. 101; *Hauck's Case*, 70 Mich. 396, 38 N. W. Rep. 269. In *Potter v. Village of Homer*, 59 Mich. 813, 26 N. W. Rep. 208, Mr. Justice Campbell says: "The legislature, and not the common council, has the right, and has exercised the duty, of determining on what terms liquors may be sold. It was not designed by the law that the lawfulness or unlawfulness of the traffic should be determined by a common council, or that the power to do business should depend on their pleasure. The statute itself has fixed the conditions, and nothing is left to the council, except to pass upon the sufficiency of the sureties. In this they have the same discretion, and no more, than is possessed by other persons called on to approve sureties. It is tyrannical, as well as unlawful, to hinder any one who is ready to furnish security from conducting his lawful business." In the *Frazee Case*, 63 Mich. 306, 30 N. W. Rep. 72, it was held that whatever regulations are made by a municipality must operate uniformly under the same conditions. "All by-laws," says Mr. Justice Campbell, "made to regulate them, must fix the conditions expressly and intelligibly, and not leave them to the caprice of any one. * * * When men in authority have arbitrary power there can be no liberty." The ordinance in that case was held to be unreasonable "because it suppresses what is in general perfectly lawful, and because it leaves the power of permitting or restraining processions, and their courses, to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions, operating generally and impartially."

The act of 1887 undertook to authorize the rejection of the bond if the principal was known to the board, to which the bond was presented for approval, to be a person whose character and habits would render him an unfit person to conduct the business. In *Robison v. Miner*, 68 Mich. 549, 37 N. W. Rep. 21, this provision was held void. Mr. Justice Campbell, referring to the power sought to be vested in the board, says: "If

no standard is laid down there may be as many scales of fitness and unfitness as there are boards. We have already had occasion, under the old law, to discover that boards desirous of preventing liquor selling are ingenious in finding fault with bondsmen. There are many very excellent people who regard every seller of liquor as a bad man, unfit for social privileges, and others who hold peculiar views on other topics which would render them harsh censors. If the statute had fixed the rule there would be means of protecting parties against caprice and condemnation unheard. But when the same persons are to be the judges of the proper cause of rejection, as well as of the fitness of persons under such causes, the law subjects every one to the mere will of his neighbor, and gives him no rights whatever. No man's rights can be submitted, under a constitutional government, to the discretion of anybody." See, also, *Kuhn v. Common Council*, 70 Mich. 534-538, 38 N. W. Rep. 470. In *Baltimore v. Radecke*, 49 Md. 217, referring to an ordinance respecting the use of steam engines in the city of Baltimore, the court say: "It does not profess to prescribe regulations for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories, and other similar establishments, within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. * * *

When we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism, and other improper influences and motives, easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to

pronounce it inoperative and void." In *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, an ordinance of the county and city of San Francisco made it unlawful for any person to carry on a laundry business within the corporate limits without first obtaining the consent of the board of supervisors, unless the laundry was located in a brick or stone building. It appeared that there were about 320 laundries in San Francisco; that 310 of them were in wooden buildings; that 240 of them were owned and conducted by Chinamen; that 200 of said Chinamen had applied to the board of supervisors for permission to do business; and that all of said applications, with one exception, were denied. The court held that the ordinance was invalid because it undertook to confer arbitrary power on the supervisors to deprive a person of the right to carry on his business. Judge Matthews, speaking for the court, says: "If an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by public interest, should fail to gain the consent of the common council or mayor to a license for the prosecution of his business, and should apply for redress by the judicial process of mandamus, it would be sufficient for them to say that the law had conferred upon them the power to withhold their consent without reason, and without responsibility. The power given to them is not confined to their discretion, in the legal sense of the term, but is granted to them mere will, and it is purely arbitrary, and acknowledges neither guidance nor restraint." In *Tugman v. Chicago*, 78 Ill. 405, it was held that an ordinance which prevents one citizen from engaging in a particular business in a certain locality, under a penalty, while another is permitted to engage in the same business in the same locality, was unreasonable and void, and that it made no difference that the persons who were allowed to continue were already engaged in the business when the ordinance was adopted, for, if the ordinance prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced.

The reasons given by the mayor for his veto in the present case illustrate the necessity for some uniform regulations fixing the rights of applicants, and the conditions under which licenses may be granted. The mayor is convinced that the application is in the interest, if not for the use, of Johnson. This is a mere supposition, unwarranted by any fact that appears either in relator's application to the council, or in the return here made. It is a mere notion of his own. The fact that a restaurant "may be" opened on the second floor "if the billiard tables are removed, as they may be," or that sleeping rooms are to be located on the third floor, or

that the board partition divides the lower floor into two apartments, or that stairs lead from this floor to the next, are not unusual conditions. In a number of the cases which have come before this court, saloons are carried on in connection with restaurants, cigar stores, billiard rooms, and lodging apartments, and no law exists, prohibiting such connection. In other cases, saloons are connected with living apartments. In others, side doors connect with hallways, and back doors with alleys. These are matters which are susceptible of definite rules, if the power exists to impose conditions respecting them. In the absence of rules applicable to all, there is no protection against individual persecution, and the exercise of arbitrary power or caprice, and the success of any application may depend upon the measure of the applicant's influence, or upon the influence exercised by the proprietor of the establishment next door, which has already been licensed. The power to license or regulate the business, or to prescribe the locality in which it shall be carried on, is conferred with the intention that it shall be exercised by the body to whom that power is delegated, and in the mode prescribed. *Black, Intox. Liq.* 228; *Cooley, Const. Lim.* pp. 248, 249. The very grant of power, in the present case, describes the mode of its exercise. It contemplates definite, impartial, and permanent rules, operating uniformly, and negatives the idea of an arbitrary exercise of the power in each case, as it may arise. If the position taken by respondents is correct the council may refuse a license to A., and grant one to B., or it may refuse to grant one to A., at No. 80 Waterloo street, and grant one to B., at No. 82 Waterloo street. Indeed, the petition in the present case sets up, and it is not denied, that within less than 11 feet of the place named there is a saloon in operation, and within the same block there are three saloons. The power conferred by the charter can only be exercised by the adoption of a general ordinance prescribing a general rule by which licenses may be granted, and all persons coming within the requirements of such ordinance, and complying with its terms, are entitled to receive a license. *Black, Intox. Liq.* 228. The matter must not be left to the caprice of any one, but, if regulated at all, must be by permanent legal provisions, operating generally and impartially, and reasons given for the refusal of a license must have their basis in, and be supported by, such provisions. See *State v. Mahner*, 43 La. Ann. 406, 9 South. Rep. 480; *State v. Dubarry*, 44 La. Ann. —, 11 South. Rep. 718; *City of Jacksonville v. Ledwith*, 26 Fla. 163, 7 South. Rep. 885; *Ex parte Thelsen*, (Fla.) 11 South. Rep. 901. In *Sparrow's Petition*, 138 Pa. St. 116, 20 Atl. Rep. 711, and in *Re Raudenbusch*, (Pa. Sup.) 14 Atl. Rep. 148, the general law provided that the court of quarter sessions should hear petitions, in

addition to that of the applicant, in favor of, and remonstrance against, the application for such license, and in all cases shall refuse the same whenever, in the opinion of the said court, having due regard to the number and character of the petitions for and against such application, such license is not necessary for the accommodation of the public, and entertainment of strangers or travelers, or that the applicant is not a fit person to whom such license should be granted. In *U. S. v. Ronan*, 33 Fed. Rep. 117, and in *Re Hoover*, 30 Fed. Rep. 51, the Code of Georgia expressly empowered the commissioners "to grant or refuse such application for a license." In *Allstock v. Page*, 77 Va. 386, by express statutory provisions, the county courts were vested with discretionary powers, and the applicant was allowed an appeal. In *Batters v. Dunning*, 49 Conn. 479, the act authorized the county commissioners to license suitable persons to sell liquors in suitable places, and the court held that the statute had characterized, by a general qualifying word, the persons to be licensed, and the places of business; that the word was not defined by law, so that its application could be determined, except by the judgment of the commissioners. There is no doubt as to the power conferred in any of these cases. The case of *Van Dann v. Uhl*, Mayor of the City of Grand Rapids, is cited by the majority, but that case is not reported, and we have been unable to agree as to just why the order to show cause was refused in that case, and there is no data at hand from which to settle the question. *Karreman v. Mayor of Grand Rapids*, determined June 11, 1889, but not reported. (no opinion being filed.) involved the same question here presented, and after a full hearing a mandamus was granted.

The section of the charter of Grand Rapids, referred to by Mr. Justice GRANT, prohibiting persons from engaging in the business without having first obtained a license, is as follows: "Sec. 21. No person shall engage in or exercise the business or occupation of hotel or tavern keeper, innholder, common victualer, or saloon keeper, within the limits of said city, until he is first licensed as such by the common council, under such penalty as the common council may, by ordinance prescribe; and all persons who shall keep a bar, or who shall sell beverages by the cup or glass, shall be deemed saloon keepers, within the meaning of this act, and be required to take license as such: provided, that nothing in this act shall be construed as licensing the sale of intoxicating liquors as a beverage." The power of the council in the premises is derived from section 10, and not from section 21. The question here is not so much what power the legislature have over the liquor traffic, or what power may be delegated to municipalities, but rather what is the nature of the power granted in this particular instance? Does the grant pre-

scribe the manner of its exercise? Is the power granted power to legislate on the subject, or is it a discretionary power, in the absence of ordinance, regulation, rule, or order? Does the grant of power to license under fixed rules, orders, regulations, or ordinances convey the right to refuse arbitrarily a license in a case where all the conditions of existing ordinances have been complied with? I think not, and the writ should issue.

LONG, J., (dissenting.) I am unable to fully agree with my brethren in this case. There can be no doubt that under our constitution the legislature have power to confer authority upon the common council of a city to regulate the business of selling liquors, or to prohibit the business altogether. The power over the liquor traffic is vested by the constitution in the legislature, to deal with it as it deems expedient, since the constitutional amendment of 1876; and the legislature may now delegate the power of control to the legislative body of the municipality under the provisions of section 38, article 4, of the constitution, which provides that "the legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers, of a local legislative and administrative character, as they may deem proper." *Friesner v. Common Council*, 91 Mich. 504, 52 N. W. Rep. 18. The legislature, by the charter of Grand Rapids, conferred upon the common council the power "to enact such ordinances, by-laws, and regulations as they deem desirable * * * to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof." Under this provision of the charter the common council passed the ordinance in question, which reads: "No person shall engage in the business of saloon keeping, in any house or place within the limits of this city, without first having obtained a license for that purpose from the common council." The ordinance also provides that every person desiring to keep a saloon is required to make an application in writing to the common council, stating the number and location of the saloon, accompanied with a recommendation, signed by at least 12 reputable and respectable citizens of the city, certifying that the applicant is of good reputation, fame, moral character, and an orderly person. There can be no question, it seems to me, that the ordinance is within the power conferred by the charter. Acting under this ordinance, the relator presented his application in writing to the common council. The application was accompanied with a recommendation signed by 12 or more citizens of the city, certifying that the applicant was a person of good reputation, fame, and moral character, and an orderly person. The common council acted upon this petition, and by a majority vote

decided that the license should issue. The mayor, claiming the right to exercise the veto power under the provisions of the charter, sent to the council his reasons why the license should not be granted. No further action has been taken, and writ of mandamus is asked to compel the mayor and clerk to issue the license granted by the council. The reasons given by the mayor for his veto of the action taken by the council are not that the application is not accompanied with a recommendation signed by 12 reputable and respectable citizens of the city of Grand Rapids, certifying that the applicant is of good reputation, fame, moral character, and an orderly person. Neither is it based upon the fact that the 12 persons making certificate are not reputable and respectable, nor that the applicant is not a person of good reputation, fame, moral character, and an orderly person. But his objections were based entirely upon the unsuitableness of the place where it was proposed to be kept. The place was in the rear part of building fronting on Monroe street, and a thin board partition separated the room from the front room, which faced the street. It is evident that the mayor's veto was the exercise of arbitrary power, and not warranted by the ordinance. Under the ordinance no person could keep a saloon without obtaining a license from the council, but the ordinance also provided what showing should be made to the council to obtain it. This showing was made, and the council granted the license. The mayor then stepped in, and, in no manner claiming but that the requirements of the ordinance had been fully complied with, seeks to prevent the issue of the license upon some other ground, which the ordinance had not provided. This ordinance was a law of the city, and every person complying with its provisions had a right to have a license to keep a saloon. It could not be issued to one person, and denied to another. If the council desired to have other restrictions placed upon the business of keeping saloons, they should have provided such restrictions, or left out all mention of them. The legislature undoubtedly has the right to prohibit altogether, and may confer this power upon municipalities, and if it may prohibit, it may impose such conditions upon the traffic as it may deem wise. It is not for the courts to determine the expediency of such legislation, or, as said by Mr. Cooley in his work on Constitutional Limitations, "to run a race of right, reason, and expediency with the legislative branch of the state government." *Cooley, Const. Lim.* 597. See, also, *Robison v. Haug*, 71 Mich. 42, 38 N. W. Rep. 668. It is said in *Ex parte Christensen*, 85 Cal. 208, 24 Pac. Rep. 747: "If the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases." But the ordinance under consideration does not prohibit. It purports that the council

shall grant licenses upon certain conditions, which are specifically set forth in the ordinance. The council has acted upon the application, and found that the conditions prescribed have been complied with. The mayor, by his veto, now sets up other conditions, not required by the ordinance. It may be true that the council would have had the right, under the charter, to have imposed the conditions by the ordinance which the mayor now prescribes, but it has not been done; and the mayor has no right now to prescribe them, or to insist upon conditions not so prescribed. The writ of mandamus should issue as prayed.

STRONG v. HOSKIN.

(Supreme Court of Wisconsin. June 21, 1893.)

PARTNERSHIP PROPERTY — WHAT CONSTITUTES — CHATTEL MORTGAGE—CONDITIONAL SALE.

1. Plaintiff, by written agreement, leased a farm for one year to M., furnished him with certain stock, and agreed to let him have all the hay and feed on the place, in consideration of M.'s agreement to feed and winter the stock. It was further agreed that either party might put additional stock on the farm, and that after sale of the stock, in the fall, each party was to be credited with what he had paid for stock, and the balance of the proceeds divided between them. *Held*, that the property contributed to the joint enterprise, and accumulated in the prosecution of it, was joint property.

2. On a settlement of the business, in the fall, it was agreed that plaintiff should take certain stock as his individual property, and that M. should have the balance of the stock, with the grain and feed, when he should have paid a note signed for him by plaintiff; plaintiff, in the mean while, to retain the ownership of said stock as security for the payment of the note. *Held*, that this agreement constituted a chattel mortgage, which was invalid, as to third parties, unless properly filed, and not a conditional sale.

Appeal from circuit court, La Fayette county; George Clementson, Judge.

Replevin by Moses M. Strong against James Hoskin. From a judgment for plaintiff, defendant appeals. Reversed.

The other facts fully appear in the following statement by WINSLOW, J.:

Replevin for cattle. In January, 1889, plaintiff owned a farm near Darlington, La Fayette county, and had thereon 38 head of cattle, together with hay and feed. January 16, 1889, he leased the farm to Joseph Moore, by written agreement, for one year, which lease, after providing that the object of the lease, and the principal business to be conducted on the farm, was the raising and sale of stock, contained the following provisions: "The said party of the first part hereby furnishes to said party of the second part the following stock, to wit: Six old cows; six heifers, three year old past; one steer, two year old past; seven heifers, two year old past; five steers and three heifers, one year old past; and ten last spring calves, (5 steers and 5 heifers,) in all, thirty-

eight head, which are hereby agreed to be of the value of ——— dollars; and he also hereby furnishes to said party of the second part, for the purposes of wintering said stock, all the hay and feed now on said place; and said party of the second part agrees to feed, take care of, and winter said stock. And said party of the first part agrees to pay for such additional steers as said party of the second part may from time to time purchase, to be pastured on said farm, and the said 38 head of stock, and such additional steers, shall be pastured, for the joint benefit of said parties, in manner following: Said party of the second part shall, whenever he can, exchange said cows and heifers for steers, with the object of stocking the farm with steers in the spring, and selling them in the fall. The use of the farm for pasturage shall be regarded as an equivalent and an offset for the services of the party of the second part in the purchase, exchange, and sale of all stock which may be on said farm, or may be purchased, and for feeding in winter any which may be wintered, and for seeding down any part of the land, and for cutting and securing any hay on said farm, or any grain that may be raised thereon; and whatever surplus of hay or grain there may be, which shall not be fed to the stock, shall be divided equally between said parties,—the grain to be delivered in the city of Darlington, and the hay in the stack on the farm. All live stock, fit for market, shall be sold for cash in the fall, at such time and place, and for such price, as the said parties shall mutually agree upon; and of the proceeds of such sale the said party of the first part shall first be paid the sum of ——— dollars, and interest thereon from this date at seven per cent. per annum, and also such sum as he may have paid for any additional stock purchased for said farm, and interest thereon from the date of such payment at 7 per cent. per annum. And if the said party of the second part shall have purchased on his own account, and paid for, any of the stock which may be so sold, he shall be repaid such sum as he may have so paid, with interest at seven per cent. per annum. The balance of the proceeds of any such sale, after such repayments shall have been so made, shall be equally divided between said parties." Moore went into possession under this agreement, and proceeded to feed and pasture the stock. In April, 1889, Mr. Strong put on the farm 18 more steers purchased from one Bray, the purchase being made through Moore. Under the lease, Moore, from time to time, exchanged cows and heifers for steers. There was also evidence tending to show that Moore purchased with his own means, from one West, four or five steers, in April, 1889, and placed them on the farm. In July, 1889, Moore bought a butcher shop in Darlington, and

gave a four-months note for \$250 in payment or part payment therefor, which note Mr. Strong, the plaintiff, signed as joint accommodation maker. On the 24th day of October, 1889, Moore and Strong settled their business relations, and reduced the terms of the settlement to writing, as follows: "This witnesseth that Moses M. Strong and Joseph A. Moore have this day agreed upon the following terms of settlement in relation to his occupancy of the Cutting farm during the past season, and in relation to the stock upon the same. The said Strong is to have the seventeen surviving steers, of the eighteen purchased from John Bray in April last, (one having died,) also, three of the best other steers, which were received from Narcisse King, or acquired by exchange, making a total of twenty head of steers which the said Strong is to have, and which are to be kept by said Moore, and fed out of the oats raised on said place, until they are sold; and the said Moore is to sell the same for the said Strong as soon as, in his judgment, the best price for the same can be obtained, and the proceeds of such sale to be deposited in the Citizens' National Bank of Darlington, to the credit of said Strong. And all the other stock, grain, hay, and feed upon said farm is to be the absolute, individual property of said Moore, whenever he shall have paid a certain note for \$250, dated July 29, 1889, payable to George F. West, cashier, or order, four months after date, with interest at 8 per cent. per annum, for the payment of which the ownership of said stock is to be retained by said Strong as security. And each party hereby releases and discharges the other from all other claims and demands." This agreement was never filed in the town clerk's office. Moore did not pay the \$250 when due, and Mr. Strong finally paid the debt evidenced thereby in October, 1890, just prior to the commencement of this action. No actual division of the cattle seems to have been made after the execution of the last agreement above quoted, but all the cattle remained on the farm, without change, in charge of Moore. On the same day of the settlement, and immediately thereafter, Strong leased the farm to Moore for five years from January 1, 1890, and Moore was in possession of the farm and all the cattle, under this lease, after that date. In October, 1890, one Nethery, a creditor of Moore, sued Moore; and a writ of attachment was duly issued, by virtue of which the defendant, Hoskin, sheriff of La Fayette county, seized, of the cattle upon the farm, six steers, three cows, and three calves, as the property of Moore. There was evidence tending to show that Nethery had been told by Moore, prior to the seizure, that the cattle seized belonged to Mr. Strong, but this was denied by Nethery. The plaintiff thereupon commenced this ac-

tion of replevin for the cattle so seized by the sheriff, claiming to own the same; and the defendant justified under his writ, claiming that the stock seized were the property of Moore. The testimony was conflicting as to the identity of the cattle which the sheriff seized. The evidence seems to be quite clear that some part of the stock seized was stock which had come on the farm subsequently to the first agreement, by exchanges made by Moore under the provisions of the said first agreement. There was evidence tending to show that two of the steers taken were steers bought by Moore on his own credit. The circuit court ruled, substantially, that the cattle placed on the farm under the agreement of January 16, 1889, and their natural increase, as well as the cattle which had been received in exchange for such original stock, was the property of Mr. Strong, and that the agreement of settlement, of October 24, 1889, was a conditional sale of part thereof to Moore, which was valid and binding as to the plaintiff in the attachment suit, if he had actual notice of Mr. Strong's rights, though the agreement was never filed, and that if they found for plaintiff their verdict would be for the value of so many of the cattle seized as were received by Moore under the contract of February 16, 1889, and the natural increase thereof. The jury returned a verdict for the plaintiff, with damages amounting to \$166.75, and, from judgment thereon, defendant appeals.

Wilson & Martin and Spensley & McIlhenn, for appellant. Orton & Osborn, for respondent.

WINSLOW, J., (after stating the facts.) We cannot agree with the conclusions of the circuit judge, that the stock placed on the farm by Mr. Strong, and its increase, remained his sole property, and that the agreement of October, 1889, was simply a conditional sale of a part thereof to Moore. The terms of the agreement of January, 1889, seem to us to preclude such an idea. By the terms of this agreement the parties, unquestionably, entered on a joint enterprise, for mutual profit, namely, the pasturage and sale of cattle. To this joint enterprise the plaintiff contributed the use of the farm, a lot of cattle, and feed. The defendant contributed his personal services in feeding and caring for the cattle, raising and securing hay and grain, and exchanging and selling stock. Each party had the right to purchase, and put on the farm, additional stock. The live stock fit for market were to be sold in the fall, and each party repaid what he had paid out for stock, with interest, and the balance of the proceeds equally divided between the parties. We can see no escape from the conclusion that the property which is contributed to this joint enterprise, and which is accumu-

lated in the prosecution of it, is joint property. Certainly, Moore had an interest in the property, more than that of a mere custodian or care taker. He became something more than a hired man. There was a common stock in trade, to which it was contemplated that each should contribute, and receive credit for his individual contributions. The property was not to be kept intact, or in specie, but selling, trading, and exchanging was provided for and contemplated, with no provisions looking towards the keeping of the property of the parties separate and distinct. When a general sale was made, in the fall, each was to receive back his cash advances, with interest, and the balance realized was to be divided equally. What element of a joint adventure for mutual profit is lacking here? We perceive none. This construction of the agreement of January renders very plain the nature of the agreement of October. The parties met to settle their joint enterprise. They proceeded to sever their ownership of the joint stock of cattle, grain, and feed. They agreed that Mr. Strong should take 20 steers as his individual property, and Mr. Moore the balance of the property, subject only to a lien thereon in favor of Strong, in the nature of a mortgage, to secure him from damage on account of his signature to Moore's note. The inevitable effect of this construction is to make the instrument a chattel mortgage, which must be filed in the proper office to be of any effect as to third parties. It follows that the circuit court erred in holding the transaction a conditional sale, which would be valid as to all persons having actual notice thereof, even though not filed in the proper office. A new trial thus becomes necessary. Judgment reversed, and cause remanded for a new trial.

SHADBOLT & BOYD IRON CO. v. TOPLIFF.

(Supreme Court of Wisconsin. June 21, 1893.)
CONTRACT OF SALE—ASSIGNMENT—DAMAGES FOR BREACH.

1. Where a partnership is dissolved, and the partners form a corporation, an assignment by the firm to the corporation of all its stock in trade, accounts, and all contracts entered into by the firm for the purchase and delivery of goods, transfers to the corporation a contract for the purchase of goods, not specifically mentioned in the bill of sale.

2. Where defendants contracted to sell "steel bow sockets for the year 1888" on stipulated terms, it was a question for the jury whether defendants were bound to fill orders for sockets to be sent direct to purchasers from the original buyers, such purchasers and the original buyers living in different cities and states.

3. Where defendants contracted to fill orders "for all steel bow sockets for the year 1888," damages were not recoverable for their failure to deliver sockets ordered in 1888, but intended for the 1889 trade.

4. Where defendants contracted to fill or-

ders "for all steel bow sockets for the year 1888," their declaration that they would "ship no more sockets on any of your unfilled orders" may have been intended to mean merely that they would not fill outstanding orders, and did not render them liable for damages for failure to deliver sockets that had not been ordered.

5. They were liable for failure to fill only such specific orders as were rightfully made under the contract, and for loss of profits on sales which plaintiffs had the opportunity of making, and would have made but for the refusal of defendants, in advance, to fill any more such orders.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by the Shadbolt & Boyd Iron Company against Isaac N. Topliff, impleaded with another. From a judgment for plaintiff, the named defendant appeals. Reversed.

The other facts fully appear in the following statement by CASSODAY, J.:

The complaint alleges, in effect, that November 1, 1887, and for a long time prior thereto, and up to January 14, 1888, John Shadbolt, Francis Boyd, and Henry B. Hunter were copartners doing business in the city of Milwaukee under the firm name and style of Shadbolt, Boyd & Co. That November 1, 1887, the said firm duly entered into a contract with the defendants, under their firm name of the I. N. Topliff Manufacturing Company, by a writing of which the following is a copy, to wit: "Milwaukee, Nov. 1st, 1887. The I. N. Topliff Mfg. Co., Cleveland, Ohio—Gentlemen: Please enter our order for all steel bow sockets for the year 1888 at 25% net, 90 days, Lea covered bow sockets at 50 and 10% net 90 days, 5% cash 30 days. Yours, resp., Shadbolt, Boyd & Co. Accepted, subject to all unavoidable or unforeseen causes. I. N. Topliff Mfg. Co. Todd." That January 14, 1888, the firm of Shadbolt, Boyd & Co. dissolved, and its members organized themselves into the plaintiff corporation, and became and are the successors in business of Shadbolt, Boyd & Co. That at that time the said firm, for value received, duly sold, assigned, transferred, and made over unto the plaintiff all their stock in trade, accounts, outstandings, and all contracts entered into by said Shadbolt, Boyd & Co. for the purchase and delivery of goods, together with the said contract with the defendants, and the cause of action arising therefrom. That the plaintiff thereby became, and now is, the lawful owner and holder of said contract, of which the defendants had due notice from the plaintiffs at the time aforesaid. That in pursuance of said contract the said firm, up to January 14, 1888, made various orders for said goods and sockets, which were duly filled by said defendants under said contract. That thereafter the plaintiff, in its corporate name, made various orders for said goods and sockets in accordance with the terms of said contract, which orders were duly acknowledged and filled by the defendants under said contract, until an order of 1,024 sets of steel

bow sockets was made on September 18, 1888, by the plaintiff, which order the defendants, without unavoidable or unforeseen cause therefor, refused to fill, and never have filled, as required by said contract, or otherwise. That afterwards and during September, 1888, the defendants refused to fill three several orders of the plaintiff upon them to send goods directly to three several companies therein mentioned, and which in the aggregate amounted to 1,248 sets of such bow sockets, but which they refused to fill. That October 2, 1888, the defendants also refused to fill an order of the plaintiff of 100 sets of said bow sockets, without unavoidable or unforeseen cause therefor. That October 1, 1888, the defendants notified the plaintiff by letter that they would ship no more sockets on any of the plaintiff's unfilled orders, without any cause for such refusal or such notice. That at that time the plaintiff was doing a large business in said sockets, and was receiving orders for said sockets in large numbers and amounts, and so continued to receive orders therefor, which it was unable to fill, up to January 1, 1889. That at all the several times mentioned, and at all other times during the year 1888, this plaintiff was ready and willing and offered the defendants to receive and pay for said sockets so ordered pursuant to said agreement, and otherwise has in all respects duly performed all the conditions of said agreement on its part. That the plaintiff claimed \$7,136.72 damages for such breach of said contract, over and above all claims and set-offs by the defendant. That the complaint also alleged a second cause of action, upon which the plaintiff claimed \$1,000 damages. The defendant demurred to the sufficiency of the complaint, and upon the demurrer being overruled the defendants separately answered, by way of admissions and denials, and alleged that the said Shadbolt, Boyd & Co. were retail dealers in bow sockets, and former customers of the defendant Topliff, and had in previous years, under similar orders, made but small orders, and that it was fully understood when the order of November 1, 1887, was given and accepted that the needs and orders of said firm under said order would be for about the same number of bow sockets as had been ordered in previous years, and that both parties so understood said alleged contract. That all orders made by the firm were filled. The answer of said Topliff also sets up a counterclaim for goods sold and delivered to the plaintiff at its request, in the sum of \$474.05. The plaintiff, replying to such counterclaim, admitted the facts upon which it was based, but alleged that the counterclaim has been allowed to reduce the plaintiff's claim for damages. At the close of the trial the jury returned a verdict in the form of answers to two questions submitted to them by the court, as follows, to wit: "First. Did the defendant know, in fact, at the time he refused to fill further unfilled

orders, that the plaintiff was a corporation? Answer. Yes. Second. Do you find for the plaintiff or the defendant, and in what amount do you assess the damages of the party in whose favor you find? A. For the plaintiff, in the sum of \$2,959.55." From the judgment entered upon said verdict, March 24, 1892, for the amount of damages so found, and costs, the defendant brings this appeal.

O. E. Monroe and W. W. Boynton, for appellant. Rogers & Mann and Turner & Timlin, for respondent.

CASSODAY, J., (after stating the facts.) This case is peculiar, in some of its features.

1. The firm of Shadbolt, Boyd & Co., of Milwaukee, wrote the defendants, of Cleveland, November 1, 1887, to the effect: "Please enter our order for all steel bow sockets for the year 1888" at the terms therein named. The defendants wrote at the bottom of such order the words, "Accepted, subject to all unavoidable or unforeseen causes," and signed the same. Here was a general order which implied a promise to receive and pay for all such bow sockets as the firm might order for the year, and upon the terms therein named, and a general acceptance, which implied a promise to fill all such orders as should be made, subject to the conditions therein named. In other words, the writing embodied the mutual promises of the one party to the other, and hence was based upon a good and valuable consideration, and hence was binding upon the respective parties.

2. It is contended that neither the complaint nor the evidence show that the plaintiff corporation was or is a party to such written contract. The dissolution of the firm, the incorporation of the plaintiff, and the transfer of all the assets and property of the firm to the plaintiff by the firm, January 14, 1888, appear to be sufficiently alleged and proved. Upon this point the court charged the jury: "The point is made that this bill of sale did not, in terms, assign this contract. It may be true that there is not a word in the bill of sale which accurately and legally describes this executory contract; but it is so obvious, upon the face of the paper, that there was a manifest intent to sell the whole business, as well as the whole property of the concern, that I shall hold as a matter of law, and so instruct you, that this bill of sale was intended to, and did in fact, transfer this contract in question from the former firm to the newly-formed corporation. And, if it were not so, still it is true the new corporation took the contract, and claimed it from that time forward as its own, without objection from the former firm. It must have been without objection on their part, because every member of the former firm was a member of the new corporation. And I therefore charge

you, as a matter of law, and dispose of this question once for all, that this contract was, so far as it was competent for the parties to do so, assigned by the firm who made it to the corporation who succeeded that firm." This part of the charge appears to be fully justified by the pleadings and the evidence, and hence the exceptions to particular portions of it are overruled.

3. It is contended that the defendants never consented to such substitution of the plaintiff company in place of the old firm, and hence were not bound to fill any such orders made by the plaintiff. The court stated to the jury, in effect, that the defendants "might have declined to deal with this new corporation upon the contracts made with the old firm," had they seen fit to do so, but that they had not. It appears that upon the organization of the plaintiff company, and for about two months thereafter, it used the old billheads or letter heads of the firm, and stamped thereon the words, "Shadbolt & Boyd Iron Co., successors to," so that the whole billhead read, "Shadbolt & Boyd Iron Co., successors to Shadbolt, Boyd & Co.;" that at the expiration of such period the plaintiff got up new billheads or letter heads, with the name of the corporation and the names of its officers thereon, including its president, vice president, secretary, and treasurer, and that the defendants thereupon, and long before they refused to fill any of such orders, received numerous copies of such new billheads or letter heads, as well as such old billheads, so stamped, and filled the plaintiff's orders for such bow sockets written thereon. Upon this point the court charged the jury as follows: "All the evidence is to the effect that after the change of the plaintiffs from a copartnership into a corporation they always signed their communications, 'Shadbolt & Boyd Iron Co.;" that their billheads also indicated that a change had been made; and that after the first two or three months their billheads indicated that they had been formed into a corporation, because they gave, not merely their corporate name, but the names of their officers as well, and stated facts upon every billhead and letter head entirely at variance with the idea of the continuance of the old firm as a mercantile firm. Whatever objections they made from the beginning to the end of the business, they never did object that the plaintiff was a corporation. They always made their objections upon some other ground. So that I charge you, as a matter of law, that they did consent to this change, and did waive their right to object by reason of this change, and that they are as liable to the Shadbolt & Boyd Iron Company, upon the facts of this case, as they would have been if the firm had remained Shadbolt, Boyd & Co. I take the responsibility of making this decision, and relieving you from any responsibility upon it, because to me

the evidence is too clear for dispute, and because the evidence upon which I base that opinion is all of it written evidence,—unmistakable, unambiguous, written evidence,—which it is the duty of the court to construe, and not to send to the jury." These statements are fully justified by the undisputed evidence. It is admitted that September 8, 1888, the plaintiff ordered the defendants to send to one of its customers in Ohio a certain number of such bow sockets; that September 17, 1888, the defendants answered the letter covering such order, and therein objected to filling such order on the ground that it did not come within the terms of the contract, as understood by the parties, but nowhere objected on the ground that such order was made by the plaintiff company, instead of the old firm; and among other things the defendants therein stated: "You also told the writer, when he called upon you later on, after contract had been made, that we could count on S. B. Iron Co. for as many as they had taken during 1887 from Topliff & Ely." It is conceded that the call which the writer of that letter so made upon the plaintiff was in March, 1888, or in June, 1888. Thus it appears that the defendants were expressly "told" as early as June, 1888, that they had been doing business with the "S. B. Iron Co." instead of the old firm, so that the defendants not only had the constructive notice by way of the billheads and letter heads, mentioned, but also actual notice, as early as June, 1888. Besides, the jury expressly found that the defendant knew, in fact, at the time he refused to fill further unfilled orders, that the plaintiff was a corporation.

4. It appears that the defendants and the Topliff & Ely Company, a corporation of Elyria, Ohio, the only manufacturers of such patented bow sockets, entered into an agreement April 2, 1888, whereby it was agreed, in effect, that such bow sockets should thereafter be sold by them, respectively, at prices to be fixed by a committee therein agreed upon, and for no less: provided, however, that such agreement should not include or prohibit either party from filling or complying with any former contract; that in pursuance of such agreement the manufacturer's price of such bow sockets was increased in July, 1888, 10 cents on each set, and September 2, 1888, another increase was made, of 10 cents on each set, making a total increase of 20 cents on each set over and above the price named in the contract upon which this action is based. The result was that the plaintiff was thereby enabled to sell such bow sockets so ordered from the defendants at a lower price than the price so fixed by such committee; and so it happened, in September, 1888, that dealers in Ohio, who had previously purchased of such manufacturers, ordered of the plaintiff a large number of such bow sockets, and thereupon the plaintiff ordered the defendants to

ship. In the aggregate, 1,248 sets of such bow sockets directly to such Ohio dealers, which the defendants refused to do, on the ground that such orders were not within the scope of the contract, and not within the contemplation of the parties thereto at the time of making the contract. Upon this point the court charged the jury that "there has been some discussion as to whether or not the defendants were required to fill some of the orders that were sent to them. There was a concern called the Hamilton Buggy Company, that made an order which they refused to fill,—I do not know upon what ground except that it was too large an order. There was another man, by the name of Cooper, for whose benefit the plaintiff made an order, and directed the goods to be delivered to him. The plaintiff had a perfect right, in the ordinary course of business, to order goods delivered direct to customers. It was not necessary that all goods should be sent to Milwaukee, and then sent off again. It is the ordinary course of business, as doubtless some of you understand, for wholesalers or jobbers, when they are ordering goods from a factory, to order them to be shipped direct to their customers, and there is ordinarily no objection to that." We are constrained to hold that it was error for the court to thus charge the jury, as a matter of law, that the defendants were bound, under the contract, to fill such orders. In an action for the breach of an executory contract for the sale and delivery of personal property, the damages should be limited to such as may naturally, or according to the usual course of things, fairly and reasonably arise from such breach of the contract itself, or from such breach committed under circumstances in the contemplation of both parties at the time of making the contract. Certainly, such may be fairly regarded as the result of the English cases. *Hadley v. Baxendale*, 9 Exch. 341; *Horne v. Railway Co.*, L. R. 7 C. P. 583, L. R. 8 C. P. 131; *Elbinger v. Armstrong*, L. R. 9 Q. B. 473; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111; *McMahon v. Field*, 7 Q. B. Div. 504; *Hamilton v. Magill*, L. R. 12 Ir. 202; *Borgnis v. Nugent*, 15 Q. B. Div. 85. These adjudications differ somewhat in the language employed, but it is believed that they are all to substantially the same import. This court has repeatedly sanctioned such proposition. *Candee v. Telegraph Co.*, 34 Wis. 471; *Walsh v. Railway Co.*, 42 Wis. 23; *McNamara v. Village of Clintonville*, 62 Wis. 211, 22 N. W. Rep. 472; *Thomas, B. & W. Manuf'g Co. v. Wabash, St. L. & P. Ry. Co.*, 62 Wis. 649, 22 N. W. Rep. 827. The contract in the case at bar is silent as to where the defendants were to ship the bow sockets. Shadbolt, Boyd & Co., at the time of making the contract, were doing business in Milwaukee. They simply directed the defendants to enter their order. The question is whether, in making the contract, the par-

ties contemplated that such shipments should be made by the defendants to whosoever and to whomsoever the plaintiff might direct. The contract in this regard is uncertain and ambiguous. Thus, Brett, L. J., in one of the cases cited, speaking of the three phases of the rule of damages, as laid down in the leading case, said, in effect, that whether the damage claimed was the probable consequence of the breach, or "whether it was in the contemplation of the parties when the contract was made," were rather questions of fact, for a jury, than of law, for the court, to determine. 7 Q. B. Div. 506. Other cases cited are of a similar import. Whenever, as here, the contract is silent or ambiguous, it must necessarily be a question for the jury, upon legitimate evidence. *Nilson v. Morse*, 52 Wis. 240, 9 N. W. Rep. 1; *Swanke v. McCarty*, 81 Wis. 112, 51 N. W. Rep. 92; *Dana v. Fiedler*, 12 N. Y. 40. We must hold that the giving the portion of the charge last quoted was error.

5. As indicated, the contract was "for all steel bow sockets for the year 1888." Upon that point the court, among other things, charged the jury "that the words 'all steel bow sockets' mean 'all that we shall require or buy or use for the year 1888.' And the words '1888' mean from the first day of January, 1888, to the last day of December of that year. It does not include part of 1887, and does not terminate until the end of 1888. * * * The plaintiff brought this suit on the 12th day of February succeeding the year 1888, and his damages are limited to the loss of business and profits down to that time, and may not be extended beyond it. If he anticipated further damage or loss, he had his option to wait, and bring his suit later, so as to include such anticipated damages or losses. * * * It was his right, upon the narrowest construction of his contract, to be supplied at the end of the year with the amount of stock which he usually carried on hand. And upon my construction of the contract it was his right to have on hand at the end of the year as large a lot of bow sockets as he had a reasonable expectation of being able to sell at a profit." As indicated, the contract was made two months before January 1, 1888. As we construe it, Shadbolt, Boyd & Co. were at liberty during those two months to commence ordering such bow sockets as might be necessary for their prospective trade to commence January 1, 1888, and to end December 31, 1888; but neither they nor the plaintiff, as their successor, had any right, under the contract, to order such goods during the year 1888 for the trade of 1889. It is true, as indicated in another portion of the charge, that "the year 1888" are words of limitation, so far as the plaintiff is concerned; but such limitation was confined to the period in which sales of the goods so ordered were to be made by Shadbolt, Boyd & Co., and the plaintiff as their successor, but not as the

period in which their orders for such goods were to be made. For these reasons we think the particular portions of the charge, last quoted, were erroneous, in allowing damages for losses in the plaintiff's trade between December 31, 1888, and February 12, 1889, on the theory that the plaintiff, under the contract, had the "right to have on hand at the end of the year as large a lot of bow sockets as he had a reasonable expectation of being able to sell at a profit."

6. If the defendants failed to fill orders for such bow sockets, properly made by the plaintiff under the contract, then the plaintiff is entitled to all legitimate damages resulting from such breach. It is conceded that the verdict includes some damages for such bow sockets never ordered by the plaintiff. The theory upon which such damages are claimed is that the defendants, by letter dated October 1, 1888, declined to fill two specific orders from the plaintiff to ship directly to certain Ohio dealers, and also wrote to the plaintiff, "We shall ship no more sockets on any of your unfilled orders." It is contended that this was an express refusal by the defendants to further perform their contract. The expression used may, however, be fairly construed as applicable only to prior outstanding and "unfilled" orders; and for aught that appears they may all have been orders to ship directly to outside dealers, and not to the plaintiff itself, and which, as indicated, the defendants claim, did not come within the scope of the contract. The difficulty with such contention is the uncertainty as to loss of profits on bow sockets never ordered by the plaintiff, and which the evidence fails to show that the plaintiff had an opportunity of selling. Remote, contingent, uncertain, and speculative damages are excluded by all well-considered adjudications. *Bradley v. Denton*, 3 Wis. 557; *Brayton v. Chase*, Id. 456; *Shepard v. Gaslight Co.*, 15 Wis. 318; *Thomas, B. & W. Manuf'g Co. v. Wabash, St. L. & P. Ry. Co.*, 62 Wis. 642, 22 N. W. Rep. 827; *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. Rep. 35; *Griffin v. Colver*, 16 N. Y. 489; *McKinnon v. McEwan*, 48 Mich. 106, 11 N. W. Rep. 828. Upon reviewing the authorities upon this subject the late Mr. Justice Lamar, speaking for the whole court, in *Howard v. Manufacturing Co.*, 139 U. S. 206, 11 Sup. Ct. Rep. 500, well said: "The grounds upon which the general rule of excluding profits, in estimating damages, rests, are: (1) That in the greater number of cases such expected profits are too dependent upon numerous, uncertain, and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of the nonfulfillment of the contract; (3) and because, most frequently, the engagement to pay such loss of profits in case of default in the perfor-

mance is not a part of the contract itself, nor can it be implied from its nature and terms. * * * But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into." By the contract the plaintiff's assignor entered its general order for bow sockets, as indicated, to be followed by specific orders from time to time. The defendants can only be held liable, upon the principles mentioned, for their failure to fill such specific orders as were rightfully made under the contract, or for the loss of profits on sales which the plaintiff had the opportunity of making, and would have made, had not the defendants, in advance, refused to fill any more such orders. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

STATE ex rel. **EDGERLY v. CURRIE**,
State Auditor.

(Supreme Court of North Dakota. May 31, 1893.)

CLERK OF RAILROAD COMMISSIONERS—COMPENSATION—STATUTES—REPEAL BY IMPLICATION.

1. Sections 82-84 of the constitution of this state are considered in connection with chapters 122, 123, 125, 126, 128, 187, 188, and chapters 9 and 10 of the Laws of 1890, and chapter 9 of the Laws of 1891; and, *held*, that said constitutional provisos, and said statutes of the state, are in conflict with, and repugnant to, section 27 of chapter 110, Laws 1889, and hence said section 27 was never in force in this state.

2. The state auditor has no authority, under existing laws, to issue warrants on the state treasurer to pay the salary of the clerk or secretary of the commissioners of railroads upon a basis of \$1,500 per annum, as fixed by section 27, c. 110, Laws 1889. Accordingly, *held*, that the state auditor lawfully refused to issue such warrants to the relator, who held the position of secretary from January 4, 1891, until the end of January, 1892. The salary annexed to said position is \$1,000 per annum.

(Syllabus by the Court.)

Appeal from district court, Burleigh county; W. H. Winchester, Judge.

Mandamus proceeding. Defendant appeals from a final order of the district court of Burleigh county, (W. H. Winchester, J.) which order directs the defendant to issue warrants for relator's official salary, as secretary of the commissioners of railroads, at the rate of \$1,500 per annum. Reversed.

W. H. Standish, Atty. Gen., for appellant.
M. J. Edgerly, for respondent.

WALLIN, J. The relator was appointed secretary of the commissioners of railroads on February 4, 1891, and served in that capacity from said date until the end of January, 1892. The relator claims that the salary allowed by law to such secretary is \$1,500 per annum, and has, upon that assumption, made out, in due form, his monthly accounts for salary during said period, and has from time to time presented the same to the respondent, as state auditor, and demanded warrants upon the state treasurer for such amounts. The auditor has refused, and still refuses, to issue warrants to the relator upon the basis of a salary of \$1,500. The court below directed the defendant to issue the warrants as demanded. The facts are conceded, and the sole question presented for the determination of the court is whether relator's salary is, or is not, \$1,500 a year. If it is that amount, the order appealed from must be affirmed; otherwise, it must be reversed. The solution of the question must turn upon the construction to be given to certain constitutional provisions and statutes which bear upon the subject-matter.

Chapter 110 of the Laws of 1889 embraces an act of the legislature of the territory of Dakota, which act amends an act of 1885, entitled "An act to provide for the establishment of a board of railroad commissioners, defining their duties," etc. Both acts authorized the governor of the territory, by and with the advice and consent of the council, to appoint three persons biennially, to be "and constitute a board of railroad commissioners." Section 6 of the act of 1885 was re-enacted without change, and constituted section 27, c. 110, Laws 1889. Said section is as follows: "The said commissioners shall hold their office at such place as they shall determine. They shall each receive a salary of \$2,000, to be paid as the salaries of the other territorial officers are paid, and shall be provided, at the expense of the territory, with necessary office furniture and stationery; and they shall have authority to appoint a secretary, who shall receive a salary of \$1,500 per annum." This section is explicit, and under it the territorial board of railroad commissioners "had authority to appoint a secretary," and when appointed the secretary's salary was \$1,500 a year. This section was in force when the state constitution went into effect, in the year 1889; and it becomes necessary to inquire whether it was in force during the time when the relator was in office, because it is not claimed that any statute has been passed by the state legislature, in terms, creating the office of secretary of the "commissioners of railroads." The relator's claim is that such office has been recognized by state legislation, and that no state enactment is in conflict with the provisions of section 27, relating to the appointment and salary of a secretary, and hence that the

same are in force. If the position of secretary of the commissioners of railroads is, under section 27, a distinct state office, and one which exists separately and apart from the position of a clerk of the commissioners of railroads, it would be the duty of the state auditor, under the annual appropriation act, approved February 27, 1891, (chapter 10, Laws 1891,) to issue the warrants demanded by the relator as the incumbent of such office. That the relator was appointed to the office of secretary by the commissioners of railroads is not questioned.

Turning to the state law we find that section 82 of the constitution provides that "there shall be chosen by the qualified electors of the state * * * three commissioners of railroads. * * * They shall severally hold their offices at the seat of government for the term of two years, and until their successors are elected and duly qualified." Section 83 provides: "The powers and duties of the commissioners of railroads shall be as prescribed by law." Section 84 fixes the annual salary of such commissioners at \$2,000. The state constitution contains no further provisions relating to commissioners of railroads, and, as has been seen, it confers upon them no powers or duties, but, on the contrary, declares that their powers and duties "shall be as prescribed by law." The legislature of the state, at its first session, enacted a great number and variety of statutes defining the powers and prescribing the duties of the "commissioners of railroads;" but, so far as we can see, no statute of the state has ever created, in terms, the office of secretary of the commissioners of railroads, or authorized such commissioners, or any one else, to appoint an officer of that name. See chapters 122, 123, 125, 126, 128, 187-189, Laws 1890. Upon this state of facts the question arises, under the law, whether there is, independent of clerkships, an office of "secretary" of the commissioners of railroads in the state of North Dakota. If the law has not created such an office it will be conceded that the commissioners could not do so by the mere act of appointing the relator to such an office; much less would such appointment operate to authorize the state auditor to draw warrants on the treasurer, as and for the salary of such secretary, at the rate of \$1,500 per annum. No money can be drawn from the state treasury without authority of law. If there is any law which will justify paying the relator a salary of \$1,500 per annum, it is conceded that it must be found in section 27 of the act of 1889, which we have quoted above, and which, the relator contends, is still in force.

The attorney general cites chapters 9 and 10 of the Laws of 1890 to show that section 27, *supra*, has been repealed by necessary implication, if not in terms. Chapter 9 is entitled "An Act to Provide Clerk Hire for the Various State Officers, and Making Appropri-

ation Therefor." Chapter 10 is an amendment of chapter 9. Section 1 of chapter 9, as amended, provides: "The following amounts are hereby fixed and allowed for clerk hire of the several state officers hereafter mentioned," etc. Section 1 then goes on to provide clerk hire for the governor's office, and all other state offices, and concludes in the following language: "Commissioners of railroads, one thousand dollars per annum." The proviso of section 1 is as follows: "Provided, that all clerical appointments shall first be referred to the governor for his approval." Section 2 provides for a continuing annual appropriation for such clerk hire. Section 3—the emergency section—declares, as a reason why the act should go into immediate effect, that there was then existing "no provision by law for the payment of any clerk hire for the several state officers." A summary of these statutory provisions will show: (1) That the state legislature, at its first session, after clothing the commissioners, then newly elected by the people, with extensive powers, some of which were of a nature to require the services of a clerical assistant, authorized the said commissioners, with the approval of the governor, to appoint a clerk to serve the commissioners. (2) The legislature provided a continuing annual salary for the clerk so to be appointed. (3) The legislature itself declared, in effect, in the emergency clause of the statute, that there was, when the act was passed, no other existing law which authorized the commissioners to appoint a person to perform their clerical work. Section 4 reads: "All acts and parts of acts in conflict with the provisions of this act are hereby repealed." We are convinced, after careful consideration, that the state constitution, which creates three commissioners of railroads to be chosen by popular vote, when read in connection with the comprehensive body of statutes enacted at the first session of the state legislature, covering all of the ground embraced in the territorial laws upon the same subjects, must be held to have effected a total abrogation of all territorial statutes which created a board of railroad commissioners, and defined their powers and duties, including the power to appoint a secretary of the board. The creation of the constitutional officers to be elected by the voters necessarily implies the abolition of the board appointed by the governor, as the two sets of officers, in the same sphere of duty, could not coexist, and exercise their powers, without a clash in jurisdiction. All duties which, under territorial laws, were devolved upon the board, are now cast upon the commissioners of railroads, by statutes passed since statehood, except only the duty of appointing an officer who was described in the territorial statute as a secretary, which officer was to be appointed by the board, without reference to the approval of the governor, whereas, under state law, the commissioners are

empowered to appoint a clerk, but such appointment does not take effect until approved by the governor of the state. The feature of the approval of the governor, required by the state statutes of both 1890 and 1891, marks a clear departure from the old system, and indicates to our mind a purpose in the state legislature to abolish the old system of allowing the board to appoint a secretary without consulting the governor, and substituting therefor the plan of executive approval of such appointment. The two systems of filling the two clerical offices in question differ so radically that we are satisfied that the state legislature intended to wipe out the old method, and substitute another. We think the legislative intent was to cast the same clerical duties which, under the territorial regime, were to be performed by an officer called a "secretary," upon a functionary who, under the state statutes, is denominated both "secretary" and "clerk." The terms "clerk" and "secretary," as applied to subordinate ministerial functionaries, are, by popular usage, synonymous terms, and are frequently used interchangeably. This use is also strictly accurate, according to the accepted standards of the language. One definition of the term "secretary," as given in Webster's Dictionary, is: "A person employed to write orders, letters, dispatches, public or private papers, records, and the like; an official scribe, amanuensis, or writer." The same authority, under the word "clerk," says: "In some cases, 'clerk' is synonymous with 'secretary';" also, that a clerk is "one who is employed to keep records and accounts; a scribe; a penman; an accountant; as the clerk of the court." A striking, as well as strictly pertinent, example of the interchangeable use of the terms "clerk" and "secretary," is found in the law we are considering. As we have seen, section 6, c. 126, Laws 1885, expressly authorized the board to appoint a secretary. A salary was provided for such secretary. But a careful perusal of the entire chapter will disclose the fact that not a single duty, clerical or otherwise, was devolved by the act upon any official of that name, while, on the contrary, one duty, at least, of a clerical nature, was expressly cast upon a subordinate of the board, who was, in terms, denominated a "clerk;" and no officer called a "clerk" was authorized to be appointed or employed, by the territorial statute. Section 3 of said chapter 126 authorized the territorial board, under certain circumstances, to serve a written notice upon railroad corporations. The statute required the notice to be served by leaving a copy thereof, "certified by the commissioners' clerk, with any station agent." Unquestionably, such written notice could have been lawfully certified by the secretary of the board, not only because the board had no clerk, and was not authorized to appoint any functionary of that name, but for the further reason, as has been shown, that the two words, "clerk" and "secretary," as applied

to such a functionary, are used interchangeably.

Respondent's counsel cites the following excerpt from section 10, c. 122, Laws 1890, to show, quoting from his brief, that "it was evidently the intention of the legislature of the state of North Dakota, of the year 1890, that a clerk or clerks should be employed in the office of the secretary of the commissioners of railroads," viz.: "Said commissioners shall inform such railroad company, by a notice thereof, in writing, to be served as a summons in civil actions required to be served by the statutes of this state in actions against corporations, when certified by the clerk or secretary of the railroad commissioners." To our mind this statutory provision furnishes only another instance of the interchangeable use of the terms "clerk" and "secretary," as descriptive of a subordinate functionary, whose duties are ministerial and clerical in character. We think both terms were used in the statute to more fully describe the subordinate functionary, whether called "clerk" or "secretary." Section 1 of chapter 9, Laws 1891, is also cited by respondent to show that there is such an officer as secretary of the commissioners of railroads. If considered by itself, and wholly divorced from other features of the statute relating to the same matter, the section would possibly tend to support respondent's contention that there is a state officer called a "secretary of the commissioners," and that that officer has been allowed \$1,000 per annum to disburse as clerk hire to his subordinates. But this theory becomes untenable when we recall the fact that there never was a statute which, by any construction possible, conferred upon the secretary of the board, or upon any other person or board, the power to appoint a subordinate to render clerical assistance to the secretary, or in the secretary's office. We think that we have shown that the obvious purpose of the state laws, when considered together, is to annul the laws of the territory upon the same subject-matter, and to confer upon the commissioners of railroads chosen by the people new and additional powers, including that of appointing, with the approval of the governor, a clerical assistant, whose salary is fixed at \$1,000 a year, and who is referred to in the act of 1890 as a "clerk," and in the act of 1891 as "secretary."

It appears that the point in question has not before arisen in the state. The law in question, as practically construed by the several state auditors, has been held to be adverse to the relator's construction. Prior to the relator's appointment, and since the state was admitted, two persons had been appointed to the position held by the relator, viz. F. W. Fancher and Harvey Harris. Both were paid salaries at the rate of \$1,000 a year. While it is true that the relator is not necessarily concluded by the uniform

rulings of the several state auditors who have practically construed the law against the relator's theory, nor by the uniform acquiescence of his predecessors in office in such rulings, nevertheless it is true that the ruling of an executive officer upon a point where it is his sworn duty to act, especially where the rulings have been acquiesced in by those whose financial interests were involved, are always given considerable weight in the courts, and when the power is doubtful the uniform rulings in an executive office would be followed, and allowed to turn the scale. Cooley, Const. Lim. (3d Ed.) marg. pages 69, 70. In the case at bar, however, we think there is a plain and necessary repugnancy between the territorial and state law upon the question involved, and of course the former must give way to the latter. The relator bases his claim wholly upon section 27 of the act of 1889. That section gave absolute authority to the territorial board to appoint a secretary, whose salary was fixed at \$1,500 a year. No such authority has been conferred upon the state commissioners. The territorial board no longer exists. The abolition of that board by the repeal of the law which created it must be held to vacate all offices, and to cut off all official salaries, which came into existence by virtue of the law which is repealed. Mechem, Pub. Off. §§ 407, 408. We must therefore hold that section 27, c. 110, Laws 1889, is repugnant to both the constitution and laws of the state of North Dakota, and especially repugnant to the acts embraced in chapters 9 and 10, Laws 1890, and chapter 9, Laws 1891. Where the salary of an officer is not fixed by the terms of the constitution, it is well settled, where an act of the legislature appropriates a sum as salary which is less in amount than the salary allowed the same officer by the statute which created the office, that the two statutes are repugnant, and the former must give way to the latter, even though the latter enactment contains no repealing words. Collins v. State, (S. D.) 51 N. W. 776, and cases cited. These authorities are not in point in the case at bar until the conclusion is first reached—and we have reached that conclusion—that all of the enactments in question which touch the matter of a "clerk" or "secretary" of the commissioners are to be construed as referring to one and the same subordinate functionary of the commissioners of railroads, whose duties are ministerial, purely, and of a clerical nature. Chief Justice Waite, in the case of King v. Cornell, 106 U. S. 395, 1 Sup. Ct. Rep. 312, said: "While repeals by implication are not favored, it is well settled that when two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier, and embraces new provisions, which plainly show that the last is intended as a substitute for the first, it will operate as a repeal."

We deem further comment unnecessary. From what has been said it follows that no law of the state will allow the state auditor to issue warrants on the state treasurer to the relator as and for salary at the rate of \$1,500. The relator, whether as the secretary or clerk of the commissioners of railroads, is lawfully entitled to a salary of \$1,000 per annum, and no more. The order appealed from must therefore be reversed, and such will be the order of this court. All concur.

EVANS v. FALL RIVER COUNTY.

(Supreme Court of South Dakota. June 26, 1893.)

VACATING JUDGMENT—DISCRETION.

A motion to vacate or set aside a judgment under the provisions of section 4939, Comp. Laws, is addressed to the sound legal discretion of the trial court on the particular facts of the case, and its action in the matter, whether of allowance or refusal, will not generally be disturbed by the appellate court, unless there is a manifest abuse of such discretion.

(Syllabus by the Court.)

Appeal from circuit court, Fall River county; William Gardner, Judge.

Action by Fred T. Evans against the county of Fall River to recover on a county warrant. There being no answer, judgment was entered by default. From an order denying a motion to set aside the judgment, and for leave to answer, defendant appeals. Affirmed.

S. E. Wilson, State's Atty., J. H. Boomer, W. G. Rice, and Wood & Buell, for appellant. Martin & Mason, for respondent.

CORSON, J. This is an appeal from an order denying a motion to set aside and vacate a judgment, and that the defendant have leave to serve an answer. On or about November 20, 1891, the plaintiff commenced an action against the county of Fall River to recover the sum of \$5,000, interest, and costs, upon a county warrant bearing date November 16, 1891, allowed and issued by the board of county commissioners of said county, and drawn upon the county treasurer, payable out of the courthouse and jail fund, not otherwise appropriated. It is alleged in the complaint, in substance, that on August 13, 1891, the board of county commissioners of said county duly awarded to said plaintiff a contract for the erection of a courthouse and jail for said county, he being the lowest bidder therefor; that a contract was duly executed between the county and said plaintiff, and that to secure the faithful performance of the same on his part the plaintiff executed a good and sufficient bond in the penal sum of \$30,000; that the plaintiff had, at the time said warrant was issued, nearly completed said courthouse, and that there was due him on account of said contract more than \$5,000;

that under and by virtue of said contract the board of county commissioners of said county duly issued to him the county warrant for the said sum of \$5,000 above mentioned; that said warrant was duly presented to the county treasurer of said county, and payment demanded, but said treasurer refused to pay the same, and that said treasurer had in his hands, when demand for payment was made, belonging to said courthouse and jail fund, more than \$15,000 not otherwise appropriated; and plaintiff demanded judgment for said sum of \$5,000, interest, and costs. The summons and complaint were duly served upon one of the county commissioners of said county, and, no answer or demurrer having been served within the time required by law, judgment was duly rendered for the amount demanded on the 29th day of December, 1891. On or about March 12, 1892, the defendant, by the state's attorney for that county, and associate counsel, served notice upon the plaintiff that on March 23d, it would move the court to vacate and set aside said judgment, and all proceedings had therein, and for leave to serve an answer. This motion was denied on April 9th, and from the order denying the said motion this appeal is taken.

The motion was made upon the affidavits of S. E. Wilson, Esq., then state's attorney for said county, and James Bradley, county treasurer of said county, and a copy of the proposed answer. The part of section 4939, Comp. Laws, under which this application was made, reads as follows: "The court * * * may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." This court in *Oil Co. v. Lee*, 47 N. W. Rep. 955, commenting upon this section, said: "When, therefore, a party makes a showing of such mistake, inadvertence, surprise, or excusable neglect, applies promptly for relief after he has notice of the judgment, and shows prima facie he has a defense, a court should not hesitate to set aside the judgment, and allow him to serve an answer, upon such terms as may be just under all the circumstances of the case." But the granting or denying an application under this statute is, as will be noticed, left to the discretion of the trial court, and the exercise of that discretion will not be disturbed by the appellate court unless it is satisfied there has been a manifest abuse of such discretion. Of course, the discretion to be exercised by the trial court is a sound judicial discretion. The same doctrine prevails in the courts of most of the states. The rule is thus stated by Mr. Black in his work on Judgments: "A motion to vacate or set aside a judgment is addressed to the sound legal discretion of the trial court on the particular facts of the case, and its action in the matter, whether of al-

lowance or refusal, will not generally be disturbed by the appellate court, unless there has been a manifest abuse of such discretion." 2 Black, Judgm. § 334; Haynes, New Trials & App. § 347; Merritt v. Putnam, 7 Minn. 493, (Gil. 399); Jorgensen v. Boehmer, 9 Minn. 181, (Gil. 166); Barker v. Keith, 11 Minn. 65, (Gil. 37); Reagan v. Madden, 17 Minn. 402, (Gil. 378); Bailey v. Taaffe, 29 Cal. 423; Coleman v. Rankin, 37 Cal. 247; Watson v. Railroad Co., 41 Cal. 20; Moore v. Kellogg, 58 Cal. 385; McMurrin v. Meek, (Minn.) 49 N. W. Rep. 983; Mulhollan v. Scoggin, 8 Neb. 202; McClelland v. Pomeroy, 75 Pa. St. 40; Seymour v. Supervisors, 40 Wis. 62; Wheeler & W. Manuf'g Co. v. Monahan, 63 Wis. 194, 23 N. W. Rep. 109. In this case the affidavits failed to show such mistake, inadvertence, surprise, or excusable neglect on the part of the county as required the court, in the exercise of a sound judicial discretion, to grant the motion. As before stated, the summons and complaint were served, as required by law, upon one of the county commissioners. Neither of the commissioners have made any affidavit in the case. They are all silent, so far as the record discloses, and, we may assume, are satisfied with the judgment. The state's attorney, in his affidavit, fails to show any mistake, inadvertence, surprise, or excusable neglect. He states that the commissioners did not notify him that the suit had been commenced, but he does not say that he did not know from other sources that such a suit was pending, or that, if he had been notified, he would have defended the action, or that the county, in his opinion, had any defense to the action. And the fact that it appears the county warrant upon which the suit was brought was allowed and issued by the board of county commissioners only a few days prior to the commencement of the action, and that no showing was made that any new facts in relation to the validity of the claims had been discovered after it was issued, raises a strong presumption that the county, through its proper officers, was satisfied to allow judgment to be taken without answer. The affidavit of the county treasurer equally fails to show the existence of any of the causes calling into exercise the discretion of the court. This court is unable to say, therefore, that the learned court below abused its discretion, or that it did not properly deny the motion upon the facts before it. Finding no error in the record, the order of the circuit court is affirmed. All the judges concurring.

MINNEKAHTA STATE BANK v. FALL RIVER COUNTY.

(Supreme Court of South Dakota. June 26, 1893.)

Appeal from circuit court, Fall River county; William Gardner, Judge.

Action by the Minnekahta State Bank

against the county of Fall River to recover on a county warrant. There being no answer, judgment was rendered by default. From an order denying a motion to set aside the judgment, and for leave to answer, defendant appeals. Affirmed.

S. E. Wilson, State's Atty., Wood & Ruell, W. G. Rice, and J. H. Boomer, for appellant. Martin & Mason, for respondent.

CORSON, J. This is an appeal from the order of the circuit court of the seventh judicial circuit denying the motion of defendant to vacate and set aside a judgment rendered in said action against said defendant on the 16th day of February, 1892, and for leave to serve an answer in said cause. The motion to vacate and set aside the judgment was made upon the affidavits of S. E. Wilson, Esq., state's attorney for Fall River county, and James Bradley, treasurer of said county, and state substantially the same facts as are stated by them in the case of Evans v. Fall River County, 55 N. W. Rep. 862, and also upon a proposed answer, a copy of which was served with the notice of motion, alleging substantially the same fact as the proposed answer in the last-mentioned case. The motion was denied, and the defendant appeals to this court.

The showing made upon the motion being substantially the same as that in the case referred to, and the briefs of the respective counsel being substantially copies of their briefs in that case, it will not be necessary to discuss the points presented further than was discussed in the opinion in that case. We held in that case that an application to set aside and vacate a judgment and for leave to serve an answer is addressed to the sound judicial discretion of the trial court, and will not be disturbed by this court, unless there has been a manifest abuse of such discretion. In this case we cannot say, on the showing made, there was any abuse of its discretion by the court in denying defendant's motion, and for the reasons stated in the opinion in the case referred to the order of the court below is affirmed. All the judges concurring.

VAN ZANDT v. S. H. WOOD PRODUCE CO.

(Supreme Court of Minnesota. July 14, 1893.)

APPEALABLE ORDER—AMENDING BILL OF PARTICULARS.

An order requiring a bill of particulars to be made more specific is not appealable.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Cauty, Judge.

Action by E. E. Van Zandt against the S. H. Wood Produce Company. From an order requiring a further bill of particulars of the defense, defendant appeals. Appeal dismissed.

J. C. Fifield, (W. R. Cray, of counsel,) for appellant. Cobb & Wheelwright, for respondent.

DICKINSON, J. After the answer had been put in, to which was appended a bill of particulars of the matters set forth in the answer, the court, on motion of the plaintiff, made an order requiring the defendant to file a further bill of particulars stating other facts concerning the matters specified in the former bill. This is an appeal by the

defendants from that order. We regard the order as not appealable. Perhaps the decision in *Pugh v. Railroad Co.*, 29 Minn. 390, 13 N. W. Rep. 189, may lend some support to the contrary conclusion, but we do not think that the rule of appealability as applied in that case should be further extended.

Appeal dismissed.

KEDZIE v. TOWN OF EWINGTON.

(Supreme Court of Minnesota. June 30, 1893.)

CONSTITUTIONAL LAW—TITLE OF ACT.

That act of the legislature now known as chapter 80, Sp. Laws 1887, is unconstitutional and void, because the subject of the attempted legislation was not expressed in the title of the act.

(Syllabus by the Court.)

Appeal from district court, Jackson county; Brown, Judge.

Action by J. H. Kedzie against the town of Ewington. From the judgment rendered, plaintiff appeals. Affirmed.

Leavitt K. Merrill, for appellant. T. J. Knox, for respondent.

COLLINS, J. The constitutionality of certain legislation is put in question by this appeal. In 1883 there was passed by the legislature an act (Sp. Laws 1883, c. 135) entitled "An act for a township drainage act, authorizing the supervisors of townships in Kittson, Marshall, Polk, Norman, Cass, and Wilkin [counties] to issue bonds for certain purposes." The names of these counties were again mentioned in the first and fifth sections of the act. In 1887 there was passed an act entitled "An act to amend chapter one hundred and thirty-five (135) of the Special Laws of Minnesota of one thousand eight hundred and eighty-three, (1883.)" Sp. Laws 1887, c. 80. This last act, by means of its first section, attempted to amend the first by inserting among the counties specified in the first and fifth sections of the latter the names of 21 additional counties in this state, so that all of the provisions of the statute of 1883 would be made to apply to the townships in these last-mentioned counties. The bonds on which this action is founded were issued by one of these townships. As we regard the case, the claim made by respondent's counsel that the original act was unconstitutional, because the subject of the same was not expressed in its title, becomes of secondary importance, and need not again be alluded to. That the subject of the legislation attempted to be covered by the amendatory act of 1887 was not expressed in its title is so patent that any discussion in support of this assertion would be a waste of time. The amendment could not have been incorporated, and the counties therein named could not have been included, in the original statute, under its title, under the

requirement found in article 4, § 27, of the state constitution, and the amendment in no manner enlarged the title of that statute. Of the numerous cases on this subject decided by this court, that of *Boom Co. v. Prince*, 34 Minn. 79, 24 N. W. Rep. 361, is probably the most in point. Order affirmed.

FARSON et al. v. TOWN OF SOUTH BROOK.

(Supreme Court of Minnesota. June 30, 1893.)

Appeal from district court, Cottonwood county; Brown, Judge.

Action by John Farson and others, copartners as Farson, Leach & Co., against the town of South Brook. From the judgment rendered, plaintiffs appeal. Affirmed.

A. M. Rutan, (Chas. T. Farson, of counsel.) for appellants. J. G. Redding, for respondent.

PER CURIAM. This case is controlled by that of *Kedzie v. Ewington*, *ubi supra*, (just determined.) Order affirmed.

DUNNING et al. v. McDONALD.

(Supreme Court of Minnesota. June 27, 1893.)

MORTGAGE—STATUTORY FORECLOSURE—VALIDITY—NOTICE.

For the purpose of foreclosing a mortgage of real estate under the power, the notice of sale must be signed with the names of all who appear, of record, to own the mortgage; and if, after the first, and before the last, publication of notice, there is put on record an assignment of a part interest in the mortgage to one whose name is not signed to the notice, a sale pursuant to notice so published will be invalid.

(Syllabus by the Court.)

Appeal from district court, Carlton county; Stearns, Judge.

Action by Genevieve M. Dunning and others against Mitchell W. McDonald and others to set aside a statutory mortgage foreclosure, and for other relief. From an order overruling a demurrer to the complaint, defendant McDonald appeals. Affirmed.

Cash, Williams & Chester, for appellant. J. L. Washburn, for respondents.

GILFILLAN, C. J. Defendant McDonald executed to plaintiff Dunning a mortgage upon real estate, with the usual power of sale, dated July 8, 1890, recorded July 19, 1890. March 28, 1891, the mortgagee began to foreclose under the power, by notice in her name, as mortgagee, first published on that day. March 31, 1891, she duly assigned to one of the other plaintiffs an undivided one-sixth of the debt and mortgage; to another, an undivided one-sixth; to another, an undivided one-sixth; to another, an undivided two-sixths; leaving an undivided one-sixth in herself. One of these assignments was recorded April 29, 1891, before the last publication of the notice of sale; the others, not till after the foreclosure sale. The publication of the notice, as first

published, in the name of the mortgagee, was continued the proper time, and the sale was made May 11, 1891. The question is, was it a valid foreclosure? It was so, unless by reason of the assignments, and the recording of one of them, after the first publication of the foreclosure notice, and before the sale. The power of sale contained in a mortgage, being coupled with an interest, passes to the assignee of the mortgage. It cannot be severed from the legal ownership of the mortgage. It is indivisible, and, no matter how many owners of the mortgage there may be, there is but one power. If there be two or more legal owners, whether as original mortgagees or as assignees, or both, the power is in them, jointly. The statute contemplates that it shall be exercised by the person or persons in whom it resides,—that is, by the holder or holders of the legal title to the mortgage, (*Bottineau v. Insurance Co.*, 31 Minn. 125, 16 N. W. Rep. 849),—provided he or they be qualified to exercise it, by his or their title having been made matter of record; and if there be an assignment of a part interest to one whose assignment is not of record, and he cannot exercise it, and the joining of his name to the foreclosure proceeding can add nothing to it, his name need not be joined, but the power must be exercised by the owner of the remaining interest, who is qualified by his title appearing of record. That is, in the case of an assignment, the power is not to be deemed as fully vested in the assignee, so that he may foreclose, or so that he must join with the others in foreclosing, until his assignment is recorded. If a mortgagee's interest in the mortgage has ceased, even pending the foreclosure proceeding, he cannot complete the foreclosure. *Niles v. Ransford*, 1 Mich. 338. For the purpose of foreclosure the notice of sale must show that it is the act of those in whom the power is vested; that is, it must be assigned by him or them. In the case of two or more joint mortgagees it could hardly be claimed that a signing by one alone would do. The names of all should be signed. We do not decide—for the point is not in the case—but that each may be regarded as the agent of all, so as to have authority to use their names for the purpose of foreclosure. But it must be the act of all. Where there are joint owners of a mortgage it can make no difference, in this respect, how they became such,—whether as original mortgagees, or by assignment. For the purpose of foreclosure it is not enough that the first step taken, to wit, the first publication of the notice, is regular, and by the proper person. Each successive step, till the last required to be done by the holder of the power, must be regular, and by the proper person. *Niles v. Ransford*, supra. If it be necessary that the notice at its first publication be signed by all qualified holders of the power, it must be so with each publi-

cation,—with each act that the holders of the power are required to do. Whether, the publications being regular, a change in the record ownership of the mortgage between the last publication and the day of sale will affect the regularity of the sale itself,—that being, in a sense, the official act of the sheriff,—it is unnecessary to decide. For the reason that, at the time of some of the necessary publications in this case, there was a record owner of an interest in the mortgage whose name was not signed to the notice, the sale was invalid.

Order affirmed.

BOYD v. FURNAS et al.

(Supreme Court of Nebraska. June 30, 1893.)

JUDGMENT—REVIVAL—LIMITATION—ACTION BY ADMINISTRATOR.

1. *Held*, that the court had jurisdiction of the subject-matter and the parties served.

2. That the proof fully sustained the order of the court reviving the judgment.

3. The limitation of one year, in which to revive an action on motion, does not apply to a proceeding to revive a judgment.

4. *Held*, that the action was properly brought in the name of the administrator.

(Syllabus by the Court.)

Appeal from district court, Lancaster county; Field, Judge.

Proceeding by Charles H. Boyd against Robert W. Furnas and O. H. Irish to revive a judgment. From a judgment granting the relief sought, defendant Furnas appeals. Affirmed.

Chas. E. Magoon, for appellant. J. C. Johnston and H. H. Blodgett, for appellee.

MAXWELL, C. J. This proceeding was brought in the district court of Lancaster county to revive a judgment in the district court of that county. The conditional order of revival is as follows: "And now comes Adella Boyd, formerly Adella Frankman, and suggests to the court that the plaintiff, Adolphus G. Frankman, has died since the judgment was recovered in this action, and that Charles H. Boyd has been appointed administrator of his estate, and that there still remains due and unpaid on said judgment the sum of \$579.92 and the sum of \$81.52 costs, and interest thereon from September 14, 1889; and the court being fully advised in the premises, on motion of the plaintiff, it is ordered that the defendants Robert W. Furnas and Orsamus H. Irish show cause, within 20 days from the service of this order, why judgment for the sum of \$579.92 should not be revived against them, the said Robert W. Furnas and Orsamus H. Irish, and in favor of Charles H. Boyd, the administrator of the estate of the deceased, Adolphus G. Frankman." This order was duly served on the defendant Furnas, and he, through his attorney, filed his answer, as follows: "Comes now the defendant Robert W. Furnas, and objects to the revivor of the

judgment heretofore rendered herein for the reasons following: (1) The court has no jurisdiction of the subject-matter. (2) The relief asked in the application herein is contrary to the law. (3) There is no authority in law for granting the application herein. (4) That said application was not made within the time fixed by law. (5) That the said Boyd has no right to the relief prayed for in said application, and has not the right, in law, to make said application. (6) That said A. G. Frankman, on the 1st day of April, 1875, assigned said judgment to one A. N. Goldwood, and that said Frankman was not the owner of said judgment at the time of his death." On the hearing the court made the following order: "This cause having been heretofore, on a former day of this term of court, to wit, December 20, 1890, submitted to the court upon the motion of Charles H. Boyd, administrator of the estate of the said Adolphus G. Frankman, now deceased, to revive the judgment heretofore entered in this court, in the above-entitled cause, in favor of the said plaintiff and against the said defendants, which judgment has become dormant by lapse of time, and because of the death of the said plaintiff, and it appearing to the court that the order heretofore entered herein, commanding the said defendant to show cause, if any there be, why said judgment should not stand revived, has been duly served upon the defendant Robert W. Furnas, and that no sufficient cause has been shown by him why said judgment should not be revived, the court doth sustain said motion. It is therefore considered and adjudged by the court that the judgment entered herein on the 21st day of April, A. D. 1875, for the sum of \$237.52, with interest on said sum from the said 21st day of April, 1875, at the rate of 10% per annum until paid, and costs of suit, taxed at \$45.98, be, and the same hereby is, revived in the name of the said Charles H. Boyd, administrator of the estate of Adolphus G. Frankman, deceased, together with the costs of increase, taxed at \$46.39, and the costs in this behalf expended, taxed at \$10.30, and for all of which sums execution is hereby awarded." The errors assigned are the same as in the answer.

It will be observed that the answer is exceedingly vague and indefinite. Take the first assignment, that "the court has no jurisdiction of the subject-matter." It is not denied that the court has authority to revive a judgment which, by lapse of time, has become dormant. Such power is clearly conferred by statute, and has been exercised by the courts whenever the facts justified the revival. *Eaton v. Hasty*, 6 Neb. 419; *Gillette v. Morrison*, 7 Neb. 263; *Hunter v. Leahy*, 18 Neb. 80, 24 N. W. Rep. 680; *Dennis v. Bank*, 19 Neb. 675, 28 N. W. Rep. 512; *Garrison v. Aultman*, 20 Neb. 311, 30 N. W. Rep. 61; *Creighton v. Gorum*, 23 Neb. 502, 37 N. W. Rep. 76. In the case last

cited a judgment was recovered in the county court, a transcript thereof filed in the district court, on which an execution was issued, and returned unsatisfied. No other proceedings were had for more than nine years, when steps were taken to revive the judgment, and it was held that the plaintiff was entitled to an order of revivor. The court therefore had jurisdiction of the subject-matter, and the first objection is overruled.

2. The second, third, and fourth assignments may be considered together. In substance, they allege a want of authority to grant the relief sought. As stated in the first proposition, such authority does exist. The fifth assignment, that Boyd has no right to relief prayed for, fails to assign any reason which would bar the right. The answer does not deny that he is administrator of Frankman's estate, and, even if it did, the proof tends to show that he is such administrator, and is entitled to have the judgment revived. The testimony tends to show that, in 1875, Frankman assigned the judgment to Goldwood as security; that Frankman was appointed subagent of Goldwood for the sale of sewing machines; and, being unable to give a bond, he assigned \$200 of the judgment in lieu thereof, for the faithful performance of his duty; that he faithfully performed his duty, and therefore the assignment did not become absolute. Goldwood is not here complaining, nor claiming any rights in the premises, and in our view the proof is sufficient to entitle the plaintiff to recover.

3. Some objection is made to the form of the action,—in effect, that the action is brought in the name of the estate, and not the administrator. It does appear that the action is brought by Boyd as administrator of the estate of Frankman, and that he is such administrator. There is no merit in the defense, and the judgment is affirmed. The other judges concur.

EDEN MUSEE CO. v. YOHE.

(Supreme Court of Nebraska. June 30, 1893.)

APPEAL FROM JUSTICE COURT — DISMISSAL — CONSENT OF APPELLEE.

1. A party appealing from a judgment of a justice of the peace to the district court may dismiss his appeal, without the consent of the appellee, at any time before the cause is submitted to the court or jury.

2. The cases of *Berggren v. Railroad Co.*, 37 N. W. Rep. 470, 23 Neb. 620, and *Robbins v. Railroad Co.*, 42 N. W. Rep. 905, 27 Neb. 73, distinguished.

(Syllabus by the Court.)

Error to district court, Douglas county; Hopewell, Judge.

Action by William M. Yohe against the Eden Musee Company. Judgment for plaintiff. Defendant brings error. Reversed.

Hall, McCulloch & English, for plaintiff in error. Jas. W. Carr, for defendant in error.

NORVAL, J. William M. Yohe brought an action before a justice of the peace against the Eden Musee Company on an account for work and labor, and recovered a judgment therein for \$50 and costs of suit. The defendant prosecuted an appeal to the district court, where, after the issues were made up, but before the cause was reached for trial, the appellant (plaintiff in error here) filed a motion for leave to dismiss its appeal, which motion was overruled by the district court. Afterwards, judgment was rendered against the appellant, and in favor of the appellee, for the sum of \$112.80.

A single question is presented for our consideration, and that is, did the district court err in refusing to permit the plaintiff in error to dismiss its appeal? Our answer is in the affirmative. It is clear, on principle and authority, that an appellant has a perfect right, in an ordinary action, to dismiss his appeal at any time before the cause is submitted to the court or jury, even though his adversary does not consent thereto. Had the appeal been dismissed the rights of the appellee would not have been in the least prejudiced thereby, inasmuch as such a dismissal would have left the case precisely the same as though no appeal had been taken. The appellee could then have enforced his judgment obtained before the justice. If he was dissatisfied with the amount of the judgment there entered, he should have taken and perfected an appeal. Not having done so, he cannot be heard to urge as an objection to the right of the appellant to dismiss his appeal that the recovery was too small. The motion to dismiss the appeal should have been sustained. Elliott, App. Proc. § 534; Bacon v. Lawrence, 26 Ill. 53; Adkinson v. Gahan, 114 Ill. 21, 28 N. E. Rep. 380; State v. Moriarty, 20 Iowa, 595; Latham's Appeal, 9 Wall. 145.

Counsel for defendant in error, in his brief, argues that plaintiff in error did not ask proper relief; that the motion should have prayed for the affirmance of the judgment of the justice, instead of the dismissal of the appeal. The cases of Berggren v. Railroad Co., 23 Neb. 620, 37 N. W. Rep. 470, and Robbins v. Railroad Co., 27 Neb. 73, 42 N. W. Rep. 905, are cited to sustain the contention. Both cases were appeals from the awards of commissioners in condemnation proceedings. The doctrine there laid down was that, where a railroad company appeals from an award of damages for real estate appropriated for right of way purposes, it cannot dismiss its appeal in the appellate court, but that the proper motion is to affirm the award; that the landowner, by the dismissal of the appeal, would lose interest on the award, while the sustaining of a motion to affirm the award would carry interest and costs. The landowner, having been deprived of the use of the money by the appeal, is entitled to interest

thereon. To allow the railroad company to dismiss its appeal would be prejudicial to the rights of the appellee, as it would deprive him of interest on the amount of the award. No such consequences could result in the case before us by a dismissal of the appeal, since the judgment of the justice would bear interest at the legal rate from the date of its rendition until paid.

Plaintiff in error did not waive the error in overruling of its motion by afterwards contesting the case on the merits. The judgment of the district court is reversed, and the cause remanded, with directions to dismiss the appeal at the costs of the appellant. Judgment accordingly. The other judges concur.

O'CONNOR v. WALTER.

(Supreme Court of Nebraska. June 29, 1893.)

GARNISHMENT—EXEMPTION—CONFLICT OF LAWS—
RES JUDICATA.

1. Where there were due a resident of Nebraska, from a railroad company operating a line of railroad through Iowa and Nebraska, wages, which, in Nebraska, were exempt from execution and attachment process, but which, nevertheless, by means of an assignment of the claim against the party entitled to such exemption to a resident of Iowa, were procured, by the garnishment of said railroad company in Iowa, to be applied to the payment of said claim, the assignor of such claim is liable to such debtor for the amount so appropriated without his consent.

2. As between said assignor and the party entitled to the benefits of such exemption in Nebraska, the proceedings in Iowa were in no sense res adjudicata.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Chapman, Judge.

Action by Fred Walter against Patrick W. O'Connor. Plaintiff had judgment, and defendant brings error. Affirmed.

Sawyer & Snell, for plaintiff in error. A. G. Greenlee, for defendant in error.

RYAN, C. The petition of Fred Walter, plaintiff, alleged, as against Patrick W. O'Connor, as defendant, that for a long time prior to the 5th day of March, 1889, the said plaintiff was, and ever since had been, a married man, the head of a family, and a resident of Cass county, Nebraska, and that during the whole of said time the said plaintiff had lived with and provided for his family, by day labor, in the employ of the Chicago, Burlington & Quincy Railroad Company, and that said plaintiff's sole income and means of support for himself and his family were the wages by plaintiff earned in said employment; that on March 5, 1889, one D. M. West filed a petition in the court of N. Schurz, a justice of the peace in the city of Council Bluffs, Iowa, claiming to be the assignee of said O'Connor of a claim against plaintiff for the sum of \$13.50 and costs; that said West caused the Chicago, Burlington & Quincy Railroad

Company to be garnished, and requiring said railroad company to answer as to the indebtedness of the said company to plaintiff; that on March 11, 1889, the said railroad company accordingly answered that it was indebted to said Walter in the sum of \$55, whereupon said cause was continued, and service was obtained by publication upon Walter, and the day for hearing was set for May 10, 1889; that in April, 1889, the said railroad company filed an affidavit of the said Walter that he was the head of a family, and that his wages were exempt from execution, and asking that said proceedings be dissolved; that nevertheless the said justice of the peace entered judgment against plaintiff, Walter, for the sum of \$13.50 damages, and costs taxed at \$8.60, and requiring said railroad company to pay into court the sum of \$22.10 out of plaintiff's wages, which said railroad company thereupon did, and that said \$22.10 was deducted by said railroad company from the sum of \$55 due plaintiff, and that plaintiff has never received said sum so deducted; that said sum of \$55 was due plaintiff for labor performed as a brakeman by plaintiff for said railroad company within the 60 days immediately preceding said date of garnishment, and that the wages so garnished were exempt from seizure by attachment, execution, or garnishee process in this state, which facts the said West and O'Connor also well knew; that said West was not the owner of the account of the said O'Connor, if any such he had, but held it simply for collection for O'Connor, who was the real party in interest, though a pretended assignment thereof had been made by O'Connor to said West. For a second cause of action, plaintiff claimed to be entitled to \$27.50 as damages indirectly resulting from said garnishment, which he alleged was simply a conspiracy between West and O'Connor to deprive plaintiff of his exemptions under the laws of Nebraska. There was an answer in denial of each of the above averments. The allegations of the petition are set out at great length, and with considerable particularity, for the reason that, with the exception of the averments in respect to the second cause of action, each allegation of said petition was, upon the trial, fully sustained by the proofs. These allegations, therefore, fairly state the facts in this case, wherefore it is needless that they be repeated. It was stipulated between the parties in the district court that, by the laws of the state of Iowa, the wages of a nonresident of that state are not exempt from attachment, execution, or garnishment. Upon a trial of the issues the jury returned a verdict in favor of Walter, against Patrick W. O'Connor, for \$24.50, for which, with costs, judgment was duly rendered. For the reversal of this judgment, O'Connor brings this cause to this court by his petition in error, with the necessary record and bill of exceptions.

In *Albrecht v. Treitschke*, 17 Neb. 205, 22 N. W. Rep. 418, this court held that, where a judgment creditor procures the exempt wages due to a laborer to be taken by garnishee process, and applied to the payment of his judgment, a cause of action arises in favor of the judgment debtor against the creditor for the amount of such wages wrongfully appropriated, unless the right of exemption is waived by the debtor. The statute exempting from seizure by judicial process such earnings of a laboring man as have accrued within the period of 60 days immediately preceding service of garnishment process was intended for the support of the family of which such laborer is the head and stay. In extending credit, every one dealing with the head of a family must take into account this right of exemption, and, presumably, in every extension of credit, this right is recognized. It therefore in no way operates to the injury of the law-abiding creditor. The rapacity which respects neither implied contract obligations nor statutory enactments must, in damages, respond for this, as for any other act of misappropriation. From the facts which we have under consideration it appears that O'Connor assigned his claim to West solely for the purpose of collection. In his evidence, O'Connor admitted this, at the same time stating that the arrangement was that West was to receive for making the collection 20 per cent. of the amount thereof. It is true the court in which suit was brought by West had jurisdiction of the garnishee, which operated its line of railroad as well in Iowa as Nebraska, and that, therefore, the amount was lost to Walter, beyond recovery, as against the garnishee. *Railroad Co. v. Moore*, 31 Neb. 629, 48 N. W. Rep. 475. But why should this operate in favor of O'Connor, who was the prime mover in this garnishment proceeding? In all respects the deprivation of this exemption was as harsh and effectual as in the case of *Albrecht v. Treitschke*, supra. Let us suppose the exemption was of a specific article of personal property. It would be unquestioned that, if he appropriated it to his own use in this state, O'Connor would be liable to Walter for its value. Instead of its being appropriated in this state, let us suppose that this property was found and appropriated by O'Connor in Iowa. Would his liability for its value in the courts of Nebraska be in any way modified by that fact? Would it at all relieve of liability for him to show that his duly-authorized agent in Iowa converted the property to the use of O'Connor? Certainly not; and there is no appreciable difference, in principle, between the cases supposed and that at bar. If the judgment creditor, directly or indirectly,—no matter where, or by what process,—appropriates to the payment of a debt due him the exempt wages of a debtor, without such debtor's consent, such creditor is liable

to the debtor entitled to such exemption to the full amount of the misappropriation. In this case, however, it was urged that the judgment of the Iowa court was res adjudicata, and therefore unassailable. An estoppel of that, as well as of any other, nature, requires mutuality between the parties to render it effective. If O'Connor is entitled to the benefit of the judgment pleaded it must appear that a judgment against him would have been likewise binding. This could not have been, for, purposely, he was not a party to the Iowa proceeding, in any way. Under the proofs no other verdict could properly have been returned than that which was rendered, and the judgment of the district court is affirmed. The other commissioners concur.

TRUMBLE et al. v. TRUMBLE et al.

(Supreme Court of Nebraska. June 29, 1893.)

STATUTES—PLURALITY OF SUBJECTS—TITLE—AMENDMENT—PARTIAL INVALIDITY.

1. Chapter 57, Sess. Laws 1889, providing for the descent of real property and the distribution of personal property of intestates, the disposition of homesteads of intestates, the barring of an insane wife's interest in the lands of her husband by deed of her guardian, and the abolition of the estates of dower and curtesy, is void, because it contains more than one subject.

2. It is also void because its object is not expressed in its title, and because it is, in effect, amendatory of other acts, which it does not contain.

3. Under the title of an act to amend a certain other act, no amendment can be enacted which is not germane to the subject of the original act.

4. When portions of an act are invalid because not within the title, the whole act must be declared void, if it is apparent from an inspection of the act itself that the invalid portions formed an inducement to its passage.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Strode, Judge.

Suit by Martha Trumble and others against Henry Trumble and Henrietta Goodell for partition. Decree for plaintiffs. Defendants bring error. Reversed.

Reese & Gilkeson, for plaintiffs in error. J. E. Philpott, for defendants in error.

IRVINE, C. Martha Trumble filed her petition in the county court of Lancaster county, setting forth that she was the widow of William Trumble, deceased, and that the other parties to this action were his children and grandchildren; that he died seised of certain real estate, one tract whereof was a homestead; that he left a will, to the terms of which she never at any time consented,—and praying that there might be set off to her one-third of all said real estate, and her homestead interest in the particular tract referred to. Upon the hearing of the case a

decree was rendered in accordance with the prayer of the petition. An appeal was taken to the district court, where a similar decree was rendered. To reverse this decree, certain of the children bring these proceedings in error.

Under the pleadings and proof the decrees of the county and district courts were right, if the act of the legislature approved March 29, 1889, (Sess. Laws 1889, c. 57,) is a valid legislative enactment. The plaintiffs in error urge that the act in question violates article 3, § 11, of the constitution, which provides that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title, and no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." They further contend that the act violates section 3 of the bill of rights, providing that "no person shall be deprived of life, liberty, or property without due process of law." The title of the act is as follows: "An act to amend section thirty (30) and one hundred and seventy-six (176) of chapter twenty-three (23) of the Compiled Statutes of the State of Nebraska of 1887, entitled 'Decedents,' and to repeal said original sections, and to repeal sections one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) six, (6,) seven, (7,) eight, (8,) nine, (9,) ten, (10,) eleven, (11,) twelve, (12,) thirteen, (13,) fourteen, (14,) fifteen, (15,) sixteen, (16,) seventeen, (17,) eighteen, (18,) nineteen, (19,) twenty, (20,) twenty-one, (21,) twenty-two, (22,) twenty-three, (23,) twenty-four, (24,) twenty-five, (25,) twenty-six, (26,) twenty-seven, (27,) twenty-eight, (28,) twenty-nine, (29,) of chapter twenty-three (23) of the Compiled Statutes of Nebraska of 1887, and section seventeen (17) of chapter thirty-six (36) of the Compiled Statutes of Nebraska of 1887, entitled 'Homesteads,' and all acts and parts of acts in conflict herewith." The third section of the act repeals the sections named in the title. Of these, sections 1 to 28, inclusive, of chapter 23, provided for dower, the barring and assignment thereof, and various details connected therewith; section 29 provided for estates by curtesy; section 30 provided for the descent of real estate of intestates; section 176 provided for the distribution of personal property; while section 17, c. 36, related to the succession of homestead, providing that, on the death of the person from whose property it was selected, it should vest in the survivor for life, with remainder to the heirs of the decedent, subject to his power of disposing of such remainder by will, and further exempted such homestead from the payment of debts contracted by the decedent. The first section of the act of 1889 provides that section 30 shall be "amended to read as follows." Then follows section 30, as amended, which, in its first portion, enacts a new order of descent of real estate of intestates. It then proceeds to provide an entirely new law for the dispo-

sition of homesteads, containing, among other things, provisions whereby the homestead shall be appraised upon proceedings instituted by the county judge. That after deducting incumbrances, if the residue do not exceed \$1,000, the homestead shall descend to the widow, subject to the incumbrances. If there be a residue after deducting incumbrances and the \$1,000, it shall descend as provided in the act. That the widow may elect to retain the homestead by paying the shares descending to other heirs, and if she do not so elect the property shall be sold in a peculiar manner provided by the act, and the proceeds of the sale distributed. The section then proceeds to declare that the widow's share cannot be affected by any will of her husband unless she consent thereto, in writing, within 30 days after his will has been left with the county judge for probate, and she advised of its contents by a certified copy served on her by personal service, and her consent filed with the county judge. The section next provides that all provisions made in the act in regard to a widow of a deceased husband shall be applicable to the surviving husband of a deceased wife; then, that the widow shall be entitled to her "distributive shares" of all lands whereof the husband was seised of an estate of inheritance at any time during the marriage, unless she join in a deed of conveyance, or is otherwise lawfully barred. Next follows a provision that if the wife be insane she may be barred of her interest in her husband's real estate at any time during the life of the husband, by deed of her guardian. The section concludes with a sentence abolishing the estates of dower and curtesy. Section 2 of the act amends section 176, c. 23, Comp. St., by providing a new order of distribution of personal property.

Is this act within the inhibition of that clause of the constitution providing that no bill shall contain more than one subject? This question is in most cases surrounded with difficulty. As was said in *Railroad Co. v. Frey*, 30 Neb. 790, 47 N. W. Rep. 87, this clause of the constitution "was never designed to place the legislature in a straight jacket, and prevent it from passing laws having but one object, under an appropriate title." Provided the object of the law be single, the whole law may be embraced in a single enactment, although it may require any number of details to accomplish the object. The purpose of the constitutional inhibition, upon the other hand, was to require each proposed measure to stand upon its own merits, and to apprise the members of the legislature of the purpose of the act, when called upon to support or oppose it, and perhaps a still stronger purpose was to prohibit the joining of several measures in one act, in order to combine the friends of each measure, and pass the bill as a whole, where probably a majority could not be procured in

favor of any one of its different objects. *Railroad Co. v. Frey*, supra. Examining the act in the light of this purpose, we think that it is within the constitutional inhibition. While all of its provisions are connected in some sense with one another, the connection is in some cases very remote. The descent of real property and the distribution of personality of an intestate might perhaps well be provided for by a single statute under an appropriate title. The disposition of an intestate's homestead might, in the same way, be connected with the descent of his other realty. Perhaps even the subjects of dower and curtesy might fall within the same legislative object as the descent of lands. By a somewhat chain-like process it might be argued that provisions for barring dower during the lifetime of the husband might be embraced in any act relating to dower, and that in an act relating to barring dower the guardian of an insane wife might be authorized to convey such wife's inchoate estate of dower. But the affairs of mankind are so interwoven that by similar reasoning a single statute, proceeding step by step, might be made to embrace the whole body of the law. We cannot conceive how the descent of an intestate's land can, under the constitution, be properly coupled with provisions granting to the guardian of an insane wife the power to convey her prospective interest during her husband's lifetime, nor can we see how such a statute of descents, and a law attaching new requisites to the validity of a will, can be said to embrace a single legislative object. These subjects, while remotely related, are not necessarily interdependent, and cannot be said to combine into a single subject of legislation. In *Smalls v. White*, 4 Neb. 353, it is plainly intimated that the court considered a law fixing the time of taking appeals, and also providing for the filing of pleadings in the appellate court, as embracing two subjects. So, in *State v. Lancaster Co.*, 6 Neb. 474, an act providing for township organization was held void in toto because embracing, in addition to that subject, provisions for county government. In *State v. Lancaster Co.*, 17 Neb. 85, 22 N. W. Rep. 228, a provision in an amendatory act, repealing an act not connected with the subject of the amendment, was declared void. The whole matter was as closely connected as in the case at bar. We are even more clearly convinced that the subject, or rather subjects, of the act, are not clearly expressed in its title, as the constitution requires. So far as that portion of the title which designates the sections repealed is concerned, it simply indicates the intention of the legislature to repeal the existing laws upon the subjects treated in those sections, and not to enact new laws in their stead. So far as the title designates sections amended, it indicates merely an intention to amend the law relating to the descent of real estate

and the distribution of personal estate of intestates, these being the only subjects treated in the amended sections. In *City of Tecumseh v. Phillips*, 5 Neb. 305, and in *White v. Lincoln*, Id. 505, an act was declared unconstitutional which by its title purported to amend the law incorporating cities of the second class, and also to legalize certain taxes, the offensive provision purporting to legalize and confirm the expenditure of certain license moneys already collected. This was held not to be within the title. In *Railroad Co. v. Saunders Co.*, 9 Neb. 507, 4 N. W. Rep. 240, this court held unconstitutional a provision in an act making it the duty of commissioners to levy taxes to pay certain bonds, because the title to the act was "An act to amend an act to provide for the registration of precinct or township and school-district bonds." The act amended contained nothing in regard to the payment of the bonds, and the provision on that subject in the amending act was declared void because not germane to the act amended, and so not within the title. The following cases also establish the rule that under the title of "Acts to amend" other acts no matter can be introduced by the amendment which is not germane to the original act: *Miller v. Hurford*, 11 Neb. 377, 9 N. W. Rep. 477; *State v. Pierce Co.*, 10 Neb. 476, 6 N. W. Rep. 763. The act in question violates this rule by introducing provisions in the nature of substitutes for nearly every one of the repealed sections, under color of an amendment of section 30, which, before the amendment, related to but one of those subjects. Nor can the legislature, in an act purporting to merely amend one law, enact measures which, in effect, amend or repeal other laws, not referred to in the title, or in the act itself. To do so violates the constitutional provision that the amending act shall "contain" the section or sections amended. *Smails v. White*, 4 Neb. 353; *Sovereign v. State*, 7 Neb. 409; *State v. Lancaster Co.*, 17 Neb. 85, 22 N. W. Rep. 228; *Touzalin v. City of Omaha*, 25 Neb. 817, 41 N. W. Rep. 796; *Holmberg v. Hauck*, 16 Neb. 337, 20 N. W. Rep. 279; *Foxworthy v. Hastings*, 23 Neb. 772, 37 N. W. Rep. 657; *Stricklett v. State*, 31 Neb. 674, 48 N. W. Rep. 820. This act violates this rule by affecting the law in regard to wills, that regulating the powers and duties of guardians, and probably, also, the married woman's act.

The law being unconstitutional, for the reasons above stated, the next question presented is whether it must be declared void altogether, or whether, by eliminating the objectionable provisions, it may be allowed to stand, in so far as it is single in its purpose, and germane to its title. The rule upon this subject is stated in *State v. Lancaster Co.*, 6 Neb. 474, and, in a case of the same title, 17 Neb. 85, 22 N. W. Rep. 228. In the latter case the court says, in an opinion by the present chief justice, that where the act itself includes two distinct subjects

the whole act must be treated as void, from the manifest impossibility of choosing between the two, but that this rule applies only in those cases where it is impossible, from an inspection of the act itself, to determine which part is void, and which valid. When this can be done the rule does not apply, unless it shall appear that the invalid portion was designed as an inducement to pass the valid, so that the whole, taken together, will warrant the belief that the legislature would not have passed the valid part alone. Applying this rule to the case at bar, we cannot see how it is possible to sustain any portion of the act. Some of the subjects treated are so different in their nature that we cannot say which operated upon the minds of the legislators to induce the passage of the act. The nature of the provisions in regard to descent of real property is such that the legislature would certainly not have approved them, in the absence of an amendment of the laws relating to dower and curtesy. That portion of the act which provides for the distribution of personal property is manifestly framed with the view of supplementing the provisions in regard to descent, and the disposition of homesteads.

We are fully conscious of the importance of the principle which forbids the courts to declare a statute unconstitutional where any substantial doubt exists, but we have no doubts in this case. The act is, upon its face, clearly violative of several constitutional provisions. To sustain it would be to invite their disregard in the future, if not to countenance the practice suggestively designated as "logrolling." In such a case the duty of the court to set aside an act is as clear as its duty generally to presume the validity of statutes, and no considerations based upon the importance of interests affected can discharge the courts from performing such duty. In this connection, however, it may be well to call attention to the fact that this is a direct proceeding to administer an open estate, and that we are not deciding that titles heretofore derived under decrees made in pursuance of the act in question can be disturbed by any collateral proceedings.

A learned and able argument was made upon the proposition that the act provided for a taking of property without due process of law—First, because of its provisions authorizing the sale of homesteads without providing for notice to, or a hearing of, parties interested; and, secondly, because it undertook to abolish existing inchoate estates of dower and curtesy. The conclusions reached upon other aspects of the case render a decision of this question unnecessary. The judgment of the district court is reversed, and the case remanded, with directions to proceed in accordance with the law as it existed prior to the passage of the act of 1889. Judgment accordingly. The other commissioners concur.

LINCOLN RAPID TRANSIT CO. v. NICHOLS.

(Supreme Court of Nebraska. June 29, 1893.)

STREET RAILWAYS — FRANCHISE — NEGLIGENCE — EXEMPTION FROM LIABILITY — CONTRIBUTORY NEGLIGENCE — ATTEMPT TO ESCAPE DANGER.

1. The granting of a franchise by the electors of a city to a corporation to build and operate a street railway in the streets of the city does not exempt the street-railway company from liability for injuries caused by its negligence, whether such negligence consists in the improper and careless management of its property, or in the character of the motive power employed in propelling its cars.

2. When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, is not contributory negligence such as will prevent him from recovering for an injury, if the attempt was one such as a person acting with ordinary prudence might, under the circumstances, make.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Tibbets, Judge.

Action by Joanna Nichols against the Lincoln Rapid Transit Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Webster, Rose & Fisher, for plaintiff in error. Adams & Scott and I. W. Lansing, for defendant in error.

RAGAN, C. Mrs. Nichols sued the Lincoln Rapid Transit Company in the district court of Lancaster county, and in her petition alleged that the transit company was a corporation, and owned and operated a street railway in the city of Lincoln; that said street railway was operated by running a steam engine on and along its track, with coaches attached; that said engine is frightful to horses and teams coming in view of or passing near it, all of which was well known to the transit company; that there was a large and almost constant travel in wagons, buggies, carriages, and other vehicles drawn by horses on the streets used by the transit company, which was well known to it; that on the 5th day of July, 1890, and prior thereto, the transit company wrongfully and without right, and negligently and carelessly, ran said engine and cars along certain streets of said city of Lincoln, on which streets there was constant travel, as above stated; that on said date, while she was driving along Twelfth street in said city, in a buggy drawn by a gentle and quiet horse, the transit company wrongfully, negligently, and carelessly, and without warning, ran said engine to and within the immediate vicinity of the place where she was driving said horse; that he became suddenly frightened and unmanageable, and in said fright upset said buggy, and threw her upon the track and ground,

and greatly injured her. The transit company pleaded to this petition three defenses: (1) A denial of negligence on its part; (2) a franchise from the electors of the city of Lincoln to operate its street railway; (3) contributory negligence on the part of Mrs. Nichols. There was a trial to a jury, with a verdict and judgment for Mrs. Nichols, and the transit company brings the case here, and assigns as errors the refusing of instructions requested by it, the giving of instructions objected to by it, and that the evidence does not sustain the verdict.

The instructions requested by the transit company and refused are as follows: "(4) If the jury find that the plaintiff had a fractious or skittish horse, or that the plaintiff was not a proper driver of the horse that was hitched to her vehicle, they will find for the defendant. (5) If the jury find that plaintiff, by her incompetence as a driver, or by carelessness in any way, contributed to the accident, the jury will find for the defendant. (6) If the jury find that horses generally are not frightened by the motor engine of the defendant, and that the machine was operated with ordinary and usual care at the time of the accident, they will find for the defendant. If the jury find that the plaintiff's horse, while yet a considerable distance from the motor, evinced alarm, and a tendency to be frightened, or become unmanageable, then it was the duty of the plaintiff to have turned about, and to have done all she could to have avoided the accident; and, if the jury find that the plaintiff did not so do, they will find for the defendant."

The fourth was correctly refused. Whether Mrs. Nichols' horse was fractious or skittish, or whether she was a proper driver, were proper questions for the jury to consider in determining whether Mrs. Nichols was guilty of contributory negligence. This instruction leaves out entirely the element of negligence on the part of the transit company. If the negligence of the transit company was the proximate cause of Mrs. Nichols' injury, the fact of her horse being fractious or skittish, or she a poor driver, would not relieve the transit company from liability. Again, the trial judge, in the tenth paragraph of his charge to the jury, told them: "If you should find from the evidence that the horse driven by plaintiff was a fractious or skittish horse, or that the plaintiff was not a proper driver of said horse, then plaintiff would be guilty of negligence in driving the horse in the vicinity of the motor, and could not recover." So it appears that the transit company has had the benefit of the instruction which it claims was erroneously refused. Certainly the transit company was not entitled to an instruction so broad as the one that was given.

As to instruction No. 5, asked by the transit company and refused, this was also sub

stantially given in paragraph No. 10 of the court's charge, and it was also covered by instruction No. 7 given to the jury at the request of the transit company. That instruction reads as follows: "If the jury find that plaintiff, after she found that her horse was alarmed at the motor, used her whip, or otherwise endeavored to force her horse forward towards the motor, and compelled him to approach the object that frightened him, such conduct is negligence on plaintiff's part, and they will find for the defendant."

As to instruction No. 6, requested by the transit company and refused, it was substantially given by the trial judge in the latter part of paragraph No. 10 of his charge to the jury, as follows: "And further, if you should find from the evidence that plaintiff's horse, while yet a considerable distance from the motor, evinced alarm, and a tendency to be frightened, and threatened accident, then it was the duty of the plaintiff to turn about, if she could have done so, and to have done all she could to avoid accident, or all that a reasonably prudent person would have done under the circumstances; and if you should find from the evidence that the plaintiff did not do so, then she would be guilty of such contributory negligence as would prevent her recovering."

Complaint is also made because the court gave to the jury the following instruction: "Whether or not horses are generally frightened by the motor engine of the defendant is a matter that you may take into consideration in determining the negligence of the defendant in causing the accident complained of, or the contributory negligence of the plaintiff as to her actions in the vicinity of the motor." Suffice it to say that there was no error in the giving of this instruction.

The transit company also claims that the court erred in giving to the jury the following instruction: "Third. When a plaintiff, through the negligence of defendant, is placed in a situation where he must adopt a perilous alternative, or where, in the terror of an emergency for which he is not responsible, he acts wildly or negligently, and suffers in consequence, such negligent conduct, under the circumstances, is not contributory negligence, for the reason that persons in great peril are not to be required to exercise all that presence of mind and carefulness that are justly required of a careful and prudent man under ordinary circumstances." This instruction told the jury, in effect, that if they found that Mrs. Nichols, while placed in a dangerous situation through the transit company's negligence, was frightened and in terror, and acted carelessly and was injured, her conduct, under such circumstances, was not contributory negligence; as a person in great peril is not required to exercise the care demanded of a careful person under ordinary circumstances. "A choice of evils

may often be all that is left to a man, and he is not to blame if he chooses one, nor if he chooses the greater, if he is in circumstances of difficulty and danger at the time, and compelled to decide hurriedly." *Gumz v. Railway Co.*, 52 Wis. 672, 10 N. W. Rep. 11; *Siegrist v. Arnot*, 10 Mo. App. 197; *Wilson v. Railway Co.*, 26 Minn. 278, 3 N. W. Rep. 333; *Cuyler v. Dicker*, 20 Hun, 177. "When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, is not contributory negligence, such as will prevent him from recovering for an injury, if the attempt was one such as a person acting with ordinary prudence might, under the circumstances, make." *Cook v. Parham*, 24 Ala. 21; *Karr v. Parks*, 40 Cal. 188; *Coal Co. v. Herler*, 84 Ill. 126; *Railway Co. v. Becker*, 76 Ill. 25; *Frink v. Potter*, 17 Ill. 406; *Linnehan v. Sampson*, 126 Mass. 506; *Railway Co. v. Warner*, 89 Pa. St. 59; *Wilson v. Railway Co.*, 26 Minn. 278, 3 N. W. Rep. 333; *Stokes v. Soltenstall*, 13 Pet. 181; *Stickney v. Maldstone*, 30 Vt. 738; *Palge v. Bucksport*, 64 Me. 51. And this is the true rule, though a person would not have been injured had he not made an attempt to escape the threatened danger. *Railway Co. v. Mowery*, 36 Ohio St. 418; *Wilson v. Railway Co.*, 26 Minn. 278, 3 N. W. Rep. 333; *Schultz v. Railway Co.*, 44 Wis. 638; *Gumz v. Railway Co.*, 52 Wis. 672, 10 N. W. Rep. 11. When the accident occurred, Mrs. Nichols and the transit company's engine were approaching one another, and the contention of the transit company is that Mrs. Nichols should have turned about and made an effort to escape, and, in not doing so, she was guilty of contributory negligence. The evidence is that on one side of the street stones were piled up for curbing purposes, and she could not turn out on that side. To turn the other way, she would have to cross the street railway track in front of the coming locomotive. That she was frightened, her horse terrified, and practically unmanageable. Had she attempted to cross the track, and been struck when crossing, that would have been alleged here as contributory negligence. She may not have chosen the wiser or safer course. The trial judge told the jury: "If you should find that plaintiff's horse, while yet a considerable distance from the motor, evinced alarm, and a tendency to be frightened, and threatened accident, then it was the duty of the plaintiff to turn about, if she could have done so, and to have done all she could to avoid the accident, or all that a reasonably prudent person would have done under the circumstances; and if you should find from the evidence that the plaintiff did not do so, then she would be guilty of such contributory negligence as would prevent her recovery." The instruction complained of, then, while not very happily expressed, stated the law correctly, and was properly given,

in view of paragraph No. 10 of the charge of the trial judge.

The transit company insists that the verdict of the jury is not supported by the evidence, and this assumption is based on the contention that the evidence shows no negligence on the part of the company. The grounds of negligence charged to the transit company by Mrs. Nichols in her petition were that it operated its street railway by running a steam engine on its track through a populous part of the city of Lincoln, and on streets in which there was constant travel of vehicles drawn by horses, and that said steam engine was of itself frightful to horses, and that on the day of the accident the transit company negligently and carelessly and without warning ran the engine in the immediate vicinity of herself and horse, and so frightened the latter that he became unmanageable, upset her buggy, and injured her. The transit company, in its answer, said: "Denies that its character of machinery is frightful to horses; denies that on July 5, 1890, it negligently or carelessly ran its motor; and denies that it wrongfully, negligently, or carelessly, and without warning, ran its engine to the vicinity where plaintiff was driving, or that her horse became frightened, scared, or unmanageable." Here, then, we have made these issues: Whether the transit company's steam engine was frightful to horses; whether it was negligent to use a steam engine on its tracks through a populous city, and on much traveled streets; and whether the transit company's servants in charge of the engine and cars at the time of the accident were guilty of negligence in their management of the locomotive. There is evidence in the record tending to support the allegations that the engine, with its smoke and steam and noise, was frightful to horses. There was evidence that at the time of the accident the engine was running fast, and puffing smoke; that the persons on the engine saw Mrs. Nichols when some distance away; saw that her horse was frightened; that the engine ran within 10 feet of her horse before the buggy was upset; that the engine ran so close to her she could not turn and get away. Of course, the evidence on nearly all these points was conflicting. It was a question for the jury to determine. The law has not clothed this court with authority to find conclusions of fact in cases of this character. It is not necessary to the support of the judgment in this case that we should decide that the using of steam engines by the transit company in the operation of its street railway was negligence of itself, but we have an abiding conviction that it was. Here was a large and populous commercial city, whose streets were constantly filled with persons on horseback, in buggies, wagons, and carriages; men, women, and even little children, were using these streets for business, pleasure, or recreation. A corporation or individual who would put a steam

engine on a street railway in such streets must have done so with a reckless disregard and an utter contempt for the lives and limbs of human beings. An examination of the charter of the transit company does not disclose any authority for propelling its street cars by steam, and it is doubtful if any such authority was conferred by that instrument; and, if it was, the company's franchise would not excuse it from liability for injuries caused by its negligence, whether such negligence consisted in the mismanagement of its roads and cars or in the character of the motive power employed. The judgment of the district court was right, and the same is affirmed. The other commissioners concur.

STATE ex rel. CHEEVER v. JOHNSON
et al.

(Supreme Court of Nebraska. June 29, 1893.)
INTOXICATING LIQUORS—LICENSE — MANDAMUS TO
REVOKE.

A board upon which is imposed the duty of hearing and determining applications for licenses to sell liquors will be compelled, by mandamus, to convene, and revoke a license granted, where the essential proceedings requisite to the granting of a lawful license have not been complied with.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Saunders county; Marshall, Judge.

Action in the name of the state, at the relation of John L. Cheever, against Rodney K. Johnson and others, for a mandamus to revoke a liquor license issued to Martin Tighe. Defendants had judgment on demurrer to the petition, and relator brings error. Reversed.

Geo. I. Wright, for plaintiff in error. N. H. Bell, for defendants in error.

IRVINE, C. The plaintiff in error instituted this action in the district court of Saunders county against the defendants in error, one of whom is Martin Tighe, who was an applicant for a liquor license, and the others of whom constituted the board of trustees of the village of Valparaiso. The object of the suit was to obtain a mandamus compelling the board of trustees to convene and revoke a license by them issued to Tighe, and to set a day for the hearing of a remonstrance filed against the granting of such a license.

The relator alleges that no notice of an application for a license was given, except by publication in a certain newspaper, averred not to be the newspaper published in the county, having the largest circulation therein; that the notice was published April 25, 1890, and that no application for a license was filed until May 10th, and that upon May 11th a remonstrance was filed on the part of the relator and 16 other residents of the village; that the board set a day for hearing said remonstrance, and that,

before action was taken thereon, Tighe withdrew his application, and on December 3d, at a regular session of the board of trustees, upon motion for that purpose, an application of Tighe's for a license was granted, without any other proceedings than those above set forth. A general demurrer was filed to this petition, and sustained by the court, and judgment rendered against the relator for costs.

There can be no doubt that under the allegations of the petition, admitted by the demurrer, the board had no authority to grant the license, and the demurrer seems to have been sustained upon the ground that mandamus was not the proper remedy. We do not regard this as any longer an open question in this state. Mandamus will lie in such case. *Vanderlip v. Derby*, 19 Neb. 165, 26 N. W. Rep. 707; *State v. Hanlon*, 24 Neb. 608, 39 N. W. Rep. 730; *State v. Kaso*, 25 Neb. 607, 41 N. W. Rep. 558; *State v. Barton*, 27 Neb. 476, 43 N. W. Rep. 249.

The judgment of the district court is reversed, but, as the year for which the license was granted has expired, no writ of mandamus will be issued, but judgment will be entered against the respondents for costs. Judgment accordingly. The other commissioners concur.

BALDWIN v. DOUGLAS COUNTY.

(Supreme Court of Nebraska. June 29, 1893.)

INSANITY—SUPPORT—ACTION BY COUNTY AGAINST HUSBAND—CONSTITUTIONAL LAW.

The provision of the statute authorizing suit to be maintained against the party legally bound for the support of an insane person, by the county which has paid for the cure, board, and treatment of such insane person at the insane hospital of this state, upon the finding of such insanity by the commissioners of said county, is in conflict with section 1, art. 9, of the constitution of Nebraska, and is therefore inoperative and void.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Tiffany, Judge.

Action by the county of Douglas against James H. Baldwin to recover money paid by the county in supporting defendant's wife in the insane asylum. Judgment for plaintiff. Defendant brings error. Reversed.

Connell & Ives and John Q. Burgner, for plaintiff in error. T. J. Mahoney, for defendant in error.

RYAN, C. The defendant in error, as plaintiff in the district court of Douglas county, filed its petition against the plaintiff in error, as defendant, on the 23d day of July, 1889, containing, in addition to proper allegations of its own corporate existence, the following material averments: That on May 26, 1878, and ever since, the defendant was and has been the husband of Mary M.

Baldwin, and legally liable for her support and maintenance; that, on said last-named date, Mary M. Baldwin, having a legal settlement in said Douglas county, Neb., and being adjudged insane by the board of commissioners of insanity of said county, was committed to the Nebraska State Insane Asylum, and that ever since said date she has been insane, and continued an inmate of said asylum, at the cost and expense of said Douglas county; that said county has been compelled to pay for her support and maintenance for the period beginning at the above date, and ending with May 31, 1889, the sum of \$2,220.94; that said support, maintenance, and care in said asylum were necessary for such insane person, and should have been provided by Douglas county aforesaid, by reason whereof the said defendant, James H. Baldwin, became justly indebted to said plaintiff in the sum of \$2,220.94. There was a prayer for judgment for said sum, with 7 per cent. per annum interest thereon from May 31, 1889. The defendant demurred to this petition on the ground that it did not contain facts sufficient to constitute a cause of action. This demurrer was overruled, and defendant duly excepted. Afterwards, there was filed an answer, by which was admitted the truth of the allegations that Mary M. Baldwin was the wife of the defendant, and that she was insane. Every other allegation of the petition was denied by this answer. Defendant also pleaded the statute of limitations, as against plaintiff's claim. By reply, plaintiff denied each allegation in the defendant's answer. On the 12th day of November, 1890, a trial of the above issues was had, in which, by instructions, the court withdrew from the consideration of the jury all items which had accrued anterior to July 23, 1885, being four years before this suit was begun, on account of the bar of the statute of limitations. The jury were instructed that the husband is liable for the support of his wife, and that the statute of Nebraska authorizes the bringing of an action against the husband for any sums plaintiff had been required to pay out for the wife's support in the insane hospital; that if defendant's wife became insane, and was committed to said insane hospital, where the plaintiff, Douglas county, had been compelled to pay for her support and treatment, said plaintiff could recover from said defendant said amount so expended. The defendant requested the giving of certain instructions submitted on his behalf, whereby the jury would have been informed that, if defendant at all times was ready and willing to provide for his said wife's maintenance and care, plaintiff could not recover, and that upon the proofs the defendant was not liable to plaintiff for the care, maintenance, and treatment of Mrs. Baldwin. These instructions asked by defendant were refused, and due exceptions were taken to such re-

fusal. The jury found a verdict against the defendant for \$628.60, upon which judgment was rendered. To reverse this judgment the defendant against whom it was rendered filed his petition in error to this court, in which he, of course, appears as plaintiff in error.

The evidence was introduced by the contending parties upon the respective theories indicated by the pleadings, and thus, by demurrer, the evidence, and the instructions given and refused, there is presented, unequivocally, for determination, the proposition whether or not the statute of this state authorizes the bringing of an action against a husband for any sums the county may have been required to pay out for the support of his wife in an insane hospital of the state. The defendant in error attempts to modify the sharp outlines of this proposition by calling attention to the fact that the "information of insanity," as it is called, was signed and sworn to by plaintiff in error. This, however, as its name imports, was simply a sworn statement that Mary M. Baldwin was a fit subject for custody and treatment in the hospital for the insane, as affiant verily believed, and that she had a legal settlement in said Douglas county, and asking that the necessary steps should be taken to investigate her condition, as the law in such cases required. This was only a request that the board investigate her condition, and ascertain whether or not such derangement of the mind existed as that the patient should be sent to the insane hospital for care and treatment, her maintenance being simply incident thereto. Upon a like showing by another person the same steps would have followed as did in this case, and it would then hardly have been contended that thereby the informant rendered himself liable in the same measure as it is sought to hold the plaintiff in error for in this case. Not only so, but the petition failed to declare upon this information of insanity as a contract, and from all these reasons it follows that in the determination of this case we are confined solely to the question above stated.

The statute under which the liability of the plaintiff in error is claimed to have arisen is chapter 40, Comp. St. Neb., particularly section 48, which is in the language following: "Sec. 48. The provision herein made for the support of the insane at public charge shall not be construed to release the estate of such persons, nor their relatives, from liability for their support, except from the cost of board, care, and treatment while in the hospitals of the state, which cost of board, care, and treatment shall be borne by the state; and the commissioners of the several counties are authorized and empowered to collect from the property of such patients, or from any person or persons legally bound for their support, any sum paid by the county in their behalf, as herein

provided; and the certificate from the superintendent, and the notice from the auditor of state, stating the sums charged in such cases, shall be presumptive evidence of the correctness of the sums so stated. If the board of county commissioners, in the case of any insane person who had been supported at the expense of the county, shall deem it a hardship to compel the relatives of such patient to bear the burden of his or her support, they may relieve such relatives from any part or all of such burden, as may seem to them reasonable and just." Under the provisions of the section just quoted the cost of the board and treatment of the inmates of the insane hospital must be borne by the state. Let us now consider the manner and extent to which the state is entitled to reimbursement for these outlays. Section 19, art. 3, of the constitution of Nebraska, requires the legislature to make needful appropriations for the expenses of the government of the state. Section 19, art. 5, creates and gives to a board so created general supervision and control of the public lands and grounds of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes. These duties of this board are more fully defined by statute. See article 7, c. 83, Comp. St. The governor, auditor of public accounts, and treasurer are by sections 74 et seq., c. 77, Comp. St., constituted the state board of equalization, which decides each year upon the rate of state tax, and equalizes and makes the levy thereof throughout the state. By these state authorities the levy of taxes for the support of the insane hospital is required, in the same general mode as obtains in the levy of taxes for other state purposes. Section 47, c. 40, Comp. St., however, requires the superintendent of the insane hospital to certify to the auditor of state, at fixed times, the amount due to said hospital from the several counties having patients chargeable thereto; and upon notice given by the said auditor to the county clerks, respectively, of each of said counties, the county commissioners must add such amount to the next state tax to be levied on each county, and payment of the amount so levied must be made into the state treasury. To enforce the performance of this duty a mandamus proceeding was prosecuted in this court against the defendant in error herein, resulting in an order granting the writ as prayed. *State v. Douglas Co.*, 18 Neb. 601, 26 N. W. Rep. 378. There was filed in that case a dissenting opinion by Chief Justice Maxwell, so that the propositions therein discussed cannot, as yet, be recognized as settled beyond question. Indeed, having regard simply to the weight of argument, we believe the views of the chief justice should have prevailed.

The defendant in error insists that the liability fixed upon it by section 47, c. 40,

Comp. St., and enforced in the above case, logically countenances the provisions of section 48 of the last-mentioned chapter. As has already been suggested, the annual cost of maintaining the insane hospital is provided for by a general tax, levied with reference to the assessed valuations of the respective counties. Again, by virtue of section 47, *supra*, the amount due the hospital for the care, board, and treatment of the insane must be paid by the several counties, reference being had to the amount expended in that behalf for the insane properly chargeable to each county. Thus it would seem that the taxpayer has twice paid taxes for this one purpose. The proposition involved in this proceeding is whether or not a taxpayer of Douglas county, who has already, in common with other taxpayers, twice met the burden of taxation for the support of the insane, shall again be required to contribute to the same end because of insanity within his family circle. In *Richardson Co. v. Frederick*, 24 Neb. 506, 39 N. W. Rep. 621, the relation of brother or sister to the afflicted was held not to justify this special exaction; and in *Richardson Co. v. Smith*, 25 Neb. 767, 41 N. W. Rep. 774, the same freedom from liability was adjudged as to the children of the insane. In the case at bar the liability is charged by reason of the marital relation existing between the patient and plaintiff in error. It is insisted that this liability exists because the husband is legally bound for the maintenance and care of his wife. The evidence in this case shows that the husband never failed to meet these requirements. It was upon an inquisition of insanity, duly held by proper county authorities, that Mrs. Baldwin was adjudged insane, and a proper subject for treatment in the insane hospital. In the language of Reese, C. J., in *Richardson Co. v. Frederick*, *supra*: "The insane person is not consulted as to whether he shall be deprived of his liberty or not, nor, indeed, are his friends or relations. As is said in *County of Delaware v. McDonald*, 46 Iowa, 171, the state reaches out its strong arm, and makes the insane its wards, regardless of the care which they may receive at home, or the wishes of those upon whom they are dependent for their support. * * * The state asserts its rights for the reason an insane person may often need more than a mere maintenance. He often needs restraint, confinement, medical attendance, and peculiar care and treatment. Society is entitled to be protected and relieved against him, and when this is so the state very properly takes charge of him, and makes him its ward." We know of no principle of equity or justice that under these circumstances would imply a contract by the husband to answer for the treatment of his wife, furnished by the state in the interest of the general public. It would

seem that the public thus benefited should defray all expenses incurred for its protection. Certainly, the husband is not liable therefor, unless by virtue of the statute already quoted. As has already been intimated, perhaps, we more than doubt the existence of an enforceable statutory liability. The husband has already twice paid for the maintenance of the insane hospital. This was upon his property. If he is required to pay for the treatment of his wife, this payment is just as much a compulsory contribution to the maintenance of the insane hospital as was either of the others. It is, in fact, another form of taxation for the same purpose. The right to levy taxes can only be justified as being necessary for the performance of its functions by the state. No tax can be legally levied for any purposes foreign to those functions, and even that far taxation is tolerated only from the necessities of the case. The collection of unnecessary revenues by the state is not taxation. It is robbery. The plaintiff in error has already paid his full proportion towards the maintenance of the insane hospital. More than that the authorities cannot constitutionally exact. Suppose the taxes under consideration had been levied for school purposes. Could any principle be found that would justify a statutory requirement that a certain class of taxpayers should, in addition to the common burden, be required to pay a special tax per capita? Manifestly, such a procedure would be wholly unjustifiable, even where the common tax is unequal to the requirement for school purposes. How much more glaring the injustice where the taxpayer has already contributed his full, fair proportion of all that is necessary! Again, suppose the state constructs a work of internal improvement, which, of necessity, adds value to neighboring property. Could the owner of such benefited property, with any justice, be required to pay a special tax on account of this increment, in addition to his payment of assessments common to all property within the state? No one would justify such a system of assessments, and yet, in principle, it differs little from that under consideration. The statute which purports to authorize the recovery, from the persons legally bound for the support of an insane person, of the sum paid by the county for the care and treatment of such insane person at the insane hospital of this state, when such care and treatment have been furnished upon the finding of the proper commissioners of the county, for the reasons stated, is in conflict with section 1, article 9, of the constitution, and is therefore inoperative, in so far as it purports to confer said right of action upon the county. The judgment of the district court is reversed. Judgment accordingly. The other commissioners concur.

LIKES et al. v. STONE et al.
(Supreme Court of Nebraska. June 29, 1893.)

ESTOPPEL—REPRESENTATIONS.

The owners of a tract of land, having platted it as an addition to an adjacent town, so as to show what appeared to be the prolongation of its streets, (though not so designated,) and having for the period of eight years acquiesced in the grading and public use of such apparent streets, the erection of sidewalks thereon, and the construction of costly improvements upon adjacent private property, in such manner that if the existence of such streets is denied these improvements will be rendered comparatively useless, and having represented to one party, who, on the faith thereof, purchased a portion of said addition adjoining said apparent street, that said portion would about upon the same as streets, are estopped to deny the existence of the streets through such addition of which they have thus superinduced such belief, and the reliance thereon of the parties who have acted upon the faith of such appearances, acts, and representations.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Hamilton county; Post, Judge.

Action by Phillip Likes and others against David Stone and others to restrain defendants from obstructing certain streets in the city of Aurora. Plaintiffs had decree, and defendants appeal. Affirmed.

Howard M. Kellogg and Kellogg & Graybill, for appellants. Hainer & Smith, for appellees.

RYAN, O. The S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 4, township 10 N., range 6 W. of the sixth P. M., lies along and constitutes the northern front of the original town of Aurora, Neb. This 40-acre strip was divided into blocks numbered consecutively, from east to west, from 1 to 7, inclusive, alternating at regular intervals with north and south streets. By some mistake there was left adjacent to the north line of said strip a triangular piece, having its base of about 140 feet across, a short distance west of the northwest corner of said block 7, the two other lines of said triangle becoming coincident at the northeast corner of said 40-acre strip. Afterwards the defendants, who owned a part of the north half of the north half of said quarter section, on the 6th day of June, 1881, duly filed a plat of such part as Stone's addition to the said town of Aurora. The written statement of the defendants, which was filed contemporaneously with said plat, and constituted a part of the dedication of the land described, was, so far as it is at all useful, as follows: "Stone's addition is situated on the north half of the north half of the northeast quarter of section four, (4,) town ten, (10,) range six (6) west of the 6th P. M., in Hamilton county, Nebraska, commencing at a point seven hundred and forty-eight (748) feet west of the northeast corner of the aforesaid section four, (4,) and 33 feet south of said north line of said section four, (4.)

The size of the blocks is given in figures in feet on said blocks of the plat. Each block is numbered on the plat. The width of the streets is given on the margin of the plat in figures in feet, and named. Stakes are driven at the corners of each block. A mound, with pits, is made at the commencement of the town or addition." The east line of this tract platted by defendants was formed by the prolongation northward of the east boundary line of block 3 of that part of the original town to which reference has heretofore been made. The plat divided that portion of the north half of the north half of said quarter section lying west of the east line of block 3 of the original town of Aurora prolonged northward through said 40-acre strip by a street running east and west through the same, designated as "Seventh Street," "Sixth" street lying along the south side of said 40-acre strip last referred to. The point of intersection of the north line of said section 4 with the aforesaid east line of block 3 of the original town of Aurora prolonged constituted the northeast corner of the block designated as (block) "1" on the recorded plat of Stone's addition. Thence the north tier of blocks were numbered consecutively westward to and including (block) "5;" directly south of which, and across Seventh street, was located (block) "6;" from whence eastward the blocks were numbered consecutively, so that (block) "10" was located just north of block 3, aforesaid, of the original town of Aurora. Between said block 3 and block 4 of said original town of Aurora, Grand avenue, as a street, was prolonged northward by said plat between blocks 9 and 10 and 2 and 1 of Stone's addition, aforesaid. In the original town of Aurora, Central avenue was located between blocks 4 and 5, Washington avenue between blocks 5 and 6, and Hamilton avenue between blocks 6 and 7. North of, and so as to constitute with uniformity a prolongation of, Central avenue, the plat of Stone's addition showed between (blocks) 8 and 9 and between (blocks) 2 and 3 of Stone's addition, respectively, a strip which, from its appearance, might well be taken for a street. It was 100 feet wide, and between (blocks) 8 and 9 of Stone's addition it was designated as "16;" between (blocks) "2" and "3" of the same addition it was designated as "11." What resembled the prolongation of Washington avenue, aforesaid, extended northward between (blocks) "7" and "8" of Stone's addition under the designation of "15," and between (blocks) "3" and "4" of that same addition as "12." In like manner, opposite the northern end of Hamilton avenue, aforesaid, there was a parallelogram of uniform width with Hamilton avenue between (blocks) "6" and "7" of Stone's addition, receiving the designation of "14," and between (blocks) "5" and "4" of the same addition receiving the designation of "13." It

will not escape careful observation that the blocks corresponding with blocks in the original town plat lay in two tiers, running east and west; that, beginning with (block) "1" at the northeast corner of the platted tract, the blocks were numbered westward consecutively to and inclusive of "5;" that just south of "5" was located (block) "6," from which eastward the blocks were consecutively numbered to include "10;" that Grand avenue, as found in the original plat aforesaid, was prolonged northward through Stone's addition; that just west of (block) "2" of Stone's addition the strip which would naturally be taken for a street was numbered "11," the like strip next found proceeding westward was numbered "12," the next "13;" that, dropping into the southern tier of blocks in Stone's addition, what would naturally be taken as prolongations of streets of the original plat, were numbered, as progress is made eastward, respectively "14," "15," and "16." These designations by numbers from "11" to "16," inclusive, are not described as streets. Indeed, if we are to be governed solely by the language quoted as accompanying the plat filed, it would seem that each number not placed in what is expressly noted as a street stands for a block in every instance. Though David Stone testified in this case, there is nowhere to be found any attempt to explain why these strips strongly suggestive of streets were not designated as such, nor what purpose was to be subserved by giving each the very suggestive location and outline which it possessed.

The petition of 19 plaintiffs alleged, in substance, that each of them resided and owned property in Stone's addition; that said addition was platted, as above described, by the defendants; that when said addition was platted, the county surveyor, who surveyed the land for that purpose, was directed by defendants to lay out the said addition so as to extend Grand avenue, Central avenue, Washington avenue, and Hamilton avenue, above referred to, through said addition, and be continuous in direction and width with such streets; that, in accordance with such instructions, said county surveyor did so lay out said streets through said proposed addition. The petition further stated the facts above set forth in the statement of this case descriptive of the manner in which said addition was platted, and the relation of the blocks and parts of said addition to the original town of Aurora, particularly describing the property interest of each plaintiff in said addition, as bearing upon the right of such plaintiffs to relief as against the defendants in respect to said property interests.

These plaintiffs alleged that the parts of Stone's addition designated as "11," "12," "13," "14," "15," and "16" have since the filing of said plat been used and graded as streets, and upon the same have been con-

structed and maintained sidewalks by the city of Aurora; that the defendants have sold the blocks laid off in said addition, designated "1," "2," "4," "5," "7," "8," "9," and "10;" that there have been erected upon said blocks a large number of houses, the only means of access to which is by use of the strips 11, 12, 13, 14, 15, and 16 as streets; that upon the block designated as "6" is located the public school in said city of Aurora; that defendants have sold said blocks 1, 2, 4, 5, 6, 7, 8, 9, and 10 as blocks, and have represented that the streets heretofore mentioned and described were public streets; that said plaintiffs relied upon said representations, and were induced thereby to purchase said premises owned by each of them severally, and to make said improvements thereon, of each of which facts the defendants had special notice; that the defendants are nonresidents of Nebraska, but that their agent, under defendants' instructions, is about to plow up and fence the tracts designated as "11," "12," "13," "14," "15," and "16," so that they shall not be used for streets as prolongations of Central, Washington, and Hamilton avenues, respectively; that, if such plowing and fencing are done, each plaintiff will have no means of access to his home, and that by such plowing and fencing the value and use of the property of each plaintiff will be seriously impaired. The prayer was that defendants be perpetually enjoined from plowing and fencing the strips numbered 11, 12, 13, 14, 15, 16, and 17, (the latter, as alleged, being a prolongation of Seventh street,) and that each of said tracts be declared a part of the public streets of the city of Aurora.

The answer admitted the filing of the plat of Stone's addition, and the statement in connection therewith. There was a denial of the other allegations of the petition. On August 16, 1890, a trial was had, and the issues found were found in favor of plaintiffs, and a decree rendered as prayed in the petition.

It would subserve no useful purpose to enter into a detailed review of the evidence of each witness. A general summary of the facts will be sufficient. In relation to direct representations of the nature charged in the petition as to the intention of the defendants to prolong Central, Washington, and Hamilton avenues through Stone's addition, there was the testimony of Mr. Giltner, who testified, in addition to this, that upon the faith of these representations he purchased, before the filing of the plat of Stone's addition, a tract of land now embraced therein, which was upon the plat afterwards designated as block "1;" that, in reliance upon said representations, said Giltner had built a large and expensive house and made his other improvements upon said tract with reference to the streets as it was represented they should be laid out, which he otherwise would not have done. County Surveyor Parks, who

said out the addition, testified that David Stone, one of the defendants, directed him, in so doing, to set only the corners of the blocks, the streets to coincide with the north and south streets in Aurora; the blocks were to occupy a like size. This witness further testified that as far as he went he followed the above instructions, and that the parts of the tract which would be portions of the streets of Aurora extended have ever since been used as such, precisely as though such extensions existed, and that on them have been done grading and the erection of sidewalks thereon, consistently with such use, and that the improvement of their property by the residents of this addition in the erection of houses and fences has been with reference to the use of streets as contemplated in the above instructions to said witness with reference to laying out said addition. As to the general use of said property for streets in the manner detailed, and the making of permanent and valuable improvements upon their property by plaintiffs, respectively, with reference to said avenues being extended as contemplated, there was abundant uncontradicted evidence. There was also evidence of the occasional visits to Aurora, of no great duration, by the defendants during the period intervening between the platting of said premises (June 6, 1881) and the commencement of this suit, during which defendants could not but have been aware of the above condition of affairs as to the improvements of private property, and the making of sidewalks, as well as of the grading and use of streets, though knowledge of these facts and the making of above representations were, by deposition, denied by Mr. Stone. There was also evidence that the agents of Mr. Stone for the sale and management of his property had at times represented that the strips in said addition opposite to said avenues were in reality streets, and that such representations were made to induce the sales of lots in said addition. This evidence, however, is not very clear or satisfactory. The other evidence, however, is sufficient to satisfy us that, while technically, by the plat which they filed, the defendants did not dedicate the strips designated as "11," "12," "13," "14," "15," "16," and "17" as portions of the public street, yet the positions occupied by these strips with reference to already existing streets naturally suggested that they were integral parts of the public highway. This inference was encouraged by defendants' silence while permanent improvements of these strips were being made as parts of the streets, and thereby plaintiffs were induced in good faith, relying upon appearances, to improve their private property; misled, without doubt, by this acquiescence and silence of the defendants. Not only so, but there was evidence of statements made by defendant David Stone inconsistent with the claim of exclusive private property now made by him in

said tracts 11, 12, 13, 14, 15, 16, and 17, and of one party, at least, acting upon the faith of such representations to his injury, if Stone's present claim is now upheld. The contentions of plaintiffs further find great support in the improbability that any sane person would purchase and improve for a home property to which there is no means of access, as is the case with some of the lots in this addition if defendants' theory is correct. An examination of block 7 in said addition shows that there are eight lots, which, under these circumstances, would be in this isolated condition, upon three of which are residences. These considerations lead us to the conclusion that by the representations and statements of David Stone, made on behalf of both defendants, with reference to the existence of the streets as by plaintiffs now claimed, and the acquiescence of the defendants in the improvement, use, and occupation of them for that purpose, considered in connection with the prejudice which will result to plaintiffs if such representations and acquiescence are not held binding, the defendants are, and should be, held estopped to dispute the right of the public to control and use said tracts 11, 12, 13, 14, 15, 16, and 17 as parts of the public streets of the city of Aurora. The defendants seek to avoid this result by calling attention to the fact that, if said avenues are prolonged, it must be by passing across the triangle referred to in the early part of the statement of facts in this case. Whatever obstacle this may hereafter present is no concern of the defendants. The plat which they filed does not show a triangle between Stone's addition and the original town of Aurora, and from the evidence it is clear that by the general public its existence has ever been equally ignored. The judgment of the district court is affirmed. The other commissioners concur.

DOWNING v. OVERMIRE et al.
(Supreme Court of Nebraska. June 30, 1893.)
SHERIFFS AND CONSTABLES—SALE UNDER SECOND ATTACHMENT—EVIDENCE.

In an action by attachment a garnishee was ordered to hold sufficient property of the debtor to satisfy the debt, which he failed to do. After the garnishment, another creditor levied an attachment on a part of the property in the garnishee's hands, and upon satisfaction of the garnishee's claim sold the remainder under the second attachment, neither the officer nor his attorney having notice of the garnishment. *Held*, that under the testimony the officer under the second attachment was not liable to the attaching creditor under the first attachment for the amount of his claim.

(Syllabus by the Court.)

Error to district court, Buffalo county; Church, Judge.

Action by Rollin L. Downing against George W. Overmire and others on a bond. Defendants had judgment, and, from a judgment overruling a motion for a new trial, plaintiff brings error. Affirmed.

Calkins & Pratt, for plaintiff in error.
John Hoge, for defendants in error.

MAXWELL, C. J. The plaintiff in error, on the 20th day of March, 1888, filed his bill of particulars before William R. Learn, justice of the peace for the city of Kearney, against one T. B. Early, claiming the sum of \$95.84 upon an account. Afterwards, on the 14th day of April, judgment was rendered in that case, in that court, against Early, for \$95.84 and costs, taxed at \$3.90. An execution was issued upon said judgment on the 6th day of April, 1888, and delivered to the sheriff of Buffalo county, who afterwards, and on the next day, returned the same wholly unsatisfied. After the return of the execution an affidavit was filed in said justice court in garnishment, and thereupon summons was issued, commanding the Buffalo County National Bank to appear in said court on the 10th day of April thereafter, and answer, under oath, all questions concerning the property of the said Early in its hands. The bank appeared by its cashier, A. T. Gamble, and, after being duly sworn, he testified as follows: "Question. State what office you occupy, as a member of the Buffalo County National Bank. Answer. I am cashier. Q. State if the Buffalo County National Bank has any property, rights, or choses in action, or any other credits, of T. B. Early, and, if so, what such consist of. A. We hold two chattel mortgages against the following property belonging to T. B. Early, to wit, cattle, horses, mules, hogs, corn, oats, and hay, and farming utensils, wagons, harness, carriages, etc. These have been seized under the mortgages, and I am unable to state whether there will be any surplus after the mortgages and expenses are paid." Thereupon the said justice made the following order: "I thereupon order the said garnishee to pay into this court any surplus there may be after paying off said mortgages and expenses." After the foregoing proceedings were had, and order made, viz. on the 21st day of April, 1888, an action was commenced in the county court of Buffalo county, Neb., by one L. E. Zimmerman, against the said T. B. Early; and an order of attachment was issued in that case out of the county court, and delivered to George W. Overmire, who was constable in and for the city of Kearney, in said county. The defendant Overmire, in pursuance of the command of said writ of attachment, did afterwards, on the 21st of April, 1888, make a levy, the return of which, on the said order of attachment, is as follows: "Received this order of attachment April 21st, 1888, and by the command thereof I levied upon the following property of the said T. B. Early, to wit, a double-barreled, breech-loading shotgun, and reloading fixtures, for which I caused the same to be valued by two responsible citizens of Buffalo county. George W. Overmire, Constable." And defendant

Overmire afterwards, on the 24th day of April, 1888, made a further levy, as shown by the return of said writ of attachment, and is as follows: "And on the 24th day of April, 1888, according to the command thereof, I made a second levy, for which I took all the stock, cattle, horses, hogs, and machinery of the said T. B. Early, and caused the same to be appraised by two responsible persons of Buffalo county, Neb. George W. Overmire, Constable." And said writ was returned on the 26th day of April, 1888, to said county court. The appraisement shows the value of the property taken and covered by the mortgage held by the Buffalo County National Bank to be of the value of \$1,303.15 over and above the value of the bank's claim against the same. At the time of the answer of the garnishee the property was being advertised to be sold by the garnishee, and which sale took place on the 4th day of May, 1888; and it was during this time that the defendant Overmire, as such constable, without any knowledge on the part of the plaintiff, made the foregoing levies. On the day of the sale the defendant Overmire, together with the plaintiff's attorneys, attended the sale, as advertised by the bank; and, as shown by the testimony, the property was sold, and the proceeds applied on the debt in the case brought by the said L. E. Zimmerman. Afterwards, the said plaintiff commenced this action in the county court of Buffalo county against Overmire, as constable, and his bondsmen, to recover the amount of his debt, with interest and costs, and the county court dismissed the action for the want of jurisdiction, from which judgment the plaintiff prosecuted error to the district court, where the judgment of the county court was reversed, and the case was there tried, and verdict returned in favor of the defendants. A motion for a new trial was filed by the plaintiff, which was overruled, and in which the following errors are assigned: "(1) The court erred in refusing to give instruction No. 1, as requested by the plaintiff, and in giving such instruction modified. (2) The court erred in giving instruction No. 2, as requested by the plaintiff, and in giving such instruction modified. (3) The court erred in refusing to give instruction No. 3, as requested by the plaintiff, and in giving such instruction modified. (4) The verdict is contrary to law. (5) Errors of law occurring at the trial, duly excepted to by the plaintiff. (6) The verdict is not sustained by sufficient evidence. (7) The court erred in admitting evidence objected to at the time by the plaintiff."

The following are the instructions asked by the plaintiff, and given by the court, as modified, and are all the instructions given: (1) "If you find from the evidence that one T. B. Early executed and delivered certain chattel mortgages upon his personal property, and that afterwards, and before said mortgages had been paid and released, the

owners thereof had been ordered to account to the court of William R. Learn, justice of the peace, for said property, or the proceeds therefrom, after having paid said mortgages, and you further find that while said personal property was held by the owners of said mortgages, under said mortgages, the defendant George W. Overmire, as constable, levied an order of attachment upon said personal property, or any part thereof, you will find for the plaintiff." Modified as follows: "Provided, the said Overmire took and appropriated the said property to any purpose other than for the benefit of garnishees in said garnishee proceedings, wherein Downing was plaintiff. If you find the said constable only levied on the property covered by the mortgage to the bank, having no knowledge of the prior garnishee proceedings, and never took the property into his possession, actually, but left it in the hands of the parties when he first took it, and never had any further to do with the property in question, he will not be liable in this case. In other words, if the surplus after the satisfaction of the mortgage never came into the hands of the constable, and he had no order of sale to dispose of same, and took no part in sale of same, but it was sold by others, and said constable took no part therein, you will find for the defendants." (2) "If you should find the taking of the possession of said property in accordance with instruction No. 1, as requested by the plaintiff, then you will further inquire as to the value of the property taken from the owners of said mortgages, remaining after said mortgages were satisfied, and you will find for the plaintiff in the full amount claimed, unless the value of said property remaining after the satisfaction of said mortgages is less than the amount claimed by the plaintiff. Then you will find for the plaintiff in that amount." Modified as follows: "Provided, the said constable had anything to do with the sale of the surplus after satisfaction of the mortgage to the bank, or exercised any control over same, or participated in said sale." (3) "If you find from the evidence that the defendant George W. Overmire, as such constable, made a return of the levy made in pursuance of the command contained in said writ of attachment, this is sufficient proof that he took possession of the property upon which the levy was made, and by which he is bound, and cannot be allowed to dispute the taking of the property named therein." Modified as follows: "But the said constable can show, after the making of said return, he never removed and took actual possession thereof, or sold or participated in sale of same, and that no proceeds of sale of same ever came into his hands."

In our view there was no error in refusing the instructions as asked. The testimony shows that the officer took no part in the sale of the goods, and that the proceeds thereof did not come into his hands. This may have

been a trick on the part of the second attaching creditor, for which he may be liable; but the proof falls in any manner to implicate the officer. The garnishee was ordered to hold sufficient of the proceeds of sale to satisfy the debt, but did not attempt to do so. Whether the bank thereby became liable for the amount of the plaintiff's debt does not arise in this case, but it is very clear that there is no error in the instructions, and the judgment is affirmed. The other judges concur.

MCKINLEY et al. v. CHAPMAN.

(Supreme Court of Nebraska. June 30, 1893.)

APPEAL—COUNTY COURT—UNDERTAKING—TIME OF DELIVERY.

1. In a civil action in the county court an appeal is to be taken in the same manner as if before a justice of the peace.

2. An undertaking for an appeal, delivered to the county judge at 9:30 P. M. of the tenth day after the judgment is rendered, is within 10 days, and the appeal is taken within the time fixed by statute.

(Syllabus by the Court.)

Error to district court, Box Butte county; Kinkaid, Judge.

Action by John T. Chapman against McKinley & Lanning, Job Hathaway, and H. B. Austin. The cause was first tried in the county court, where judgment was had for plaintiff. Defendants appealed to the district court. From a judgment dismissing the appeal, defendants bring error to this court. Reversed.

Thomas Darnall and John P. Arnott, for plaintiffs in error. Fowler & McNamara and W. M. Iodence, for defendant in error.

MAXWELL, C. J. A trial was had in this case in the county court on the 8th day of July, 1890, and judgment rendered against the plaintiffs in error for the sum of \$450. On the 18th day of the same month the plaintiffs in error placed their undertaking for an appeal in the hands of the county judge, whereupon the next day he made the following record of such filing: "In the county court, Box Butte county, state of Nebraska. John T. Chapman v. McKinley & Lanning, Job Hathaway, and H. B. Austin. I, D. K. Spacht, county judge within and for the county of Box Butte, state of Nebraska, hereby certify that the appeal undertaking in this case was handed to me by Daniel Roberts and left with me on the 18th day of July, 1890, at 9:30 P. M., at my residence in Box Butte county, Nebraska; that the said undertaking in appeal was entered of record in said case, and securities thereon approved by me, the 19th day of July, 1890. Witness my hand and official seal this 26th day of July, A. D. 1890. [Seal.] D. K. Spacht, County Judge." A transcript was thereupon duly filed in the district court. The defendant in error in that court moved

to dismiss the appeal because the undertaking was not filed in 10 days from the date of the rendition of the judgment. The motion was sustained, and the appeal dismissed, from which order the cause is brought into this court.

Section 26, c. 20, Comp. St., provides: "In civil actions brought under the provisions of this chapter either party may appeal from the judgment of the probate court, or prosecute a petition in error in the same manner as provided by law in cases tried and determined by justices of the peace. The amount of the bond or undertaking taken shall be double the amount of the judgment and costs, and shall be approved by the probate judge." Section 7 of the same chapter provides: "It shall be the duty of the probate judge in each county to hold a regular term of the probate court at his office at the county seat, commencing at 9 o'clock A. M. on the first Monday of each calendar month, for the trial of such civil actions brought before such court as are not cognizable before a justice of the peace. Such regular term shall be deemed to be opened without any formal adjournment thereof until the third Monday of the same month, when all causes not then finally determined shall be continued by such court to the next regular term; but such courts shall be deemed to be always open for the filing of papers and issuance of process in civil actions, and for the purpose of taking and entering judgment by confession." Section 1007 of the Code provides: "The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than \$50.00 in any case nor less than double the amount of judgment and costs, conditioned (1) that the appellant will prosecute his appeal to effect, and without unnecessary delay; (2) that, if judgment be adjudged against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant." Had the county judge in this case been a justice of the peace, and the appeal undertaking delivered to him as in this case, no question, I think, would have been raised against it on the ground that it was not filed in time. The Code gives the appellant 10 days after the day on which the judgment is rendered in which to file the undertaking. There is no provision that it shall be filed during business hours. The undertaking must be delivered to the officer, and, if the sureties are deemed sufficient, it is his duty to approve the undertaking. In *State v. Clark*, 24 Neb. 318, 38 N. W. Rep. 832, where the justice had received and retained the undertaking for an appeal without objection, it was held to be his duty to approve the same, and the appeal was sustained. It is said: "The particular objection to a bond presented to a justice for his approval must

be made at or soon after the time of receiving the same, and an opportunity given the appellant to correct the alleged defect. An appeal is a valuable right, and, being in furtherance of justice, the laws relating to it are to be liberally construed. The justice, therefore, is to aid as far as possible in perfecting an appeal. The fact that the appeal is from his judgment is no reflection either upon his integrity or ability." It is very clear that the undertaking in this case was filed within the proper time, and dates from the time of delivery. The judgment is therefore reversed, and the cause remanded for further proceedings. The other judges concur.

STATE ex rel. LARABEE v. BARNES,
Sheriff.

(Supreme Court of North Dakota. May 9,
1893.)

ADOPTION OF CONSTITUTION — INTOXICATING LIQUORS—PROHIBITION—CONSTITUTIONALITY OF ACT—TITLE—UNUSUAL PUNISHMENTS.

1. Congress, by an act approved February 22, 1889, known as the "Enabling Act," directed the people in what is now the state of North Dakota to elect delegates to a constitutional convention, which convention should formulate a constitution to be submitted to the qualified electors for their adoption, and provided for the submission at the same time of separate articles or ordinances, and required for their adoption a "majority of the legal votes cast." Article 20 of our constitution, known as the "Prohibition Article," was so submitted for adoption. At the same time, under a provision of the proposed constitution, a full set of state officers was elected. Said article 20 received a majority of all the votes cast upon the question of the adoption of the same, and upon the question of the adoption of the constitution, but did not receive a majority of the votes cast for governor. *Held*, that said article 20 was legally adopted.

2. Said enabling act provided that the state officers should exercise all the functions of their offices when North Dakota was admitted as a state, and that the legislature might assemble, organize, and elect two United States senators; and section 17 of the schedule to the constitution required the governor, as soon as qualified, to issue his proclamation convening the legislature within a specified time for the purpose of electing such senators. Section 41 of the state constitution provides that the term of office of members of the legislature shall begin on the first Tuesday in January following their election, and section 53 provides that the legislative assembly shall meet on the first Tuesday after the first Monday in January in the year next following the election of the members. The governor, by proclamation, convened the legislature at a time prior to the first Tuesday in January next succeeding the election, for the purpose of electing said United States senators, and "for the performance of such other legislative duties as may be in accordance with the provisions of said constitution." The legislature convened pursuant to such proclamation on November 19, 1889, and at once proceeded to exercise general legislative functions, and passed chapter 110, known as the "Prohibition Statute," and the same was approved December 19, 1889. *Held*, that the legislature so convened had full power to enact said statute. Said act is not vulnerable to the constitutional ob-

jections that its object is not fully expressed in the title, or that it contains more than one subject, or that it is not uniform in its operation, or that it inflicts cruel and unusual punishment.

(Syllabus by the Court.)

Original application in the name of the state at the relation of William Larabee against Oscar G. Barnes, sheriff of Cass county, for the release of relator on habeas corpus. Writ granted, and case heard upon objection to the sufficiency of the petition. Judgment for defendant.

J. W. Tilly, (Halvor Steenerson, of counsel,) for relator. W. H. Standish, Atty. Gen., and Charles A. Pollock, for defendant.

BARTHOLOMEW, C. J. The relator was informed against in the Cass county district court for violation of the provisions of the constitution and statutes of the state prohibiting the sale of intoxicating liquors. He pleaded guilty, and was sentenced to the county jail of Cass county for the term of 90 days, and to pay a fine of \$300. To relieve himself from confinement under this sentence he procured a writ of habeas corpus from this court. The petition for the writ, with the exhibits attached, alleges, in substance, that such imprisonment is illegal, because the charge against relator does not state facts sufficient to constitute a public offense, in that the same is based upon article 20 of the constitution of the state of North Dakota, and upon chapter 110 of the Laws of said state for 1890. That said article 20, and the said act based thereon, are null and void, for the reason that said article was never adopted by the people of the state as required in the enabling act, hereinafter more particularly noticed; and for the further reason that said chapter 110 was never passed by any legally constituted legislature; and that said chapter, independent of said article 20, is void, for the reason that the title does not embrace any object to prohibit the sale of intoxicating liquors, but only to prescribe penalties for its unlawful sale; and that the act violates section 61 of the state constitution, which provides that no bill shall embrace more than one subject, which shall be expressed in the title; and that said act violates both the federal and state constitutions, in that it inflicts cruel and unusual punishment. The writ was served on the defendant, Barnes, who is sheriff of Cass county, and upon the return day defendant appeared in court with the prisoner, and entered a general demurrer to the petition. Relator bases his right to a release from imprisonment upon the following propositions: First, article 20 of the constitution of the state of North Dakota, commonly known as the "Prohibition Article," was never adopted as a part of the constitution; second, chapter 110, Laws 1890, was not enacted by a legally constituted legislature; third,

said chapter violates the constitution of this state and of the United States.

To understand the points made under the first proposition it is necessary to state that the enabling act, approved February 22, 1889, under the terms of which North Dakota, South Dakota, Montana, and Washington became states, after providing for constitutional conventions to formulate constitutions, and the submission of such constitutions to a vote of the qualified electors of the proposed states, provides in section 8 that "at the elections provided for in this section the qualified voters of said proposed states shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same, and, if a majority of the legal votes cast shall be for the constitution, the governor shall certify the result to the president of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions, and a copy of the said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the president of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by congress into the Union, under and by virtue of this act, on an equal footing with the original states, from and after the date of said proclamation." Section 24 of said act provides "that the constitutional conventions may by ordinance provide for the election of officers for full state governments, including members of the legislatures and representatives in the 51st congress; but said state governments shall remain in abeyance until the states shall be admitted into the Union, respectively, as provided in this act." The time and the manner of the election of such officers was left entirely in the hands of the several constitutional conventions. As a matter of fact, the constitutional convention of North Dakota did provide for the election of all state officers at the time of the vote upon the adoption of the constitution. An inspection of the returns of that election as certified by the proper canvassing board, and which are made a part of the petition herein, discloses that there were 35,548 votes cast for or against the adoption of the constitution, and 35,945 votes cast for or against the adoption of said article 20, of which 18,552 were in the affirmative and 17,393 in the nega-

tive. It thus appears that a majority of all the votes for or against said article were in the affirmative, and also that the affirmative vote for said article exceeded one-half of all the votes cast for or against the adoption of the constitution. But at said election there were 38,093 votes cast for governor, and the affirmative vote upon the adoption of said article 20 was less than one-half of the total vote cast for governor. Upon these facts it is urged upon us with great earnestness and force that a "majority of the votes cast," within the meaning of said section 8 of the enabling act, were not in favor of the adoption of said article 20, and hence the same was never adopted. This proposition cannot receive our assent, and we will briefly state some of the reasons which irresistibly lead our minds to the opposite conclusion. Said section 8 of the enabling act requires (and the requirement is mandatory) that the proposed constitution, and any specific article that the constitutional convention may direct, be submitted to a vote of the people, and that any such specific article shall be voted upon separately, and that, if a majority of the votes cast be in favor of the constitution, that fact shall be certified to the president of the United States, with a statement of the votes for and against the constitution and each specific proposition so separately submitted, together with a copy of the constitution and of any articles separately submitted; and from the data thus certified the president was required to determine whether or not the constitution was republican in form, and whether or not all the requirements of the enabling act had been complied with, and, if so, he was required to issue his proclamation admitting North Dakota as a state. Where, in this section, congress spoke of the votes cast, it had reference to votes cast upon the particular objects which it directed should be submitted to a vote of the qualified electors. Congress had no knowledge that any candidates for offices would be voted for at that same election, and the matter of electing officers was left under the exclusive control of the constitutional convention; and, further, it was the vote upon the constitution and the articles, if any, separately submitted, that was to be certified to the president; and, if by the use of the words "majority of legal votes cast" congress meant votes cast upon any subject other than those directed to be certified to the president, it would be obviously impossible for that official ever to determine whether or not the constitution had been legally adopted, and yet, under the act, the duty devolved upon him to determine that question at once. These considerations seem to us to conclusively establish that when congress used the words "majority of legal votes cast" it meant votes cast for or against the adoption of

the constitution or of the articles separately submitted. Whether or not congress did not also intend that, in case the constitution was adopted, the separate articles should stand or fall upon their separate vote, we need not determine.

Chapter 110, Sess. Laws 1890, was enacted by our first state legislature undoubtedly in response to what the legislature regarded as its duty under the provisions of article 20 of the constitution, and to provide the necessary machinery for the proper enforcement of that article. It is claimed that at the time of the passage of the act the legislature was not a lawful legislature, and was without power to exercise ordinary legislative functions. The act was approved December 19, 1889. The constitution was adopted; and full state officers, including members of the legislature, elected, October 1, 1889. North Dakota became a state by virtue of the proclamation of the president on November 2, 1889. Section 24 of this enabling act provided, in case that the constitution was adopted, the legislature of the state might assemble, organize, and elect two senators of the United States, and that when the state was admitted the state officers should at once proceed to exercise the functions of their office. On November 4, 1889, the governor elect of this state qualified. Section 17 of the schedule of the constitution provides: "The governor elect of the state, immediately upon his qualifying and entering upon the duties of his office, shall issue his proclamation convening the legislative assembly of the state at the seat of government, on a day to be named in said proclamation, and which shall not be less than fifteen nor more than forty days after the date of such proclamation. And said legislative assembly, after organizing, shall proceed to elect two senators of the United States for the state of North Dakota; and at said election the two persons who shall receive a majority of all the votes cast by the said senators and representatives shall be elected such United States senators." On said 4th day of November, 1889, the governor issued his proclamation convening the legislature on November 19, 1889, for the election of two United States senators, and "for the performance of such other legislative duties as may be in accordance with the provisions of said constitution." The legislature convened on said November 19, and at once proceeded to the exercise of general legislative functions, and said chapter 110 was passed and approved on December 19, 1889, as stated. Section 41 of the constitution reads: "The term of service of the members of the legislative assembly shall begin on the first Tuesday in January next after their election." Section 53 reads: "The legislative assembly shall meet at the seat of government at 12 o'clock noon on the first Tuesday after the first Monday in January in the year next following the election of the members thereof." The contention is that

the term of office of the members of the legislature elected on October 1, 1880, did not begin until the first Tuesday in January, 1890. Such would be true, if we could not look beyond or away from said section 41. But it must be remembered that when the state was admitted all the legislative offices were vacant unless filled by the newly-elected officers; and unless so filled, however great the emergency, or however imperative the necessity for action, the sovereign state was without power to take legislative action from November 2, 1889, to the first Tuesday in January, 1890. We do not think any such condition was contemplated. Section 24 of the enabling act provides that, upon the admission of North Dakota as a state, the officers of the state government shall proceed to exercise all the functions of state officers. In the broad sense here used, members of the legislature are state officers. This section, as well as section 17 of the schedule, required that the legislature should meet and organize and elect United States senators. It is a solecism to say that the persons thus called together were legislators for one purpose, but not for all purposes. If they were not legislators they could not elect United States senators. If they were legislators, being legally convened, and there being no restrictions in the constitution or the enabling act, they possessed plenary legislative powers. *Cooley, Const. Lim. 187; Morford v. Unger, 8 Iowa, 82.* As other plain provisions had been made respecting the members and the first session of the first legislature, it is clear that sections 41 and 53 of the constitution were intended to apply only to subsequent legislatures, elected in the regular manner, and at the regular time provided by law, and that said chapter 110 is not vulnerable to this attack.

All the questions pertaining to defects in the title of this act in this case were raised and fully discussed in *State v. Haas, 2 N. D. 202, 50 N. W. Rep. 254.* These same objections are here urged, on the assumption that we would hold that said article 20 of the constitution had never been adopted. As we do not so hold we need add nothing to what we have said in the *Haas Case*.

The next point made by relator—that the statute is unconstitutional, because it inflicts cruel and unusual punishment—hardly merits mention. It is legal history that all jurisdictions that have sought to prohibit or effectually control the sale of intoxicants have found it necessary from time to time to increase the rigor of the punishment for the violation of prohibitory and regulating laws. The matter is peculiarly of legislative cognizance, and we certainly see nothing in this statute that indicates that the legislature has provided for greater punishment than is requisite to the proper execution of the law. Nor does the fact that by such statute the sale of intoxicants for lawful purposes is confined to druggists render the statute open

to the charge of want of uniformity in its operation. It applies to all persons who come within its terms, and no person is prohibited from placing himself within its terms. That is all the constitutional provision requires. *Trust Co. v. Whithed, 2 N. D. 82, 49 N. W. Rep. 318.* And it was clearly a wise and proper exercise of police power to so limit the sale. If all persons indiscriminately were permitted to keep and sell intoxicants for the enumerated lawful purposes it would be quite impossible, as all experience teaches, to prevent illegal sales. The statute increases the punishment for second and third offenses. This is urged as an objection to it, but no authority sustaining the objection is cited, nor do we find any. Such statutes are very common, and are universally upheld. Nor can we see that the fact that the increased punishment passes the arbitrary line fixed by the legislature between misdemeanors and felonies can in any manner change the principle. The writ must be discharged, and the relator remanded to the custody of the defendant, to be dealt with according to the terms of his commitment; and it is so ordered. All concur.

THOMPSON v. SMITH.

(Supreme Court of Michigan. June 30, 1893.)
MORTGAGES — PROPERTY COVERED — EVIDENCE —
FORECLOSURE — ESTOPPEL.

1. Testimony that a mortgagor pointed out and told the mortgagee what lands were to be included in the mortgage, is not admissible to show that the mortgage, which described the land as all of block B, did not include parts of that block.

2. Where plaintiff claims certain land under a deed which describes it as block B, he cannot, in an action therefor against one claiming from his grantor under a prior mortgage covering all of block B, dispute the deed, and show that the land was not a part of block B.

3. One who has received a deed of mortgaged premises prior to the filing of his pendens in foreclosure proceedings, if not made a party thereto, does not have his right to possession cut off thereby, though the proceedings be regular, nor by entry of one claiming under the foreclosure, and he can therefore maintain trespass against such person.

Error to circuit court, Newaygo county; John H. Palmer, Judge.

Action by Judith D. Thompson against Israel C. Smith. Judgment for defendant. Plaintiff brings error. Reversed.

More & Wilson, for appellant. Fletcher & Wanty, for appellee.

LONG, J. This is an action of trespass. The lands in controversy are described as "commencing at a point on the south bank of the Muskegon river, where the east line of River street, produced, intersects the river; thence westerly along the bank of said river to the old channel of Brooks creek; thence southerly along the easterly bank of said creek to the right of way owned by

the Chicago & West Michigan Railroad Company; thence easterly on the north line of said railroad company's right of way and to the west line of block four; thence along the west line of block four to a point which would intersect the south line of Wood street if produced; thence east on the south line of Wood street, produced, to the west line of River street; thence northwesterly along the north line of River street to the north line of Water street; thence east on the north line of Water street to the east line of River street; thence northwesterly along the east line of River street, produced, to the place of beginning." The cause was commenced in the Newaygo circuit court. Defendant appeared, and with his plea of the general issue gave notice that the title to the premises described in the declaration at the time of the acts complained of was vested in one James W. Converse, and that any acts that were done by the defendant were done as the agent of said Converse. The cause was tried before a jury, who returned a verdict in favor of the defendant. The principal question on the trial was whether the land in controversy was a part of block B. The plaintiff, on the argument here, presents a plat which it is claimed shows that the western boundary of block B is at a line extended northerly from the line between lots 6 and 7 of block C; while the defendant presents a plat which it is claimed shows that block B is not thus bounded, but that it extends westward, and includes the lands in controversy. Reference to the two plats, which were used on the argument in this court, does not settle the controversy. One is a copy of the plat of the village. This village plat was offered in evidence by the defendant on the trial, and excluded. It was offered, as defendant's counsel claims, for the purpose of showing that no particular piece of land was platted as block B, but that block B was the designation of a parcel of land in the village of Newaygo, whose boundaries and limits were as well known and as well defined as those of any block in the village plat, and that the parcel described in the declaration is a part of that block. It is conceded that the village plat was never properly authenticated, but the one offered in evidence was the only one made or recorded, as shown by the record in this case. The proprietors were John A. Brooks, John A. Brooks, Jr., and Sarel Wood. By reference to this plat it is seen that block B has no definite boundaries, though there appears to be a line extended northerly from Pine or River street to Muskegon river. If this line is to be taken as the westerly boundary of block B, then that block has a definite boundary as it would extend from the range line on the east to this line extended; but nowhere upon the plat or in the proceedings is it shown that that line is extended as the westerly boundary of block B. Neither is it insisted by either of the parties to

be so. Defendant claims that block B extends to Brooks creek on the east, and includes the lands in controversy. Plaintiff's counsel, on the other hand, contend that the westerly boundary of that block is, as shown on a plat presented by him by an extended line between lots 6 and 7, block C, to the Muskegon river, and that all the lands lying westerly of that line and Brooks creek never were platted. In other words, plaintiff's counsel contend that the lands upon the plat of the village of Newaygo between block A and Brooks creek were divided into three parcels. The parcel between block A and the extended line between lots 6 and 7 of block C to the Muskegon river is properly block B; that the second parcel lies between the westerly boundary of block B and Pine or River street extended to the Muskegon river; and that westerly of that parcel is the third parcel, which includes all the lands included in the boundary between Pine or River street extended and Brooks creek, except what is shown on plaintiff's exhibit as block 4. This third parcel, as plaintiff describes it, is the piece in controversy. It is conceded that what is called on the plats "Pine Street" is in many conveyances called "River Street."

The plaintiff, to maintain her case, on the trial called David P. Clay as a witness, and he testified substantially that he knew the land in controversy, and at one time he claimed to own it; that such claim of ownership commenced in the spring or summer of 1871, and that he cultivated and cropped it that year. Counsel then offered in evidence a deed bearing date May 20, 1884, and recorded on the same day, from David P. Clay to the plaintiff. This deed describes certain lands in the village of Newaygo, and, among other descriptions, the land in controversy as "so much of block B as lies west of River street," as well as all of blocks 4 and 127, except certain parcels theretofore deeded. Plaintiff testified that she went into possession of this land the 1st of May, 1887, and continued in possession until April or May, 1889, and cut the grass for two years, but never lived upon the land. On May 21, 1889, she claims to have gone to the land, and found defendant, Smith, in possession. He rebuilt the fences, cut the grass, and cropped part of it. There are in all some 15 or 16 acres. It is undisputed that defendant went into possession in the spring of 1889, and is still in possession. Defendant, on his part, not only claimed possession, but title to the premises. To prove his title he put in evidence a mortgage made by David P. Clay and wife to James W. Converse, dated December 15, 1877, and duly recorded two days afterwards, to secure the sum of \$25,000. The land is described in the mortgage as "block B, village of Newaygo." The mortgage also covers other lands. It appears that this mortgage was foreclosed in the circuit court of the United States for the

western district of Michigan, the lls pendens being recorded in the register's office of Newaygo county, May 30, 1887. The sale was made October 8, 1888, James W. Converse being the purchaser at the sale. Defendant. Smith, claims to be in possession as the agent of Converse, and sets up title in Converse under his notice. The deed on this foreclosure sale was offered in evidence by defendant. It contains the same description as found in the mortgage. The land described in the declaration, it is claimed by the defendant, is the same as that covered by the Clay mortgage, and the same as in the sheriff's deed to Converse. The deed was objected to on the ground that the plaintiff was not made a party to the foreclosure proceedings, and was never served with process in that case, and at the time of the sale notice of that fact was given. It was also claimed by plaintiff's counsel that the land sold under the foreclosure is not the same description as the land in controversy. The lands are described in the deed from Mr. Clay to the plaintiff as "so much of block B as lies west of River street, in the village of Newaygo," while the mortgage from Clay and wife to James W. Converse describes the property as all of block B, village of Newaygo, and other lands, and the sheriff's deed describes the property the same as in the mortgage. To show how the lands had theretofore been described, and how Mr. Clay derived his title, the defendant offered in evidence a deed from William D. Foster, assignee in bankruptcy of Alexander Blake, to Mr. Clay, dated June 28, 1871, describing the lands as "that part of block B lying north of block 4 and west of said block and the Newaygo Company's land, and extending to Muskegon river, meaning all the meadow land extending from said block 4 and the line of River street north to Muskegon river and Brooks creek, all in the village of Newaygo." Several other deeds were also offered in evidence, tracing the title back through these mesne conveyances to John A. Brooks and Sarell Wood, showing title in them prior to the year 1857, and all of said deeds describing the lands in controversy as a part of block B of the village of Newaygo. The tax rolls were also offered in evidence for the various years from 1858 down to the time of the trial, showing that these lands were assessed for taxes during all that time as a part of block B, village of Newaygo. Witnesses were also called who had known these lands for many years, and who were familiar with the village plat, and testified that they had never known that any of these lands remained unplatted on the south side of the Muskegon river and westward to Brooks creek. The plat itself does not define the boundaries of block B, but all the conveyances above referred to recognize the lands in controversy as a part of it. The deed under which the plaintiff claims describes it as such, and the Clay mortgage to Converse

so describes it. Plaintiff's counsel offered in evidence certain deeds and mortgages executed prior to 1857, and extending back to 1840, in which these lands are described by metes and bounds. Some evidence was offered by the plaintiffs, and excluded by the court, which, it is claimed, would tend to show that Clay, at the time of giving the Converse mortgage, pointed out to Converse the boundaries of the land the mortgage would cover, and the boundaries of block B. It was claimed from this that the parties to the mortgage never understood that the mortgage covered the land described in the declaration.

The court directed the jury that the fact was established that the plaintiff was not made a party to the foreclosure proceedings, and hence whatever proceedings were taken to foreclose it could not deprive her of her title; that both parties derived their title through Mr. Clay, and that the title to the property described in the declaration was in Mr. Clay at the time of the execution of the mortgage, December 15, 1877; and that the evidence beyond dispute shows that the deed of May 20, 1877, was made by Mr. Clay, who had the legal title, and was delivered to the plaintiff, and she went into possession under it. "But," the court said, "the vital question is this: Do the premises described in the declaration include any portion of block B? and that is the question for you to determine from the evidence." The court further said: "There was a stipulation between the parties filed in this cause, to the effect that all the proceedings to foreclose the mortgage were regular, and no claim can be made now of any irregularity." The court further charged the jury as follows: "David P. Clay being the owner of the premises in question and other lands included in the mortgage under date of December 15, 1877, that was prior to the conveyance made by him to plaintiff in this action, she was a subsequent purchaser of the premises, and necessarily took them subject to the mortgage and the legal effect of the foreclosure proceedings, providing all the proceedings were regular, as stipulated by the respective parties to this mortgage; and the title obtained under and by virtue of the foreclosure proceedings would refer back to the execution of the mortgage, and give the purchaser such title to the premises covered by the mortgage as the mortgagor had at the time the mortgagor executed and delivered to the mortgagee. Now, the plaintiff, in order to make out her case under the declaration in this cause, introduces in evidence a deed, the date of which I have called your attention to, under date of May 20, 1877, (Mr. Clay at that time was the owner of the premises in question,) to Mrs. Thompson, the plaintiff in this suit. Mrs. Thompson, the plaintiff in this suit, I will say to you, as I said before, went into possession of the premises

under and by virtue of that deed; and there is no dispute in the testimony, and it is a conceded fact, that on or about the 8th day of April, 1889, the defendant in this action took possession of the premises, and has continued in the possession of the premises ever since, and claims to hold and occupy the premises on account of his having had a superior title to that of the plaintiff in this action; and his title would be superior to that of the plaintiff in this action provided you find from the evidence in the case, as a matter of fact, that the premises mentioned in this declaration are included in block B, covered by the mortgage in question in this suit. So the question of fact for you to determine, and the vital question of fact in this case, is, do you find from the evidence, as a matter of fact, that the premises described in this declaration are the same as the premises described in the mortgage as block B?" The court further charged: "Then the first question for you to determine is, taking it as a conceded fact that at the time of the execution of the mortgage Mr. Clay was the owner of the premises in question, (and that is your basis,) ascertain, then, gentlemen of the jury, from the evidence in this case, whether this block B, as described in this declaration, covered the premises which the plaintiff in this action claims to have been trespassed upon; and if you find that it does, that is a defense to this action, and this plaintiff is not entitled to your verdict. If, in considering that question, gentlemen, you find the issue in favor of the plaintiff,—you find that the premises described in the declaration in this suit are not there within the premises described in the mortgage as block B,—then the plaintiff would be entitled to your verdict; and in determining that question of fact you will take into consideration all the evidence in the case before you. Now, certain deeds have been introduced here on the part of the plaintiff, and also on the part of the defendant, dating as far back as November, 1853; certain mortgages have been introduced, certain tax rolls have been introduced in evidence, and a certain map has been introduced in evidence here; and these records and this map are all circumstances competent for you, gentlemen, to consider in determining this question of fact to which I have called your attention, either one way or the other. In the absence of direct proof as to where the boundary lines are, and as to whether or not the land described in this declaration is included in the description of land mortgaged, it would be competent for you, and your duty, to take into consideration these deeds of conveyance. Now, did the parties to the instruments understand it,—the grantors and grantees therein named? How did the parties who executed, and to whom the mortgages were executed, understand it? What was their understanding of block B? What land

was included? You may take into consideration, and it is your duty so to do, also, the tax rolls which have been introduced in evidence. How did the parties—the assessor, the party who made the assessment—understand it? What was their understanding with reference to this matter, as to whether or not the lands described in the declaration were the same as the lands described in the mortgage as block B? Neither the tax rolls nor the deeds offered in evidence nor the mortgage are conclusive upon this question, but they are circumstances in the case proper to be considered."

Reference need not be made to the several assignments of error. It is evident from the whole record that the only question of fact in the case was submitted to the jury, and they have found that the lands in controversy were a part of block B.

It is contended that the court below was in error in excluding the testimony offered to show that Clay pointed out to Converse the boundary lines of the lands to be included in the mortgage, and that Converse was told that the lands in controversy were not to be included. This was properly excluded. The question under consideration on the trial was whether the lands in controversy were actually included in the Converse mortgage, and this question could be determined only by showing what were the boundaries of block B. The parol testimony of what the understanding was as to what was to be included could not aid this question, and could not be used for the purpose of contradicting or changing the description in the mortgage. The mortgage covered all of block B, and if this land was a part of block B it was included in the mortgage, whatever the understanding of the parties may have been about it; and parol evidence would not be admissible to change or vary the terms of the mortgage. The only question of fact arising in the case was whether the lands in controversy were a part of block B. The jury found that issue in favor of defendant. It appears without contradiction that the plaintiff's deed describes it as a part of block B, and the Converse mortgage covers all of block B, and the sheriff's deed on foreclosure describes it in the same way. The plaintiff, then, by this record, is put in the attitude of making claim to this land, and attempting to prove her title by showing that it was not a part of block B, while the deed under which she herself claims describes it as block B, and all other conveyances dating back to 1857 so describe it, and it has been so assessed during all that time. Whatever title she had was derived from David P. Clay under this deed. She cannot now be heard to dispute the deed, and show in this action that, though the deed describes the land as a part of block B, it is not in fact part of that block. *Payne v. Atterbury*, Har. Ch. 414; *May v. Tillman*, 1 Mich. 262; *White v. Smith*, 37 Mich.

290, and note; *Shotwell v. Harrison*, 22 Mich. 409; *Case v. Green*, 53 Mich. 615. 19 N. W. Rep. 554. Plaintiff's deed, however, was given prior to the filing of the lis pendens in the foreclosure proceedings, and there is some evidence that she went into possession of the property under the deed prior to that time. The court below assumed that, inasmuch as the stipulation between the parties to this cause recited that the foreclosure proceedings were regular, therefore whatever rights the plaintiff had in the premises under her deed were cut off and foreclosed by that proceeding. The plaintiff was not made a party to the foreclosure, and consequently it was a matter of no concern to her whether the foreclosure proceedings were regular or not. The right to possession was not foreclosed, and could not be cut off, by that proceeding, or the entry of the defendant claiming under the foreclosure of the Converse mortgage. 2 Jones, Mortg. §§ 1412, 1413. The court below was therefore in error in that part of the charge. Under these facts the court should have directed the verdict in favor of the plaintiff. Judgment reversed, and a new trial ordered. The other justices concurred.

STATE v. EATON.

(Supreme Court of Wisconsin. June 21, 1893.)

ORDER FOR JUDGMENT OF DIVORCE — MARRIAGE PREVIOUS TO ENTRY OF JUDGMENT—VALIDITY.

1. An order for a judgment of divorce without an entry of judgment thereon does not change the status of man and wife.

2. Though a judgment of divorce is entered as of the date of the findings and order for judgment on which it is based, it does not take effect from the date of such order, and render an intervening marriage by one of the parties legal, so as to support an information for adultery, alleged to have been thereafter committed by the other party to the latter marriage.

Case certified from municipal court, Milwaukee county; Emil Wallber, Judge.

Henry L. Eaton was convicted of adultery, and the case was certified to the supreme court. Order for discharge of defendant.

J. L. O'Connor, Atty. Gen., and W. Clancy, Asst. Atty. Gen., for the State. George E. Sutherland and J. J. Dick, for defendant.

LYON, C. J. The defendant was tried in the municipal court of Milwaukee county on an information charging him with the crime of adultery with one Louise Gray, and was convicted. To sustain the conviction it was essential that the defendant should have been a married man when the alleged offense was committed. It is charged in the information that he was then the lawful husband of Letitia Eaton, and it was proved on the trial that before the alleged adultery was committed a marriage ceremony was performed between him and

one Letitia Pfeiffer. It was also proved that said Letitia had theretofore lawfully intermarried with one Joseph Pfeiffer, who is still living, and had commenced and prosecuted an action for a divorce against said Joseph in the superior court of Milwaukee county. That action was tried, and the court filed findings of fact sustaining her cause of action, and ordered that a judgment of divorce and for alimony be entered accordingly. No judgment was entered upon such findings and order until more than 2½ years later, when judgment was entered as of the date of such findings and order. Before such judgment was entered, the attempted intermarriage between defendant and Letitia occurred.

The judge of the municipal court has duly reported the case to this court for its decision upon the following question: "Was Letitia Pfeiffer capable of contracting marriage with the defendant at the time the ceremony was performed?" The question must be answered in the negative. An order for judgment is not a judgment. Notwithstanding the order in the Pfeiffer divorce case, the parties continued to be husband and wife for the 2½ years and more which intervened after the order was made, and before the judgment was actually entered pursuant thereto. If for any purpose the judgment of divorce, when entered, took effect from the date of the order therefor, (a proposition not here determined,) it could not operate to make an act a crime which was not a crime when committed, or, if then a crime of one grade, to make it a crime of a higher grade. To hold otherwise would be to violate the most fundamental principles of law established for the protection of persons charged with crime. It is unnecessary to cite authorities in support of or to argue so plain a proposition. The question submitted for our decision is answered in the negative, and the municipal court advised to arrest judgment and discharge the defendant. It will be so certified to that court.

NEILSON v. GRIGNON.

(Supreme Court of Wisconsin. June 21, 1893.)

EJECTMENT—TITLE—ADVERSE POSSESSION—WHAT CONSTITUTES—STATUTE OF LIMITATIONS.

1. Where a mortgagor remains in possession after foreclosure and sale for 7 years, and his widow continues in possession 30 years after his death, but gives no notice of any claim of title to the true owner, who pays the taxes, such widow cannot claim title by adverse possession, though she made substantial improvements on the land while in possession by clearing, fencing, and cultivating it.

2. In such case the statute of limitations does not begin to run against the true owner's right to recover possession until notice to him of the hostile claim.

Appeal from circuit court, Outagamie county; John Goodland, Judge.

Action of ejectment by James Nellson against Mary E. Grignon to recover possession of certain land. From a judgment in favor of plaintiff for part of the land claimed, he appeals. Reversed.

Hooper & Hooper, for appellant, cited *Allen v. Allen*, 58 Wis. 202, 211, 16 N. W. Rep. 610; *Proprietors, etc., v. Springer*, 4 Mass. 416, approved in *Schwallback v. Railway Co.*, 69 Wis. 292, 299, 300, 34 N. W. Rep. 128; *Core v. Faupel*, 24 W. Va. 238, 243; *Sedg. & W. Tr. Title Land*, §§ 730, 751; *Boyd v. Beck*, 29 Ala. 703; *Parker v. Banks*, 79 N. C. 480; *Hall v. Stevens*, 9 Metc. (Mass.) 418-422; *Creekmur v. Creekmur*, 75 Va. 436.

Humphrey Pierce, for respondent.

ORTON, J. This is an action in ejectment to recover a small part of private land claim No. 35, in Kaukauna, Outagamie county, by the plaintiff from the defendant in possession. The land in dispute was divided into two parcels by an old rail fence, running from near the southwest corner to near the northeast corner. The plaintiff recovered the land lying northwest of said fence, and the defendant recovered that lying southeast of it; and the plaintiff has appealed from the latter judgment.

The facts are few and simple. Augustin Grignon owned the land January 31, 1834, and deeded it to Charles A. and Alexander Grignon, and they mortgaged it back to Augustin Grignon, December 20, 1841. This mortgage was foreclosed by advertisement, and the premises purchased by the said Augustin Grignon, to whom a deed was made by the sheriff of Brown county, dated July 14, 1855; and the plaintiff holds title by successive conveyances from him. Charles A. Grignon, the mortgagor, with his wife and family, continued in the possession of the premises until he died, April 8, 1862; and his wife, the defendant, has continued in the possession thereof since until the commencement of this action. The defendant was the wife of Charles A. Grignon when said mortgage was given, but she did not join in the execution of it. The defendant kept up the fences on this land, and built a wire fence, cultivated and pastured it, and dug a cellar, and used it, and had some of it cleared. This land was in the same general inclosure with claim No. 35, but separated from it by a fence. The defendant testified that the reason she supposed this land was hers was because her husband died with the property, and it was cultivated and kept up the same as hers, and that she was in possession and called it hers, and that a lawyer told her to keep possession of it, and she could claim it as hers, and that she has claimed it ever since. The defendant never paid any taxes on the land, and they were always paid by the plaintiff and his grantors. The defendant defends her possession by "adverse possession" and the statute of limitations of 20

years. The questions in this case are not difficult or complicated, but very simple and plain. Charles A. Grignon, while he lived, held these premises subordinate to the title of the purchaser under the foreclosure, and by his permission. When he died, and left the defendant, his wife, in the occupancy, with her children, she continued to hold either in subordination to the plaintiff's title, as she and her husband had while he was living, or she held without any claim of right, and was a mere trespasser. She never disclaimed the plaintiff's title, and never claimed that she had any title other than mere naked possession. She was in possession, and she intended to remain in possession. Having no title, and claiming none, she undertakes to build up a title by adverse possession and the statute of limitations, by making the improvements required.

First, the possession must be "by a person claiming title;" second, the premises must have been protected by a substantial fence; and, third, usually cultivated or improved. Section 4214, Rev. St. The last two requirements are useless if the first is wanting. The defendant was not in possession "claiming title." The defendant's first entry and possession were in subordination to the title of the owner, the same as those of her husband, as she was there only in his right. Her possession cannot, therefore, become adverse without distinct notice to the owner that she claims by some other title, so that he may not be dispossessed without his knowledge. *Allen v. Allen*, 58 Wis. 202, 16 N. W. Rep. 610; *Schwallback v. Railway Co.*, 69 Wis. 292, 34 N. W. Rep. 128. The plaintiff knew that Charles A. Grignon held by permission, under and in subordination to his title. The defendant's wife continued in possession on and after his death, the same as before. How could the plaintiff know that she claimed by any other right? Not knowing that she did, and having no notice of any kind of it, he permitted her to remain as she was. *Proprietors, etc., v. Springer*, 4 Mass. 416; *Thompson v. Pioche*, 44 Cal. 508; *Zeller v. Eckert*, 4 How. 289; and other cases in appellant's brief. This element of hostility to the title of the true owner is an indispensable ingredient of adverse possession, and it must be continuous and notorious. It cannot be made out from inference, for the presumption is in favor of the true owner. 1 Amer. & Eng. Enc. Law, p. 228, note 2; *Pepper v. O'Dowd*, 39 Wis. 548; *Washburn v. Cutter*, 17 Minn. 361, (Gil. 335;); *Smith v. Burtis*, 6 Johns. 218. The defendant concealed the fact from the plaintiff, and never let him know that she was holding or claiming to hold in hostility to his title, until this action was brought. But it is claimed that her making improvements, inclosing the premises with a fence, and cultivating them, were notice sufficient that she claimed them by some other title. But it is held that the true owner must have notice that the improvements

are being made in hostility to his title, or they will not be available as the ground for setting up the statute of limitations. *Thompson v. Felton*, 54 Cal. 547. If the defendant had paid the taxes on the land and on her improvements, she might, perhaps, claim that the owner had some constructive notice that she held adversely and in hostility to his title; but she permitted the true owner to pay the taxes in silent submission to his title, and his paying all the taxes from year to year was an unequivocal assertion of his ownership. In *Hall v. Mathias*, 4 Watts & S. 331, the husband had possession 15 years before his death, and at his decease left his widow and children in possession in his right, and she continued in such possession nearly 30 years before her death. She cleared the land, paid the taxes, leased it, and it was levied upon as her land, she called it her land, and said she owned it, and she finally willed it to the grantor of the defendant. It was held that she did no act hostile to the title of the true owners, and that there was no ouster in fact or by presumption. *Cook v. Nicholas*, 2 Watts & S. 27, was a similar case. "The widow being in possession at the death of her husband, she retains and holds such possession in the right which the law casts upon her; and, not having made any new or distinct entry, no inference of an adverse claim can arise from facts and circumstances short of an open avowal that she claimed to hold the land wholly in her own right, of which [the true owner] had full notice." *Osborn v. Carden*, 1 Plow. 293; Co. Litt. 391. "A widow left in possession of land at the death of her husband is presumed to hold under the title of the husband, and that her possession was consistent with and friendly to the right of the legal owners." In such case the legal title is not barred or defeated by lapse of time or the statute of limitations. *Frazer v. Naylor*, 1 Metc. (Ky.) 593. The possession of the widow, continued at the death of her husband, is not adverse to the right of the true owner. *Stevenson v. Huddleson*, 13 B. Mon. 299; *Driskell v. Hanks*, 18 B. Mon. 855, are to the same effect. The mortgagor or his grantee, remaining in possession after a foreclosure sale, holds subordinate to the title of the purchaser, as well as those who hold with or under him. *Avery v. Judd*, 21 Wis. 262; *Seeley v. Manning*, 37 Wis. 574; *Maxwell v. Hartmann*, 50 Wis. 660, 8 N. W. Rep. 103; *Mason v. Beach*, 55 Wis. 607, 13 N. W. Rep. 884; *Cook v. Travis*, 20 N. Y. 400; *Lowry v. Tilden*, 31 Minn. 500, 18 N. W. Rep. 452. When the possession is thus merely permissive, the statute will not begin to run until an adverse holding is declared, and notice thereof given to the holder of the legal title. *Allen v. Allen*, supra; *Roebke v. Andrews*, 26 Wis. 311; *Bartlett v. Secor*, 56 Wis. 520, 14 N. W. Rep. 714. The wife cannot hold adversely to the husband or the husband to the wife. *Vandevoort v. Gould*, 36 N. Y. 639; *Bank v. Guerra*, 61 Cal. 109;

Hendricks v. Rason, 53 Mich. 575, 19 N. W. Rep. 192. The possession of a trespasser, or of one without claim or color of title, is not adverse to the rightful owner, and cannot ripen into title by lapse of time. *Clarke v. Courtney*, 5 Pet. 320; 1 Amer. & Eng. Enc. Law, 227, and cases cited in note. Giving the defendant the advantage of every principle of law or equity, she is not in the situation to invoke the protection of either adverse possession or the statute of limitations. It is a mistake to suppose that the statute runs on mere naked possession of 20 years. The presumption is that such possession is subordinate to the legal title, and the statute begins to run only from the time it becomes openly hostile to the legal title and notice of it to the true owner. The judgment of the circuit court, appealed from, is reversed, and the cause remanded for a new trial of that part of the case relating to the land "lying southeast of the old rail fence."

HOLTZHAUSEN v. PARKHILL.

(Supreme Court of Wisconsin. June 21, 1893.)
REPLEVIN—WHEN LIES—BY MORTGAGOR AGAINST MORTGAGEE.

Plaintiff mortgaged his stock in trade, credits, and accounts to secure certain creditors, and, after the latter had been in possession for some time, making sales and collecting accounts, he brought replevin for some of the property mortgaged, on the ground that the mortgagees had collected sufficient to pay their claims and expenses, which they denied. Held that, as plaintiff had no legal title, replevin would not lie, and he must proceed by a bill to redeem and for an accounting.

Appeal from circuit court, Clark county; W. F. Bailey, Judge.

Replevin by Herman Holtzhausen against George B. Parkhill. From a judgment for plaintiff, defendant appeals. Reversed.

Leopold Hammel and O'Neill & Marsh, for appellant.

A mortgagor of chattels cannot maintain replevin against the mortgagee. *Lathrop v. Cheney*, (Neb.) 45 N. W. Rep. 617; *Tyler*, 41, 49, 52; *Dyer v. Toothaker*, 51 Me. 380; *Parsons v. Welles*, 17 Mass. 419; *Bigelow v. Willson*, 1 Pick. 491; *Gillett v. Treganza*, 13 Wis. 472; *Eaton v. Smith*, 19 Wis. 537; *Gillett v. Eaton*, 6 Wis. 30; *Hubbell v. Moulson*, 53 N. Y. 225; *Sedg. & W. Tr. Title Land*, § 841; *Jones, Mortg.* § 716, 1115; *Jones, Chat. Mortg.* § 632; *Jackson v. Cunningham*, 28 Mo. App. 354.

G. I. Follett and R. J. MacBride, for respondent.

ORTON, J. This is an action in replevin for one store ledger and a note given by one Albert Rusch to the defendant for \$42.88. It was brought in a justice's court, and the plaintiff obtained judgment, and the defendant appealed to the circuit court. The fol-

Following facts appear to have been established by the evidence: The plaintiff and one Louis Horn were a firm of merchants at Thorp, in the county of Clark. On the 20th day of November, 1890, they gave a chattel mortgage on their whole stock in trade, furniture, and fixtures, and one horse, to the North Star Boot & Shoe Company, to secure the payment of \$500 and interest, according to certain notes, the last one of which would become due January 1, 1891. On the 13th day of December, 1890, they gave a mortgage on the same property to the Chippewa Valley Mercantile Company, to secure the payment of \$624.36, according to certain notes, the last of which would become due on the 1st day of March, 1891, bearing 8 per cent. interest; and this company purchased and had assigned to them said first-mentioned mortgage, and by the consent of the mortgagors took possession of the property and store, with the right to make sales sufficient to pay both of said mortgages. On the 15th day of December, 1890, this last-mentioned company sold out their mortgage interest in the property to Mahler, Albenburg & Co., to whom the plaintiff's firm also owed \$500, and with the consent and agreement of said firm they took full possession of the store and property, with the right to make sales sufficient to satisfy both of said mortgages as well as said \$500. This sale was absolute in terms, but such was no doubt the effect of it. By the consent and agreement of said firm, all the accounts and books of account and credits of said firm were added to the securities of said mortgages, and they also passed into the possession of said last-mentioned company, to be collected and applied on their claims. The defendant, as the agent and attorney of said company, therefore held the said ledger and note claimed in this action by the above authority. It was also the agreement of said firm that the said company should be paid their necessary expenses in taking care of the property and in making it available to the best advantage in the payment of the said claims upon it. On the 8th day of January, 1891, the company sold the remaining property to one Garrison for \$608. This sum, added to what the company had been paid and had collected from accounts and sales and otherwise, according to the contention of the defendant makes the sum of \$1,298.88, or \$1,398.88, as the whole amount the company ever received on all of said claims, when the claims themselves were over \$1,500, without any of the expenses added thereto, and, with such added, the claims of the company were over \$1,800. On the other hand, the plaintiff disputes this claim for expenses, and contends that the company has been paid in full for all of their liens on the property or accounts and credits of the firm. The testimony was repeated more than once, and was uncontradicted, that there has never been any accounting or settlement between the parties of any of

these matters. The special verdict of the jury is confined to these claims on the property, except that the value of the property in this action is \$43.88. This value of the property is the only part of the verdict that is appropriate to this action of replevin. The court rendered judgment for the plaintiff for the return of the property, or for its value. The store ledger, as an account book, together with the accounts in it, and the note, were securities in the hands of Mahler, Albenburg & Co., by the defendant, as their agent, the same as the goods, and they are entitled to their possession until their claims are all paid; and they contend that there is a considerable amount yet unpaid; and this cannot be ascertained without an accounting. This leads to the commanding question in this case, and that is whether these mortgage and security matters can be tried and adjusted by the court in an action of replevin,—a strictly legal action. It is obvious that they cannot. The court has assumed to try many issues quite foreign to such an action. It has attempted to ascertain what became of this mortgage property in the hands of three different mortgagees; how much of it has been sold, and what accounts have been collected; what judgments have been made; what was due upon the mortgage claims, with the interest thereon; what was paid for taxes, rent, and insurance; what were the necessary expenses and disbursements; and, finally, every material fact necessary to an exact adjustment of the whole matter. On an adjustment of these matters by the aid of a jury, the court has determined that the defendant and those he represents are no longer entitled to retain the possession of the residue of the mortgage property, and, in effect, ordered that its possession be given up to the plaintiff, as the mortgagor, as in case of the redemption of mortgage property. The matters involved in such an inquiry show upon their face that they are cognizant only in a court of equity. The parties interested should be brought in upon a proper complaint to answer and to account. The pleadings in replevin afford no notice of these important issues. It is claimed by the learned counsel of the respondent that this objection was not made in the trial court, and was therefore waived. It is by no means certain that this was not a mistrial of such a case, and therefore fatal to the judgment; but the learned counsel of the appellant insists that this objection was taken at the trial, and argued by counsel on the defendant's motion for the court to direct a verdict in his favor. "The law appears to be well settled that the execution of a chattel mortgage transfers to the mortgagee a defeasible title to the mortgaged property, which becomes absolute at law by the failure to pay the debt at the stipulated time; but, notwithstanding the mortgagor is divested of all interest in the property at law, he still has an equity of redemption, which a court

of equity would protect and enforce." This extract from the opinion of Mr. Justice Cole in *Flanders v. Thomas*, 12 Wis. 410, expresses the whole law on the subject, and the reason of it. After default, and the mortgagee has taken possession of the property, the mortgagor has no longer any legal title to it. It follows, of course, that he cannot bring the legal action of replevin for it. His only remedy is to file a bill in equity to redeem. See, also, *Nichols v. Webster*, 1 Chand. (Wis.) 203. Mr. Justice Cole cites the following cases in support of this doctrine: 2 Story, Eq. Jur. § 1031; Hart v. Ten Eyck, 2 Johns. Ch. 62-99; Kemp v. Westbrook, 1 Ves. Sr. 278; Charter v. Stevens, 3 Denio, 33; Patchin v. Pierce, 12 Wend. 61; 4 Kent, Comm. 139. "The mortgagor's only right is to redeem." *Smith v. Coolbaugh*, 21 Wis. 427. The same doctrine is stated in a recent case of *Lathrop v. Cheney*, (Neb.) 45 N. W. Rep. 617, and many cases cited. This being the settled doctrine of this court, it is needless to cite other cases. Those cited in the appellant's brief may be referred to. In this view of the case, the exceptions taken on the trial become immaterial. Notwithstanding the judgment in this case, it is very clear that the mortgagees have not been, as yet, divested of their legal title to the property claimed in this action. The judgment of the circuit court is reversed, and the cause remanded, with direction to dismiss the complaint, without prejudice to the plaintiff's right to bring an action in equity to redeem the property.

**DUGAN v. CHICAGO, ST. P., M. & O.
R.Y. CO.**

(Supreme Court of Wisconsin. June 21, 1893.)

INJURY TO RAILROAD EMPLOYEE — NEGLIGENCE — EVIDENCE — BURDEN OF PROOF — REMARKS OF COUNSEL — DAMAGES.

1. In an action against a railroad company by a fireman for injuries received through the negligence of his engineer in starting the engine, whereby the fireman, while pushing up the water spout with which he had supplied the engine, was thrown therefrom, it was proper to give in evidence rules of the company, providing that the engine should not be started before the spout had been replaced, and that previous to starting the engine bell should be rung for five seconds.

2. The remark of plaintiff's counsel, in his address to the jury, that defendant can bring experts from one end of the world to the other to defeat plaintiff; that it has money enough to do it,—having been expressly discountenanced by the court, will not be held error, in the absence of an affirmative showing.

3. Under Laws 1880, c. 438, (Sanb. & B. Ann. St. § 1810a,) making railroad companies liable for injuries sustained by an employee "without contributory negligence on his part," the burden is not put on the employee to show freedom from contributory negligence.

4. To authorize the interference of the supreme court in the matter of damages, it should appear that they are so excessive as to create the belief that the jury were misled by passion, prejudice, or ignorance.

Appeal from circuit court, Eau Claire county; W. F. Bailey, Judge.

Action by Martin Dugan against the Chicago, St. Paul, Minneapolis & Omaha Railway Company for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

The other facts fully appear in the following statement by CASSODAY, J.:

The complaint alleges, in effect, that on the morning of March 31, 1891, the plaintiff was a fireman in the employ of the defendant, and at work upon his engine, then standing at the water tank at the city of Eau Claire; that in the discharge of his duty the plaintiff went upon the tender, and pulled down the spout, to supply the engine with water; that after he had supplied the engine with water, and while he was standing upon the rear portion of the tender, with his hands above his head, pushing up the spout, the engineer, without giving any warning, and without receiving any signal from the fireman, and before the spout was in place, started up the engine, throwing plaintiff from the tender onto the rail of defendant's track, and injuring him very severely; that at the time of the injury the engineer and a brakeman were in the engine,—for which he claims \$10,000 damages. The answer consists of admissions and denials, and alleges, in effect, that the plaintiff's injuries were caused solely by his own carelessness, recklessness, and negligence, or the carelessness, recklessness, and negligence of his coemployees. The plaintiff put in evidence rule 41 of the defendant company, which reads as follows, to wit: "The engine bell must be rung for five seconds previous to starting the engine, and must be kept ringing while passing into and from all stations and yards, and while passing through the limits of all towns and villages. It must also be rung in approaching and passing over all highway crossings." Also, rule 332, which reads as follows: "Engineers must use care that no damage is done to discharge pipes at water tanks. These pipes must never be pulled from the tender or raised while the engine is in motion, and they must be allowed to empty themselves of water before they are raised, especially in winter, when ice will accumulate. The engineer will know before starting that the pipe has been properly replaced, so that it is entirely clear of passing trains, particularly the pipes upon passenger coaches. Should water pipes be in bad order, and liable to be injured, time should be taken to repair them temporarily, and, if frozen, great care should be used not to break them, and thereby cut off the water supply at that station." At the close of the trial the jury returned a special verdict to the effect (1) that the plaintiff was injured at the water tank at Eau Claire on the morning of March 31, 1891; (2) that such injury was not caused, in any manner,

by the negligence of the defendant in the construction, maintenance, or repair of said water tank or appliances; (3) that the plaintiff's injury was caused by reason of the negligence or want of ordinary care on the part of the engineer in charge of the locomotive; (4) that such negligence consisted in moving his engine in violation of the rule; (5) that the plaintiff was not guilty of any want of ordinary care and prudence which contributed proximately to the injury complained of; (6) that the sum of \$3,583.33 will fully compensate the plaintiff for the injuries and damages he sustained by reason of the accident in question. From the judgment entered upon said verdict, by order of the court, for the amount of the damages so found, with costs, and from the whole thereof, the defendant brings this appeal.

S. L. Perrin and R. J. MacBriue, for appellant. T. F. Frawley and W. H. Stafford, for respondent.

CASSODAY, J., (after stating the facts.)

1. There can be no doubt but what the rules of the defendant company, applicable to the service of the plaintiff and the operation of the engine in question, were properly admitted in evidence. *Schultz v. Railway Co.*, 44 Wis. 638; *Townley v. Railway Co.*, 53 Wis. 626, 11 N. W. Rep. 55; *Lockwood v. Railway Co.*, 55 Wis. 50, 12 N. W. Rep. 401; *Hoye v. Railway Co.*, 62 Wis. 668, 23 N. W. Rep. 14; *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. Rep. 544; *Abbot v. McCadden*, 81 Wis. 563, 51 N. W. Rep. 1079; *Beems v. Railway Co.*, (Iowa,) 12 N. W. Rep. 222.

2. Exception is taken because counsel for the plaintiff, in addressing the jury, said: "The defendant can bring experts from one end of the world to the other to defeat Mr. Dugan. They have money enough to do it." This language escaped the attention of the trial judge at the time, but a few moments afterwards was, by his direction, taken down by the reporter, and the defendant's exception entered; and in the closing argument for the plaintiff, the next morning, such remark was expressly discounted. It appears that the remark referred to a physician from St. Paul who testified as a witness on the part of the defendant. We are not prepared to say, from the record, that this remark was prejudicial to the defendant. The occasion of it is not made to appear of record. "In arguing a case to the jury, counsel necessarily have a broad latitude. The administration of justice requires it. The trial judge is necessarily familiar with all the facts and circumstances, as well as all shades of the evidence. He must necessarily have a broad discretion in such matters. Error is not to be presumed in such case. If counsel abuse their privilege, or the trial court its discre-

tion, and such abuse is made to appear affirmatively in the record, then an exception to the same will be sustained; otherwise, it will be overruled. Such have been the repeated rulings of this court." *Smith v. Nippert*, 79 Wis. 139, 48 N. W. Rep. 253, and cases there cited. The exception mentioned must be overruled.

3. Error is assigned because the court refused to charge the jury to the effect that the burden was upon the plaintiff of showing due care, and freedom from contributory negligence, on his part. The jury found that the plaintiff's injury was caused by the negligence of the defendant's engineer in charge of the locomotive at the time, and consisted in moving his engine in violation of the rule. Such engineer being the plaintiff's coemployee at the time, it is contended that there would have been no liability at common law, and hence that his right of action, if any, is purely statutory. The statute applicable reads: "Every railroad corporation doing business in this state shall be liable for damages sustained by any employee thereof within this state, without contributing negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, yard master, conductor, or engineer, or of any other employee who has charge or control of any stationary signal, target point, block, or switch." Chapter 438, Laws 1889; section 1816a, Sanb. & B. Ann. St. The contention is that under this statute the plaintiff was bound to prove, as a condition precedent to recover, that he was without contributory negligence on his part. It is, in effect, conceded that, independent of this statute, the burden of proving contributory negligence, when not disclosed by the evidence on the part of the plaintiff, was purely a matter of defense. *Hoye v. Railway Co.*, 67 Wis. 15, 29 N. W. Rep. 646, and cases there cited. The defense of contributory negligence has frequently been sustained to a right of action given by statute, where none previously existed, notwithstanding the statute was silent on the subject of contributory negligence. This has frequently been held under the statute giving a right of action for damages caused by a defective highway. Section 1339. The same is true in respect to the statute giving damages caused by the failure of railway companies to construct and keep in repair fences and cattle guards, as required. *Holum v. Railway Co.*, 80 Wis. 303, 50 N. W. Rep. 99, and cases there cited. The mere fact that the legislature embodied in the act in question the words, "without contributing negligence on his part," when the courts would necessarily have supplied the same by construction, had they not been so embodied, cannot operate to change the burden of proof from the defendant to the plaintiff. It will be observed that such words were not so embodied for the pur-

pose of giving to the plaintiff a right of action, but for the purpose of more certainly securing to the defendant a defense in case of such contributory negligence. The case is clearly distinguishable from that line of cases where the right to recover is based wholly upon an exception in the statute, as, for instance, where the statute expressly prohibits all right of recovery except upon one condition, and the plaintiff seeks to bring himself within such exception. The supreme court of Minnesota has recently held that a similar statute in that state did not change the rule as to the burden of proving contributory negligence. *Lorimer v. Railway Co.*, 48 Minn. 391, 51 N. W. Rep. 125. We must hold that the trial court properly refused to instruct the jury as requested. The exception to the portion of the charge on contributory negligence is based upon the same objection, and is overruled for the same reason.

4. It is claimed that the damages are excessive, and that the verdict should have been set aside on that ground. No complaint is made, and none can be fairly made, of the charge of the trial judge on that subject. He expressly charged to the effect that the damages should be limited to what was fair and reasonable, and should not be excessive; that nothing should be allowed for permanent injuries unless the jury were satisfied that the injuries sustained were permanent, nor then unless they were fairly and reasonably so satisfied; that mere possibility would not do. The same judge refused to set aside the verdict on that or any other ground, notwithstanding he possessed a broad discretionary power in that regard. This court has no such discretion, and we find nothing in the record which would justify us in holding that the trial court has abused its discretion. To authorize the interference of this court, it should appear from the evidence that the damages are so excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance. This is not such a case. We find no error in the record. The judgment of the circuit court is affirmed.

MARSTON et al. v. DRESEN et ux.

(Supreme Court of Wisconsin. June 21, 1893.)

FRAUDULENT CONVEYANCES — APPARENT OWNERSHIP — ECTOPHEL.

A wife intrusted her separate property to her husband to invest and manage in his own name, he to transfer it to her when she so desired. While it so stood in his name, he entered into business, and bought merchandise of persons who knew from the records that it was in his name, and who relied on his apparent ownership in giving him credit. It was conveyed by the husband to the wife while he was still solvent. *Held*, that it not having been put in the husband's name for the purpose of giving him credit, and no representations that it was his having been made, and the wife not

having known that credit was given him on the faith of such apparent title, she was not estopped to claim it as her own.

Appeal from circuit court, La Crosse county; A. W. Newman, Judge.

Action by Daniel Marston and another against Hubert Dresen and Josephine Dresen, his wife. Judgment for defendants. Plaintiffs appeal. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action in the nature of a creditors' bill. The defendants are husband and wife. The plaintiffs are judgment creditors of the firm of Dresen & Fjelstad, of which urm defendant Hubert was a member, and this action is brought to set aside certain transfers of real and personal property from Hubert to Josephine as being in fraud of Hubert's creditors. At the close of the trial the circuit judge made findings as follows: "(1) That in the fall of 1881 the defendant Hubert Dresen and one Andrew Fjelstad entered into copartnership in the retail grocery business at the city of La Crosse under the firm name of Dresen & Fjelstad, which partnership continued until about the 1st of January, 1887. said Andrew Fjelstad being the business manager of said firm; and while so engaged in such business said Dresen & Fjelstad had dealings with, and in course of trade purchased goods and merchandise of, the plaintiffs, who were wholesale grocers in said city. That on the 27th day of November, 1888, the plaintiffs obtained judgment in the circuit court of La Crosse county against said Dresen & Fjelstad for the sum of eight hundred and seventy-one and 19-100 dollars (\$871.19) and costs of suit, upon an indebtedness incurred by them in said business, and upon which said judgment execution has been issued, and returned unsatisfied. (2) That prior to the 27th day of March, 1893, the defendant Josephine Dresen, acting through her husband, and trusting to his judgment, purchased with her own money the following real estate mentioned and described in the complaint in this action, viz.: Lots three, (3,) six, (6,) and seven, (7,) in block eight (8) of Southeastern addition to the village of North La Crosse, according to the recorded plat thereof, the consideration paid for said premises being the sum of one hundred ninety dollars, (\$190;) also, lots four (4) and five (5) in block eight (8) of said Southeastern addition to the village of North La Crosse, the consideration paid therefor being the sum of one hundred dollars, (\$100;) also, fractional lot number three (3) of section twenty-nine (29,) in township sixteen (16,) range seven (7) west, in the county of La Crosse, Wis., for the sum of one hundred dollars, (\$100,)—and also, acting through her said husband, and trusting to his judgment, loaned and invested certain moneys of her own upon the following mortgages and mortgage securities mentioned and referred to in complaint, viz.: A certain mortgage given by

John Bamberger and wife, for the sum of two hundred dollars, (\$200;) a mortgage of Henry Erickson and wife, for two hundred fifty dollars, (\$250;) a mortgage of John Asslin and wife, for five hundred dollars, (\$500;) a mortgage of Louis Perions, for one hundred twenty-five dollars (\$125,) recorded in volume 25 of Mortgages, on page 511, in said La Crosse county; a mortgage of John Neagle and wife, for six hundred dollars, (\$600;) a mortgage executed by Michael Lambert to Abe Chavaler, for one hundred sixty dollars, (\$160;), a mortgage executed by August Freimark and wife to Joseph Fay, for four hundred dollars, (\$400.) (3) That the money paid for said real estate and invested in said mortgage securities was derived by said Josephine Dresen from her own separate estate, and no part thereof was received by her from or through her husband. That the title of said real estate and said mortgages was taken in the name of defendant Hubert Dresen for the use and benefit of said Josephine Dresen, and with the express agreement and understanding between said parties that said Hubert Dresen should convey such real estate and assign said mortgages to said Josephine Dresen at any time she so desired. That such title was not taken in the name of said Hubert Dresen for the purpose of enabling him to obtain credit, and said Josephine Dresen had no knowledge that any credit was ever extended either to him, or to the firm of Dresen & Fjelstad, by reason thereof. (4) That on the 27th day of March, 1883, the defendant Hubert Dresen, upon demand of said Josephine Dresen, pursuant to and in consideration of such agreement between said parties, conveyed to her the aforesaid real estate, and assigned to her said mortgages, together with a certain other mortgage mentioned in the complaint, executed by John Asslin and his wife, for the sum of eight hundred dollars, (\$800,) and recorded in volume 16 of Mortgages, on page 475, in said La Crosse county, and for which said last-named mortgage the said Josephine Dresen paid full value to said Hubert Dresen, out of her own separate estate, at the time of such assignment. That the consideration expressed in said deed of conveyance was one dollar, love and affection, and that said conveyance and said assignment of mortgages were duly recorded in the office of the register of deeds of said La Crosse county. (5) That, at the time of execution of such conveyance of real estate and assignment of said mortgages from said Hubert Dresen to said Josephine Dresen, the aforesaid firm of Dresen & Fjelstad was indebted to the plaintiffs and other persons with whom they have been dealing in the aggregate sum of about \$2,500, such indebtedness to the plaintiffs being about \$1,209.42, and at said time the stock in trade of said Dresen & Fjelstad amounted to about \$1,500, and their book accounts and credits to the face amount of about \$2,500, and that the property then re-

maining in the ownership of said Hubert Dresen, in addition to his interest in said store, consisted of about \$3,000 in cash, in his personal possession, which he took west with him shortly thereafter, and invested in speculation and mining, and which said investment is now understood to be of little or no value. That, before the plaintiffs commenced dealing with said Dresen & Fjelstad, they ascertained, from inquiries and examination of the records in the register of deeds office in said La Crosse county, that the record title of the aforesaid mortgages and real estate was in said Hubert Dresen; and, when plaintiffs commenced giving credit to said firm, they believed said Dresen to be the owner of said real estate and mortgages, and relied upon such apparent ownership in giving the firm credit. (6) That at the time said inquiries were made by plaintiffs, and up to the time they so obtained judgment, the said Andrew Fjelstad had no property subject to execution, except his interest in said store and mercantile business. (7) That plaintiffs did not know of the conveyances and assignments aforesaid made by Hubert Dresen to his wife until suit was brought, in February, 1888, on the notes for which said judgment was obtained. (8) That, subsequent to the time of the aforesaid conveyance of real estate and assignment of mortgages, that said Hubert Dresen and Andrew Fjelstad continued in business as hereinbefore stated, and during all the said time continued to trade and have dealings with the plaintiffs, and had a running account with them for merchandise purchased in said business. That in the course of such dealings with Dresen & Fjelstad they paid to the plaintiffs, upon account, more than the sum owing from them to the plaintiffs at the time such conveyance and assignments were made, but, owing to the continual purchase of new goods, the amount owing upon such account was at no time reduced below the sum of eight hundred dollars, (\$800.) (9) That in the year 1884 the defendant Josephine Dresen intrusted with the defendant Hubert Dresen certain moneys of her own to be invested in the purchase of real estate, and loaned upon mortgage securities, and that said Hubert Dresen, as agent for said Josephine Dresen, invested said money in the purchase of the following described lands and premises mentioned in the complaint, viz.: Lot number one (1) in block fourteen (14) of the Northern addition to the village of North La Crosse, according to the recorded plat thereof, the consideration paid therefor being the sum of four hundred eighty-five dollars, (\$485;) also, lot number two (2) in block twenty-one (21) of the original plat of the village of North La Crosse, according to the recorded plat thereof, the consideration paid therefor being the sum of three hundred dollars, (\$300,)—and also loaned the sum of three hundred dollars (\$300) to one Patrick Kaveny, and took a mortgage therefor, which was recorded in

volume 28 of Mortgages, on page 577, in said La Crosse county. That all of the money paid for said real estate and loaned upon said last-mentioned mortgage was derived by said Josephine Dresen from her own separate estate, and no part thereof was derived from or through her husband. (10) That said Hubert Dresen, without the knowledge or consent of said Josephine Dresen, took the title of said real estate and said mortgage in his own name. That said Josephine Dresen did not ascertain such fact until the latter part of December, 1885, or fore part of January, 1886. That she thereupon demanded that the title of said real estate and mortgage be conveyed to her, and that the same was conveyed to her by said Hubert Dresen on the 13th day of February, 1886, and that the deed of said real estate and assignment of said mortgage from said Hubert Dresen to her were at once recorded in the office of the register of deeds in said La Crosse county. (11) That at the time of said last-mentioned conveyance and assignment of said mortgage the said firm of Dresen & Fjelstad was indebted to the plaintiffs, but that no part of such indebtedness was contracted on the faith or credit of said Hubert Dresen being the owner of said mortgage, or any of the property included in said conveyance. That said Hubert Dresen did not take the title to said property in his name for the purpose of procuring or obtaining credit. (12) That said Dresen & Fjelstad continued in business as copartners, and continued to deal with the plaintiffs as such until about the 1st of January, 1887, at which time they dissolved partnership, the said Hubert Dresen retiring from said firm; and the said Andrew Fjelstad continued to carry on said business in his own name, which fact was known to the plaintiffs at the time. That after such dissolution the said Andrew Fjelstad continued to carry on such business in his own name, and continued dealing with the plaintiffs in said business until about the time (6th day of January, 1888) when he failed, and made a general assignment for the benefit of his creditors. That during the time said Fjelstad carried on said business after said dissolution of copartnership he in fact paid to the plaintiffs various sums of money, but such moneys were applied, at the times of payment, largely upon payment for new purchases of merchandise made by said Andrew Fjelstad, leaving the old indebtedness, which had been renewed from time to time, due from said Dresen & Fjelstad at the time of their dissolution, upon which the aforementioned judgment against said Dresen & Fjelstad was recovered. (13) That none of the conveyances of real estate or assignments of mortgages above mentioned and set forth were made with intent on the part of either of the defendants to defraud the plaintiffs, or any creditor of said Hubert Dresen. (14) That the mortgages herein described were of the value of \$3,035, and the herein-described real

estate of the value of about \$2,600. when conveyed and assigned as aforesaid. (15) That from the real estate deeded as aforesaid the defendant Josephine Dresen has realized by the sale the sum of \$3,350, and from said mortgages the sum of \$3,035. (16) That the defendant Josephine Dresen has undisposed of said real estate the following, to wit, lots 4, 5, 6, and 7 of block eight (8) of Southeastern addition to the village of North La Crosse. (17) That defendant Josephine Dresen is, and was at the times herein mentioned, the wife of the defendant Hubert Dresen. (1) And as conclusions of law this court finds and determines that all of said conveyances of real estate and assignments of mortgages from the defendant Hubert Dresen to said Josephine Dresen are upon a valid and sufficient consideration, and said Josephine Dresen is not estopped from claiming title thereto, as against the plaintiffs, as creditors of said Hubert Dresen. (2) And that the defendants are entitled to judgment herein, dismissing the complaint of the plaintiffs, with costs. Judgment is ordered to be entered accordingly." From judgment for the defendants, plaintiffs appeal.

Winter, Each & Winter, for appellants.
Paul W. Mahoney and Bleekman & Bloom-
ingdale, for respondents.

WINSLOW, J., (after stating the facts.) The first contention of appellants is that the findings of the circuit court as to the possession of separate estate by the wife, and as to the investment thereof in the real and personal property in controversy, are contrary to the weight of the evidence, and that, on the contrary, the evidence shows that all of such property was purchased by the husband with his own moneys; and they say that the testimony as to the sources and origin of the wife's alleged separate estate is absolutely incredible. If this contention be well founded, then the judgment, manifestly, cannot be sustained, because, in a contest of this nature, between the wife and the creditors of the husband, where the wife claims title to property by transfer direct from her husband, the wife must first establish the fact, by satisfactory and clear evidence, that she had a separate estate which she used in acquiring the property. *Gettelmann v. Glitz*, 78 Wis. 439, 47 N. W. Rep. 600. It must be admitted that the wife told a very remarkable story as to the acquisition of her alleged separate estate. This story was, in substance, that she came to this country from France in 1808,—she being then 25 years of age,—with her father, mother, one brother, and two sisters; that her father taught school, and had land in France; that he brought to this country 30,000 to 35,000 francs in gold, which she testifies was sewed up in the clothes of her father and mother and herself. This money, she alleges, was changed

to paper when they arrived in this country, at a premium of from 40 to 50 cents. Of this money, 1,400 francs, she says, was her own, willed to her by her godmother, one Christina Staley, and given to her father to take care of. The family went first to Manitowoc, where she says the father bought a house and lot for \$2,200. After living at Manitowoc a few months, he moved with the family to St. Mary's Ridge, Monroe county, and soon bought 80 acres of land for \$1,600, and started a saloon, grocery, and tavern, besides teaching school for two winters. This \$1,600 was loaned to the father by Nicholas Staley, Josephine's uncle, although the father still had the money he had brought from the old country, uninvested. In 1870, Josephine married the defendant Hubert, who was then working on a railroad, and left home, and lived thereafter at La Crosse, and immediately began to buy lots with money which she says her father gave her, in sums running from \$100 to \$350, during the years from 1870 to 1874. In 1874 her father sold out the place at St. Mary's Ridge, and came to La Crosse, with his wife, and commenced to live with Josephine, and continued to live with her until his death, in 1886. He gave Josephine, as she testifies, \$500, as soon as he came to live with her, and also other sums on subsequent occasions, which she invested in real estate or mortgages. All of these investments, prior to March, 1883, amounted to about \$3,000; and she testifies that in all cases she gave the money to her husband, with the understanding that he was to invest it and manage it in his own name, and transfer the property to her when she so desired. It appears that Hubert managed the property and dealt with it in many ways as if it were his own. Hubert was a railroad brakeman when married, at \$45 or \$50 a month, and continued to work for the railroad until 1880, when he was getting \$60 to \$70 a month, and supported his family. In 1880 he went into business with Fjelstad, putting in at first \$680 as capital, and in 1881 about \$300 more. Fjelstad was the manager of this business. He fully corroborates his wife as to her advances of money with which he purchased the real estate and mortgages in question. Both husband and wife testify that, in 1883, Dresen determined to go west, and before going his wife demanded the transfer to her of the real and personal property which her money had bought, and the transfers were made. Testimony was given tending to show that both Dresen and the firm of Dresen & Fjelstad were perfectly solvent at this time, and the circuit court so found, with which finding we agree. Now, as we have said, this story is in many respects remarkable, but we certainly are not prepared to say that it is incredible. More remarkable instances of the secretion of money come to light every

day than the one which is here detailed. It frequently happens that people in the class of life to which these people evidently belonged have an abnormal distrust of banks, and of investments of all kinds, and keep their money uninvested, as Josephine's father is alleged to have done in this case. If evidence is to be always disbelieved because the story told seems remarkable or impossible, then a party whose rights depend on the proof of some fact out of the usual course of events will always be denied justice simply because his story is improbable. Such is not the rule. A remarkable and exceptional state of facts may be satisfactorily proven, and, if so proven, a court cannot refuse belief simply because it is out of the usual course of events. The circuit court, after hearing all the evidence, believed the defendants' statements to be true; and we cannot, after careful reading of the evidence, say that his finding in this respect was wrong, and we concur therein. The circuit court also found that none of the conveyances or transfers attacked were made with intent on the part of either of defendants to defraud the plaintiffs, or any creditor of Hubert, and such is also our conclusion from the evidence. It being, then, satisfactorily established that the wife had a separate estate with which all the property in question was bought; that title to the property was taken in the husband's name with the understanding that he would convey to his wife when she desired; and he having conveyed when solvent, and without fraudulent intent on the part of either,—no reason is perceived why the transfers should not be upheld, as against the creditors of the husband. But another contention is made by plaintiffs at this point which requires notice. The fact was, as the circuit court found, that, before the plaintiffs commenced to deal with Dresen & Fjelstad, they learned, by examination of the records, that the title to said real estate and mortgages was in Hubert Dresen, and that they relied on such apparent ownership in giving him credit, and that they did not know of the transfers from Dresen to his wife until they brought suit on the firm notes, in February, 1888. The court also found, as the fact seems to be, that Josephine had no knowledge that credit was extended to her husband or to the firm on the faith of such apparent title in her husband, and did not put the title in his name for any such purpose. Upon these facts the contention is made that Josephine is now estopped from claiming ownership of the property, and the doctrine of the case of *Hopkins v. Joyce*, 78 Wis. 443, 47 N. W. Rep. 722, is relied upon. In the case last cited the wife's property was put in the husband's name for business convenience, and the husband represented, for the purpose of gaining credit, that he owned such property, and credit was extended to him on the faith of that repre-

resentation. It was held (the husband having no other property) that the wife was estopped, as against the creditor so misled, from asserting her equitable title. That case differs from this in the very material fact that there was in that case an actual fraudulent misrepresentation, which the wife had put it within the power of her husband to make, and upon the faith of which (the husband having no other property) the creditor extended the credit, whereas, in this case, there was no representation made by any one, and the husband made the conveyance while entirely solvent. True, the records showed title in the husband, and the plaintiffs relied on that showing; but neither of the defendants knew that plaintiffs relied thereon, and, had plaintiffs applied to Dresen for information, it may well be that he would have informed them of the condition of the equitable title. It does not appear, to use the language of Chief Justice Marshall in *Sexton v. Wheaton*, 8 Wheat. 229, that the wife was "herself the instrument of deception," or that she "contributed to its success by countenancing it." We are referred to no case which carries the doctrine of estoppel so far as the appellants contend it should be carried in this case, and we decline to do so.

So far, in this opinion, we have discussed questions relative to the validity of the transfers of March, 1883. Much that we have said applies with equal force to the conveyance of February, 1886. So far as the facts relating to the last-named transfer differ from the facts surrounding the conveyance of 1883, we agree with the conclusions of the circuit court, and detailed discussion thereof is unnecessary. It follows from what has been said that judgment for the defendants was rightly rendered.

Judgment affirmed.

CAHOON v. CHICAGO & N. W. RY. CO.
(Supreme Court of Wisconsin. June 21, 1893.)

NEGLECTANCE — IN OPERATION OF LOCOMOTIVE — WHISTLING — BLOWING OFF STEAM.

1. Rev. St. § 1809, provides that an engine, before crossing any highway, except in cities and villages, shall have its whistle blown 80 rods from such crossing. *Held*, that where, in an unincorporated village, an engine whistled at the whistling post for one street, and continued to whistle till it arrived at another whistling post, 400 feet away, this was not negligence on account of which one who was injured by his horse becoming frightened at the noise could recover from the railroad company.

2. Neither was it negligence to allow steam to escape with considerable noise from the cylinder cocks.

3. The provision of section 1809 that the whistle shall be blown 80 rods before a locomotive crosses a street does not make it unlawful for it to stop and move in the direction from which it has come, at a distance of less than 80 rods from the street it has last crossed.

Appeal from circuit court, Sauk county;
R. G. Siebecker, Judge.

Action by Levi Cahoon against the Chicago & Northwestern Railway Company for personal injuries. From a judgment for defendant, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action for personal injuries. The unincorporated hamlet of Lyons lies on the north side of the Baraboo river, in Sauk county, about 1¼ miles west of Baraboo. It has four streets, running due north and south, named, respectively, beginning at the east, Cedar, Walnut, Mulberry, and Pine, the intervening blocks being about 400 feet in length. The defendant's railway traverses the village east and west, and crosses all of these streets at right angles, but has no depot or switches in the village. On the south side of and adjoining the right of way of the defendant, and about 50 feet from its track, a street known as "Oak Street" runs east and west, and all the north and south streets above named connect therewith. Pine street continues south, after crossing Oak street, about 100 feet, and connects with a bridge across Baraboo river. September 12, 1890, plaintiff was driving a horse attached to a road cart south on Mulberry street, intending to cross the railway track, and thence to drive west on Oak street one block to Pine street, and thence south across the bridge. Before plaintiff reached the railway track, a freight train went west, followed in close proximity by an engine. Plaintiff then crossed the track in safety, and turned west on Oak street. The detached engine proceeded west to a point from 8 to 12 rods west of Pine street, where it stopped, and commenced to back down to the east. It whistled when it started back, and continued to whistle after crossing Pine street, and steam escaped with considerable noise from the cylinder cocks. A whistling post stood at about the point where the engine started back, and another at a point about midway between Pine and Mulberry streets. At about this last-named point plaintiff met the engine. His horse became frightened at the whistling and escaping steam, and ran south to Pine street, where plaintiff was thrown out and was seriously injured. He brought this action, claiming negligence in the management of the engine, and upon close of plaintiff's testimony a nonsuit was ordered, and from judgment thereon he appeals.

G. Stevens and Grotophorst & Buckley, for appellant. Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

WINSLOW, J., (after stating the facts.) The whistling of the engine was not negligence; on the contrary, it was required by the statute. Rev. St. § 1809. The village of Lyons being unincorporated, the whistle must be blown 80 rods before crossing each of the streets which cross the track. The

place where the engine first began to whistle was at or very near the whistling post for Walnut street, and the place where the last whistle was sounded was at or very near the whistling post for Cedar street. The statute absolutely requiring whistling to be done at these points, negligence cannot be predicated thereon.

As to the alleged negligent and excessive escape of steam, the case is very similar to the case of *Abbot v. Kalbus*, 74 Wis. 504, 43 N. W. Rep. 367, and that case seems decisive of this upon this question. In this case there was no more proof of excessive noise in blowing off steam than in that case, and it was there held there was no proof of unusual escape of steam. The right to operate a railroad includes the right to make the usual noises incident to the movement of its engines and trains, and it is matter of common knowledge that the exhausting of steam from the cylinder cocks is one of the noises very frequently accompanying the movement of engines. Furthermore, there is no evidence from which the jury would be justified in finding that it was done wantonly or recklessly.

It is claimed that the engine could not lawfully stop and move eastward until it had reached a point at least 80 rods west of Pine street, because it must by law whistle 80 rods west of and before crossing Pine street. As aptly said by respondent's counsel, the result of this construction would be that no engine could ever start at a point less than 80 rods from a highway crossing. We cannot indorse such a construction, certainly not in favor of one who is not using the highway crossing, but simply traveling on a parallel highway. The nonsuit was right. Judgment affirmed.

PARKER v. TRUESDALE.

(Supreme Court of Minnesota. July 21, 1893.)

RAILROADS—STREET CROSSING—RESTORATION OF STREET—CHANGE IN GRADE.

In enforcing against a railway company the duty imposed by its charter, to construct, when necessary, on a street or highway crossing its tracks, a bridge or viaduct, with the approaches, the court has power to establish the grade therefor, though that involves a change in the grade previously established for the street or highway. *Mitchell, J., dissenting.* *State v. Minneapolis & St. L. Ry. Co.*, 39 N. W. Rep. 153, 39 Minn. 219, and *Robinson v. Railway Co.*, 51 N. W. Rep. 384, 48 Minn. 445, followed.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Lochren, Judge.

Action by William W. Parker against William H. Truesdale, as receiver of the Minneapolis & St. Louis Railway Company, to compel defendant to restore a street crossed by the railway to its former state. Judgment, from which plaintiff appeals. Affirmed.

A. M. Harrison, for appellant. Albert E. Clarke and Wilbur F. Booth, for respondent.

GILFILLAN, C. J. It is obvious that if the cut on the northerly part of Third avenue north, in front of plaintiff's premises, was in accordance with the lawfully-established grade, whether the work of cutting down to such grade was done by the city, or by some other person by its authority, or upon its requirement, no liability accrued to plaintiff by reason thereof; and under the charter of the city of Minneapolis it makes no difference with this proposition that the grade on which the cut was made was a change from one previously established. *Henderson v. City of Minneapolis*, 32 Minn. 319, 20 N. W. Rep. 322. So the only questions in the case are, was the cut made upon a legally-established grade? and was it made by authority of the city? That the grade for the cut was lower than the grade as first established, and covered or included only a part of the width of the street, leaving the other part on, or perhaps raised above, the grade, as first established, does not make it illegal, for the authority which may establish the grade for a street may, under peculiar circumstances, adopt one plane for a part of the width of the street, and a higher or lower plane for the other part, requiring a retaining wall to sustain the part on the higher plane. *Yanish v. City of St. Paul*, (Minn.) 52 N. W. Rep. 925. The charter of the city of Minneapolis (chapter 8, § 2) authorizes the common council to establish grades, and, by a vote of two-thirds, to change the grade of any street after such grade has been established. So far as appears in this case, the council never, by ordinance or resolution passed by a two-third vote, made any change in the grade of Third avenue north, as it had been previously established; and if the sole power to change an established grade rests in the common council, the cut, which was below the grade as established, and not changed by the council, was, as between the abutting property owners and the person making it, unauthorized and wrongful. And this brings us to the question whether, in such proceedings as were proved in this case, which proceedings have been several times, directly or indirectly, before this court, the court has the power, equally with the council acting under the charter, to change established grades, when deemed necessary. If it has, then this action in changing grades has the same effect, and precisely the same consequences, as the action of the council making a change under the provisions of the charter. It is no answer to this that the abutting property owner is not in person a party to the proceeding, nor a party in any other sense than that the entire public interested in the use of the streets and the establishment of grades is represented by the city which prosecutes the proceeding. In no

other sense would he be a party to a proceeding to change grades, before the council; and certainly no one could say that a change made by the council was invalid because he was not personally brought before it.

The proceeding was in behalf of the public, represented by the municipality, to enforce the performance by the railway company of the duty imposed on it by its charter, to restore any street or highway crossed by its tracks "to its former state, or in a sufficient manner not to impair its usefulness to the owner or to the public," which duty, as construed by this court in *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 23 N. W. Rep. 3, and *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219, 39 N. W. Rep. 153, includes the construction, when necessary to the free public use of the highway, of bridges or viaducts, and the approaches thereto. Of course the legislature intended that, when not voluntarily performed, the courts should enforce that duty, and should have all the powers necessary to accomplish that end. And as said in the last-cited case, and as must be obvious, when the parties—the public authorities in charge of the streets and highways, on one side, and the railway company, on the other—do not agree as to what shall be done, it must, of necessity, be for the courts, when appealed to, to determine what the public interests require to be done, within the duty imposed on the railway company, and how it shall be done, including the grade or level upon which any bridge or viaduct, and the approaches thereto, shall be constructed; and for this purpose the court must have as full and complete authority over the streets and highways as the necessity of the case requires, and as the legislature could vest in any one. That the court may impose the duty on the company to carry the street across the tracks at a level higher or lower than the previously established grade, and yet it be unlawful, as to any one, for the company to construct the crossing on that level, involves an absurdity. The construction of a bridge or a viaduct across the tracks on a particular street, changing the grade of the street, may make necessary the readjustment of the grades of other streets in the vicinity, so as to preserve to the public the beneficial use of such streets in connection with that on which the crossing is constructed. Before applying for the mandamus to compel the railway company to perform the duty to the public imposed on it by its charter, the city caused to be prepared by its engineer careful and comprehensive plans of the work it deemed necessary to be done, including that on several streets; among them, a part of Third avenue north. These plans, which were attached to the alternative writ, are referred to in the judgment, and the work directed to be done in accordance therewith. On these plans appears the cut in question, which appears as intended to preserve to

the public a practicable way to and from the freight houses of the company. The judgment necessarily changed the previously established grade of that part of the avenue to the grade necessary to make the cut represented on the plan. It is not disputed that the work was done according to the plans and judgment. The case is fully covered by *Robinson v. Railway Co.*, 48 Minn. 445, 51 N. W. Rep. 384. If, in any case where a change of grade of a street is made by the proper authority, it can be alleged to be invalid because made for the purpose of benefiting a private person, it can be only where it is unmistakable that a determination of what the public interest requires was not the reason for the change. The fact that one person may be incidentally benefited by the change certainly is not enough. The cut in question is as much a public highway as the avenue ever was. No one, except as one of the public, has any interest in it. And if the court determined—as we are bound to presume it did, and as we would have been bound to presume of the council, had it changed the grade—that the public interest required the cut to be made to preserve a way of access for the public to the company's freight houses, the fact that it also facilitates the transaction by the company of its business with the public can be no legal objection to the change of grade. Order affirmed.

MITCHELL, J., dissents.

GRANT v. MUNCH et al.

(Supreme Court of Minnesota. June 30, 1893.)

SPECIFIC PERFORMANCE—CONDITIONS OF CONTRACT—TIME OF THE ESSENCE.

1. The intention of the parties to a contract for the sale and conveyance of real property, clearly and unequivocally expressed, that time is of the essence of the agreement, must govern in equity as well as at law.

2. In such a contract it was stipulated that the agreement should be void, at the election of the vendors, in case the vendee defaulted in the payment of a part of the purchase price according to the conditions of his promissory note of even date therewith. This note was made payable at a certain bank, was there for collection when due, and was not paid. The vendors gave immediate notice that they had elected to declare the contract void, and with this notice returned the note. *Held*, that it was not necessary for the vendors to prepare, and have at the bank, in readiness for delivery when the note matured, a deed of conveyance of the premises, nor was it incumbent upon them to return that part of the purchase price already paid in order to exercise their right to declare the contract void.

(Syllabus by the Court.)

Appeal from district court, Pine county; Crosby, Judge.

Action for the specific performance of a land contract by William Grant, Jr., against Adolph Munch and others. Defendants had judgment, and plaintiff appeals. Affirmed.

J. F. Fitzpatrick, for appellant. J. M. Gilman and Robertson Howard, for respondents.

COLLINS, J. This was an action for specific performance of a contract for the sale and conveyance of real estate. At the time of the sale one-fourth of the purchase price was paid by the vendee, and the balance was to be paid in six months, according to the conditions of the vendee's promissory note of even date. By the terms of the contract, prompt performance on his part was required of the vendee; and it was expressly provided that if he should make default in his payment the contract should be void, at the election of the vendor, "time being of the essence of this agreement." The note was made payable at a certain bank in the city of St. Paul, and was there for collection on the day it matured,—August 17, 1891; but the maker did not have, nor did any other person have, funds at the bank with which to pay it, and it was not paid. On August 18th—the day after that on which the note matured—the vendors elected to declare, and by written notice to the vendee did declare, the contract void, at the same time returning his note. Having been notified by the bank on August 17th that it held the note for collection, the vendee sent a draft for the full amount due. It does not appear from the findings when the draft was sent, but it was not received until August 20th, and was promptly returned. A few days afterwards the vendee made a tender, and demanded a deed, which was refused on the ground that the tender came too late.

It is now thoroughly established, with respect to contracts of this character, that the intention of the parties must govern, and if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, then the time of completion, or of performance, or of complying with the terms, will be regarded as essential in equity, as much as in law. The courts cannot disregard and ignore express stipulations made by the contracting parties in respect to the essentiality of time, thus to make new contracts for them, although great hardship may result from a rigid adherence to such stipulations. In the contract now under consideration the vendors were given the right to declare it void, should the vendee fail to strictly perform on his part, and this right they exercised upon discovering that he had defaulted in the payment of his note at the time and place agreed on. We have not the power to render this right, stipulated to them by the vendee, unavailable.

Counsel for appellant does not really dispute this, but urges that it was incumbent upon the respondents to show that they had prepared, and had ready for delivery at the bank, when the note matured, a deed of the

premises in question, and that his client could not be declared in default without such a deed being in readiness for delivery upon payment of the note; payment and delivery being simultaneous and concurrent acts, as he puts it. Under the vendor's covenants in the contract to convey by warranty deed upon prompt and full performance by the vendee, the former were not bound to prepare a conveyance until the vendee was in a situation rightfully to demand it,—that is, when he paid his note,—and after that they would be allowed a reasonable time for drawing and executing the deed. *Wells v. Smith*, 2 Edw. Ch. 77, affirmed in 7 Paige, 22, a leading case. See, also, *Davis v. Stevens*, 3 Iowa, 158. The vendee could not have put the vendors in default, under the contract, by tendering or paying the amount of his note at the bank on the due day, and demanding immediate delivery of the deed. Nor, had the note been silent as to the place of payment, would it have been obligatory on the vendors to have prepared, and had in readiness for delivery, a deed of conveyance, on the day the note matured. It was not necessary that the vendors should return that part of the purchase price which had been paid, in order to exercise their right to rescind. *McMannus v. Blackmar*, 47 Minn. 331, 50 N. W. Rep. 230.

Judgment affirmed.

VANDEBURGH, J., did not sit.

STATE v. TISDALE.

(Supreme Court of Minnesota. June 30, 1893.)

INTOXICATING LIQUORS—ILLEGAL SALE—CRIMINAL PROSECUTION—BURDEN OF PROOF—INSTRUCTIONS.

1. Upon an indictment for the sale of intoxicating liquors without a license, the prosecution is not obliged to prove the quantity of liquor sold, precisely as laid in the indictment.

2. Where an indictment charged the defendant with selling a specified quantity of brandy and beer, alleged to be intoxicating, an instruction to the jury that California brandy was presumptively spirituous and intoxicating liquor, and that the sale of an article purporting to be beer, at a place where intoxicating liquors were sold, will be presumed to be such beer as is usually kept for sale at such places, held not erroneous. *State v. Dick*, 50 N. W. Rep. 362, 47 Minn. 377, followed.

(Syllabus by the Court.)

Appeal from district court, Goodhue county; Williston, Judge.

Harry Tisdale was convicted of selling intoxicating liquor without having a license therefor, and from an order denying a new trial he appeals. Affirmed.

J. C. McClure and F. M. Wilson, for appellant. H. W. Childs and Geo. B. Edgerton, for the State.

VANDEBURGH, J. Indictment for selling intoxicating liquors without a license.

1. It is well settled by the decisions of this court that the burden rests upon the defendant, in such cases, to prove that he has a license, and not upon the state to show that he has none.

2. The indictment charges the defendant with selling intoxicating liquors in a quantity less than five gallons, and specifies one-half pint of brandy and six pints of intoxicating malt liquor, commonly called "beer." If the evidence should show a sale of such liquors within the statutory limit, a verdict of guilty would be warranted, though the quantity sold should differ from that specified; that is to say, it would not be a fatal variance if the proof show that the sale in question was of a greater or less quantity than a half pint of brandy or six pints of beer.

3. It was not error for the court to instruct the jury that, if they found that the defendant sold to the complaining witness California brandy, that was a spirituous and intoxicating liquor. The court will take notice, from the commonly-accepted definition of the word "brandy," that it is spirituous and intoxicating liquor, whether it be French brandy, California brandy, or any other.

4. The court further charged the jury that if they found from the evidence that, at the place where this sale was made of the brandy, the witness called for beer, and an article purporting to be beer was furnished him, the law presumes that it was such beer as is usually kept for sale where spirituous and intoxicating liquors are sold. There was no conflict in the evidence touching the character of the place where the liquor was sold, or the nature of the liquors kept and sold there, and the evidence shows that the witness bought the liquor at a bar, behind which were bottles on the shelves, and the place was like any other saloon, and he was furnished brandy and beer there, and the beer tasted as other beer he had bought before. The instruction was correct, and it is supported by the case of *State v. Dick*, 47 Minn. 377, 50 N. W. Rep. 362. There was evidence sufficient to justify the verdict, and the order denying a new trial must be affirmed.

PYE v. BAKKE et al.

(Supreme Court of Minnesota. June 30, 1893.)

PLEADINGS—ANSWER—COUNTERCLAIM—EVIDENCE.

1. Upon an examination of the answer herein it is held that the allegations respecting an oral contract between the parties were irrelevant and redundant, and should have been stricken out on motion. *Held*, further, that, independently of these allegations, facts sufficient to constitute a defense by way of counterclaim for a breach of contract were contained in said answer.

2. Certain assignments of error relative to the admission of testimony considered.

3. *Held*, further, that there was evidence tending to support the verdict.

(Syllabus by the Court.)

Appeal from district court, Grant county; Brown, Judge.

Action on a contract by James Pye against Ole A. Bakke and others. Defendants had judgment, and, from an order denying a new trial, plaintiff appeals. Affirmed.

Geo. F. Edwards, for appellant. T. & M. Casey and J. W. Reynolds, for respondents.

COLLINS, J. The causes of action arising on contract for the payment of money, set forth in the complaint herein, were admitted in defendants' answer, and by way of counterclaim it was alleged that in the month of June or July, 1890, the plaintiff and defendants entered into an oral contract, whereby, for a specified sum of money, the former undertook and agreed to erect and complete for the latter, as co-partners, by the 1st day of December following, a flour mill at Elbow Lake, in this state. The details of this contract as to the materials to be used in the mill building and in an adjoining engine room, the dimensions of each, the power of the engine, the capacity of the boiler, and various other matters, which went to the character and capacity of the mill, were fully stated. It was also alleged that the mill was to be complete in every respect, and capable of making from 50 to 70 barrels of first-class flour each day of 24 hours. The answer then set forth that on August 12th plaintiff produced a written contract, and by means of false and fraudulent statements and representations that it was a full and complete memorandum of the said oral contract, prevailed upon and induced one of the defendants to sign it for both, and as the act of the firm, and as the contract for the erection and completion of the flour mill. A copy of this written contract was made a part of the answer. Then followed several allegations in reference to the failure of the plaintiff to build, equip, and complete the mill as agreed upon, and especially that he did not furnish an engine of 45 horse power with a boiler of 50 horse power, as stipulated, but that the engine was of 44 horse power only and the boiler of 40 horse power only, and that the mill as constructed was not capable of making from 50 to 70 barrels of flour each day of 24 hours, but that its capacity did not exceed 35 barrels of flour in 24 hours. Defendants' damages were placed at \$3,000 by reason of the alleged breach of contract, judgment being demanded for the excess over and above the sum admitted to be due to plaintiff on the cause of action sued upon. The reply admitted that at the time and place mentioned plaintiff had built a mill for defendants, but alleged that it was

so built under and by virtue of a written contract, and not otherwise. A copy of this contract was incorporated into the reply, and was the same written contract made a part of the answer. Full and complete performance of the same by the plaintiff, except as to certain changes by mutual consent, and an acceptance of the mill by defendants, was averred, and that the latter had paid various sums to plaintiff as agreed on; that \$2,000 was paid in May, 1891, and that a balance of only \$666.66, evidenced by a note and secured by a real-estate mortgage, remained unpaid. The defendants had a verdict for \$2,750.60, and plaintiff appeals from an order refusing a new trial.

The counsel for plaintiff makes 20 assignments of error, but these need not be discussed separately, for the principal questions are whether the trial court ruled correctly when it allowed the defendants to go into the alleged breach of contract, and whether there was evidence reasonably tending to support the verdict. The first of these questions is raised by several of the assignments, it being contended by plaintiff's counsel that the allegations of the answer were insufficient to constitute a counterclaim or defense. These allegations are not in the best form, and are somewhat indefinite. It is difficult to understand the purpose for which the averments in respect to the securing of the firm's signature to the written contract by means of false and fraudulent representations were introduced into the answer, for these averments were entirely insufficient, if upon the trial defendants intended to rely upon such a defense. But we think that, taking the whole answer, it is apparent that there was no substantial difference between the oral contract as stated therein and the written contract as set forth in the answer by the defendants, and reiterated by the plaintiff in his reply. The allegations of the answer clearly indicated that no reliance was to be placed upon the charge of fraud in respect to the written contract, and that it was the conditions of this contract which defendants complained had not been complied with by the plaintiff, to their damage. It is apparent that all averments in the answer in respect to the oral contract were so irrelevant and redundant that they should have been stricken out on motion. In fact, almost at the outset of the trial, counsel for defendants announced to the court that they relied entirely on a breach of the written contract. But it is urged that it was not alleged in the answer that the mill was built under either the oral or written contract set out therein. But the making of the written contract was admitted by the reply, and this admission was coupled with the positive allegation that under this contract, and not otherwise, did the plaintiff build the mill in contro-

versy. If there was a defect in the answer in this respect, it was cured by this averment in the reply.

The plaintiff's counsel contends that under the allegations of the answer no testimony should have been received concerning the capacity of the boiler. By the terms of the contract plaintiff was to furnish an automatic cut-off engine capable of developing 45 horse power, with a boiler capable of developing steam for a 50 horse power. It may be, as argued, that there is a vast difference between agreeing to furnish a 50 horse power boiler and agreeing to furnish a boiler which will develop steam for 50 horse power; but to the ordinary mind the difference is not perfectly plain. The power or capacity of a boiler as well as of an engine is commonly referred to in the language found in the allegation. At any rate, the objection to the testimony relative to the capacity of the boiler was so general that the court below did not have its attention called to the distinction claimed in form of expression. One of plaintiff's witnesses as to the capacity of the mill had been in defendant's employ as a miller in the mill in controversy. He testified as to the number of barrels of flour made by him per day while making a test of its capacity. On the cross-examination he was asked whose wheat he was grinding at the time, and if it was not wheat belonging to one Derby. To these questions plaintiff's counsel objected, and he also protested against proof being made subsequently that the flour manufactured at that time was of an inferior quality. The witness had testified that in making the test he ground flour at the rate of 60 barrels a day, and of first-class quality. It was competent to show whose wheat he used on this occasion to lay the foundation for showing the quality of the flour made and claimed by him to have been first class, and, of course, it was proper to contradict him as to the quality of the flour.

There is nothing in plaintiff's claim that defendants waived their right to recover damages. The court fully and fairly stated the law pertaining to the subject of waiver as applicable to the facts, and plaintiff has no cause for complaint on this feature of the case.

The charge as given by the court was based largely on requests prepared and presented by plaintiff's counsel. It was a clear and comprehensive statement of the principles which should govern the jury when determining the facts, and certainly was not unfavorable to plaintiff. It is not improbable that the weight of the evidence was also in his favor, but we do not concur in the assertion of counsel that the verdict, both as to general results and as to the amount of damages, was wholly unsupported by the proofs. On both of these points there was evidence sufficient to war-

rant the conclusion of the jury. The damages awarded seem to have been all that the evidence would justify, but we cannot say the amount was excessive.

Order affirmed.

VANDERBURGH, J., absent, did not sit.

SHEPARD v. CARPENTER.

(Supreme Court of Minnesota. July 13, 1893.)

CONTRACT—CERTAINTY.

1. An agreement to enter into a contract in the future, in order to be enforceable, must express all the material and essential terms of such future contract, and not leave any of them to be agreed on in the future.

2. A certain contract to enter into a future contract considered, and held to leave material terms for future agreement.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Lochren and Hooker, Judges.

Action on a contract by Eugene S. Shepard against Herbert M. Carpenter. Defendant had judgment, and plaintiff appeals. Affirmed.

Larrabee & Gammons, for appellant. W. H. Vorris, for respondent.

GILFILLAN, C. J. A contract between two persons, upon a valid consideration, that they will, at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and upon a breach thereof the party having the election or option may recover as damages what such particular contract, to be entered into, would have been worth to him, if made. But an agreement that they will in the future make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations.

The agreement herein sued on leaves essential terms of the future contract to be fixed by future agreement. It clearly contemplated that the logs to be cut and hauled should be delivered at some one place, but it does not specify what place, but instead thereof provides that the (future) contract shall be for plaintiff to cut into logs, "haul and deliver at the boom or other place of delivery, to be in and by said contract

agreed upon," without indicating what boom, or where it may be. The place of delivery was manifestly left to be agreed on, and, when agreed on, inserted in the future contract. How payments were to be made by plaintiff for logs sold by him was a matter of serious importance, but all the contract says of it is: "One-third of the selling price thereof, in cash, to be paid within ——— days after such sale shall be made." It is manifest the parties intended the future contract to specify the number of days within which payment or payments were to be made, but that they had not agreed on the number of days, and so left it to be agreed on and inserted in the future contract. A perhaps still more important matter was within what time the logs should be cut. All the contract says of that is "that the amount of timber or logs to be cut in any one year shall be agreed upon, and be expressed in said contract." Where a final contract fails to express some matter, as, for instance, a time for payment, the law may imply the intention of the parties; but, where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon. Judgment affirmed.

PETERSON v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota. July 13, 1893.)

STREET RAILWAY COMPANIES—COLLISION WITH VEHICLE—NEGLIGENCE—QUESTION FOR JURY.

Evidence held to make a case proper to submit to the jury.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Egan, Judge.

Action for personal injuries by Ella O. Peterson against the St. Paul City Railway Company. Defendant had judgment, and from an order granting a new trial it appeals. Affirmed.

McCafferty & Noyes, for appellant. J. L. Macdonald, for respondent.

GILFILLAN, C. J. The action was for an injury to the person in a collision between an electric street-railway car and a buggy in which plaintiff was riding in the city of St. Paul. Upon the close of the evidence the trial court directed a verdict for the defendant, but afterwards, on plaintiff's motion, ordered a new trial, on the ground that the evidence made a case proper to submit to the jury. In this the court was right. The testimony on the part of the plaintiff as to how the collision occurred was obscure and not precise, but it may be gathered from it that, as plaintiff was riding down West Seventh street from St. Peter towards Washash street, that part of the street being then much crowded with vehicles, so that the pass was narrow, making it difficult for

the buggy to turn to the right or left, a car coming rapidly down West Seventh street behind the buggy struck one of its wheels, and caused plaintiff's injury. Had the jury accepted such as the facts, they might, under the circumstances, have found defendant was and plaintiff was not negligent. On the other hand, the testimony on the part of the defendant was clearer and more definite, and perhaps more reliable, than that on the part of the plaintiff; and that testimony indicated that, as the car was moving along at the rate of about three miles an hour, the buggy, either from the want of self-possession or of incompetency to handle a horse on the part of its driver, was backed suddenly against the car. Which was the correct version of the facts was for the jury to determine. Order affirmed.

SEYMOUR v. CHICAGO GUARANTY
FUND LIFE CO.

(Supreme Court of Minnesota. July 13, 1893.)

LIFE INSURANCE—SUBSTITUTION OF POLICY BY
ANOTHER COMPANY—EFFECT ON CONDITIONS.

A policy of insurance issued by defendant in lieu of the policy of another insurance company, pursuant to a contract between the two companies, construed in connection with that contract.

(Syllabus by the Court.)

Appeal from district court, Washington county; Williston, Judge.

Action by Hannah D. Seymour against the Chicago Guaranty Fund Life Company on a policy of life insurance. Plaintiff had judgment, and defendant appeals. Affirmed.

Eller & Hao, for appellant. Otis & Godfrey, for respondent.

GILFILLAN, C. J. As the defendant's articles of incorporation provide that certificates (of insurance) will be issued only to persons who are above the age of 18 years and not above the age of 60 years, and that no person shall become a member of the corporation who is under 18 or over 60 years of age, the contract of insurance with George M. Seymour, who, when the certificate was issued to him, was over 60 years of age, and the agreement of the defendant with the Northwestern Guaranty Life Insurance Company by which the former agreed to substitute its certificates of insurance for those surrendered to it by the holder of like certificates of the latter, so far as it assumed to bind defendant to make the substitution as to persons who at the time of the substitution should be over the age of 60, and all certificates substituted in such cases, were outside of the purposes for which defendant was incorporated. They were ultra vires. But there are few rules better settled or more strongly supported by authorities, with fewer exceptions, in this country, than that when a contract by a private corporation, which is otherwise unobjectionable, has been

performed on one side, the party which has received and retained the benefits of such performance shall not be permitted to evade performance on the ground that the contract was in excess of the purpose for which the corporation was created. The rule may not be strictly logical, but it prevents a great deal of injustice. The decisions are found referred to in the following text-books: Mor. Priv. Corp. (1st Ed.) § 100; Beach, Priv. Corp. §§ 422-425; Field, Priv. Corp. §§ 263-266; Spelling, Priv. Corp. § 766. Seymour had fully performed the contract on his part, and the defendant received and appropriated the benefit thereof, and it must accordingly perform on its part. And this brings the case to the question of how much plaintiff is entitled to recover. The amount of the insurance was on the face of the certificate \$5,000. But the articles of incorporation provided for the creation of a reserve fund, by deducting from the face of any policy 25 per cent. if the member should die within the first year from its date, 20 per cent. if within the second year, 15 per cent. if within the third, 10 per cent. if within the fourth, and 5 per cent. if within the fifth. The policy to Seymour contained this provision: "If this policy be terminated by death on or before the first anniversary of the date hereof," and then stating the percentage to be deducted in case of death within the several years, respectively, according to the articles of incorporation. The policy was dated December 19, 1891, and Seymour died April 11, 1892, so that by the terms of the policy, standing alone, there was to be deducted for the reserve fund 25 per cent. of its face, to wit, \$1,250. The policy, however, contained this clause: "This certificate is issued and accepted in lieu of the certificate issued to the assured within named by the Northwestern Guaranty Life Insurance Company of St. Paul, Minn., and in consideration thereof the certificate issued by said Northwestern Guaranty Life Insurance Company is hereby surrendered, and the application, statements, and representations made therein by the within named assured to said Northwestern Guaranty Life Insurance Company for such insurance shall apply to and become a part of this policy, and are warranted by the assured within named to be true." This recital makes it proper, in construing the policy, to inquire into its origin, and the nature of the transaction in which it was issued. It appears that the substitution of policies was pursuant to a contract between this defendant, party of the first part, and the Northwestern Company, party of the second part, which provided for the defendant taking up and continuing the insurance by the Northwestern Company, which was agreed to be effected by each holder of a policy in the Northwestern surrendering it to defendant, and the defendant issuing in lieu thereof its policy for the same amount, based on the original application to the Northwestern, and the con-

tract contained this covenant on the part of defendant: "And further agree that the holder of such substituted policy, who shall comply with the terms and conditions thereof, shall be entitled to all the contracts, rights, privileges, and protections that such holder would have had had he taken out a policy from the first party in the first instance." This we construe to mean, in brief, that, so far as might affect any rights under it, the substituted policy should be deemed to have been issued at the date of the surrendered policy of the Northwestern; that is, each policy taken in substitution should stand and be construed as though issued and dated at the date of the surrendered policy. The policy to Seymour was issued to carry out, so far as he was concerned, that agreement, and to determine the effect of the policy and the rights of the assured under it it may be read in connection with the contract pursuant to which it was issued. It is to be presumed that the parties intended the policy to be construed (if possible) consistently with the contract; and as this was not and does not purport to be an original insurance, but rather the continuation of insurance effected by a previous policy, there is no difficulty in construing the words, "and if this policy shall be terminated by death before the first anniversary of the date hereof," to refer, not to the date of the substitution, but of the policy of which this is a continuation. So construing it preserves to the holder the rights assured to him by the contract between the two companies, to preserve which this policy was substituted for the other. To construe it alone and by the letter, these rights would be defeated. Seymour's policy in the Northwestern was issued and dated July 27, 1888, so that by the terms of the contract between the two companies and of this policy, if it is to be deemed as issued of the date of the original policy, there could be deducted but 10 per cent. of the face of the policy.

Order affirmed.

DAVIS et al. v. JACOBY.

(Supreme Court of Minnesota. July 13, 1893.)
LANDLORD AND TENANT—ACTION FOR RENT—EVIDENCE.

1. Where parties consent to try their cause below on a particular theory of what the law of the case is, though it be erroneous, they cannot complain, if the result be correct according to that theory.

2. Evidence held to sustain the verdict.

3. Various assignments of error, of no general interest, disposed of.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

Action by D. C. Davis and others, partners as D. C. Davis & Sons, against Fanny G. Jacoby, doing business under the firm name of Citizens' Fuel Company, to recover rent. Defendant had judgment, and plaintiffs appeal. Affirmed.

Welsh, Botkin & Welsh, for appellants. S. Meyers, for respondent.

GILFILLAN, C. J. Action for rent. Plaintiffs owned a wood and coal yard in Minneapolis, and May 15, 1890, rented the same to defendant for two years, to commence July 1, 1891, at the rent of \$450 per year, quarterly in advance. The defendant paid the first quarter's rent, and the action is for the succeeding four quarters' rent. A tenant of plaintiffs, whose term, as we infer, expired when defendant's term commenced, appears to have continued in possession after that term. The cause was tried below on the theory that it was the plaintiffs' duty to put defendant in possession, and if, by reason of such possession by the former tenant, defendant was unable to get actual possession, she was absolved from the obligation to pay rent, and might abandon the lease. The court, without objection from either party, submitted the case to the jury upon that theory, and the evidence introduced on both sides shows such to have been the theory in the minds of both parties through the trial. The only request by plaintiffs for instructions to the jury was based on such theory. When parties consent to try their case upon a certain theory of what the law is, though it be erroneous, they cannot complain at the result, if it be correct according to that theory. So we need not inquire whether the theory was right or wrong, but only whether there was any error, assuming it to have been right.

On the question whether the former tenant continued in possession by consent of defendant, or without such consent, and whether such possession excluded defendant from such beneficial possession as, under the lease, she was entitled to have, the evidence made a fair case for the jury; and we must assume that those facts were found in favor of the defendant, and, according to the theory of law on which the case was tried, such being the facts, she had a right to abandon the lease. The fact that she tried, ineffectually, to get possession from the former tenant, and tried, unsuccessfully, to rent the premises to him, and that pending such effort, and before she knew that plaintiffs had re-rented the premises to such former tenants, she paid to them the first quarter's rent, was not a waiver of her right to be put in possession by them, (assuming it to have been their duty to put her in possession,) nor could any estoppel to assert that right against them be based on those facts.

The defendant, against plaintiffs' objection, was permitted to prove that about the time her term commenced she rented the premises to another at \$600 a year, and that her lessee, finding that he could not get possession, threw up his lease. As plaintiffs' theory was that, because defendant unjustifiably refused to abide by her lease, they had a right to rent the premises for such rent as,

with reasonable diligence, they could get, and hold defendant for the difference, it was competent for defendant to prove that they could have been rented for more than plaintiffs re-rented them at, (\$25 per month,) though not to prove the terms of a particular contract. But, though the evidence may have been strictly inadmissible, we do not see how it could have influenced the minds of the jury upon the question of fact on which the case was tried, on which, exclusively, it was submitted by the court to the jury, and on which, we must presume, they decided it, and consequently, if error, it was not prejudicial. We do not see anything worth mention in any assignment of error not covered by this opinion. Order affirmed.

**CHURCH OF ST. GEORGE OF GLENCOE
v. SUN FIRE OFFICE CO. OF LONDON.**

(Supreme Court of Minnesota. July 14, 1893.)

INSURANCE — CONDITION OF POLICY — ADDITIONAL INSURANCE.

The policy of insurance here sued on contained a condition that it should be void if the assured (plaintiff) should procure other insurance on the property. After the issuing of this policy the plaintiff mortgaged the premises to secure a loan then made, and covenanted in the mortgage to cause the property to be insured, and that the policy should be made payable to and delivered to the mortgagee. The mortgagee was also thereby authorized to procure insurance at plaintiff's expense in case of the default of the latter so to do. Before the delivery of the mortgage the mortgagee procured such insurance (assumed to cover the interest of the owner) without the knowledge or authority of the plaintiff, and after the delivery of the mortgage the mortgagee by mail informed the plaintiff merely that he had procured insurance at the expense of the latter, withholding the cost of it from the money loaned. The plaintiff was not informed and did not inquire whether the insurance covered its interest as owner or only the interest of the mortgagee, which would not constitute a breach of the policy in suit. *Held* (1) that the plaintiff is not to be deemed to have procured the additional insurance; (2) that the circumstances did not justify the conclusion that by acquiescence or ratification the plaintiff had consented to or adopted the insurance as one covering its interest as owner, the plaintiff having no knowledge that such was the nature of the insurance, and owing no duty to this defendant to inquire as to the terms of the contract made between other parties.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Cornish, Judge.

Action on a policy of insurance by the Church of St George of Glencoe against the Sun Fire Office Company of London, England. Plaintiff had judgment, and defendant appeals. Affirmed.

Lusk, Buan & Hadley and F. C. Stevens, (Emanuel Cohen, of counsel,) for appellant. C. D. & Thos. D. O'Brien, for respondent.

DICKINSON, J. This is an action upon a policy of fire insurance, by which, in Au-

gust, 1891, the defendant insured the church of the plaintiff for one year in the sum of \$5,000. The building was burned in March, 1892. The defense is that the conditions of the policy respecting other insurance were violated. The policy, in the form prescribed under the laws of this state, contained this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the assured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." Certain other insurance was expressly authorized, and was procured by the plaintiff. Afterwards, in February, 1892, the plaintiff negotiated a loan of \$5,000, to be secured by mortgage on this property, from one Barrett, residing in the state of New York. The business was conducted on the part of Barrett by Messrs. Cochran & Walsh, of St. Paul, in this state; and their communications with the plaintiff, so far as they are important, were through the mail. The mortgage was acknowledged on the 16th of February, recorded in McLeod county on the 19th, and not until the latter date, at least, is it to be regarded as having taken effect as by delivery. The mortgage contained covenants to the effect that the mortgagor would, until the debt should be paid, cause the building to be, and keep the same, insured against loss by fire in at least the sum of \$5,000, by policy or policies of insurance in some insurance company or companies approved by the mortgagee; all policies of insurance thereon to be made payable in case of loss to, and be deposited with, the mortgagee; and that, if the mortgagor should fail so to do, the mortgagee might, without notice, effect such insurance, and the money paid therefor should become a part of the mortgage debt. As we have said, this mortgage does not appear to have taken effect by delivery before February 19th. But on the 17th of that month, Cochran & Walsh, the agents of the mortgagee, procured two policies of insurance to be issued, one by the Atlas Insurance Company, and the other by the Orient Insurance Company, each for the sum of \$5,000, in terms insuring the plaintiff, in respect to this property, for the period of five years. Attached to those policies, respectively, and forming parts thereof, were clauses providing that the loss or damage, if any, should be payable to Barrett, as mortgagee, as his interest might appear. There was a mortgage subrogation clause, the particular provisions and effect of which we do not deem it necessary to consider. Cochran & Walsh paid \$150, the premiums for such insurance, and withheld that sum from the amount loaned by Barrett to the plaintiff. In procuring such insurance they acted as agents for Barrett, and they received and always retained the policies for him. On the 26th of

February, Cochran & Walsh, who had then received the mortgage, already recorded, wrote to the representative of the plaintiff, inclosing a statement of various charges against the plaintiff on account of matters connected with the making of the loan, among which was the item, "Amount paid Weed & Lawrence for insurance, \$150.00." The letter referred to this statement as "showing payment of insurance bill." In this letter was inclosed, also, a check for the remainder of the \$5,000 loaned, after deducting the charges there stated. This communication was received by the plaintiff. No response appears to have been made. In no other way was any notice given to the plaintiff that the mortgagee, or his agents, had effected the insurance in the Atlas and Orient Companies; and the plaintiff does not appear to have been informed as to the terms or form of such insurance. The court directed a verdict for the plaintiff. On this appeal by the defendant from the judgment the case is presented by a bill of exceptions from which we have drawn the foregoing statement of facts.

We will assume, in favor of appellant, (without deciding as to the effect of the subrogation clause,) that the policies of the Atlas and Orient Companies should be construed as insuring not merely the interest of the mortgagee, but also that of the plaintiff as the owner; so that, if the latter is to be deemed to have procured, or to have accepted the benefit of, such insurance, it would violate the above-recited condition of the policy in suit, and hence avoid the same. Such, however, would not be the effect of any contract of insurance which might have been procured by the mortgagee insuring only his own distinct and separate interest as mortgagee, so that payment to him under the policy would not have the effect to extinguish the mortgage debt, but only to subrogate the insurance company to his rights as creditor of the plaintiff. *Carpenter v. Insurance Co.*, 16 Pet. 495, 501; *Insurance Co. v. Tyler*, 16 Wend. 385, 399; *Guest v. Insurance Co.*, 66 Mich. 98, 33 N. W. Rep. 31; *Carpenter v. Insurance Co.*, 61 Mich. 635, 28 N. W. Rep. 749; *Fox v. Insurance Co.*, 52 Me. 333.

We come, then, to consider whether the plaintiff can be deemed to have procured the additional insurance, covering its interest as owner, within the meaning of the condition in the policy in suit. Without further comment upon the facts above stated, it is to be said that the plaintiff did not itself procure such insurance, nor, when Cochran & Walsh procured it, had the plaintiff authorized them to do so. Without any breach of obligation on the part of the plaintiff to procure insurance, and even before the delivery of the mortgage creating such an obligation, the insurance had been procured by the agents of the mortgagee, without the previous knowledge or consent of the plain-

tiff. Hence, when that insurance was effected, it could not be said to have been procured by the plaintiff. Its action, consent, or authority were not involved in the transaction. But subsequent ratification would have had the same effect as prior authority. The purpose of the condition in the policy in suit was to limit the amount of insurance, so that the plaintiff should continue to have an interest in the preservation of the property. *Funke v. Association*, 29 Minn. 347, 352, 13 N. W. Rep. 164. Such being the purpose, it could make no substantial difference whether the plaintiff should directly procure other insurance, or should ratify and adopt, for its own benefit, the action of another person who should have procured insurance in its name, and in terms beneficial to it. But we think the case falls short of showing any such ratification as would have justified the inference that the plaintiff had consented to additional insurance of its interest in the property as owner. It is to be conceded that the plaintiff, when informed by the letter of the agents of the mortgagee that they had effected an insurance, must have understood that they had done this for the protection of their principal, the mortgagee; and the failure of the plaintiff to express any dissent may have justified the inference that it consented to such an insurance,—that is, an insurance for the benefit of the mortgagee. But the inference that the plaintiff consented to or adopted or ratified the additional insurance as one covering its interest as owner, with the legal effect of avoiding the insurance which it had previously procured for its own benefit, is not justified, unless, at least, the plaintiff either knew that such was the nature of the insurance, or had such notice of the fact that by reason of some duty towards this defendant it was required to make inquiry concerning it. As we have said, the plaintiff did not know the fact; and although it might have had reason to suppose it possible, or even probable, that the insurance effected for the benefit of the mortgagee might be in such form as to also inure to the benefit of the plaintiff, yet the plaintiff was under no obligation or duty, as respects this defendant, to make inquiry respecting that matter. The insurance had been procured from other companies, not by the plaintiff, nor by its authority, but by a third party. The mere failure of the plaintiff, under the circumstances, to repudiate the action of Cochran & Walsh, acting as agents for, and for the benefit of, another person, the mortgagee, would not amount to an acceptance of the contract so far as it might constitute an insurance of its interest. If the plaintiff was willing to pay for the insurance for the benefit of the mortgagee, as in fact it agreed to do, its relations to the mortgagee did not require it to make inquiry as to the form of the policies. It was enough that the mortgagee who had

taken them out was satisfied with them. Nor did the circumstances make it the duty of the plaintiff towards this defendant, a stranger to those contracts, to inquire and see to it that the subsequent insurance was not in such a form that, if the plaintiff should consent to or ratify the same, it (plaintiff) might claim some benefit therefrom. It is enough that the plaintiff neither procured such an insurance, nor authorized it, nor knew that it had been procured; nor ever sought or contemplated, so far as appears, any benefit to itself therefrom. The burden of proving ratification was on the defendant, and we think that the case falls short of showing it. Hence we conclude that the case did not show any violation of the condition upon which the defense rests, and that the court was right in directing a verdict for the plaintiff. Judgment affirmed.

VANDEBURGH, J., did not sit, being absent by reason of sickness.

SCHAPS et al. v. LEHNER. SAME v. KULZER. SAME v. DIEDERICH.

(Supreme Court of Minnesota. July 14, 1893.)

EQUITY—CANCELING DEEDS—MENTAL CAPACITY OF GRANTOR—EVIDENCE.

Evidence held to justify the findings. The mere fact that one of the parties to a contract was insane (he not having been so adjudged by judicial proceedings) does not render the contract void, but at most only voidable, and constitutes no ground for setting it aside where the other party had no notice of the insanity, and derived no inequitable advantage from it, and where the parties cannot be placed in statu quo.

(Syllabus by the Court.)

Appeal from district court, Stearns county; Searle, Judge.

Three actions to set aside certain conveyances.—Peter Joseph Schaps and others against Joseph Lehner, the same plaintiffs against John G. Kulzer, and the same plaintiffs against Mary Diederich. From the judgment entered, plaintiffs appeal in each case. Affirmed.

N. H. Miner, for appellants. Bruckart & Brower, for respondents.

MITCHELL, J. These actions were brought to set aside certain conveyances, which it was alleged that the defendants had severally obtained from the plaintiff without consideration, by fraud and duress, while he was insane, and incapable of transacting business. It appears the plaintiff was the owner of a flouring mill, which required to be repaired or "rebuilt." In the spring of 1888 he was committed to the hospital for the insane at St. Peter, presumably under the provisions of Gen. St. 1878, c. 35, § 21; and about the same time his wife was appointed guardian of his estate, presumably under the provisions of Gen. St.

1878, c. 59, § 8. While he was confined at St. Peter, and his estate under guardianship, his wife verbally agreed with the defendants that if they would proceed and expend the money necessary to make the needed improvements in the mill they should have conveyances of an undivided half of the property. In pursuance of this arrangement they made the proposed improvements at a cash outlay of \$3,950, besides their own labor for several months, thereby increasing the value of the property, as the court finds, \$3,000. On May 8, 1889, plaintiff was legally discharged from the hospital at St. Peter, and on the 19th of June following the probate court discharged the guardian of his estate. On June 25th, the plaintiff, in pursuance and in execution of the verbal agreement made by his wife with defendants, executed the conveyances which it is here sought to set aside. The issues of fact were tried partly by a jury and partly by the court. The findings are to the effect that at the time plaintiff signed the deeds he was "of unsound mind, and incapable of making said deeds and of transacting business of that importance," but that the deeds were not obtained by fraud, duress, or by taking undue advantage of plaintiff, but that the defendant made the improvements in the mill in good faith, and received the deeds without knowledge of the fact that plaintiff was insane, and incapable of transacting business of that character. The judgment ordered was that upon payment by plaintiff to defendant of \$3,000, the amount to which the improvements had enhanced the value of the property, within 60 days, the deed should be set aside and canceled; otherwise to stand affirmed and in full force and effect.

Plaintiff's assignments of error all go to the point either that certain findings of fact were not justified by the evidence, or that the conclusions of law were not supported by the findings. The principal finding complained of is the one to the effect that when the defendants obtained the deeds they had no knowledge of the fact that plaintiff was then insane, and incapable of transacting business of that nature. We have searched the record in vain for evidence that defendants had any such knowledge, and the burden of proof was on the plaintiff who assailed the deeds. It does appear that they knew that the plaintiff had been committed to the hospital for treatment, but this was no evidence of mental incapacity to make contracts. Knox v. Haug, 48 Minn. 58, 50 N. W. Rep. 934. And, even if they knew that he was incapable of making contracts during the time he was in the hospital, it does not follow that they knew that this incapacity continued after he was discharged, and his estate discharged from guardianship. As to the point that the deeds were without consideration, it is enough to say that, while the contract as-

sumed to be made by the wife with the defendants was originally void, both under the statute of frauds and also because not within the scope of her authority, yet, if the husband subsequently ratified it by executing the deeds, the improvements made on the property constituted a good and adequate consideration. Some point is made as to a discrepancy between the findings of fact and the admission of the answers regarding the value of the property before and after the improvements were made; but the material question was not the value of the property at these dates, but how much had defendants' expenditures increased its value; and upon that question the evidence amply justified the finding.

A point is made that the order discharging the guardian of plaintiff's estate was absolutely void, because made without a hearing. The use sought to be made of this is that the deed of an insane person, while under guardianship, is not merely voidable, but absolutely void. But there is no assignment of error that raises this point, and, even if there was, we find nothing in the record to support it. The complaints alleged that the discharge of the guardian was procured by fraud, but the court made no finding on the subject, and none was asked for. Therefore, upon the findings, which are supported by the evidence, the case stands thus: The deeds were obtained by the defendants in good faith for a full and adequate consideration, without knowledge of plaintiff's insanity, and when he was neither under guardianship nor found a lunatic by any judicial proceedings then in force. The general rule, both in equity and at law, is that the mere fact that one of the parties to a contract is insane (he not having been found to be a lunatic by judicial proceedings) does not render the contract void, but at most only voidable, and is no ground for setting it aside where the other party had no notice of the insanity, and derived no inequitable advantage from it, and where the parties cannot be placed in statu quo. As defendants do not complain of the judgment, it is not necessary to consider whether plaintiff made a case for the rescission of these deeds, even upon the condition of partial restitution; but the plaintiff has certainly no ground for complaint that the court required, as a condition to their cancellation, restitution to the amount to which defendants' expenditures had actually enhanced the value of the property. Judgment affirmed.

PHOENIX PUB. CO. v. RIVERSIDE CLOTHING CO.

(Supreme Court of Minnesota. July 14, 1893.)

PAROL EVIDENCE.

It is competent to prove by parol the existence of any separate oral agreement as to

any matter as to which a written instrument is silent, and which is not inconsistent with its terms, when it is apparent that the parties did not intend the writing to be a complete and final statement of the whole transaction between them.

(Syllabus by the Court.)

Appeal from municipal court of Minneapolis; Elliott, Judge.

Action by the Phoenix Publishing Company against the Riverside Clothing Company. From the judgment rendered, plaintiff appeals. Affirmed.

W. A. McDowell, for appellant. Peterson & Kollmer, for respondent.

MITCHELL, J. The rule forbidding the use of parol evidence to affect a written instrument does not apply to a case where a part only of the dealings between the parties in respect to a particular subject-matter is reduced to writing, except as respects such part. It is always competent to prove by parol the existence of any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them. 1 Greenl. Ev. § 284a; Steph. Dig. Ev. art. 90; Sewing-Mach. Co. v. Anderson, 23 Minn. 57; Furnace Co. v. Clark, 42 Minn. 335, 44 N. W. Rep. 121; Beyerstedt v. Mill Co., 49 Minn. 1, 51 N. W. Rep. 619; Routledge v. Worthington Co., 119 N. Y. 592, 23 N. E. Rep. 111. This rule, which is elementary, disposes of the only point in the case. The order given by defendant did not purport to be a full and final statement of the whole transaction between the parties. In fact, in and of itself it was not a contract at all. No obligation was assumed or agreement expressed in it on the part of the plaintiff. Parol evidence would have to be resorted to at the very outset to prove a contract. Of course, when the order was accepted, there was a binding contract, and, in so far as its terms were expressed in the order, they could not be varied or contradicted by parol. But, even after acceptance, the order would not purport to be a complete statement of the whole contract. Parol evidence would still have to be resorted to to show what these proposed "sketches" were to be, and it was entirely competent to prove the existence of any oral agreement as to what they should be or contain as to any matter as to which the order was silent, and which was not inconsistent with its terms. Such, we think, was the agreement that defendant should be the only one in the same line of business in that neighborhood whose advertisements should be given space in the proposed publication. Judgment affirmed.

MISSOURI PAC. RY. CO. v. BAIER.

(Supreme Court of Nebraska. June 29, 1893.)

DEATH BY WRONGFUL ACT—EVIDENCE—DAMAGES
— CERTIFIED COPIES AS EVIDENCE — INSTRUCTIONS.

1. A copy of letters of administration, when duly certified to be true and correct copies of such letters as appear from the original on file in the county court wherein such letters of administration were granted, are admissible in evidence with the same effect as the original.

2. A declaration, to be a part of the res gestae, need not necessarily be coincident in point of time with the main fact proved; it is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause.

3. In an action by an administrator under the provisions of chapter 21, Comp. St., to recover damages for the death of his intestate, it is proper to prove the value of the services of the deceased, which the next of kin of the deceased could reasonably expect, but for the injury, would have been rendered in their behalf; the natural expectancy of life of the deceased just previous to receiving the injury which resulted in her death having been duly shown.

4. The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amount to negligence per se. At most the jury should duly be instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence.

5. Under the provisions of section 3, art. 1, c. 72, Comp. St., it is only necessary, to a right of recovery against a railroad company, to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that the injury complained of was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Otoe county; Chapman, Judge.

Action by Oswald Baier, administrator of the estate of Katherine Baier, deceased, against the Missouri Pacific Railway Company, to recover for the death of decedent. Plaintiff had judgment, and defendant brings error. Affirmed.

B. P. Waggener and C. W. Seymour, for plaintiff in error. John C. Watson, E. H. Wooley, and H. D. Travis, for defendant in error.

RYAN, C. The defendant in error filed his petition in the district court of Otoe county, Neb., alleging, in substance, that on the 26th day of December, 1890, the Missouri Pacific Railway Company received one Katherine Baier as a passenger on its said railroad from Nehawka to Lincoln; that at Weeping Water, to continue her journey, it was neces-

sary for her to change from one of defendant's cars to another, and said railway company was thereby bound to furnish her suitable means, time, and instructions to make said change; that it failed and neglected to do its duty in these matters, and carelessly, negligently, and wrongfully performed its duty towards her in making said change; that the defendant furnished no platform for that purpose; that the ground was three or four feet below the lowest step on said car, and that the defendant then and there gave her wrong instructions about making said change, and did not give her time to make said change, in consequence whereof, when the said train stopped at the defendant's water tank before reaching the depot at Weeping Water, the conductor of said train having wrongfully, carelessly, and negligently instructed her to get off said train, she did get off at said place, and the conductor, finding that he had made a mistake, immediately instructed her to get on again, and further instructed her to get off of said train when the next stop should be made; that afterwards said train of cars pulled by and at some distance beyond said station at Weeping Water, and the said Katherine Baier, in accordance with the instructions given her by said conductor, upon the stoppage of said train of cars attempted to get off, but by reason of said train making a sudden jerk while she was in the act of leaving said train to change to the other which should take her to Lincoln she was without fault on her part seriously injured, from the effects of which injury, on the 3d day of January, 1890, she died; that she left eight minor children, naming them, which were her only children and next of kin, and that they were dependent upon her for a mother's care and attention, and had been otherwise injured by the death of said Katherine Baier to the amount of \$5,000. The plaintiff in error filed a general denial, and further pleaded the defense of contributory negligence of Katherine Baier, to which answer the defendant in error filed a reply in denial. Upon a trial of the issues had to a jury a verdict was rendered for the full amount prayed, and, a motion for a new trial being overruled, judgment was entered on the verdict, to reverse which plaintiff in error filed its petition in this court.

On the trial of the case in the district court the plaintiff in error requested the court to give 49 instructions, and asked that the jury be required to answer 29 interrogatories submitted for that purpose. The petition in error in this court assigns 79 alleged errors. In view of these facts no attempt will be made to consider seriatim the several matters complained of in detail, or in the order in which they occur. Upon the trial there was offered in evidence and admitted over the objection of the defendant, the railroad company, a duly-authenticated copy of the letters of administration upon the estate of

Katherine Baler, issued in the usual form by the county court of Cass county, Neb., to Oswald Baler. It is insisted that the admission in evidence of this copy was error, for that it did not fall within the description of documents of which copies may be introduced under the provisions of section 408, Code Civil Proc. This section reads as follows: "Duly-certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed." The certificate of the county judge by whom was issued the aforesaid letters of administration, and by whom a copy thereof, under his seal, was authenticated, recited that the said copy was a true and correct one of the letters of administration of the estate of Katherine Baler, deceased, as appeared from the original on file in said judge's office. This was sufficient to entitle said copy to consideration under the strictest construction of said section.

In argument it is insisted that it was error to permit the following question to be answered by the witness Johnson. His testimony had reference to the accident on account of which this suit was brought, following which evidence was this question and answer: "Question. Has there been any change since that time, that you know of, in making up trains? (Objected to as incompetent, irrelevant, and immaterial, and not a proper issue in this case. Overruled, and exception.) Answer. I don't know whether there is or not, of my personal observation. I heard there had been a change." There might be imagined circumstances under which a question of this character, followed by evidence of a certain kind, would be prejudicial to the railroad company. Upon what ground the existence of such prejudice is founded in this case is not apparent, for the argument of the plaintiff in error is simply that the only effect of this evidence was to prejudice the defendant. We can observe no such necessary, or even natural, result of that kind which could arise upon either the question or answer of this witness.

It is insisted on argument that the district court should have sustained the motion of the railroad company to strike out all of the statements in the witness' testimony relative to what Mrs. Baler told him of the accident, because it was hearsay, no part of the res gestae, and was very prejudicial to said company. The evidence complained of was given by James Johnson. It is as follows: "Question. State how you came to be there at the depot that morning. Answer. I brought some people down there from my house to take the train. Q. Go on, and state to the jury what you saw there in connection with this accident. A. I was standing on the platform in front of the depot—I think it was in front of the depot—when the train pulled in. They stopped a few minutes in front of

the depot. When they uncoupled the Lincoln car they pulled out, and a few minutes after I heard a scream. I started to run in the direction from which the scream came, and ran a little over a hundred feet, I think, and I found a lady laying across the platform. I picked her up, lifted her partly up, and then there was a gentleman—I think it was Fenstermaker—came with a lantern, and I saw her legs were cut off, and I think I told him he had better run for a doctor. While I was helping her up I asked her who she was, and she told me. Q. I will ask you if, while you were helping her up there, the conductor came down there? A. Yes, sir. Q. Now, I will ask you to state what Mrs. Baler stated at that time as to how the accident occurred. (Objected to as incompetent, irrelevant, immaterial, hearsay, and no proper foundation laid. Overruled, and exception.) Examined by Waggener, attorney for railroad company: Q. Had the train gone at the time she made this statement? A. No, sir; the train had pulled up to the platform and stopped. Q. How long had the train been away from the spot where she was injured? A. I don't think the train had come to a stop when I got there. Q. How long after the scream until you heard this conversation? A. Could not have been, I think, two minutes. Q. First place, Fenstermaker came with a lantern? A. Yes, sir. Q. You saw how badly she was injured? A. Yes, sir. Q. You told him to go for a doctor? A. Yes, sir. Q. He did go? A. Yes, sir. Q. You had the conversation with her after that? A. Yes, sir. Question by Court: Was the conversation at that time? A. Yes, sir. Examination resumed by Wooley, attorney for defendant in error: Q. She told where she came from, and who she was? A. Yes. I asked her how she came to get off the train, and she told me her name was Baler, and that she was from Nehawka, and she said the conductor had told her—had come into the car when they got to Weeping Water, and told them to get out at Weeping Water, and change cars for Lincoln. When the train stopped at the tank she supposed it was the place, and they got off. Then the conductor told them it was not the station, and they had better get back on the train, and ride to the depot. She said she got on, but when she got on the steps the train pulled out, and her husband and children had not got on the train, and then she said when the train stopped in front of the depot she supposed it was the place to get off. She got out of the car, and got on the steps, but just as she was in the act of getting off the steps the train made a jerk, and she fell off." It was of the ruling upon a motion to strike out this evidence as to what Mrs. Baler said that complaint is made in argument of the plaintiff in error. It might not be improper to observe at this point that the testimony shows without question that Mrs. Baler was, immediately after the above-detailed circum-

stance, taken to a vacant store room in the town of Weeping Water, and that there both her legs were amputated, and that from the effects of the injury she died one week after the date of the accident of which the last witness has testified.

From the above testimony it is apparent that the statements of Mrs. Baier were made immediately after she had received her injury, and before she had been removed from the place where she had sustained them, and were explanatory of the occurrence of the accident. In the brief of the plaintiff in error is cited *Waldele v. Railroad Co.*, 95 N. Y. 274, in which are grouped the holdings in several decisions bearing upon the question of evidence admissible as part of the *res gestae*. In respect to those most analogous in facts, the following language was used in said opinion, to wit: "In *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 38, in view of the frequent recurrence of questions in regard to the admission of declarations claimed to be part of some *res gestae*, the court undertook to set forth and illustrate with some particularity the principles and tests by which such questions must be determined, and, among other things, said: 'When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of a contemporary declaration as a part of the transaction to explain a particular fact, distinguish this class of declarations from mere hearsay.' And, further: 'Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances, which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it.' In *Com. v. Hackett*, 2 Allen, 136, upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out 'I am stabbed!' and he at once went to him, and reached him within twenty seconds after that, and then heard him say: 'I am stabbed. I am gone. Dan Hackett has stabbed me.' This evidence was held competent as part of the *res gestae*. Bigelow, C. J., speaking of this evidence, said: 'If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible; but such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a

person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declarations or exclamations of the deceased may fairly be deemed a part of the same sentence as that which followed immediately after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement contemporary with the same transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestae*.' * * * In *Rockwell v. Taylor*, 41 Conn. 55, the rule was laid down thus: 'To make declarations on this ground admissible, they must not have been mere narratives of a past occurrence, but must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain, and to so harmonize with them as to constitute a single transaction.' In *Railroad Co. v. Coyle*, 55 Pa. St. 398, the action was against the railroad company for injuring the plaintiff by negligence, and the trial court admitted the declarations of the engineer, by whose negligence the plaintiff was injured, made at the time of the injury as a part of the *res gestae*, and it was held that they were properly admitted. Agnew, J., writing the opinion, and speaking of the declaration of the engineer, said: 'It was made at the time of the accident, in view of goods strewn along the road by the breaking of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot at the time and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself.' * * * In *Tilson v. Terwilliger*, 56 N. Y. 273, Folger, J., lays down the rule as to *res gestae* declarations as follows: 'To be a part of the *res gestae*, they must be made at the time of the act done which they are supposed to characterize. They must be calculated to unfold the nature and quality of the acts which they are intended to explain. They must so harmonize with those facts as to form one transaction. There must be a transaction of which they are considered a part. They must be concomitant with the principal act, and so connected with it as to be regarded as a result and consequence of coexisting motives.'"

In *Railway Co. v. Becker*, 128 Ill., on page 545, 21 N. E. Rep. 524, the rule is thus

stated: "The true inquiry according to all the authorities is whether the declaration is a verbal act illustrating, explaining, or interpreting other parts of the transaction of which it itself is a part, or is merely a history or a part of the history of a completed past affair. In the one case it is competent, in the other it is not;" citing *Mayes v. State*, 64 Miss. 329, 1 South. Rep. 733; *Waldele v. Railroad Co.*, 95 N. Y. 274; *Lander v. People*, 104 Ill. 248.

Greenleaf says: "The principal points of attention are whether the circumstances and declaration offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." 1 Greenl. Ev. § 108.

Taylor says: "In all cases the principal points of attention are whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form, in connection with it, one continuous transaction." 1 Tayl. Ev. (7th Ed.) § 588. The same author, after speaking of the change in the old rule, where there are connecting circumstances, goes on to say: "Still an act cannot be varied, qualified, or explained either by a declaration which amounts to no more than a mere narrative of the past occurrence or of an isolated conversation held or an isolated act done at a later period."

There is not so much difficulty in the enunciation of the rule as in its application to the facts in each case under consideration. The consensus of the authorities seems to be that a declaration, to be a part of the *res gestae*, need not be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. The declaration is then a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible. Applying these principles to the facts of the case at bar, there would seem to be no room for doubt that the declarations of Mrs. Baier, made under circumstances so nearly coincident in point of time with the accident itself, explanatory of its cause and history, were admissible as part of the *res gestae*.

There appears in the bill of exceptions the following evidence given by Oswald Baier, administrator, in whose name this action was brought: "Question. What was the condition of your wife's health that morning when you left Nehawa? Answer. She was in good health. Q. State what was her condition from the time she was injured up to the time of her death. A. She had both legs amputated, and it caused her death. (On motion

of defendant the words 'it caused her death' were stricken out.) Q. I will ask you what was the reasonable value of her work as housekeeper, and the work she did? (Objected to as incompetent, irrelevant, immaterial, and no proper foundation laid; no allegation in the petition of any damages of that character. Overruled. Exception.) A. I would not miss her for \$25.00 a week for these children. (On motion this answer was stricken out.) Q. What I mean, what was the work she did there in the way of saving you from having to hire a girl to do the work? What was the actual value of the work that was performed by her? (Objected to as incompetent, irrelevant, immaterial, and not within the issues in this case, and not a proper item of damages. Overruled. Exception.) A. I do not think I could get anybody to do the work for less than \$5.00 per week,—the work that she did. (The defendant moves to strike out the answer as not responsive to the question, incompetent, irrelevant, and immaterial, not within the issues in this case. Overruled. Exception.)" It is argued that the court erred in admitting this evidence—First, because, no special damages having been alleged specifically, none such could be proved; second, because the loss of services of the wife and mother was not a proper element of damage to be considered in cases of this class. The suit was brought by Oswald Baier, as administrator of his deceased wife's estate. The petition alleged that Mrs. Baier left surviving her eight children, ranging from 2 to 17 years of age, who were her only children and next of kin, and that said children were dependent upon her for a mother's care and attention, and that said children had been otherwise injured by the death of Katherine Baier to the amount of \$5,000. This action was brought under chapter 21, Comp. St. Neb., of which the following is a copy: "Section 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereto, then, and in every such case, the person who, or company or corporation which, would have been liable had death not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the

jury shall give such damages as they shall deem fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: provided, that every such case shall be commenced within two years after the death of such person."

The case specially relied upon by counsel for plaintiff in error to support the contention that damages must be specially alleged is *Hurst v. Railway*, (Mich.) 48 N. W. Rep. 44. In that case the injuries resulting in death were inflicted upon a child of the age of one year and eleven months, and the only damages alleged were the pain, agony, and suffering endured by the said child in the interim of two hours between the injury and the death. This was under a statute much the same in terms as that above quoted, and the decision was not so much because of the failure to allege special damages as to allege no pecuniary damages whatever to the next of kin. Another case cited for the same purpose is *Pennsylvania Co. v. Lilly*, 73 Ind. 252, in which the victim was at the time of her death five years of age. The averment in the complaint was that, "by reason of the said negligent, reckless, and willful killing of the said Emma, the plaintiff has been made to suffer great mental pain and anguish, and has been deprived of the happiness and comfort of her society, and thereby has suffered great damage." It was held that the recovery by a parent for the death of his child could only be for the pecuniary damage he had sustained, the proper measure of which was the value of the child's services from the time of the injury until majority attained, taken in connection with such child's prospect of life, less the cost of support and maintenance. In a proper case a recovery could be had of the expenses for the care and maintenance of a child, funeral expenses, and medical services made necessary by the injury. This case was not merely one of a failure to properly allege special damages, it was one where no recoverable damages whatever had been stated. To the same end counsel for plaintiff in error cites *Cooper v. Railway Co.*, 66 Mich. 261, 33 N. W. Rep. 306. For the purposes of the case under consideration, the seventh syllabus of the case cited states with sufficient fullness the facts and views of the court. This syllabus is as follows: "In an action brought under How. St. § 8314, to recover damages for the negligent killing of a child of 11 years of age, the court instructed the jury that in assessing the damages they might allow for the services of the deceased to her parents until she arrived at the age of 21 years, and might further take into consideration such other pecuniary benefits as a parent might be reasonably expected to realize had she lived for the balance of her probable duration of life not exceeding theirs, to the latter portion of which charge exception was taken, defend-

ant's counsel insisting that the damages should be limited to the minority of the child. Held that the exception was well taken, and that any estimate of damage placed upon events so uncertain must be without any satisfactory basis to rest upon." Notwithstanding this criticism, the supreme court of Michigan held in that case that, as the jury might properly have found that the value of services which were properly recoverable was equal to or in excess of the verdict, (\$1,550,) the judgment was affirmed. At best the quoted syllabus is wholly directed rather against an indefinite instruction than a faulty pleading.

In *Regan v. Railway Co.*, 51 Wis. 599, 8 N. W. Rep. 292, there was a general averment of damages, which was properly held insufficient, for there should have been alleged a state of facts from which pecuniary damages were inferable. The statute under which the case at bar was brought made this requirement, so that the case last cited aids but little in this inquiry. In Ohio there is a statute almost exactly the same in terms as chapter 21, Comp. St. Neb. Under that statute it was held that a recovery might be had of an amount which it might reasonably be expected that the next of kin would have received from the deceased had he lived, the expectancy of life being a proper subject of proof to that end. *Lyons v. Railroad Co.*, 7 Ohio St. 336. The allegations of the petition upon which judgment was rendered in the case at bar more fully states the grounds of damages than was done under the same statute in *Lyons v. Railroad Co.*, supra, where the petition was set out at length.

In *Steel v. Kurtz*, 28 Ohio St. 191, Ashburn, J., delivering the opinion of the court, said: "The phrase 'next of kin' is a comprehensive one. Bouvier, in defining it, says: 'This term is used to signify the relations of a party who has died intestate. In general, no one comes within the term who is not included in the provisions of the statute of distribution,' etc. As used in the statute it comprehends all those persons who are entitled to stand in the order of inheritance under the statute of distribution in the case of personalty: (1) Children; (2) husband and wife; (3) brothers and sisters; and so on."

Under the statute of Nebraska regulating the distribution of personalty the same persons would be entitled to shares of the personal property of the deceased as those above stated, though not in the same order. Comp. St. c. 23, §§ 30, 176. In *Wilson v. Bumstead*, 12 Neb. 1, 10 N. W. Rep. 411, it was held that an action should be brought by the administrator, Maxwell, J., who delivered the opinion of the court, saying: "The object, doubtless, was to prevent a multiplicity of suits in cases where the next of kin were numerous, and to make an equitable distribution of the amount recovered among those entitled to the same."

In *Johnson v. Railway Co.*, 18 Neb., on pages 699, 700, 28 N. W. Rep. 347, occurs the following language in reference to a recovery had under this statute: "If it should appear upon the trial that the father suffered no damage in the death of the son, it is probable that there could be a recovery only for nominal damages. But it is said that the word 'pecuniary,' as used in our statute, is not construed in a strict sense. The damages are largely prospective, and their determination committed to the discretion of juries upon very meager and uncertain data. A parent may recover for loss of expected services of children, not only during minority, but afterwards, on evidence justifying a reasonable expectation of pecuniary profit therefrom. Neither is it essential that this expectation of pecuniary benefit should be based upon a legal or moral obligation on the part of the deceased to confer it, but it may be proved by any circumstance which rendered it probable that such benefit would in fact be realized."

Necessarily, in the above review of authorities, there could be no separate examination of the two points urged on behalf of the plaintiff in error on this branch of the case,—First, of the necessity of more special pleading of damages; and, second, of the right to recover for loss of prospective services. Upon the last of these propositions, before a full examination of the authorities, the writer hereof, at least, entertained some doubts, which have now been dispelled. The petition, especially in the absence of a motion to make more specific and certain, stated with sufficient particularity a cause of action under chapter 21, Comp. St. Neb., to admit evidence of damages of the character above set out. It was competent, under the averments of the petition, to prove any facts which would show any pecuniary loss to the next of kin of the deceased resulting from her death. There was no error, therefore, in admitting evidence of the value of the services of the deceased in connection as it was given with proof of her expectancy of life at the time she was injured.

In the instructions requested on behalf of the railroad company it was insisted that the court should instruct the jury that, if they found the existence of certain facts as indicated by the instructions, their verdict should be for the railroad company. This the court very properly refused to do. The existence of negligence, whether as a cause of action pleaded by the plaintiff or as a defense set up by the defendant, is a question of fact to be submitted to the jury for determination, as should be any other essential fact. *Railroad Co. v. Bailey*, 11 Neb. 332, 9 N. W. Rep. 50; *Johnson v. Railway Co.*, 18 Neb. 690, 28 N. W. Rep. 347; *Lincolum v. Gillilan*, 18 Neb. 114, 24 N. W. Rep. 444; *Powers v. Cralg*, 22 Neb. 621, 35 N. W. Rep. 888; *Railroad Co. v. Chollette*, 33 Neb. 143, 49 N. W. Rep. 1114;

Stevens v. Howe, 28 Neb. 547, 44 N. W. Rep. 865; *City of Plattsmouth v. Mitchell*, 20 Neb. 228, 29 N. W. Rep. 593; *Huff v. Ames*, 16 Neb. 139, 19 N. W. Rep. 623; *Railway Co. v. Sue*, 25 Neb. 772, 41 N. W. Rep. 801; *Orleans Village v. Perry*, 24 Neb. 831, 40 N. W. Rep. 417. It is doubtless proper for the court in any case to instruct the jury that certain facts, if proved, may be considered in arriving at conclusions upon the propositions involved, but in no case should there be an effort to impress upon a jury the convictions of the presiding judge as to the weight of the evidence under consideration. To single out and state a fact or group of facts, and inform the jury that if such is found to exist it establishes the existence of negligence, is to comment improperly upon questions of fact to the jury, and the learned judge properly refused to lend sanction to such procedure. For instance, the fortieth instruction requested on behalf of the railroad company was in the following language: "(40) If the jury believe from the evidence that Katherine Baier attempted to get off after the train was in motion, in disregard of the warning of passengers not to do so, she was guilty of negligence, and plaintiff cannot recover herein." The theory of the railroad company upon the trial was that, after the train left the water tank where the conductor had directed Mrs. Baier to resume her place in the car, it had not stopped at all, but that Mrs. Baier, observing that she had been conveyed past the depot, and being apprehensive that she would be carried to Omaha, alighted from the moving train, and so was injured. Upon this theory the above instruction could have no other meaning than that if, after the train left the water tank, Mrs. Baier "got off" in disregard of the warning of passengers, she was guilty of negligence, regardless of whether or not there was a halt, such as she might well mistake for the stop, according to her statement, indicated by the conductor as the proper time for her to leave the train. Aside from this, the instruction requested gave a certain positive weight to the warning of passengers to which such warning might or might not be entitled. If these passengers were agents of the railroad company in the management of its trains, they could, of course, speak with authority. They were not, however. They were in this matter mere volunteers, not necessarily presumed to possess better means of knowledge than Mrs. Baier herself, especially if, as she said, she had received directions from the conductor as to the course she was to pursue. The unfairness of such an instruction is apparent without comment. It is referred to simply as illustrative of the danger there is in attempting to state to the jury what fact or facts constitute negligence. The jury may with propriety be instructed that certain facts are proper for consideration in determining whether or not there has been negligence. Whether such facts as are

in evidence establish negligence is solely a question for the jury. If there is insufficient evidence to sustain a verdict the remedy is as in other cases. No exceptional course of procedure should be adopted because the existence of negligence is involved in the facts to be determined.

The record shows that the plaintiff in error specially excepted to that portion of instruction No. 4 given by the court, which makes the defendant liable to passengers for damages sustained through accident, and to each and every other part of said instruction. The instruction complained of is as follows: "As a matter of law you are instructed that the defendant railroad company is bound to carry its passengers without injury, and that said company is liable for damages suffered by passengers through accident while upon its trains which is not contributed to by the gross negligence of the parties injured. By gross negligence, as used in the foregoing instruction, is meant such negligence on the part of a passenger as would amount to a disregard of his or her own safety when in the presence of danger, and which would amount to willful indifference to the injury liable to follow or result from such carelessness or negligence." Section 3, art. 1, c. 72, Comp. St., reads as follows: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the persons of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road, actually brought to his or her notice." In *Railroad Co. v. Chollette*, 33 Neb. 143, 49 N. W. Rep. 1114, the following instruction was approved by this court: "The term 'criminal negligence,' as it is used in the statute above quoted, is defined to be 'gross negligence.' It is such negligence as would amount to a flagrant and reckless disregard of her own safety, and amount to a willful indifference to the injury liable to follow." In his definition of the term "criminal negligence" the district judge in the case at bar only followed that adopted by this court. Counsel for plaintiff in error insists, however, that a rigid application of the terms of the above statutory provision was discountenanced in the opinion written by Maxwell, J., in *McClary v. Railroad Co.*, 3 Neb. 44. That case was brought to recover damages caused by a sudden gust of wind blowing from the track the train upon which plaintiff was riding; the theory of plaintiff being that, if the train had run on its schedule time, it would have safely crossed the narrow strip devastated before the wind struck that part of the track where the wreck occurred. In the opinion it was properly said, therefore, that "common carriers are liable only where the injury has arisen from their own neglect," and, as it was shown affirmatively and with-

out question that the company was entirely free from responsibility for the injury, it was held not liable in damages. The purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurers against any and all injuries while being transported upon the trains of such carriers, but it was rather intended to establish a presumption from the passengers receiving injury under the circumstances contemplated. Under this statute it is necessary to prove only that the injured person was a passenger being transported over the line of railroad of the defendant, when damages were inflicted upon the person of such passenger, to entitle a recovery of whatever amount of damages may be established by the evidence; in other words, these facts being shown, any damage resulting from the operation or management of the train is, without more, presumed to be entirely attributable to the negligence of the railroad company, and to avoid liability it then devolves upon such company to show that the injury was imputable to the criminal negligence of the party injured, or to his violation of some express rule or regulation of said road actually brought to his or her notice. As applied to the facts of this case, the fourth instruction given by the court fairly stated the correct rule as embodied in the section of the statute above quoted, and the assignment of error predicated upon the giving of that instruction must therefore fail.

These considerations of the fortieth instruction requested by the plaintiff in error, and of the fourth instruction given by the court, fully meet the contentions urged against the instructions given as well as upon those refused, so that a more extended examination of either class is rendered unnecessary. The judgment of the district court is affirmed. The other commissioners concur.

BRAGG v. GAYNOR et al.

(Supreme Court of Wisconsin. June 21, 1893.)

SERVICE BY PUBLICATION—SUFFICIENCY OF AFFIDAVITS—"PROPERTY" WITHIN THE STATE—CREDITORS' BILL—SITUS OF DEBTS—PARTIES—FRAUDULENT ASSIGNMENTS.

1. Under Sanb. & B. St. § 2610, providing that an application for service of summons by publication "shall be based upon the complaint, duly verified and filed, and an affidavit, together showing the facts required to exist," it is not necessary, as formerly, that the affidavit allege all the facts.

2. In an action under Sanb. & B. St. § 3029, in the nature of a creditors' suit to enforce a judgment against a nonresident, the situs of debts due the latter and evidenced by notes and mortgages will be considered as at the domicile of the resident debtors owing them.

3. By serving writs of injunction upon the resident debtors, restraining them from paying the debts to the nonresident judgment debtor, the court acquired jurisdiction of the debts, though the nonresident debtor never appeared, and it could collect and apply them to the payment of the judgment.

4. Under Sanb. & B. St. § 2630, providing

for service by publication where defendant is a nonresident and has "property," the word "property" includes debts having a situs in the state.

5. In an action under Sanb. & B. St. § 3029, in the nature of a creditors' suit by an assignee of a judgment to enforce payment, where one of the original judgment plaintiffs claimed the entire judgment, and executed a release of it, it was proper to make such a joinder of defendants that the release might be canceled if fraudulent.

6. In a suit under Sanb. & B. St. § 3029, in the nature of a creditors' suit to enforce a judgment, one of the issues was whether certain assignments by the judgment debtor of notes and mortgages were valid. The assignments bore date prior to the commencement of the action, but were brought to the register of deeds to be recorded six months after the alleged assignment, and after the action had been commenced. Several witnesses familiar with handwriting testified that when the assignments were presented for registry they looked as if they had been recently written. It did not appear that the pretended assignee made any inquiry of the mortgagors, or at least of two of them, as to the validity of the mortgages and the value of the property, and his subsequent statements and actions did not seem like those of a bona fide purchaser, but rather in the interest of his assignor. *Held*, that the assignments were fraudulent.

Appeal from circuit court, Fond du Lac county; N. S. Gilson, Judge.

Action under Sanb. & B. St. § 3029, in the nature of a creditors' suit, by Edward S. Bragg against O. L. Helmer, Benjamin Chapman, Leonard L. Chapman, and Patrick Gaynor, impleaded with James Gaynor and others, to enforce a judgment against James Gaynor. There was a judgment for plaintiff, and Helmer, the Chapmans, and Patrick Gaynor appeal. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

This is an action in the nature of a creditors' suit under the statute Sanb. & B. St. § 3029, after the return of an execution on a judgment unsatisfied, brought in the circuit court for Fond du Lac county by the plaintiff, as assignee of a judgment rendered in favor of Edmund Blewett and Patrick Gaynor against James Gaynor in the circuit court for Winnebago county, March 31, 1890, for \$8,114.50, damages and costs. A history of previous litigation which resulted in the judgment will be found in 77 Wis. 378, 46 N. W. Rep. 547, and of a subsequent action between the judgment debtor and Edmund Blewett and Patrick Gaynor to limit or reduce such judgment in 55 N. W. Rep. 169. The assignment of the judgment was executed by Blewett only, who, it is claimed, was the real owner of it. That Patrick Gaynor falsely claimed the entire judgment belonged to him, and November 10, 1890, at the request of James Gaynor, and without any consideration therefor, fraudulently executed a satisfaction of said judgment under seal in his name, and in the name of Blewett as well, but without any authority in that behalf, and both the said Patrick and James Gaynor, who had notice of Blewett's rights, claim that said judgment had been fully sat-

isfied, and was rightfully discharged. The complaint alleges, among other things: (1) That on the 9th of January, 1893, James Gaynor loaned to O. L. Helmer and C. S. Cook the sum of \$7,000, taking security therefor on real estate situated in Fond du Lac county, and described in the complaint, in the name of his wife, Mary Gaynor, but which had been transferred in 1886 to the said James Gaynor, and was still held and owned by him, and was past due and unpaid, said Cook having been released from all liability thereon. (2) That he owns and holds a claim and debt secured by mortgage on real estate in said county, described in the complaint, for \$2,500, against said O. L. Helmer, then past due and unpaid; and that, if any transfer had been made of the same, it was made to defraud the plaintiff. (3) That said James Gaynor is the owner and holder of a certain note and mortgage executed by Benjamin and Leonard Chapman for \$4,500 on real estate in said county, made to said Mary Gaynor for his use, and which were assigned to him in 1888, and are dated October 17, 1884, and remain outstanding and unpaid, except as to the sum of \$300; and any subsequent transfer by said Gaynor was fraudulent and colorable. In respect to these mortgages the complaint stated the date and volume and page of the registry thereof in the office of the register of deeds of said county. (4) That the defendant John Hughes has in his possession or under his control moneys, credits, and effects belonging to the defendant James Gaynor in excess of \$600. (5) That the defendant Marquis Moore has in his hands, or in his name or control, as trustee or otherwise, real estate, or equitable interests therein, or property, in which the defendant James Gaynor has an interest, legal or equitable. The several parties above named, to wit, O. L. Helmer, the Chapmans, John Hughes, and Marquis D. Moore, when this action was commenced, all resided in Fond du Lac county, in this state, and were served with process. Patrick Gaynor and Edmund Blewett were also made defendants in respect to the controversy concerning their alleged interests in or ownership of the judgment assigned by the latter to the plaintiff. The action was commenced January 1, 1891, and the defendants Helmer, the Chapmans, and Hughes were enjoined from making payment of the said several debts to said Gaynor or to any one for him, etc., and this injunction was served on James Gaynor, with the summons and complaint, on the 9th day of January, 1892, in Chicago, Ill., with the summons and complaint, under an order made in that behalf. The complaint was amended February 21, 1891, by making W. D. Witherwax a party defendant, and alleging that since the commencement of the action the defendant James Gaynor had caused to be recorded in the office of the register of deeds of Fond du Lac county what pur-

ports to be assignments of the Helmer mortgages and the Chapman mortgage; and that said assignments are merely colorable, and made and received to aid the said James Gaynor to hinder, delay, and defraud the plaintiff, and ought in equity to be canceled. Plaintiff prayed judgment that James Gaynor be adjudged to apply to the payment of the judgment any money, property, debts, choses in action, or equitable interests belonging to him, or held in trust for him, or in which he is in any way or manner beneficially interested; that the release of the judgment given by Patrick Gaynor to him be declared fraudulent and void as against the plaintiff, and be canceled, and the judgment adjudged to be the property of and belong to the plaintiff; that said Patrick Gaynor did not then have, and has never since acquired, any interest or right to control such judgment or any part thereof; that the defendant James Gaynor be enjoined from selling, etc., any of his property, debts, things in action, equitable interests, etc., and that the defendants Helmer, the Chapmans, Hughes, and Moore be enjoined from making any payment on their respective notes and mortgages and debts described in the complaint; that a receiver be appointed to sell or otherwise dispose of all said property, equitable interests, etc., of the said James Gaynor; and for other and further relief. The defendants James Gaynor and Witherwax, both of whom resided at Chicago, Ill., were served under orders in the usual form with the summons and complaint, based on the verified complaint and affidavits of the plaintiff. The defendants James Gaynor and W. D. Witherwax did not appear. The defendant Helmer admitted that he, with C. S. Cook, borrowed \$7,000, and gave as security therefor a mortgage upon the lands stated in the complaint, which ran to Mary Gaynor, wife of James Gaynor, and was recorded as stated; that the money was received from James Gaynor; the assignment of record of said mortgage, dated March 11, 1886, from Mary Gaynor to Patrick Gaynor, and an assignment thereof from Patrick Gaynor to James Gaynor, dated April 14, 1888, and that Cook had been discharged from all liability for the debt secured thereby, and that said mortgage was unpaid as to the principal thereof. Further, that about July 30, 1889, he borrowed from James Gaynor the sum of \$2,500 upon the real estate described in the complaint, and made a mortgage therefor, which was recorded as therein alleged, which is still unpaid. It further set up that each of the mortgages was, prior to the bringing of the action, assigned and transferred, with the debts secured thereby, by James Gaynor to some party unknown to defendant, and alleged that James Gaynor is not and was not at the commencement of the action, the owner and holder of said mortgages, or either of them. Defendant Benjamin Chapman admits that

on or about the 17th of October, 1884, he, with one Leonard L. Chapman, made jointly a mortgage upon certain lands described in the complaint in the county of Fond du Lac for \$4,500 to one Mary Gaynor, which was recorded as in the complaint alleged, and that there appears in the records of the office of the register of deeds an assignment thereof to James Gaynor, dated on or about April 2, 1888, and that said mortgage is unpaid as to the principal sum thereof, except \$300, paid on or about November 1, 1889; and alleges that said mortgage was made for the benefit of said mortgagee, Mary Gaynor; that it was, before this action, duly assigned by said James Gaynor to some party unknown to defendant; that he, Gaynor, has not now, and did not at the beginning of this suit have, any interest in or claim upon said mortgage, or the notes or debt secured thereby. The answer of Leonard L. Chapman is the same, in substance, as that of Benjamin Chapman, except that it alleges an assignment of the mortgage to W. D. Witherwax, made by James Gaynor, dated and acknowledged September 1, 1890, recorded February 10, 1891, and avers that the assignment was made and accepted in good faith, for a valuable consideration, without fraud, and for the purpose of transferring the mortgage only, and not for the purpose of hindering, delaying, and defrauding creditors of James Gaynor. The defendant Patrick Gaynor alleged that in the action in which the judgment was recovered against James Gaynor he was a party plaintiff in interest, and not a nominal party. His answer then proceeds to set up the transactions between himself and James Gaynor as alleged partners in the business of logging in 1882; that he was hostile to the recovery of the judgment against James Gaynor, and admits that he testified that the alleged causes of action set up in the complaint in that action had been fully discharged and satisfied before it was commenced, and he denied all fraud and collusion between himself and James Gaynor. He admitted the execution of the satisfaction of judgment, and insisted that it was a due and legal satisfaction, and that he had authority to satisfy it for himself and his coplaintiff therein, Edmund Blewett. He also set up a contract for logging between Edmund Blewett and James Gaynor, and proceeded to give an account of the dealings of James Gaynor and himself and Edmund Blewett; that by reason of the premises there was nothing actually or equitably due from said James Gaynor to Edmund Blewett; and that on the 6th of December, 1890, an action was begun by James Gaynor against this defendant and Blewett in the circuit court for Winnebago county for the purpose of having the rights and equities of the parties in said action adjusted, being the same here stated, and he made a copy of the complaint in said action an exhibit to his answer; that said judgment

had not been paid, and, if anything is due thereon, it is the only partnership asset of value existing and owned by this defendant and Edmund Blewett; that Blewett is insolvent, and James Gaynor makes many claims and demands against this defendant and Edmund Blewett, because of his contract with Blewett and transactions under it; that said partnership firm were owing large sums of money, exceeding \$10,000, and by way of counterclaim demanded that the prosecution of this action be stayed, and the assignment of the judgment made by the defendant Blewett to the plaintiff be canceled and set aside, and a receiver be appointed of the partnership assets of the firm of Gaynor & Blewett, to adjust the equities and rights of the parties and to pay partnership debts; and that he, Patrick Gaynor, might have other and further relief, etc. A reply was made to the counterclaim.

At the trial the plaintiff moved to suppress the deposition of James Gaynor upon certain affidavits made a part of the bill of exceptions. This motion was granted, and the defendants excepted. Neither the deposition, nor the substance of it, is contained in the bill. When the plaintiff offered evidence in support of his complaint, counsel for the appellants Helmer and the two Chapmans and Patrick Gaynor objected, for the reason that the record shows that the court had no jurisdiction over the principal debtor, and could not proceed as against these defendants; that the court had no jurisdiction of the subject of the action, and that the complaint shows no facts to constitute a cause of action as against these defendants. The objections were overruled. Evidence was given tending to support the allegations of the plaintiff's complaint, the main features of which are referred to in the opinion. The finding as to facts and conclusions of law, as well as the judgment, are so lengthy that it is impracticable to make more than a very brief abstract of them, and are substantially in accordance with the statements and prayer of the complaint. It was found that the defendant Patrick Gaynor was a nominal party to the original judgment, and had no interest therein, nor in the moneys secured thereby. That it was the sole property of Edmund Blewett, who had good right to convey, satisfy, or assign the same. That Patrick Gaynor had no authority to satisfy it, in whole or in part, and received no consideration for any such discharge or satisfaction. That no partnership ever existed between the defendant Blewett and Patrick Gaynor, and that the judgment was never a partnership asset or partnership property, and Patrick Gaynor had no right to an account for any part thereof. That the judgment was assigned to the plaintiff, Bragg, as alleged. That the defendant James Gaynor made the loans mentioned in the complaint to Helmer, and received the said notes and mortgages, and

the same was found as to the mortgage of the defendants Chapman. That said several mortgages were assigned, as hereinbefore stated, and that at the date of the personal service of the summons and complaint on James Gaynor, January 9, 1891, he was the owner of these several notes and mortgages, which were then unpaid; the Helmer mortgages, as well as the greater part of the Chapman mortgage, being past due, and all of it remaining unpaid, except \$300. That the assignments thereof, respectively, dated September 1, 1890, and recorded as stated in the complaint, were not executed at that date, and not earlier than the 26th day of January, 1891, and, when executed and delivered, were colorable merely, and made and received for the purpose of hindering and delaying the plaintiff in the collection of the judgment. That at the date of the commencement of the action the defendant Moore held real estate in said county as trustee, for the benefit of himself and three other persons, of whom James Gaynor was one; and that the defendant Hughes had property in his hands at the time of the commencement of this action, which he held as trustee, one-quarter thereof belonging to the defendant James Gaynor. That the transfer thereof by James Gaynor, and of his interest in the real estate held by Moore to Witherwax, was colorable, and made and received for the purpose of hindering and delaying the complainant. And as conclusions of law, among other things, that the court had jurisdiction of the defendants James Gaynor and W. D. Witherwax to the extent of binding them, and each of them, so far as they, or either of them, had any right or claim in or to the property, debts, real estate, interests, moneys, credits, and effects due from or in the hands of the defendants Helmer, the Chapmans, John Hughes, and Marquis D. Moore, as above found, and had jurisdiction of the subject of the action; that the debts secured by the said several notes and mortgages, and the estate, property, and effects, etc., in the hands of the defendants Hughes and Moore, and each of them was, at the time of the commencement of this action and the date of the service of the summons and complaint and injunction order upon said defendants, within and subject to the jurisdiction of the court, and by virtue of the laws of the state, for the purpose of the remedies sought to be enforced by this action, had their situs at the residence of the said several debtors, and not otherwise; and that the complainant have judgment against the said several defendants accordingly, and that a receiver be appointed, etc. The judgment declared the said several transfers from James Gaynor to the defendant Witherwax fraudulent and void; that the whole amount of the judgment was due to the plaintiff, with interest from its date; that Patrick Gaynor had no interest in or to it, and that

the satisfaction thereof executed by him was void and of no effect; and in its general provisions was in accordance with the finding providing for the appointment of a receiver of the said debts, credits, and effects, with power to carry out and execute the judgment, and apply the same to the payment of the plaintiff's debt. The debtors Helmer, the Chapmans, Hughes, and Moore were adjudged to pay the receiver the amount of their debts due to James Gaynor, so far as necessary to pay off plaintiff's demand, within 90 days after notice by the receiver. The defendants Helmer, the Chapmans, and Patrick Gaynor appealed.

George E. Sutherland, for appellants. J. W. Hines and E. S. Bragg, for respondent.

PINNEY, J., (after stating the facts.) 1. The contention that the affidavits used to obtain the orders for service of summons and complaint on the defendants James Gaynor and Witherwax, under Sanb. & B. St. §§ 2639, 2640, are void because the respective affidavits used to obtain them do not describe any property of the defendants within the state, or in which they had any interest to be affected by the action, cannot be sustained. The case of *Winner v. Fitzgerald*, 19 Wis. 393, arose under section 10, c. 124, Rev. St. 1858, when the grounds for making the order were required to appear wholly by affidavit. The present statute (Sanb. & B. St. § 2640) provides that the application for the order "shall be based upon the complaint, duly verified and filed, and an affidavit, together showing the facts required to exist." In *Cummings v. Tabor*, 61 Wis. 188, 21 N. W. Rep. 72, the change in the statute was considered, and it was held that "the statute now requires the order to be based in part upon a verified complaint filed, and it does not expressly require that the affidavit which is to accompany the verified complaint shall show that a cause of action exists against the defendant. * * * It does not say, as the old statute did, that such fact must be made to appear by affidavit." It is enough, within the statute and the rule established by this decision, that the applications were made upon a complaint duly verified, and on affidavits, together showing the facts required to exist. *Voelz v. Voelz*, 80 Wis. 507, 508, 50 N. W. Rep. 398. The rule thus laid down has not been departed from or modified in any subsequent case. The failure to describe the property in question in the affidavits does not render the orders invalid. The property in question is sufficiently described in the complaint for all purposes of jurisdiction, if it is of such character and so circumstanced that on a creditors' suit it can be regarded as property in this state which can be reached in the action, and applied to the payment of the judgment against James Gaynor, and as against said Witherwax, if his claim to it, as found

by the circuit court, is colorable and fraudulent as against the plaintiff.

2. It has been the law in this state from a very early period that debts due to a non-resident debtor from citizens of this state are subject to garnishee process at the suit of his creditor in the courts of this state, and that such debtor can be brought into such courts by publication of summons; and where the debt is claimed by another he need not be summoned at all, but, in order to conclude him, it would be necessary to give him timely notice of the proceeding, and to tender him the defense of it. *Adams v. Filer*, 7 Wis. 306; *Wilson v. Groelle*, (Wis.) 53 N. W. Rep. 900. More recent provisions have been made for bringing in the adverse claimant as a party defendant, so that as to the different claimants the proceeding may assume the character of an action of interpleader, and for service of an order without the state, or by publication, if either is a non-resident. The proceedings are regarded as an action, and the court may adjudge the recovery of any indebtedness, the conveyance, transfer, or delivery to the sheriff, or any officer appointed by the judgment, of any real estate or personal property disclosed or found liable to be applied to the plaintiff's demand, or to pass title thereto, and may by its order, when proper, direct the manner of making sale and of disposing of the proceeds or any money or other thing paid over or delivered to the clerk or officer, (*Baker v. Insurance Co.*, 52 Wis. 193, 8 N. W. Rep. 611; *Prentiss v. Danaher*, 20 Wis. 311;) and the garnishee may be enjoined from disposing of the debtor's property, (*Almy v. Platt*, 16 Wis. 169; *Malley v. Altman*, 14 Wis. 22;) "and any property, money, credits, and effects held by a conveyance or title void as to the creditors of the defendant shall be embraced in the liability of the garnishee;" but no garnishee can be charged "by reason of his having drawn, accepted, made, indorsed, or guaranteed any negotiable bill, draft, note, or other security;" (Sanb. & B. St. §§ 2766-2768.) But for the last-named provision, the indebtedness of the defendants Helmer and the Chapmans to the defendant James Gaynor could have been reached by process of garnishment, and applied to the satisfaction of the judgment against him, although a nonresident of the state, and although he had made a colorable or fraudulent transfer of the indebtedness to the defendant Witherwax, also a nonresident. For all such purposes, these debts would have been regarded as property in this state, and subject to the jurisdiction of its courts, although both Gaynor and Witherwax were nonresidents. Such result would not have been considered in conflict with the general rule that the situs of personal property is, for many purposes, such as taxation, succession, and distribution, regarded as having its locality at the domicile of the owner. By force of statute law, as well as public policy

declared thereby, and in the decisions of the courts, the situs or place where these debts are considered to be with reference to jurisdiction of our courts over them for the purpose of subjecting them to the satisfaction of debts due to a resident of this state from a nonresident in order to protect, do justice to, and satisfy creditors resident here, is that of such resident debtor owing the same. The right to so reach and appropriate such debts for such purposes has been affirmed by numerous adjudications from the earliest period, and it is too late now to attempt to maintain the proposition that for all purposes the situs of debts so sought to be reached and applied is at the domicile of such nonresident. They are to be regarded, for the purposes of such proceedings, as property abiding or being in the domicile of the party owing them, and are as much subject to the jurisdiction and control of our courts as tangible property of a nonresident found within our jurisdiction. It cannot be disputed that tangible property so situated could be seized and applied to the satisfaction of the debts of a nonresident; and it is equally clear, as it seems to us, that debts, things in action, as distinguished from things in possession, may be subjected to the equitable jurisdiction of our courts for the same purpose. The process of garnishment operates as an attachment, and fastens on such debts a lien by which they are brought under the dominion and jurisdiction of the court. *Embree v. Hanna*, 5 Johns. 102, 103; *Milne v. Moreton*, 6 Bin. 353; *Bissell v. Briggs*, 9 Mass. 467, 468. In *Tingley v. Bate-man*, 10 Mass. 344, it is said: "The summoning of a trustee is like a process in rem. A chose in action is thereby arrested and made to answer the debt of the principal. The person entitled by the contract or duty of the supposed trustee is thus summoned by the arrest of this species of effects. They are to be considered for this purpose as local, and as remaining at the residence of the debtor or person intrusted for the principal;" and in *Blake v. Williams*, 6 Pick. 303, it is said that "the relation of debtor and creditor, and the rights of the latter over the effects of the former, are distinct objects of jurisprudence, within the control of the legislative power of the country where the property is. This power is absolute and uncontrollable. It may be unreasonably exercised, but still it is legal if so willed by a sovereign independent power, for the dominion is here." *Story, Conf. Laws*, §§ 390, 592, 592a; *Milne v. Moreton*, 6 Bin. 361. The courts of this state can exercise jurisdiction only over persons and property within its territory, but it is familiar law that "through its tribunals it may subject property within its limits, owned by nonresidents, to the payment of demands of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where such owners are domici-

cled. Every state, it is held, owes protection to its own citizens, and when nonresidents deal with them it is a just and legitimate exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens." *Pennoyer v. Neff*, 95 U. S. 726. "This jurisdiction is called into exercise and attaches where property is once brought under the control of the court by seizure or acts of equivalent import, and which stand for and represent the dominion of the court over the thing, and, in effect, subject it to the control of the court. This may be by the levy of a writ, or by the mere bringing of a suit. 'It is immaterial,' said the court, by Mr. Justice McLean, in *Boswell's Lessee v. Otis*, 9 How. 336, 'whether the proceeding against the property be by an attachment or bill in chancery.'" The property may be bound without actual service within the jurisdiction of process upon the owner where the only object of the proceeding is to enforce a claim against the property specifically of a nature to bind the title. Notice of the proceeding may be given by publication, etc., as prescribed in the statute, (*Cooper v. Reynolds*, 10 Wall. 308, 317; *Heidritter v. Oil Cloth Co.*, 112 U. S. 300-302, 5 Sup. Ct. Rep. 135); and the property will be effectually bound by the judgment that may follow. That local laws may thus fix the situs of debts at the domicile of the debtor for such purposes that under such laws they may be attached, and compulsory payment will protect the debtor everywhere against a suit for the recovery of the same debt by the creditor, is well established by many adjudicated cases, among which are *Allen v. Watt*, 79 Ill. 294; *Bethel v. Judge*, 57 Mich. 379, 24 N. W. Rep. 112; *Newland v. Judge*, 85 Mich. 151, 48 N. W. Rep. 544; *Railway Co. v. Crane*, 102 Ill. 246; *Morgan v. Neville*, 74 Pa. St. 52; *Cochran v. Fitch*, 1 Sandf. Ch. 142; *Williams v. Ingersoll*, 89 N. Y. 523, 524. And the correctness of this doctrine is distinctly recognized in *Gullander v. Howell*, 35 N. Y. 658, 659, as an exception to the general rule as to the situs of personalty at the domicile of the owner. Garnishee process under our statute is only the equivalent of an equitable attachment, and creates a lien in like manner as by filing a bill, and is in every essential element, so far as it extends, a creditors' bill, (*Bank v. Wilson*, 74 Wis. 391, 43 N. W. Rep. 153;) and a creditors' bill is an equitable levy, (*In re Milburn*, 59 Wis. 34, 17 N. W. Rep. 965.) Had James Gaynor died domiciled in Illinois, the plaintiff, as his creditor, could have taken out administration in Wisconsin, by reason of Gaynor's ownership of the debts and demands due from the defendants in this action, and enforced collection of his debt by that means, beyond the power of Gaynor's personal representatives to prevent such result, for locality of personalty of a deceased confers local probate jurisdiction, without

consideration as to his last domicile, and debts due the deceased are deemed bona notabilia, i. e. personalty suitable for conferring local probate jurisdiction; and the rule is that simple contract debts constitute such where the debtor (not creditor) resides, and where they can be sued upon. So of any chose in action or money right. *Schouler, Ex'rs*, §24; *Attorney General v. Bouwens*, 4 Mees. & W. 191; *Owen v. Miller*, 10 Ohio St. 136; *Pinney v. McGregory*, 102 Mass. 186; *Clark v. Blackington*, 110 Mass. 873. In *Attorney General v. Bouwens*, supra, it was held that, "as bills of exchange and promissory notes do not alter the nature of simple contract debts, but are merely evidences of title, the debts due on these instruments are assets where the debtors lived, and not where the instrument was found." In *Wilkins v. Ellett*, 9 Wall. 740, 742, the court, recognizing the general rule as to the situs of personal property, recognizes also a limitation or qualification in respect to personal property by the comity of nations, founded on the policy of the foreign country to protect the interests of its home creditors; and the same distinction or exception, as well as the ground for it, is again assigned in the same case. 108 U. S. 258, 2 Sup. Ct. Rep. 641. Under these principles the situs of such debts is made by such local policy the domicile of the debtors, and not of the nonresident to whom they may owe them. This action is founded upon the statute (section 3029) restoring actions in the nature of creditors' suits, and providing that, "whenever any execution against the property of any judgment debtor shall have been issued upon a judgment for the payment of money, and shall have been returned unsatisfied in whole or in part, the judgment creditor may commence an action against such judgment debtor and any other person to compel the discovery of any property or thing in action belonging to such judgment debtor, and of any property, money, or thing in action due or held in trust for him, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to such judgment debtor, except," etc.; and the court has power by statute to appoint a receiver for such property, money, and things in action. Fraudulent grantees may be joined as defendants, although they hold by separate conveyances, and are not connected in interest with each other. *Hamlin v. Wright*, 23 Wis. 491. This action plainly extends to debts evidenced by bills and notes, and is more comprehensive and far-reaching than a proceeding by garnishment. When commenced by service of process or notice, it operates as an equitable levy, and creates a lien in equity upon the effects of the judgment debtor, and every species of property belonging to him may be reached and applied to the satisfaction of his debts. *Wait, Fraud. Conv.* §§ 24, 33; *Hadden v. Spader*, 20 Johns. 554; *Storm v.*

Waddell, 2 Sandf. Ch. 514, 515; *In re Milburn*, 59 Wis. 34, 17 N. W. Rep. 865; *Miller v. Sherry*, 2 Wall. 249; *Tilford v. Burnham*, 7 Dana, 110, 111; *Edmeston v. Lyde*, 1 Paige, 637; *Beck v. Burdett*, Id. 309. By the injunction granted in this case against the defendants resident in Wisconsin the court in the most effective manner possible asserted its dominion and control over the indebtedness sought to be reached, and there can be no doubt, we think, that these debts were thus brought, by reason of this equitable levy, within the control and dominion of the court for the purposes of this action, which was made effective by its final judgment appointing a receiver to collect them and apply the proceeds to the plaintiff's judgment, with interest and costs. We are not aware of any well-considered case in conflict with this view. The debt or duty evidenced by notes, bonds, or bills is incorporeal and intangible, and exists in idea or contemplation of law. The note, bond, or bill is the visible, tangible symbol of the debt or duty, which may be transferred by assignment or indorsement thereof. Practically the note, bill, or bond represents money due and to come from the maker or party liable in one state to a party in another, who holds merely the evidence of the existence of the debt for it; and it seems but reasonable and proper to hold that the situs of the debt for the purposes here in question is at the domicile of the debtor, where collection of it may be enforced, and the property pledged as security may be subjected and applied to its payment. In no other jurisdiction could the security be made available; and it seems clear that the subject-matter to which the title or claims in question relate is the property, and not the notes, etc., which are merely evidence of its existence. *Owen v. Miller*, 10 Ohio St. 143. Loss of the notes and mortgages, or destruction of them, does not effect or imply a loss or extinction of the debts which they evidence. They are none the less property because their amount and maturity are set forth in the notes and mortgages. *Kirtland v. Hotchkiss*, 100 U. S. 498. A well-founded distinction would seem to exist between the right of the creditor to collect the debt which may have no locality independent of his own domicile, and the right as to creditors in this state seeking to reach and apply such debts to the payment of their debts against the payee thereof, in which case the situs of the debts for that purpose must be regarded as in Wisconsin, where the right can be made effective as against the persons owing such debts. The case of *Owen v. Miller*, 10 Ohio St. 136, 143, is directly in point, and fully sustains the plaintiff's contention, as well as other authorities already referred to. The question upon which this action depends was not involved in the cases of *Bryan v. Publishing Co.*, 112 N. Y. 332, 19 N. E. Rep. 825, and *Von Hesse v. Mackay*, 55 Hun, 365, 8 N. Y. Supp. 894. Those

cases more nearly resemble the proceeding under consideration in the case of *Renier v. Hurlbut*, 81 Wis. 24, 50 N. W. Rep. 783.

3. In *Winner v. Fitzgerald*, 19 Wis. 393, it was held that the officer signing the order of publication, where jurisdiction was based upon property within this state, must be able to see from the affidavit that it was such as is liable to be seized on attachment or execution; but this was said and must be considered in respect to a legal action in form in personam, such as that was, and designed to reach by execution on the judgment therein property which could be seized and sold under such process. *Jarvis v. Barrett*, 14 Wis. 642. It was not the intention of the court to so narrow the statute as to exclude from its operation and effect property within this state not the subject of such seizure and sale, and thus defeat in a considerable measure the equity jurisdiction plainly intended to be extended as to all property within the state, tangible or intangible, over which the judicial power of the state may be lawfully exercised by an action of an equitable nature, either in rem or one in substance quasi in rem. The language of the statute is general. No such limitation is suggested by it, and we think the statute thus providing for service by publication extends to and includes all equitable interests and all such property as may be reached by an action such as this, as debts having a situs here, and capable of being subjected to the jurisdiction and control of our courts. The statute should be liberally and beneficially construed in favor of citizens of this state, or those suing in its courts. We hold, therefore, that the property described in the complaint was not only property in this state, but sufficient to found the jurisdiction of the court, and that the objections to the jurisdiction of the court are not well taken.

4. The plaintiff having sued as trustee for others interested in the judgment, as well as in his own right, has also joined as a defendant Patrick Gaynor, the complainant of the plaintiff's assignor in its recovery, and who afterwards, claiming to be the owner of the entire judgment, collusively and without any consideration executed to his brother, James Gaynor, a satisfaction and discharge of the entire judgment, which is relied on to defeat this action. One purpose of this action is to have this discharge canceled, and the respective rights and interests of the claimants in the judgment determined. It was competent for the plaintiff, as such assignee, to bring his action, and to make such joinder of defendants, so that the discharge or release might be canceled if fraudulent, and that the rights of the parties might be ascertained and adjusted with a view to the proper application of the proceeds of the judgment when collected. The object of the action is not to overhaul, modify, or alter the judgment

originally given, but to enforce it, and to settle the rights of Patrick Gaynor and the plaintiff, as the assignee of the judgment, as between themselves, and remove an obstacle wrongfully interposed to its collection by the collusive conduct of Patrick and James Gaynor. The case of *Stein v. Benedict*, (Wis.) 53 N. W. Rep. 891, and cases cited, does not tend to show that the complaint as thus framed ought not to be maintained. The court, upon the evidence produced, properly found that the plaintiff was the sole owner of the judgment; that Patrick Gaynor had no beneficial interest in it; that the discharge by him was without authority, and fraudulent and void. Patrick Gaynor's counterclaim failed because it appeared that he and Blewett, the plaintiff's assignors, had not been copartners.

5. We have examined the evidence, and are satisfied that it sustains the findings of the circuit court. It would serve no useful purpose to protract this opinion with a discussion of the evidence. After a bitter and protracted litigation, a large judgment was recovered against the defendant James Gaynor. About that time, or soon after, he took up his residence in Chicago. He had made loans and investments in the county of Fond du Lac, and the debts in question were due him from parties residing there, in all to a large amount, very much in excess of what would be required to satisfy this judgment. He had a strong motive for attempting in the future, as he had in the past, of avoiding payment of it, and had resorted to a device for that purpose, which we have been compelled to hold fraudulent. We are satisfied from the evidence that the three mortgages affected by the judgment in this action, and the debts due to James Gaynor from Moore and from Hughes, two of the defendants, were not in fact assigned until after this action had been commenced and the injunction served upon the mortgagors Helmer and the Chapmans; that the transfers afterwards made were not real, but a mere device to defeat this action, and defraud the plaintiff of his debt. The notes and mortgages have been a considerable time past due. It appears that no inquiry was made by Witherwax, the pretended assignee of the parties who had made these notes and mortgages, or at least of two of them, either as to the validity of the claims or the value of the property on which they appeared to be secured. These assignments bear the same date, September 1, 1890. Three of them came to the office of the register of deeds of the proper county about February 10, 1891,—surely a long delay in making registry thereof, if bona fide; and they were in a condition showing that they had been freshly written, and but a few days before. Proof on this subject was given by witnesses who saw them when received, and who had experience in matters of handwriting and examination of manu-

scripts. These transfers were without recourse, and appear not to have been made or conducted according to the usual course of business; that is to say, with examinations in the manner and with the prudence and caution that would naturally attend bona fide transactions. The several insurance policies on the mortgaged property for the benefit of the mortgagee do not appear to have been assigned until January 26th. Three days after the assignments were sent for registry, a request came to have them "recorded, and returned soon," in which James Gaynor joined, saying it would accommodate the party who sent them,—ostensibly the attorney of Witherwax. The subsequent statements and conduct of Witherwax in regard to these claims do not seem like those of a bona fide purchaser, but rather to have been in the interest of James Gaynor; and the latter, in one instance, at least, by letter, was quite importunate that the party owing one of the mortgages should pay Witherwax; and there are also other facts and circumstances in evidence which tend to show that the alleged transfers were not bona fide and real. The defendants James Gaynor and Witherwax made default, and offered no explanation of the evidence produced against them. We think the evidence sustains the findings of the circuit court that Witherwax at the time the action was commenced had not, nor had he afterwards, any real interest in the debts and demands in question, but that James Gaynor was the real owner of them.

6. The suppression of the deposition of James Gaynor is assigned as error, but the deposition is not before us, as it was not included in the bill of exceptions. We cannot say that the appellants have been injured by the ruling of the court. Error must be established affirmatively, and will not be presumed. The cases in this court to this effect are very numerous. We cannot presume that this deposition contained anything that would have justified a result different from that at which the circuit court arrived. It follows from these views that the judgment of the circuit court must be affirmed.

WHITNEY v. WEGLER.

(Supreme Court of Minnesota. July 21, 1893.)

TAX SALE—ACTION TO SET ASIDE—LIMITATION—CONSTITUTIONAL LAW.

1. The limitation of Laws 1881, c. 135, § 7, was intended to operate as confirming the tax sale, with certain exceptions, and the right acquired under it. As such it was constitutional, and the repeal in Laws 1887, c. 127, § 1, cannot affect it.

2. Certain objections to the jurisdiction of the court in proceedings under chapter 135 considered, and held unfounded.

(Syllabus by the Court.)

Appeal from district court, Stearns county; Searle, Judge.

Action by Albert G. Whitney against Frank Wegler. Judgment, from which plaintiff appeals. Affirmed.

Taylor, Calhoun & Rhodes, for appellant. Geo. W. Stewart, for respondent.

GILFILLAN, C. J. Laws 1881, c. 135, being "An act to enforce the payment of taxes which became delinquent in and prior to the year one thousand eight hundred and seventy-nine," provides, (section 7:) "And the judgment and sale herein provided for shall not be set aside unless the action in which the validity of the judgment or sale shall be called into question, or the defense to any action alleging its invalidity, be brought within nine months of the date of said sale, except that, in case any tract or parcel shall be included in any such judgment, when such taxes shall have been paid, or such property was exempt from taxation, that said judgment and sale shall be void upon proof at any time that such taxes have been paid or such property was exempt." The sale in question here under said chapter was made September 30, 1881. This action was brought in 1891. Laws 1887, c. 127, § 1, was broad enough to repeal that part of section 7 above quoted, provided the legislature could repeal it so as to affect the rights of purchasers under said sale. To determine whether it could be repealed it is necessary to consider whether the limitation was intended to operate on the right acquired under the sale, so as to make it unassailable in any form of action, or only to bar a particular form of action, leaving to the original owner all other remedies by which to vindicate his right of property. If the latter, then, as the legislature might have given the particular remedy or form of action, had it never existed, it might restore it after it had once been taken away. If the former, then the legislature could not affect the right by repeal of the law or otherwise. *Baker v. Kelley*, 11 Minn. 490, (Gil. 358;) *Hill v. Lund*, 13 Minn. 451, (Gil. 419;) and *Kipp v. Johnson*, 31 Minn. 360, 17 N. W. Rep. 957,—are instances where the limitation was construed to operate on a particular form of action only. We think section 7 was intended to operate on the sale and make it valid, excepting for the reasons specified, unless its validity should be called in question within the specified time, and that without regard to the form of action, or to whether its validity should be questioned by the plaintiff or the defendant in any action. "The judgment and sale herein provided for shall not be set aside unless," etc. The language is very different from that construed in *Kipp v. Johnson*: "Actions to test the validity of any proceeding" "shall be commenced within three years," etc.—clearly a limitation of the time for bringing the particular form of action. We are the more satisfied that the limitation in section 7 was in-

tended to make the sale valid when we consider how little it really operates upon. To set the time running there must, of course, be a sale in fact, and there must be a valid judgment authorizing it. *Sanborn v. Cooper*, 31 Minn. 307, 17 N. W. Rep. 856; *Feller v. Clark*, 36 Minn. 338, 31 N. W. Rep. 175. And, except as otherwise provided,—that is, in respect to payment or exemption, which may be shown at any time,—the judgment is conclusive, and establishes the right to sell. So that the lapse of the time specified really confirms only the sale itself and the proceedings between the judgment and the sale. As the limitation in section 7 operated to confirm the right acquired at the sale, the act of 1887 could not affect it. But it is claimed that, if the limitation was intended to operate to cut off the right to contest the validity of the sale, no matter in what form of action, nor by whom brought, it is unconstitutional, within the decision in *Baker v. Kelley*, 11 Minn. 480, (Gil. 358.) Upon a case like that we do not question the decision nor the correctness of the reasoning by which it was reached. The tax proceedings, including the making and recording of the tax deed in that case, were all by acts in pais, to which the owner of the land was in no sense a party; and the real proposition upon which the decision went was that the legislature cannot make one's right to enjoy and defend his property depend upon his taking notice of such proceedings and bringing an action to test their validity. In this case the proceeding was by action to which all persons interested in or having liens on the land were parties; and no reason can be suggested why the legislature may not charge parties to an action with notice of all the proceedings in it, or proceedings upon the judgment rendered in it; nor why it may not require objections to the regularity of such proceedings to be made within a specified time, or in a specified manner, and confirm such proceedings upon failure to so make such objections. No one could question the power of the legislature to charge the parties to an action to foreclose a mortgage with notice of the sale under the decree, and bar their right to object to its regularity, unless they should do so within a specified time or in a prescribed manner. The statute in question goes no further than that, merely applying the same principle to the action by the state to foreclose its lien for taxes. In any view of it, the statute is constitutional. Of course, under the decisions in *Sanborn v. Cooper* and *Feller v. Clark*, the objection can always be made that the court had no jurisdiction to render the judgment authorizing the sale. The limitation does not run against that objection.

Several objections to the jurisdiction of the court to render this tax judgment are made. The first is that the certified delinquent list filed by the auditor with the clerk consisted of 60 sheets fastened or bound together, and

the certificate was at the bottom sheet, instead of being on each sheet. There is nothing in that objection. The second and third objections are that the list did not state the taxes for each year, and that it included taxes for the years 1879 and 1880. The act of 1881 (section 1) requires "the amount of taxes, principal and interest due thereon, according to the provisions of this act," to be stated opposite each description, but does not require the taxes to be stated in detail year by year. It was enough, therefore, to state the amount. We do not see that the taxes for 1879 and 1880 were included in the amount of taxes stated in the list, but, if they were, it would not affect the jurisdiction. *Kipp v. Dawson*, 31 Minn. 371, 17 N. W. Rep. 961, 18 N. W. Rep. 96.

Order affirmed.

KREMER v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Minnesota. July 14, 1893.)

ACTIONS CONCERNING LAND—NEW TRIAL AS OF RIGHT.

Where, in an action against a railway company for the recovery of real property, it puts in issue plaintiff's right to recover, it is entitled, if defeated, to another trial, under Gen. St. c. 75, § 11, notwithstanding that in its answer it asks, under the provisions of Gen. St. c. 34, § 34, for an assessment of the compensation to be paid for taking the land for railway purposes, in case plaintiff on the trial establishes his right to recover.

(Syllabus by the Court.)

Appeal from district court, Faribault county; Severance, Judge.

Action by Peter Kremer against the Chicago, Milwaukee & St. Paul Railway Company to recover land. Plaintiff had judgment, and from an order denying a new trial, defendant appeals. Reversed.

Andrew C. Dunn, (H. H. Field, of counsel,) for appellant. Daniel Buck and Hale & Morgan, for respondent.

MITCHELL, J. The question presented on this appeal is whether a defendant railway company is entitled, under Gen. St. 1878, c. 75, § 11, to a second trial of an action against it for the recovery of real property, where, in its answer, in addition to putting in issue plaintiff's right of recovery, it also, under the provisions of Gen. St. 1878, c. 34, § 34, asks for an assessment of the compensation to be paid for taking the land for railway purposes, in case the plaintiff on the trial establishes his right to recover. We are compelled to the conclusion that this question must be answered in the affirmative. If the legal effect of a demand for such an assessment was to admit plaintiff's right of recovery, or if, in its answer, the railway company admitted that right, so that the action became one pure and simple for an assessment of plaintiff's compensation, it would really no longer be an action

for the recovery of real property, and would not be within the spirit, at least, of the statute giving another trial in such actions. But such is not the effect of the defendant's demanding an assessment of compensation, and such was not the tenor of the answer in this case. The assessment was contingent upon plaintiff's establishing his right to recover the land. That issue remained to be litigated the same as in any action for the recovery of real property. It was the foundation of the action. The provision for an assessment is one for the benefit of the defendant, so that, in case plaintiff succeeds, it may, at its option, pay the compensation, instead of surrendering the land. As was said in *Koerper v. Railway Co.*, 40 Minn. 132, 41 N. W. Rep. 656, this is merely a qualification of plaintiff's recovery, by which he obtains the value in lieu of the land itself. The fact that a defendant, in its answer, asks for this conditional relief certainly does not deprive the plaintiff, if defeated, of the right to another trial; and it would be inconsistent with the provisions of our statute on the subject to hold that one party had this right while the other had not. We find nothing in the statute indicating any legislative intent that by asking for this contingent relief a defendant waives or loses the right, which unquestionably he would otherwise have, to demand another trial. On the contrary, the last section of the act, (Gen. St. c. 34, § 38,) providing that the action given by the act shall in all other respects, except as therein provided, be governed by the same rules of practice and procedure as to new trials, etc., as other actions brought for the recovery of real estate, seems to us conclusive on the question. Unless this refers to the right to another trial as given by chapter 75, it would be practically meaningless. The suggestion that this applies to such an action only where no demand for an assessment of compensation is made in the answer, finds no support in the language of the statute. Stress is laid upon a stipulation made in the trial court that the plaintiff at the commencement of the action was the owner in fee of the several 40's described in the answer (of which the 100-foot strip in possession of defendant was a part) as amounting to an admission of plaintiff's right of recovery, and hence rendering the action merely a proceeding for ascertaining plaintiff's compensation. We do not think the stipulation goes that far. Plaintiff might be the owner of the fee, and yet the defendant the owner of an easement for railway purposes, entitling it to possession. See, also, *Newell*, E. j. p. 844, § 43; *Hewitt v. Land Co.*, 81 Wis. 546, 51 N. W. Rep. 1016. It may be suggested that if the defendant is entitled to a second trial it is only of the issue as to plaintiff's right of possession, and not of the assessment of compensation. There are several reasons why it seems to us that if defendant is entitled to another

trial at all it must be of the entire case, but the mention of one is sufficient. The line of evidence on part of either plaintiff or defendant on a second trial cannot be anticipated, and, if plaintiff succeeds at all, it may be by establishing an entirely different interest or estate in the land from that established on the first trial, thus rendering necessary an assessment of his compensation on a different basis. The right to a second trial in actions for the recovery of real property is a relic of the fictions of the old common-law action of ejectment, which had their foundation, in part, at least, in the old feudal idea that the title to real property is too sacred to be concluded by the result of one trial, or even one action, which, in my judgment, has no justification for its continued existence. It is also apparent that under the statute of 1876 a railway company may be enabled to avail itself of this right to a second trial, ostensibly to retry the question of the plaintiff's right to recover the land, but in reality merely for the purpose of securing a second assessment of the amount of compensation to be paid for taking the land for railway purposes. But we see no way of preventing this under the statute as it now exists. Order reversed.

MERCHANTS' NAT. BANK v. McKINNEY et al.

(Supreme Court of South Dakota. July 29, 1893.)

APPEAL—QUESTIONS NOT RAISED BELOW — JUDGMENT ON FINDINGS OF REFEREE — FAILURE TO FIND ON PART OF ISSUES.

1. Where the pleadings in a case present several issues of fact, and the referee, to whom the case is referred, returns findings, omitting to make any finding upon one or more of such issues, and the parties suffer the referee's report to be made the basis of judgment by the court, without any suggestion to the court, or objection, that all the issues are not reported upon, and judgment is entered which is consistent with, and supported by, the findings returned, such judgment will not be reversed on account of such neglected issues unless the appellant shows to this court that evidence was offered upon one or more of such issues, and that such evidence would have supported a finding which would countervail the findings actually made, and thus have required a different judgment to be entered.

2. An appellant cannot complain in this court that no finding was returned upon an issue, when the record presented shows that such finding, if made, must have been against him. (Syllabus by the Court.)

Appeal from circuit court, Yankton county; E. G. Smith, Judge.

Action by the Merchants' National Bank against Charles E. McKinney and George R. Scougal, partners. Defendants had judgment, and plaintiff appeals. Affirmed.

For report on former appeal, see 48 N. W. Rep. 841.

R. B. Tripp, for appellant. French & Orvis, for respondents.

KELLAM, J. Historically, this case is as follows: The appellant, as plaintiff, commenced an action against respondents, as defendants, to recover the amount paid by it to defendants as the purchase money of a number of warrants purporting to have been issued by Douglass county, upon the ground that, in said sale, defendants warranted the same to be the warrants of, and binding on, said county, according to their purport, while in fact they were not the warrants of the county; that, at the time of their issuance, Douglass county was not organized, and has ever since its organization refused to recognize or pay the same; and that they were issued fraudulently, and without consideration. Except as to the corporate and partnership character of the parties, respectively, defendants' answer denied each and every allegation of the complaint. By agreement the case was sent to a referee "to hear the testimony, and report, as provided by the statutes of this territory." Upon the filing of the referee's report the plaintiff moved the court, "upon the findings in this action, evidence taken thereon, report of the referee, and all proceedings had," for judgment against defendants. The motion was granted, and judgment entered accordingly. From this judgment defendants appealed to this court, where the judgment was reversed, and the cause remanded for further proceedings "consistent with the opinion." *Bank v. McKinney*, 48 N. W. Rep. 841. Upon the return of the case to the court below the plaintiff moved to place the case on the calendar for the purpose of having tried and settled certain issues in the case, which, it was claimed, were presented by the pleadings, but not covered by the findings of the referee, and which still remained as issues, upon which the rights of the parties rested, after the decision of this court upon the questions presented to it on the appeal. The defendants, on the other hand, upon the pleadings and the findings of the referee, moved for judgment for defendants. The plaintiff's motion was denied, and the defendants' motion allowed, and judgment was thereupon entered, dismissing the action on its merits. From this judgment, plaintiff appeals.

Appellant contends that its complaint sets up a good cause of action for breach of defendants' warranty, under which the warrants in question were sold; that, by the complaint and answer, distinct issues were raised, not only as to the legality of the county organization by which the warrants purported to have been issued, but as to the validity and binding force of the warrants themselves,—it being alleged in the complaint, and denied in the answer, that they were issued fraudulently and without consideration; that, upon the facts found and reported by the referee, this court held, reversing the trial court, that the county organization was *de facto*, thus making the

warrants *prima facie* good, but that the referee entirely failed to make any finding upon the question whether or not the warrants were issued upon or without consideration, and that it is still entitled to have that question tried as a material issue in the case. Its objection is not that the judgment appealed from is inconsistent with, or unsupported by, the findings returned, but that other findings should have been made. To sustain the judgment which the court rendered, a finding upon the question of consideration or of fraud was not essential. A finding upon either, favorable to plaintiff, might have required a different judgment; but the facts found, as construed by this court, supported a judgment for defendants, because such facts did not show any breach of warranty, which was plaintiff's cause of action. While it is often declared that no final judgment in a case should be entered until all the material issues are disposed of, as in *Dole v. Burleigh*, 1 Dak. 228, 46 N. W. Rep. 692, still it would seem to us that the materiality of the neglected issue should be made to appear to the appellate court before it would be required to reverse a judgment which is justified by the findings returned; that is, that a party asking such reversal should present a record showing that he has been prejudiced by the entry of the judgment without a decision upon such issue. To illustrate: If, in this case, no evidence was offered upon the question of fraud or want of consideration, then the finding must have been, if made at all, in favor of the warrants, because, in the absence of evidence, the warrants are presumed to have been issued regularly, and upon consideration. *Ednburg-American Land & Mortgage Co. v. City of Mitchell*, (S. D.) 48 N. W. Rep. 134, and cases cited. But a finding in favor of the validity of the warrants would be a finding against the appellant on the issue of a breach of warranty in those respects, and the failure of the referee to make and report such a finding could not prejudice appellant. *Hutchings v. Castle*, 48 Cal. 152. If there was evidence upon these questions, or either of them, isn't it incumbent on a party seeking to reverse the judgment on account of the omission of the referee to report a finding to exhibit such evidence, and show that it justified a finding which would countervail the findings upon which the judgment rested, and so invalidate it? In *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. Rep. 1098, the conclusion of the court, after a discussion of this question, is thus stated: "The findings must be sufficient to support the judgment, and must contain nothing inconsistent with it; but a failure to find upon some issue,—a finding upon which would merely have the effect of invalidating a judgment fully supported by the findings made,—will not be held ground for reversal, unless it is shown, by statement or bill of exceptions, that evidence was sub-

mitted in relation to such issue." In *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. Rep. 504, the court said, upon the same subject: "The appellant is not prejudiced unless the court shall fail to make such findings in his behalf as will countervail its other findings; and, as error in the court below is not to be presumed, but must be shown by him, it is incumbent upon him to produce before this court the evidence that was presented to that court, in order that we may determine whether any error was committed in failing to make such findings. If the omitted findings must have been adverse to the appellant, their omission is not error sufficient to authorize the reversal of the judgment." Again, in *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. Rep. 4, the court says: "The failure of the court to make findings upon other issues presented by the pleadings is not a ground for reversal, unless it shall appear from the record that evidence was offered upon such issues in the court below, and that a finding thereon from such evidence would countervail the findings actually made, to such an extent as to invalidate the judgment." See, also, the recent case of *Fincher v. Malcolmson*, (Cal.) 30 Pac. Rep. 235, where the rule is again applied, and compared with the rule that findings upon all issues is necessary to support a judgment.

The doctrine of these cases seems to us reasonable. Where, upon the coming in of a referee's report, the trial court is allowed to render judgment thereon, without any suggestion from either side that material issues are ignored in the findings, and the judgment rendered by the court is consistent with, and sustained by, the findings returned, it is not ground for reversal of such judgment that an issue presented by the pleadings was not reported upon by the referee, unless the appellant asking such reversal shows that evidence was offered upon such issue, and that upon such evidence a finding would have been allowable that would have required, or at least justified, a different judgment. We think the case must be regarded now just as though, upon the finding of the referee's report, the circuit court had held, upon his findings of fact, that the county organization was de facto, and the warrants, therefore, prima facie good. What would then have been the appellant's rights on account of the omitted issues? To have the case again put on the calendar, and have such issues retried? We think not. At most, it could only have had the omitted findings supplied, either by the court or by the referee. No effort was made to have this done. The fact that the referee made no finding upon these issues, and that neither party asked any, but, without objection, suffered the findings, as returned, to be made the basis of a judgment, starts a strong presumption that at that time such issues were regarded as abandoned. It is perfectly consistent with the record before us that the trial court knew, from the evidence returned

by the referee, either that there was no evidence at all offered upon the omitted issues, or that, if there was any, it was entirely insufficient to support a finding adverse to the validity of the warrants. If such were the fact,—and, because consistent with the record, it will be presumed, in support of the judgment,—it could not have prejudiced the appellant that there was no finding, for it must have been against it. *Hutchings v. Castle*, supra. Upon the record before us, we do not find any error in the judgment of the circuit court, and it is affirmed. All the judges concur.

WRIGHT v. LEE et al.

(Supreme Court of South Dakota. July 29, 1893.)

FOREIGN CORPORATIONS — FAILURE TO COMPLY WITH LAW — REMEDY — ASSIGNMENT FOR BENEFIT OF CREDITORS — VALIDITY — PROCEDURE.

1. The question of the right of a duly-organized foreign corporation to do business in this state without having complied with the statutes of this state as to filing an authenticated copy of its articles of incorporation, etc., cannot be raised or determined collaterally.

2. Transacting business in the state by such noncomplying foreign corporation is a usurpation of power by such corporation, but with the state rests the right to elect whether it will acquiesce in such usurpation, or dispute and prevent it.

3. Sections 5345, 5346, Comp. Laws, providing that the remedies heretofore reached by writ of quo warranto, and proceedings by information in the nature of quo warranto, might be obtained by civil action, as provided in said sections, were not repealed by the adoption of the state constitution.

4. The action provided for in said sections is available against a foreign corporation. "Annuling the existence of a corporation," as expressed in said section, must be taken to mean, in respect to a foreign corporation, annulling its existence and life within the limits of the state.

5. But even if said sections were repealed, or if the action provided by them were not available against a foreign corporation, quo warranto proceedings would still remain and be entirely adequate for the maintenance of the authority of the state against a usurping foreign corporation.

6. A corporation duly organized under the laws of another state, and publicly doing business in this state, without having complied with the statutory requirements above referred to, is, until its authority is challenged by the state, a de facto corporation.

7. In a general assignment by a corporation, the inventory required by the statute may be verified by its secretary, although the board of directors had authorized the president and secretary to execute the assignment; the object of the statute being fulfilled when the justness and truthfulness of the inventory is guaranteed by the oath of the assignor, in the only way in which it, as a corporation, could verify the same, to wit, by one of its managing officers.

8. Such inventory does not necessarily show upon its face that it does not contain all the creditors of the assignor because it shows certain of its lands are subject to mortgages, while the holders of such mortgages do not appear as creditors; as the assigning corporation may have bought such lands subject to the mortgages, without assuming to pay them, or becoming debtors to the holders of them.

9. Section 4660 et seq., Comp. Laws, prescribe the manner of making, and declare the legal effect of, an assignment made under such provisions. It must be made "in good faith," and, when made, is subject to the Code provisions "relative to trusts and to fraudulent transfers."

10. An assignment not made "in good faith," or which would be invalid under the Code provisions "relative to trusts and fraudulent transfers," even though modally within the letter of the statute, is not effectual to protect the property assigned against the attacks of creditors by attachment.

11. Section 4675, being, in respect to the provisions to be now noticed, an amendment subsequently attached to the law, and providing that all proceedings under the law should be subject to the supervision of the district court, and authorizing the judge of said court, upon petition of creditors showing cause therefor, to interfere, require an accounting, remove the assignee for cause, appoint a new one, etc., was not intended to, and does not, radically change the plan and theory of the original law, but adds a new feature to it, important, but still incidental.

12. Whether, after the power of the court authorized by said section 4675 has been actively called into exercise, as it is provided it may be for cause shown, the assigned estate is in custodia legis, and thus protected from attachment, quære.

(Syllabus by the Court.)

On rehearing. Affirmed.

For report on appeal, see 51 N. W. Rep. 706.

KELLAM, J. This case is now before us upon rehearing. The original opinion is published in — S. D. —, and in 51 N. W. Rep. 706, where the facts are fully stated. Appellants asked and were allowed a rehearing for the further discussion of the following propositions: (1) The court erred in holding that the question of noncompliance with the statute in relation to foreign corporations could not be inquired into collaterally; (2) in holding that the La Belle Rancho Horse Importing Company (respondent's assignor) was a de facto corporation; (3) in holding that a sufficient affidavit was made to the inventory; (4) in holding the inventory to be in compliance with the provisions of the assignment laws of the state.

So far as they are pertinent to either of the questions thus presented, the facts are not in dispute. The assignor, the La Belle Rancho Horse Importing Company, was a foreign corporation, organized under the laws of the state of Minnesota, and it had never complied with the provisions of sections 3190-3192 of the Compiled Laws, by filing with the secretary of the territory of Dakota, or with the secretary of state of the state of South Dakota, a copy of its articles of incorporation, or by the appointment of an agent residing in the territory authorized to accept service of process. The contention of appellants was and is that, without compliance with these provisions, such foreign corporation was incapable of transacting business in this jurisdiction, and that every contract it attempted to make was void, and should be so declared upon a showing of such noncompliance. Neither side, of course,

questions the inherent power of the state to exclude foreign corporations from transacting business within its limits, subject to the constitution and laws of the United States, as declared in such cases as *Bank v. Earle*, 13 Pet. 588; *Paul v. Virginia*, 8 Wall. 168; *Carroll v. East St. Louis*, 67 Ill. 568; *Doyle v. Insurance Co.*, 94 U. S. 535; *Thompson v. Waters*, 25 Mich. 214; *People v. Association*, 92 N. Y. 311. The question here is not as to the existence of the power, but to what extent, if at all, the state has undertaken to exercise it, and what is the legal effect of what it has done. The constitutional provision which, it is also claimed, makes void any attempt of this foreign corporation to transact business in this state under the conceded conditions of this case, is as follows: "No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." Section 6, art. 17, Const. The admission of the respondent is that his assignor, a foreign corporation, had not filed its articles of incorporation with the secretary of the territory or of the state, nor filed an appointment of an agent with such secretary, or in the office of the register of deeds of the county in which its principal place of business is located. It will be at once observed that the constitutional provision does not require either of these things to be done. Its requirement is satisfied if such foreign corporation had in fact a known place of business, and an authorized agent, upon whom process might be served in this state. It was not required of respondent, as assignee, in order to validate the acts of his assignor, that he show that such assignor had met the prescribed conditions. That he had not done so, if material at all, was defensive, and must come from the other side. *Sewing-Machine Co. v. Moore*, 2 Dak. 280, 8 N. W. Rep. 131; *Lumber Co. v. Keefe*, (Dak.) 41 N. W. Rep. 743. The admission did not negative the conditions named in the constitution. It was not admitted by plaintiff, nor proved by defendants, that such corporation did not in fact have a known place of business and an authorized agent in this state, but only that it had not filed its articles of incorporation, nor filed any appointment of an agent; hence it does not appear but that respondent's assignor was fully qualified to transact business in this state, so far as the constitutional provision controls.

Section 3190, Comp. Laws, is: "No corporation created or organized under the laws of any other state or territory shall transact any business within this territory * * * until such corporation shall have filed in the office of the secretary of the territory a duly authenticated copy of its charter or articles of incorporation, and shall have complied with the provisions of this article," etc. Section 3192 names the other provisions to be

complied with, to wit, the appointment of a resident agent, authorized to accept service of process, and the recording of the same in the office of the secretary of the territory, (now state,) and of the register of deeds of the county wherein such agent resides. It is specifically admitted that this was not done. The defendants claimed below, and, as appellants, they claim here, as already observed, that the consequence of such non-compliance was to render void and of no effect every attempted act or contract of such noncomplying corporation. Upon the former examination and decision of this case, we were impressed with the great diversity of views expressed by different courts upon this question, under constitutional and statutory provisions like our own; but a closer study satisfies us, not only that the conclusions of the courts are irreconcilable with each other, but that no general controlling principle can be deduced from the judgments or the reasoning of the cases. In some instances, as in *Bank v. Page*, 6 Or. 431, it is argued that the evident legislative intent was to prevent disqualified foreign corporations from transacting business in that state, and that, as no specific penalty was prescribed as a punishment for a violation of such prohibitory law, the legislature must have understood and intended that the usual result would follow an attempt to make an unlawful and prohibited contract, to wit, that it would be void and unenforceable, as otherwise there would be no penalty, and the law would be simply an expression of legislative opinion, without means for its enforcement; while in such cases as *Woods v. Armstrong*, 54 Ala. 150, followed in *Dudley v. Collier*, (Ala.) 6 South. Rep. 304, the fact that a penalty is provided in the law is regarded as important, if not controlling, in establishing the severely prohibitory character of the law, and in making the contract void; while in still other cases, as *Lumber Co. v. Thomas*, (W. Va.) 11 S. E. Rep. 37, the presence of a penalty in the law is taken to mean that the legislature intended no other forfeiture or disadvantage to result from noncompliance with the law, and the contract of the noncomplying foreign corporation was held good. With these cases, and many others of which they are simply representative, before us, we conclude that a collation and attempted analysis of them would be profitless in developing from them any general principle or rule adopted by the courts in the construction of statutes of this kind. The only proposition upon which all agree is the elementary one that the statute should be given such effect as the legislature intended. It certainly was not intended by it to adopt or announce a policy of excluding or even discouraging foreign corporations from transacting business in this territory or state, for it named very easy conditions upon which their right and qualification might be established and made unquestionable. The leading thought and primary design of the

legislature undoubtedly was to protect the people of the state from imposition and loss at the hands of alien corporations, whose responsibility, character, powers, and home were unknown to them. They must file copies of their articles of incorporation, so that their powers and the character of the corporation might be known to those who might have occasion to deal with them, and they must publicly announce upon whom, as their agents, process might be served, if found necessary to bring suit, and thus bring themselves within the jurisdiction of the courts. Until the foreign corporation does this, it has no legal right or standing to transact business in the state; but it does not follow that it was intended that every attempt to do so should be void without regard to its effect upon either party. The statute was designed to place foreign corporations, in respect to a knowledge of their powers, the object of their incorporation, and the jurisdiction of our courts within the state over them, in the same position as domestic corporations. In the case either of domestic or foreign corporations, the state names the conditions upon which it may transact business. It does it in its sovereign capacity, as the conservator of the rights and best interests of its citizens. The state, which alone can name the conditions, can alone enforce their observance. The statute in this case is directed, not against the contract made or the act done, but against the party acting. The wrong done in disregarding the law is against the state, and not against the individual. It may have been to the advantage of the individual. Transacting business in the state without compliance with the statutory conditions is a usurpation of power by the corporation, but with the state rests the right to elect whether it will acquiesce in such usurpation, or dispute and prevent it. This is the rule in respect to a domestic corporation, certainly where it is conceded there was legal authority for its creation. *Ang. & A. Corp.* §§ 94, 636; *Lehman v. Warner*, 61 Ala. 455; *Cochran v. Arnold*, 58 Pa. St. 399; *Baker v. Backus*, 32 Ill. 79; *Humphreys v. Mooney*, 5 Colo. 282; *North v. State*, 107 Ind. 356, 8 N. E. Rep. 159; *Doyle v. Petroleum Co.*, 44 Barb. 239. And if this is the rule in respect to domestic corporations, and the object and purpose of this law is as far as practicable to make the foreign corporation within the state as a domestic one, why should not the rule apply, leaving to the state, and not to an individual litigant, who may not even be a resident of the state, the election of insisting upon an entire compliance with the law, or a waiver of such compliance? We think it should, and in this conclusion we are directly supported by the supreme court of North Dakota construing the same law, inherited from the territory by both states. *Mill Co. v. Bartlett*, (N. D.) 54 N. W. Rep. 544. See, also, *Grant v. Coal Co.*, 80 Pa. St. 208.

In our former opinion, it was suggested

that the state might proceed under sections 5345, 5346, Comp. Laws, providing that the remedies heretofore reached by writ of quo warranto, and proceedings by information in the nature of quo warranto, might, be obtained by civil action, as provided in said sections. Against this suggestion, appellant contends that said sections were, by implication, repealed by the state constitution, and that, in any event, they are inapplicable in the case of a foreign corporation. In our judgment, neither contention can be maintained. In *People v. Association*, 84 Cal. 114, 24 Pac. Rep. 277, cited by appellant in support of the theory of repeal, the facts were not as here. There the legislature had expressly abolished the writ of quo warranto, and proceedings by information in the nature of quo warranto, and by the same section, and in continuous language, provided that the remedies obtainable under the abolished writ and proceedings might thereafter be obtained by civil actions, in the manner thereafter provided. Section 802, Code Civil Proc. 1872. But here the territorial legislature made no attempt to abolish either. Such attempt would have been abortive, if undertaken, for the powers and jurisdiction of the territorial courts were established by the organic act, and included the power and right to issue all common-law writs. The civil action provided by those sections was therefore not exclusive, but cumulative. In the California case, however, the legislature abolished the writ, and in the same breath provided a new remedy. The two provisions were evidently intended to be interdependent, so that there might have been reason for holding that the new constitution, which restored the abolished writ, also had the effect of repealing the provision for a substitute; but in that case even the court did not go to that extent. It simply recognized the fact that such contention might be made, and, without passing upon the question, suggested the answer that, even if the claim of implied repeal were allowed, the power of the court was quite as broad under the writ of quo warranto as under the statute claimed to be repealed. Repeals by implication are not favored, and we see no reasonable ground for holding that the constitutional provision defining the jurisdiction of the courts created by it repealed the statutory section cited.

Appellant further contends that the civil action provided for by the statutory sections under consideration is not available against a foreign corporation, for the reason that the purpose of the action must be "vacating the charter or articles of incorporation, or for annulling the existence of a corporation, and that the courts of this state cannot vacate the charter, or annul the existence of a foreign corporation." If this reasoning is conclusive, what shall be done with the first of the two cited sections,—5345,—which declares that the remedies formerly attainable

by quo warranto proceedings might thereafter be obtained by the civil action provided for by the subsequent sections. This would seem to be a plain declaration by the legislature of the intended scope of these sections and of the action authorized. The jurisdiction of our courts, prior to the enactment of these sections, to control foreign corporations within the state by quo warranto proceedings, can hardly be questioned; and it is expressly enacted that, if there were such remedy by quo warranto, it might now be obtained by civil action. True, the purpose of the action is to "annul the existence of the corporation," but that must be taken to mean its existence within this state. Whenever it attempts illegally to come into this state, and live, and exercise the functions of a living corporation, it may be proceeded against in this civil action, and its existence within this state annulled. The Ohio statute is similar to ours, but it has not, like ours, an authoritative declaration of its intended scope, and it is held to apply to foreign and domestic corporations alike. *State v. Insurance Co.*, 47 Ohio St. 167, 24 N. E. Rep. 392. But, even if appellant were clearly right upon both these minor questions, the merits of this controversy upon the major question of whether the validity of the executed acts of a foreign corporation may be investigated and settled in a collateral proceeding for that purpose, remains unaffected; for, with the statute authorizing a civil action repealed, quo warranto proceedings would still remain, and, as suggested in *People v. Association*, supra, are entirely adequate for the maintenance of the authority of the state against a usurping corporation, whether foreign or domestic. We might say in passing that the constitutional authority of the supreme and circuit courts to issue writs of quo warranto, and to hear and determine the same, must be understood to give such courts jurisdiction of cases in which the information in the nature of quo warranto has become a substitute for the ancient writ. *State v. Gardner*, (S. D.) 54 N. W. Rep. 606.

The second proposition of appellant in the petition for rehearing is the error of the court in treating the foreign corporation under consideration as a *de facto* corporation. Appellant's amended answer, upon which this action was tried, alleges "that, at the time of its pretended assignment, the La Belle Rancho Horse Importing Company was a foreign corporation, incorporated under and by virtue of the laws of the state of Minnesota," and then avers its incapacity to make the assignment under consideration, or to do any other business in this state, because it had not complied with the requirements of the statute already noticed as to foreign corporations. The question, then, is this: Is a corporation, duly organized under the laws of another state, but doing business in this state without having complied with the statutory conditions named, entitled to be con-

sidered and treated as a de facto corporation? If we have correctly decided the first proposition discussed, there can be little doubt as to this. We have already said that the acts of such a body were valid as corporate acts until such assumption of authority is challenged by the state. This is, at least, equivalent to saying that, during the time the state acquiesces in the transaction of business by such foreign corporation, it must be considered and held to be a de facto corporation. This case is radically different from *Empire Mills v. Alston Grocery Co.*, (Tex. App.) 15 S. W. Rep. 505. There it appeared, and was so stated in the opinion, that the grocery company had never organized at all. The court says: "An examination of the case before us discloses no organization at any time or place." They had no standing as a foreign corporation. Besides, in that case, which was upon demurrer, it was admitted that the purpose of the alleged incorporators was to commit a fraud upon the laws of Texas, where they attempted to do business, and upon Iowa, where they pretended to file their articles. No such facts appear here.

Appellant's third proposition is that the court erred in holding that a sufficient affidavit was made to the inventory. The two respects in which the affidavit in this case is assailed are (1) that it is not made by the assignor, (the corporation,) but by its president, and does not verify its statements according to the best knowledge and belief of the assignor, (the corporation,) but according to the best knowledge and belief of its president, who makes it; and (2) that, as the board of directors had authorized the president and secretary to execute the assignment, it was necessary that both make and assign the affidavit. We are satisfied neither point is good, for reasons stated at length in the former opinion, written by Judge Bennett. A corporation could, of course, make no affidavit except by an agent, and no agent could truthfully swear to the best knowledge and belief of any person or persons other than himself. Any attempt to do so would be uncandid and worthless on its face. The object of the statutory provision was to secure an inventory whose justness and truthfulness should be guaranteed by the oath and conscience of the assignor. In the case of a corporation, we think that its president, or its secretary, or any other managing agent, is presumably qualified to make the affidavit.

It is next urged that the court erred in holding the inventory to be in compliance with the provisions of the assignment laws of this state. In the petition for rehearing, appellant represents that but a part of the objections raised against the inventory was considered by the court, or at least discussed in the opinion, and urges upon our present notice that the inventory does not even purport to contain "a list of all the creditors of the assignor;" and it shows upon its face that it does not contain a list of all the cred-

itors. It was not necessary that the inventory should advertise itself as containing all the creditors. It is not so much what it purports to contain as what it does contain that is important. The statute does not require the inventory itself to state that it contains all the creditors. *Landauer v. Conklin*, (S. D.) 54 N. W. Rep. 322. If we understand appellant's contention, it is that the schedule affirmatively shows that it does not contain all the creditors of the assignor, because it shows that certain of its lands are subject to mortgage liens, while the holders of such liens do not appear as creditors. But, assuming this to be correct, it does not follow that the holder of a claim against the lands is necessarily a creditor of the assignor. The company may have bought and held these lands, subject to the incumbrances referred to, without making itself a debtor to the holder of such incumbrances. It is only "creditors of the assignor" that are required to be listed by the provision of the law under which their objection is made.

It is next suggested, as a defect in the inventory, that it "nowhere specifies the incumbrances on any particular piece of land, giving the name of the party holding the mortgage, his place of residence, the true consideration of the liability, or the place where it arose." Without discussing what would be a sufficient compliance as to particularity of detail with subdivision 7 of said section 4667, requiring the inventory to show all the assignor's property, "and the incumbrances existing thereon," we content ourselves by saying that it nowhere appears that the incumbrances referred to were upon separate or particular pieces of the lands described. All the incumbrances may have rested upon all the lands. To justify an examination of either of these objections upon the merits would require us to assume facts which are not proved.

Appellant also objects to the inventory of the notes owned and assigned by the assignor, because at the end of this schedule appears the statement: "All the notes in this division No. 2 were listed by the ex secretary and treasurer, George L. Wright, and are in his possession, together with all other papers and books belonging to the corporation." We apprehend it is unimportant who actually makes the list, provided, when made, the assignor adopts it, and verifies it, as required by the statute, which appears to have been done in this case. In construing an assignment for the benefit of creditors under our statute, the same rules apply as in cases of ordinary contracts and conveyances, and, if allowable within its terms, such interpretation and construction should be given to an assignment as will render it legal and operative, rather than that which will render it illegal and void. *Landauer v. Conklin*, supra; *Burill, Assignm.* (5th Ed.) p. 480; *Townsend v. Stearns*, 32 N. Y. 209; *Bank v. Dunn*, 67 Ala. 381.

We have thus considered, at length, the

several points upon which appellant asked to be reheard, and find nothing which leads us to believe we were in error in our former decision.

Upon the part of respondent, the claim is made upon this rehearing that, upon the execution and delivery of this assignment, the property covered by it passed into the custody of the law, and so beyond the reach of attachments, and this contention is based upon section 4675, Comp. Laws, providing as follows: "After the lapse of six months from the date of filing his bond, the assignee, on motion of one of the creditors, with ten days' notice, accompanied by an affidavit of the creditor, his agent or attorney, setting forth his claim and the amount thereof, and that no account has been filed within six months, may be ordered by the court, or by the judge thereof, at any place in his judicial district, to render an account of his proceedings, within a given time, to be fixed by the court or the judge thereof, not to exceed fifteen days. All proceedings under this title shall be subject to the order and supervision of the judge of the district court of the county in which such assignment was made, and such judge may, from time to time, in his discretion, on the petition of one or more of his creditors, by order, citation, attachment, or otherwise, require any assignee or assignees to render accounts and file reports of his or their proceedings, and of the condition of such trust estate, and may order or decree distribution thereof; and such judge may, in his discretion, for cause shown, remove any assignee or assignees, and appoint another or others instead, who shall give such bonds as the judge, in view of the conditions and value of the estate, may direct; and such order or removal and appointment shall in terms transfer to such new assignee or assignees all the trust estate, real, personal, and mixed, and may be recorded in the deed records in the office of register of deeds of any county wherein any real estate affected by the assignment may be situated. And such judge may by order, which may be enforced as upon proceedings for contempt, compel the assignee or assignees so removed to deliver all property, money, choses in action, book accounts, and vouchers to the assignee or assignees so appointed, and to make, execute, and deliver to such new assignee or assignees such deeds, assignments, and transfers as such judge may deem proper, and to render a full account and report of all matters connected with such trust estate. Whenever any assignee so removed shall have fully accounted for and turned over to the assignee or assignees appointed by the judge all the trust estate, and made a full report of his doings, and complied with all orders of the judge touching such estate, and also whenever an assignee has fully complied with his trust, he may by order of the judge be fully discharged from all further duties, liabilities, and responsibilities

connected with the trust. In either case, he shall give notice by publication in some newspaper of the county, if there be one printed and published therein, if not, in a newspaper published at the capital of the territory, once in each week, for at least three weeks, that he will apply to such judge for such discharge, at a time and place to be stated in such notice, which time shall not be more than three weeks after the last publication of the notice. If, upon the hearing, the judge shall be satisfied that the assignee is entitled to be discharged, he shall make an order accordingly; or if, in the opinion of the judge, anything remains to be done by such assignee, he may require the performance thereof before making such order. Such order shall have the effect of discharging the assignee and his sureties from all further responsibility in respect to the trust, and such order shall not be refused on account of any failure on the part of the assignee to comply with the formal provision of law, where no loss or damage to any one shall have occurred through such failure. Whenever the trust estate shall have been taken out of the hands of the assignee by proceedings in bankruptcy in the federal court, the assignee may in like manner be discharged, upon showing that he has fully accounted with the assignee in bankruptcy, and turned over to him the whole of the trust estate."

We do not think respondent's contention can be maintained. This assignment was made under the statute. The right to make it is, at the very outset, by section 4660, secured to the insolvent debtor who, in so doing, acts "in good faith," and such assignment, when made, is expressly declared in the same section to be "subject to the provisions of this Code relative to trusts and to fraudulent transfers." It is only when the assignment is made "in good faith" that it is authorized by, or is under the protection of, the statute; and then, to further secure the rights of creditors, and to open the doors to a searching investigation of the fides of every such transaction, it is expressly provided that when made, even though modally within the letter of the statute, it is still subject to statutory provisions relative to trusts and conveyances. With these authoritative and unambiguous declarations before us as to the intent and purview of this law authorizing and controlling assignments, we must rule against respondent's contention, unless we can find in said section 4675, and upon which he relies, a reasonably plain indication that the legislature intended to abrogate the fundamental rule of the first section of the law to which we have referred. This section—4675—is a combination of section 1, c. 8, and section 1, c. 9, of the Laws of 1887. Prior to these amendments, the statute (section 2042, Civil Code) simply provided that the assignee might after six months, on complaint of a creditor, be required to account before

the district court of the county where the inventory was filed, "in the manner prescribed by the Code of Civil Procedure." This section was probably taken from the California Civil Code, § 3460, which provided for an accounting "in the manner prescribed by the insolvent laws of this state." There were no insolvent laws in this territory; hence the necessity for this unintelligible reference to the "manner prescribed by the Code of Civil Procedure." The immediate purpose of these amending sections, now constituting section 4675, undoubtedly was to provide a simple and expeditious means by which the assignee might be required to report and account. That was the thought of the first section, and that at once suggested the necessity of providing for the removal of a dishonest or unfaithful assignee, and the substitution of another, and that, in turn, to the propriety of providing for the final discharge of the assignee when his accounting should be full and satisfactory. Incidental to the accomplishment of these ends, and in connection with these particular provisions, it is said that "all proceedings under this title shall be subject to the order and supervision of the judge of the district court of the county in which such assignment was made," and providing that such supervisory jurisdiction might be called into active exercise by petition of one or more creditors. But we feel very sure that the legislature never intended by these subsidiary provisions to radically change the original theory of the statute authorizing and regulating assignments. When the statute expressly declares that every assignment made under it shall be "subject to the provisions of the Code relative to trusts and to fraudulent transfers," and then, as to "trusts and fraudulent transfers," that "every transfer of property or change therein made * * * with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor," little room is left for debate as to whether an assignment executed for such fraudulent purpose is valid or void. If void, it conveys nothing to the assignee, but leaves the property in the assignor. An instrument would not be void if it had the effect to transfer the title or the custody of property from one to another. An assignment with preferences, being invalid, would have no effect, only that the statute affirmatively says that in such case the property of the insolvent shall become a trust fund, to be administered by the court, (section 4660;) but no such status is declared for property covered by a fraudulent or defective assignment, but in such case the whole transaction is stamped as void. The statute of Iowa under which *Shoe Co. v. Mercer*, 51 N. W. Rep. 415, was decided, holding property covered by an assignment under that law to be in custodia legis, is different from ours in just the respect that would account for the holding in that case. By our law the assignor

makes a list of his creditors, and files it with the assignment in the office of the register of deeds of the proper county, and no provision is made in the statute whereby a creditor may, under the assignment, contest the correctness or honesty of the list or the validity of any particular claim. By the Iowa law the list of creditors is made by the assignee, and not by the assignor, and filed in the court, and any creditor may except to the demand of any other creditor. The court tries the issue thus made, by a jury, if necessary, and renders judgment. Thus, the statute itself provides a direct and adequate means by which any creditor may, without disturbing the assignment, object to and have judicially investigated the validity of the claim of any creditor. With such provisions in force, there is no reason for allowing a general attack upon the assignment, particularly on account of a challenged claim not listed or necessarily approved by the assignor. Under the Iowa law the list of creditors or its correctness sustains no such relation to the assignment as under ours. There no assignment can be declared void for want of such list. Here the statute makes the assignment void if the list is not duly made and filed. There are other respects in which the two statutes are essentially different. They are not constructed upon the same theory or plan. The reasoning and ruling of the Iowa case are not applicable to our statute.

It is also argued by respondent that the Minnesota cases point to the conclusion contended for by him. He suggests, what may be assumed as correct, that so much of said section 4675 as was section 1, c. 9, Laws 1887, providing "that all proceedings under this title shall be subject to the order and supervision of the judge of the district court of the county in which such assignment was made," etc., was taken from the Minnesota law of 1876, as amended in 1877, and then cites *Klingman v. Barton*, 24 Minn. 295, where the question was upon the rights of an assignee who had failed to file a bond as required by the statute. In his brief the respondent quotes from the opinion of the court the following language, as indicating the opinion of the court as to the character of the law: "Further, the proceeding is in the nature of a judicial proceeding. By the filing of the assignment the court gets jurisdiction over the assignor, and probably over the property, but it gets none over the assignee until he files his bond." It must be remembered in this connection that the Minnesota law required the assignment, the inventories, and the bond of the assignee all to be filed in the office of the clerk of the district court, and, while it might be plausible to say that the object and effect of filing such papers in court was to place their subject-matter under the jurisdiction of the court in which they were filed, it would not be equally plausible to say that the filing of the same papers in the office of the register of deeds, as required

by our statute, was intended to have the same effect. The later Minnesota cases, like *Donohue v. Ladd*, 31 Minn. 244, 17 N. W. Rep. 381, and *In re Mann*, 32 Minn. 60, 19 N. W. Rep. 347, in which it was held that the assigned property was in custodia legis, arose under the insolvent laws of 1881, and, as respondent frankly concedes, are not closely applicable to this case. Aside from the single provision in said section 4675, borrowed from the Minnesota statute, we find nothing in our law that would suggest the thought or legislative intent that, upon the making of an assignment by an insolvent debtor, and filing the same in the office of the register of deeds, the circuit court should at once take and have jurisdiction and control over the execution of the trust, any more than over any other trust which the statute allows parties to make. The borrowed section may be an apt and consistent provision in a law whose general purpose and theory is to place the assigned estate under the immediate supervision and control of the court, but its transplantation from such a law to ours, which was not so intended and has no such purpose, simply adds a new feature to our law, important, but still incidental. The amendment is attached to, and becomes a part of, the law, and not the law to the amendment. We are therefore of the opinion that the execution of the assignment did not place the property mentioned in it in the custody of the law, so as to protect it from the reach of appellant's attachments. We say the execution of the assignment did not do this. What may be the effect upon the status of the assigned estate of the actual interference by the court upon an affirmative showing of cause therefor, under said section 4675, it is not now necessary to consider, for no such question is presented by the facts in this case.

We have thus, at unjustifiable length perhaps, attempted to examine each point presented by either side upon this rehearing, and we discover no reason to doubt the correctness of the conclusions of the former opinion as prepared by Judge Bennett.

PRAIRIE SCHOOL TP. v. HASELEU et al.
(Supreme Court of North Dakota. July 6, 1893.)

SCHOOL DISTRICTS—POWERS OF OFFICERS—LOSS OF FUNDS—LIABILITY OF TREASURER ON OFFICIAL BOND—PAROL EVIDENCE—HARMLESS ERROR.

1. Chapters 44, 45, Sess. Laws Dak. T. 1883, relating to school townships and school-house bonds, considered. *Held*, that the school board (consisting of the treasurer, clerk, and director) is the official governing board of such school township, and such board has full power and authority to issue, negotiate, and sell such bonds of the school township as have been duly voted by the electors for the purpose of building a schoolhouse. *Held*, further, that the school township treasurer, acting independently, has no authority, under the law and by virtue

of his office as treasurer, to issue, negotiate, or sell such bonds.

2. Where the school board of the plaintiff, consisting of the treasurer, clerk, and director, issued certain schoolhouse bonds, which had been regularly voted by the electors, and in doing so delivered such bonds to a bank to be negotiated and sold for the benefit of the school township, and the bonds were sold and put in circulation, but the proceeds were never turned over to the school township, but, on the contrary, were lost to the school township, *held*, that the school board was wholly responsible for such loss. *Held*, further, that such bonds not having been delivered to the treasurer for negotiation and sale, and he never having sold or attempted to sell the same, an action will not lie against the treasurer or his sureties on his official bond for a breach of the condition of such bond which requires the treasurer to account for and pay over all moneys and property which shall come into his hands as treasurer.

3. The obligations of sureties upon official bonds are measured by the language of the bond, and where the condition of a bond embodies the provisions of the statute, and no more, the obligation cannot be expanded by construction beyond the fair import of the language in which the sureties have consented to be bound.

4. When the bonds were delivered by the board at the bank for negotiation and sale, all members of the board were at the bank, and acting in concert. At that time the cashier of the bank delivered to the treasurer a writing as follows: "\$1,000. Grand Rapids, Dakota, Sept. 28th, 1883. Received of William Haseleu, Treas. Prairie School Township, one thousand dollars in bonds of Prairie Tp., La Moure Co., D. T., for placing and cr. A. H. Huester, Cashier Bank of Grand Rapids." *Held*, that such writing embodied both a receipt and a contract, and that, as such, its terms could be varied and explained by parol evidence, but only as to that part which is a mere receipt.

5. Where it appears that upon the uncontroverted facts the plaintiff cannot recover in the action, a verdict and judgment for defendants will not be disturbed by this court even when the record shows errors in procedure. Such errors are without prejudice.

(Syllabus by the Court.)

Appeal from district court, La Moure county; Roderick Rose, Judge.

Action on a bond by the Prairie School Township against William Haseleu, August Beckman, and Stephen Kohan. Defendants had judgment, and plaintiff appeals. Affirmed.

George W. Newton, for appellant. L. C. Harris and E. W. Camp, for respondents.

WAILIN, J. This action is brought to recover damages for an alleged breach of the condition of an official bond given by an ex-treasurer of the plaintiff. All of the defendants executed the official bond; the defendant William Haseleu, the ex-treasurer, signing as principal, and defendants Beckman and Kohan signing as sureties. The allegations contained in the first six paragraphs of the complaint, and which are expressly admitted to be true by the defendants' answer, are, in substance, as follows: That plaintiff was at the time in question, and is, a duly-organized school township of La Moure county; that defendant Haseleu, after being elected, qualified for the office of

treasurer of said school township in July, 1883, by taking the required official oath and giving said official bond; that Haseleu entered upon the duties of his office, and was treasurer of the plaintiff at the time the school bonds hereafter referred to were voted, executed, and delivered; that at a meeting of the school township held in September, 1883, it was decided by a majority of the electors that said school township should, for the purpose of building a schoolhouse, issue two bonds of \$500 each, bearing 7 per cent. interest; that thereafter, and on the 28th day of September, 1883, the school board of said school township, (which board was wholly composed of the three defendants,) in pursuance of the vote caused to be executed and did execute and did issue two separate school bonds of said school township, each of said bonds being for the sum of \$500, and bearing 7 per cent. interest per annum. Paragraphs 7, 8, 9, 10, and 11 of the complaint are as follows: "(7) That both of such school bonds, each being for the sum of five hundred dollars, and of the value of five hundred dollars each, were placed in the hands and custody of William Haseleu, the treasurer of said school township, for the purpose of negotiation and sale, and that said William Haseleu did negotiate and make sale of said two school township bonds with one C. T. Ingersoll for the whole sum of nine hundred and fifty dollars cash. (8) That on the 24th day of June, 1884, the term of said office of said William Haseleu expired as treasurer of said school township, and one Lewis M. Olson immediately succeeded him, the said William Haseleu, as treasurer of such school township, and received from his predecessor, the said William Haseleu, the books and papers belonging to his said office; but that the said William Haseleu neglected and refused to turn over to him, the said Lewis M. Olson, and to deliver up to him, the two school bonds heretofore described, or to turn over and deliver up to him, the said Lewis M. Olson, the moneys or which said described school bonds were sold, and neglected and refused to account for said bonds or their proceeds, or any part hereof, except the sum of fifty dollars. (9) That the said Lewis M. Olson, the school township treasurer who immediately succeeded the said William Haseleu as treasurer, repeatedly demanded of the said William Haseleu the above-described school township bonds, or their value, less the fifty dollars accounted for by the said William Haseleu, but that the said William Haseleu has all the time refused to turn over to him, the said Lewis M. Olson, the said school township bonds, or their value, and has refused in every way to account for their value or for the said bonds, except as herein stated, and still refuses and neglects to account for them or for their value, or any part thereof, except the fifty dollars herein mentioned. (10) That the said Lewis

M. Olson was treasurer of said school township for the five years next succeeding his first taking possession of such office on the 27th day of June, 1884, and that he was succeeded in said office by Gustave Papenfuss, who is now the duly elected and qualified treasurer of said school township. (11) That by reason and means of the facts herein stated the said William Haseleu and his co-defendants are indebted to the plaintiff herein, the said Prairie school township, in the sum of nine hundred dollars, and interest thereon from the 27th day of June, 1884, at the rate of seven per cent. per annum, for which amount and costs of this action plaintiff asks judgment against said defendants."

For answer to the complaint defendants say: "(1) That they admit all the allegations contained in paragraphs numbered 1, 2, 3, 4, 5, 6, and 10 of plaintiff's complaint. (2) That they deny that the school bonds described in paragraph 8 of plaintiff's complaint were ever placed in the hands of the defendant William Haseleu, treasurer, as alleged; and further deny that the said bonds were sold by the said William Haseleu, treasurer, to one C. T. Ingersoll, for the sum of nine hundred and fifty dollars cash, as alleged; and further deny that said bonds were ever sold or negotiated at any time or place by the said William Haseleu, treasurer, for the sum alleged in paragraph 8, or for any other sum whatever. (3) That they specifically deny all the allegations contained in paragraph 9 of plaintiff's complaint, except as to the date on which defendant's (William Haseleu's) term as treasurer expired, and the name of the person succeeding him as such school treasurer. (4) That they specifically deny each and all of the allegations contained in paragraph 11 of plaintiff's complaint. (5) That they deny that they are indebted to the plaintiff in the sum of nine hundred and fifty dollars and interest, as alleged in paragraph 11 of complaint, or that they are indebted to plaintiff in any sum whatever. (6) The defendants, for further answer and defense to plaintiff's complaint, say that the cause of action therein stated did not accrue at any time within six years next before the commencement of plaintiff's action thereon. Wherefore defendants demand judgment for costs."

There was a jury trial, and the verdict and judgment were for the defendants. The proceedings had at the trial, embracing the evidence and rulings thereon and the instructions given to the jury, were brought up on the record. A motion for a new trial was denied. Plaintiff assigns error in this court upon certain rulings of the trial court made upon the admission of evidence, and upon certain instructions of the court given to the jury; but, in the view which we have taken of the whole case as presented by the record, we deem it unnecessary to specifically pass upon plaintiff's assignments of error. If the

district court did err in its rulings and instructions which are assigned as error the result would not be different, as we have concluded, upon the conceded facts and undisputed and competent evidence in the record, that the plaintiff cannot recover in this action, and hence that the judgment must be affirmed.

Paragraph 6 of the complaint, the averments in which are expressly admitted in the answer, alleges, in substance, that the defendants at the time in question constituted plaintiff's school board; and that the defendants, acting as a board, executed and issued two \$500 7 per cent. bonds, pursuant to a vote of the electors directing such bonds to issue for the purpose of building a school-house. The execution and issuing of the bonds by the school board being admitted, it becomes of importance to inquire when, where, and to whom such bonds were issued and delivered by the school board. Upon this vital feature of the case issue is squarely joined. The complaint (paragraph 7, *supra*) alleges in substance that "both of such school bonds were placed in the hands and custody of William Haseleu, the treasurer of said school township, for the purpose of negotiation and sale; and that said William Haseleu did negotiate and make sale of said two school township bonds with one C. T. Ingersoll for the whole sum of nine hundred and fifty dollars." It is admitted that Haseleu, upon demand therefor, has neglected and refused to turn over the bonds or their proceeds to his successor in office, and has wholly failed to account for either the bonds or their proceeds, except for the sum of fifty dollars, which was paid over to the treasurer when the bonds were issued, and has been properly accounted for; and also for a certain bill of lumber to the amount of \$216, which has been received by the plaintiff on account of the two bonds, and which has been accounted for to the plaintiff. The failure to turn over the bonds or their proceeds, except as above stated, constitutes the alleged breach of the condition of the official bond upon which the plaintiff bases its rights of action.

At the trial the plaintiff rested its case upon the admissions made in defendants' answer, and upon the testimony, oral and written, set out hereafter. Lewis M. Olson testified substantially as follows: "My name is Lewis M. Olson. Am a farmer. Was treasurer of Prairie school township at one time. Know the defendant William Haseleu. I became treasurer June 27, 1884. I succeeded Mr. Haseleu, the defendant in this case. Mr. Haseleu did not turn over to me the bonds of Prairie school township of \$500. He turned over a receipt. He never turned over any money as realized from such bonds. [Paper shown witness.] That is the receipt and paper. I received that paper from the defendant Mr. Haseleu." The paper was put in evidence, and is as follows: "\$1,000.

Grand Rapids, Dakota, Sept. 28th, 1883. Received of William Haseleu, Treas. Prairie School Township, one thousand dollars in bonds of Prairie Tp., La Moure Co., D. T., for placing and cr. A. H. Huelster, Cash. Bank of Grand Rapids." Olson further testified: "I was treasurer of the township for some years. As treasurer I have knowledge of the payment of interest on the bonds of \$500 each issued September 28, 1883. I paid coupons every year for two terms while I was treasurer. Am not a member of the school board. These bonds are now outstanding." George R. Frallick testified in substance that he was county auditor of La Moure county. He produced a record showing that the two \$500 bonds were registered on September 28, 1883, and were issued by plaintiff, and made payable to one C. T. Ingersoll. Another witness testified that the bonds were worth \$950 when Haseleu went out of office on September 24, 1884. Plaintiff here rested its case.

The defendants introduced Haseleu as their only witness. He testified as follows: "Reside in Prairie township, La Moure county, N. D., since 1882. Am one of the defendants in this action. I was treasurer of Prairie school township in 1883. I knew of certain bonds of \$500 each having been issued in the month of September, 1883, by Prairie school township. I knew Mr. Beckman procured the blanks for the issuance of these bonds. He was clerk of Prairie school township. The bonds which are in question in this action were filled out at Mr. Whitman's office, at Grand Rapids, in this county. I was in town that day. The way I happened to be there that day was Mr. Beckman came to me, and said he was going to Grand Rapids, and he had some business there; no other party. He told me he was going to prepare these bonds, and asked me to come along with him. Mr. Stephen Kohan went with us that day. He was director of Prairie school township. I did go in there when the bonds were filled out. I did not sign them. These identical bonds were taken in hand by a party I do not know. After these bonds were filled out, Mr. Beckman, Mr. Kohan, and I went with them to the Rapids Bank, and they were handed right over, after we went into the bank, to Mr. Huelster. He was cashier of the bank at that time. There was no conversation at that time,—not as to how much should be received for them. Mr. Ingersoll was not there. I did not, before these bonds were issued, ever make any negotiations with any parties whatever—Mr. Ingersoll or anybody else—for the sale of these bonds. I never saw Mr. Ingersoll. I never made any attempt to sell these bonds to any one. By the Court: Did you have these bonds in your hands? Answer. I did not. No, sir. It was so long ago I couldn't tell. They were carried in by all three of us. Question. Did you never have any conversation previous to the

time of your going in, either with Mr. Ingersoll or the cashier of the bank, Mr. Huelster? A. Before these bonds were sold or left there? Q. Yes. A. I did not. I never saw Mr. Ingersoll. I did not talk with Mr. Huelster. I had nothing to do with these bonds. Q. Did Mr. Beckman tell you before the bonds were sold that he had agreed to sell these bonds to Mr. Ingersoll for 95 cents on the dollar? (Plaintiff's counsel objects to the question on the grounds that it is hearsay and incompetent. Objection overruled, to which ruling the plaintiff, by his counsel, duly excepted.) A. He did. Mr. Beckman did the bargaining. Mr. Beckman took full charge and control of procuring all the blanks and negotiating the sale of these bonds. Q. You may state whether or not Mr. Beckman made any statement to you in regard to the fact as to whether Mr. C. T. Ingersoll was to purchase these bonds or simply negotiate for the township. (The plaintiff's counsel objected to the question on the ground that it is incompetent and immaterial and hearsay. The court overruled this objection, to which ruling the plaintiff, by its counsel, duly excepted.) A. He was going to sell them for the district. Q. Did Mr. Beckman ever tell you that? A. He did. Since these bonds were placed there I have been there once a week, to see if the funds for them had been returned; and until I got a little money from him, and an order for the material to build the schoolhouse, no money was received from the bank. At the time the bonds were left there by the board I communicated my inability to collect the proceeds of these bonds to the other members of the board after my trips to Grand Rapids and attempts to collect. Talked with Beckman from time to time about it. We talked about it sometimes twice a week. The order for material that Mr. Ingersoll gave was taken to the lumber yard and figured out. Mr. Beckman took it there. I went along. We both went together. He was the clerk. The amount received by the township on that order was \$216. By the Court: Who took this order to the lumber yard? A. I and Mr. Beckman. We both took it. Do not know who it was given to. They delivered the lumber to Mr. Beckman, and the farmers went together and hauled it out. After these bonds were issued, did not give any additional bond to cover the amount to be received from their proceeds. Only gave one bond as treasurer. Cross-examination by Mr. Gaspell: This order was given at Grand Rapids, in the bank. Mr. Huelster wrote it. I and Mr. Beckman and Mr. Kohan were present. I went along with the board that day. The order was delivered to me, Mr. Haselau. The order was delivered to Mr. Haselau for material to build the schoolhouse. I made an entry on my books as treasurer for this \$216. Don't believe I wrote it in the books. I was in the bank when these bonds were delivered. They

were delivered to Mr. Huelster. Mr. Kohan, Mr. Beckman, and Huelster were present. Mr. Huelster gave me that receipt, Exhibit A. The board ordered him to. I didn't ask for any. The board ordered it. I was present at the time, and the members of the school board. The treasurer was a member of the school board at that time. I was present when the receipt was made out in my name. It was not made out in the name of the three members of the school board, because I was put there to collect the money. It was understood and agreed that I was to collect the money, and the board ordered me to collect the money after the bonds were left there. Don't know who carried the bonds over there. I didn't have them in my pocket. I can't tell you if it was possible that I had them. I did see these bonds. I was out and in when they were signed. There were two bonds. They were signed in Mr. Whitman's office. Did not put them in my pocket when we started over to the bank. Mr. Whitman did not go over to the bank with us. I attended the meeting when the proposition was indorsed for the issuance of these bonds for this school township. Do not know when it was. First was in June, 1883. Was at the meeting when the proposition was passed to issue these bonds. Told at the meeting that Mr. Beckman had been talking with Mr. Ingersoll, and the bonds would bring 95 cents, and would rather issue bonds than orders. Mr. Beckman was present, and talked also. Told them the same thing. We all wanted the bonds issued. I did explain the matter of issuing bonds at that meeting. My reason for wanting to issue the bonds was that it was pretty hard to get money for orders here at that time. Mr. Beckman told me that money could be realized on bonds. All I stated was what Mr. Beckman told me. Don't know as I gave Mr. Beckman as my authority at that meeting." Defendant rests. Gustave Papenfuss recalled on behalf of the plaintiff: "I was present at the school meeting in Prairie school township when the proposition of issuing the bonds in question in this suit was brought up. Mr. Haselau was present. He stated about issuing bonds. He just spoke like this: 'We have spoken to Mr. Ingersoll, and we can get 95 cents, and it is a better way to issue bonds.' Cross-examination: He said, 'We.'"

We think there is no substantial conflict in the evidence upon any feature of the case which is at all material. The facts may be condensed as follows: After the bonds were voted, the school board, consisting wholly of the defendants, caused the bonds to be filled out in favor of C. T. Ingersoll; and after they were properly registered the bonds were conveyed to the bank of Grand Rapids,—all of the defendants going to the bank together,—and the bonds were then and there delivered to the cashier of the bank, who gave to Haselau the receipt above set out. On the

occasion of the delivery of the bonds to the bank no conversation whatever was had between the cashier and the defendants, or either of them, as to what disposition should be made of the bonds; and it distinctly appears by the undisputed evidence that defendant Haseleu had never at any previous time seen Ingersoll, or had at any time sold or attempted to sell or negotiate a sale of the bonds. It appears by evidence offered on both sides that previous to the voting of the bonds some arrangement had been made with Ingersoll whereby the bonds were to be so disposed of that they should yield \$950 net to the school township. The details of such arrangement do not appear in evidence, but all the circumstances of the transaction demonstrate the fact that the bonds were delivered to the cashier of the bank pursuant to such previous arrangement. There were two acts done by the cashier which can only be explained upon the theory of a pre-existing understanding, viz. the payment of \$50, which was made at the time to Haseleu, and which money is accounted for, and the execution of the receipt which was delivered to Haseleu. These two acts of the cashier were not the result of any talk had at the time, and they are of a nature to show that an arrangement had previously been made, and one which was understood and assented to by the defendants. The terms of the writing show that the bonds were to be "placed." This expression is one that is well understood by bankers and business men generally, and it means that the bonds were to be sold. The circumstances preclude the idea that the sale of the bonds was to be wholly consummated, and the money paid over then and there, at the bank. The evidence shows that all of the defendants understood that the treasurer should collect the money when it was obtained out of the proceeds of a sale, which sale was not to be fully consummated at the bank at the time when the bonds were delivered. The understanding of all members of the board to the effect that Haseleu was to collect and receive the money derived from the sale of the bonds was natural and in entire consonance with the duties which the law imposes upon a school township treasurer. Hence it was quite proper that the receipt for the bonds should be made out to Haseleu. The law expressly states: "All money received from the sale of the bonds shall be paid to the treasurer of the school township." Section 2, c. 45, Laws 1883. The very terms of this statute import that when a school township sells its bonds the proceeds of such sale are to be paid over by those who make the sale to the treasurer. No such provision would be necessary if the treasurer, as such, was, under the law, empowered and required to negotiate a sale. Section 1 of chapter 45 authorizes a school township to issue and sell its bonds for the purposes stated, and within the limitations of the statute. A school township is a municipal

corporation for school purposes, and can only act through its officers. When the bonds have been voted the authority of the electors over the subject-matter is exhausted. The voters direct the issue and sale of certain bonds, but they cannot either issue or sell the bonds. This duty, in the absence of specific provisions to the contrary, devolves upon the governing officials of the corporation, viz. the school board. Section 1, c. 45, Laws 1883, provides that "the bond and each coupon shall be signed by the clerk of the school township, and countersigned by the director." Nor is there any provision which authorizes the treasurer to either issue, sign, or countersign the bond; nor is the treasurer, as such, authorized by law to sell or negotiate a sale of a school bond. Plaintiff assumes correctly that the duty of executing and issuing school bonds is devolved by law upon the school board, and plaintiff expressly charges in paragraph 6 of the complaint that the school board "did execute and did issue" the bonds. The truth of this averment is expressly admitted by the answer, and the testimony shows in detail how and in what way the bonds were "executed and issued." They were signed and countersigned by the clerk and director, and, after being registered, were delivered to the cashier of the bank by the board, pursuant to some pre-existing arrangement, the terms of which are not fully disclosed by the evidence, but were obviously known to the board, and concurred in by all the members of the board. This delivery of the bonds to the cashier of the bank is and constitutes the issue of the bonds, which the complaint alleges was an act of the board. No other issue—no other delivery of the bonds—appears to have been made. The plaintiff has signally failed to offer any evidence tending to support the essential averment set out in the seventh paragraph of its complaint as follows: "That both of such school bonds * * * were placed in the hands and custody of William Haseleu, the treasurer of such school township, for the purpose of negotiation and sale; and that said William Haseleu did negotiate and make sale of said two school township bonds with one C. T. Ingersoll for the whole sum of nine hundred and fifty dollars cash." Not only is there an entire failure to support this averment by proof, but the undisputed evidence negatives its truth, and shows beyond the possibility of a doubt that the bonds were never placed in William Haseleu's hands for sale, or negotiation for sale, or for any purpose. The fact is made perfectly clear by the undisputed testimony that Haseleu never sold the bonds, and never negotiated with Ingersoll for their sale, either as treasurer, or in his private capacity, or at all. On the other hand, the evidence leaves no room for doubt that the board, acting in concert and collectively, "did execute and did issue" the bonds as alleged in the 6th paragraph of the complaint. Not only did the board "execute and issue" the

bonds, but it also delivered the bonds to the cashier, and no other delivery appears ever to have been made. Counsel for appellant points to the terms of the writing signed by the cashier and delivered to Haseleu at the time the bonds were handed to the cashier. It reads, "Received of William Haseleu, Treas." etc., and counsel's contention is that the writing shows on its face that the treasurer delivered the bonds to the cashier, and that the writing is the best evidence of the transaction, and excludes any parol evidence which contradicts or varies the terms of the writing. It is true that the terms of the writing, when unexplained, are such as to indicate that the treasurer did deliver the bonds to the cashier; but, as has been seen, the writing was executed in a transaction had between the school board and the cashier of the bank, and the treasurer, as such, was not a party to it. In such a case the rule excluding parol evidence does not apply. 7 Amer. & Eng. Enc. Law, p. 95. If the instrument can properly be classed as a receipt, the rule does not apply, and the parol evidence would, in that view, of course, be admissible; but we think the instrument partakes of a dual character, and is in part a receipt and in part a contract. In such instruments the rule is that the part which is a receipt may be explained or varied by parol. *Morris v. Railroad Co.*, 21 Minn. 91; *Burke v. Ray*, 40 Minn. 34, 41 N. W. Rep. 240. We think the writing is clearly a mere receipt, except as to that part in which it is stated that the bonds were received "for placing and credit." Hence the evidence outside the writing was proper to show the circumstances and the relation of the parties to the transaction in which the writing was made.

Upon the facts thus appearing the question arises whether the treasurer and his official sureties, in an action for a breach of the condition of the treasurer's official bond, can be made responsible for the loss of the bonds or their proceeds, when such loss was wholly the result of the action of the school board. This question must be answered in the negative. Neither the treasurer nor his official bondsmen should be held responsible for the conduct of other officers over whom the treasurer, as such, has no control. The law and the official bond constitutes the sole measure of the treasurer's liability. Section 35, c. 44, Laws 1883, says: "The treasurer of every school township shall, before entering upon duty as such, give bond to such corporation, conditioned that he will faithfully and impartially discharge the duties of his office, (naming it fully,) and render a true account of all moneys, credits, accounts, and property of every kind that shall come into his hands as such treasurer, and pay and deliver the same according to law." The condition of the bond in suit substantially embodies this statute, and the bond and statute furnish the full measure of the treasurer's liability. The statute requires the treasurer

to render a true account of money and property which shall come into his hands as treasurer. It requires no more than this. It appears in this case that the treasurer has fully accounted for whatever property and money has been placed in his hands as proceeds of the bonds in question, and also appears that the bonds themselves never came into his hands or custody as treasurer or otherwise. Never having come into his hands, the treasurer, as such, never became liable to account for or turn over the bonds.

While the language of an official bond should, under the established modern doctrine, receive a fair and reasonable interpretation, its obligation is nevertheless strictissimi juris. The obligors consent to be bound to a certain extent only, and their obligation ought not to be expanded by judicial construction beyond the fair terms of their consent. The liability of sureties extends to the official acts of the principal, and only to such acts. For acts done outside of official duty an officer may incur personal liability, but for such acts sureties are not responsible. These views have the amplest support in the authorities. *U. S. v. Boyd*, 15 Pet. 187; *Bank v. Ziegler*, 49 Mich. 157, 13 N. W. Rep. 496; *Taylor v. Parker*, 43 Wis. 78; *State v. Conover*, 78 Amer. Dec. 54; *Gerber v. Ackley*, 37 Wis. 43; *Murfree, Off. Bonds*, §§ 461, 462; *Mechem, Pub. Off.* §§ 282, 283.

Appellant's counsel argues that it was the duty of the treasurer to object to the delivery of the bonds to the cashier of the bank, and that his silence constitutes negligence which renders him and his official sureties liable on his bond. This theory is untenable under the issues made by the pleadings. The action arises wholly upon contract, and there are no averments in the complaint sounding in tort. The complaint counts on an alleged breach of the condition in the bond for not accounting for certain bonds which it is alleged were delivered to the treasurer. Upon the issues made no question can arise as to whether the board or its members exercised due care in issuing the school bonds. We find, after a very careful consideration of the whole record, that the verdict and judgment are in accordance with law and the testimony, and therefore should be affirmed. The court will so order.

CORLISS, J., concurs. BARTHOLOMEW, C. J., having been of counsel, took no part in the above decision.

OMAHA & R. V. R. CO. v. COOK.
(Supreme Court of Nebraska. June 30, 1893.)
RAILROAD COMPANIES — INJURIES TO PERSONS ON TRACK — COMPETENCY OF JURORS — DISCRETION OF COURT — QUESTION FOR JURY.

1. In a personal damage case against a railway a juror stated in his examination on his voir dire, in substance, that he had an ele-

vator on the line of railway, and was engaged in the business of buying and shipping grain over the railroad; that he had received favors from the railway company, and desired to retain the favorable consideration of the company; that he had no personal feeling in the matter, and could render a fair and impartial verdict. *Held*, that a challenge for cause was properly sustained; that a fair trial can only be had where the jurors are absolutely free, impartial, and independent.

2. Where the examination of a juror raises a doubt as to his being an elector of the county where the action is brought, there is no error in sustaining a challenge for cause.

3. Even where, by his formal answers, the juror brings himself within the letter of the statutory qualification, if the court should discover the least symptom of unfairness or prejudice, he should be rejected. So that a fair and impartial jury is secured, error cannot be predicated on the rejection of persons who may have been qualified. Some discretion must be allowed to the trial court in the selection of jurors.

4. Evidence, being conflicting, was fairly submitted to the jury.

(Syllabus by the Court.)

Error to district court, Howard county; Harrison, Judge.

Action for personal injuries by Mary Cook against the Omaha & Republican Valley Railroad Company. Plaintiff had judgment, and defendant brings error. Affirmed.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error. A. A. Kendall, for defendant in error.

MAXWELL, C. J. The amended petition of the plaintiff below, after stating the corporate existence of the defendant company, and the operation of its road, running northwesterly through the counties of Hall, Howard, Greeley, and Valley, to Ord, Neb., avers, in substance, that on the 8th of September, 1884, the plaintiff, "being then a child of the age of thirteen years, while walking upon the track of the said railroad company, in the county of Greeley, in said state, was run into and against and violently struck and thrown from the track of the said railroad company by a locomotive attached to a passenger train then in use upon the said track of the said railroad company; that by reason of being struck and thrown from said track by the said locomotive this plaintiff was frightfully mangled, and permanently injured; that this plaintiff's right leg and hip were broken, and the plaintiff's left foot was terribly mangled and crushed and bruised, and the flesh torn therefrom, and the heel severed from the said foot, and the use of said foot was thereby permanently injured and destroyed, and plaintiff has suffered, and still suffers, greatly with bodily pain by reason of said injury, and that the injury to the said foot was so great that said foot has never become healed up, and still remains an open sore; that said foot is of an ill shape in consequence thereof, and plaintiff is unable to wear a shoe upon it owing to its ill shape, and its unhealed condition; that plaintiff, in consequence, is unable to stand or walk upon

said foot, and is unable to work and maintain herself in any way, and has, in consequence of said injury, become a helpless cripple for life." The petition further alleges "that plaintiff was struck and run against by said locomotive through the gross neglect and carelessness of the said Omaha & Republican Valley Railroad Company, said neglect and carelessness being in not providing its locomotive and cars thereto attached with the latest improved and best appliances for the operating, controlling, and stopping of said locomotive and train of cars, and through the gross negligence and carelessness of its agents, employees, and servants in charge of the said train, and not through any act of carelessness on the part of this plaintiff." It also avers "that said locomotive and train of cars attached thereto were not supplied with air brakes, they being the latest improved and best appliances then in use upon all carefully equipped trains for speedily controlling and stopping them. That said locomotive and cars thereto attached were running off from the schedule time stated by said railroad company, a fact at that time unknown to plaintiff. That they were running at a greater rate of speed than allowed by the rules of said company, to wit, at a rate of 40 miles an hour; that the defendant's operators, agents, and servants in charge of said train of cars carelessly neglected to sound the whistle and ring the bell of the said locomotive to apprise the plaintiff of its approach, although they were able to see the plaintiff more than 70 rods in front of the said locomotive and train; and they carelessly and negligently failed to slacken or stop the said locomotive and train of cars, although the said agents, servants, operators, and engineer in charge thereof had ample opportunity to stop said train of cars before injuring the plaintiff had said train of cars been properly supplied with air brakes, and had said operators, agents, servants, and engineer applied all means within their power to stop said locomotive and train after discovering the perilous situation of the plaintiff." And the petition alleges "that by reason of the carelessness and negligence of the said Omaha & Republican Valley Railroad Company, as above set forth, and the gross negligence of its agents, employees, operators, and engineer, as above set forth, and the injury sustained by this plaintiff in consequence thereof, this plaintiff has been damaged and injured in the sum of \$25,000, no part of which has been paid by the said Omaha & Republican Valley Railroad Company nor by any other person or corporation. Wherefore plaintiff prays judgment against it for the sum of \$25,000, with interest thereon from the 8th day of September, 1884, and for the costs of this action."

To this petition the railway company filed an answer: "The above-named defendant, for answer to the plaintiff's amended petition herein, admits all and singular the alle-

gations contained in the first paragraph of said petition, and that it is successor to the Omaha & Republican Valley Railroad Company, as averred in said petition. Defendant admits and alleges that on the 8th day of September, 1884, while plaintiff was walking on the track on defendant's ground in the county and state therein stated, she was run against and struck by defendant's locomotive attached to one of its passenger trains, and thrown from the track, but alleges that the same was unavoidable by defendant, its agents or employees, and without fault of defendant, its agents or employees. Defendant avers that the said plaintiff, at the time aforesaid, was, wholly without authority or license, walking without any precaution between the rails of the defendant's track, and was a trespasser thereon. Defendant has no knowledge or information, except from the statements of the plaintiff's petition and statements given above on the part of the defendant in the trial of the said action, as to the plaintiff's age at the time of the accident, and leaves the plaintiff to make her proofs as she may be advised are material. Further answering, defendant admits that the plaintiff was injured at the time aforesaid at the time of said collision, but as to the extent of said injuries the defendant has no knowledge or information except from averments of the said petition and the testimony given on the part of the defendant on said trial; and it leaves the plaintiff to make her proof thereof as she may be advised is material. The defendant alleges that whatever injuries, if any, which the plaintiff so then and there sustained at the time of said collision, the said injuries were by said plaintiff received and sustained by and through her own fault, carelessness, and negligence contributing thereto, and in no respect by or through any fault, wrong, or negligence of the said defendant, its employees, agents, servants, operators, or engineers. The defendant denies each and every other allegation of the said petition not herein answered or denied."

On the trial of the cause the jury made special findings, and returned a general verdict as follows: "You will, in addition to your general verdict, return answers to each of the following questions: Question. Was the plaintiff, at the time of the injury, of the age of 18½ years? Answer. Yes. Q. Was she then apparently a girl of ordinary discretion? A. Yes. Q. Was she then at that time deaf to any considerable extent? A. No. Q. Had she, just before the happening of the accident, left her brother's house, to return to her father? A. Yes. Q. If you answer the last question in the affirmative, then did she voluntarily and for her own convenience go upon the defendant's premises and right of way? A. Yes. Q. Was the plaintiff then and there trespassing upon the defendant's premises,—that is, was she there without right or authority? A. Yes. Q. Was she

at the same time walking in the same direction the train was going? A. Yes. Q. Was she then between the rails or outside of them? A. Yes, between the rails. Q. Did she step from the outside of the rails into the space between them after the engineer saw her? A. No. Q. Was she walking between the rails when the engine struck her? A. Yes, in the act of jumping. Q. Was the engine whistle sounded more than once before she was struck? A. No. Q. Did the engineer cause the whistle to be sounded as the train approached the plaintiff? A. Yes. Q. Did the trainmen, in response to the danger whistle, promptly apply the brakes on the train, and use such appliances as they had thereon to stop the train? A. Yes. Q. Could the defendant's agents, by the appliances then at their command, after it became apparent that plaintiff was walking between the rails, unaware of the coming of the train, have stopped the train before it reached her? A. Yes. Q. Did the plaintiff, after she went upon defendant's premises, either look or listen to satisfy herself whether or no any train was approaching? A. No." The jury also returned a general verdict for \$11,500, upon which judgment was rendered.

The first error relied upon for a reversal is the exclusion of Mr. Salter from serving on the jury. His examination on his voir dire is as follows: "Question. You have no feeling, in a case of this sort, in favor of or against either party to the suit, have you? Answer. Well, it is certainly to my interests to keep in the favor of the railroad company, for I am an extensive shipper of grain. Q. And you are also interested in buying the grain from the farmer? A. Yes, sir. Q. Taking into consideration all your circumstances, are you in such a position that you could fairly and impartially render a verdict in this case without any feeling or prejudice in one way or the other? A. Yes, sir. Q. Mr. Salter, if you are conscious of anything that would prevent you from sitting fairly and impartially on this case you may state it. A. Well, I have received considerable favors from the railroad. Q. Have you from any one else? A. No, sir. Q. Would these favors in any way affect your verdict? A. No, I think not. At the same time I would prefer to be relieved from service in this case. Q. I presume so. But your situation is such that you could, so far as you know, fairly and impartially render a verdict in this case? A. Yes, sir. Further examination by Mr. Kendall: Q. I believe you stated that you had received some favors from the railroad company? A. Yes, sir. Q. And by reason of receiving these favors you feel somewhat under obligations to the company, do you? A. I do. Q. And that is this same Omaha & Republican Valley R. R. Co.? A. Yes, sir. It is certainly to my interest to stand in well with the railroad company. Q. Think you would have a kind of a feeling that, if all other things were equal, if you

could return the favor, you would like to do it, would you? A. Yes, sir. (Mr. Kendall challenges the juror for cause.) By the Court: Q. That is a general opinion or prejudice that way, is it? Just a general opinion in favor of the company? A. Yes, sir; the same as I would have for any person else that has shown me a favor. That is all. Q. Supposing it to have been a person or a railroad company or what not, that person being a party to a suit such as we have here this morning, would past favors, and any desire that you might have to do them a favor, have any bearing upon your consideration of the evidence in the case? A. No, sir; decidedly no. Q. Would it in any manner influence your verdict for or against either party? A. No, sir. Q. You could enter into it perfectly free from any bias in either direction? A. Yes, sir. Q. Laying that all aside, and trying it entirely upon the evidence and the law? A. Yes, sir." Afterwards, and before the jury was completed, the plaintiff below renewed his challenge to Mr. Salter, and the record shows the following: "Court: Mr. Salter, is there any reason, or are you sensible of any reason, why you should not sit upon this jury? A. I am not, sir. (The court excuses Mr. Salter, and the defendant excepts.) Court: I will allow each of you a peremptory challenge to anyone that may be called in Mr. Salter's stead, and also allow the defendant to withdraw its waiver of the last peremptory challenge."

It is evident that the court erred in overruling the challenge in the first instance, and no doubt, on reflection, became convinced of that fact, and hence sustained the challenge. A fair trial before an impartial jury means one where the jurors are entirely indifferent between the parties. In *Curry v. State*, 4 Neb. 545, it was held that to justify the retention of a juror on the panel he must be entirely indifferent between the parties. It is said: "If he [the juror] express the least doubt of his ability to do so, he should not, in the face of a challenge for cause, be retained; and even where, by his formal answers, the juror brings himself within the letter of the statutory qualification, if the court should discover the least symptom of prejudice or unfairness, or an evident desire to sit in the case, he should, in justice both to the state and the accused, be rejected." This court from the first has held that a juror could accept no favors from either party, as the effect might, and probably would, be to affect his verdict. *Ensign v. Harney*, 15 Neb. 330, 18 N. W. Rep. 73; *Vose v. Muller*, 23 Neb. 171, 36 N. W. Rep. 583; *Johnson v. Greim*, 17 Neb. 447, 23 N. W. Rep. 338. It is very clear that the relations between the railway company and the juror were too intimate to secure impartiality on the part of the juror named, and the court did not err in discharging him.

The juror W. B. Spangler, a former employe of the company, was also excused,

which, it is claimed, is erroneous, and the same is true of the juror Jackson. He testifies: "Question. Mr. Jackson, does your family reside here? Answer. No, sir. Q. Where is your family? A. Grand Island. Q. How long has your family resided in Grand Island? A. Seven or eight years. Eight years, I guess. Q. Then you are over here temporarily, running the hotel, are you? A. Yes, sir. Q. Have you exercised the right of the ballot here? A. No, sir. I do not vote. Q. Where is your voting place. A. Well, I don't know whether I would be a voter here or not. I did not try to vote. Q. You were here for the temporary purpose of conducting the hotel? A. Yes, sir. Q. How long does your lease run for the hotel? A. Until to-morrow night. Q. Where are you going then? A. I haven't hardly made up my mind where I shall go. Q. Return to your family for the present? A. For the present, yes, sir. By Mr. Kelly: Q. Do you consider yourself a resident of this country? A. Well, I don't know whether I would be or not. Q. I am asking you what you consider yourself. A. Why, yes, sir, so long as I stay here, I suppose I am. They came around and assessed me the other day, —personal tax, I suppose they call it." It is very clear that Mr. Jackson was not an elector of Howard county, and therefore the challenge was properly sustained. In addition to this, the excusing of a person called as a juror from serving on the jury where there is any doubt of his fairness or qualifications is not ground of error. *Richards v. State*, (Neb.) 53 N. W. Rep. 1028; *State v. Miller*, 29 Kan. 43; *Maxw. Crim. Prac.* 581. In the case cited from Kansas it is said: "We can hardly see how the court could commit substantial error by discharging any person from the jury, when twelve other good, lawful, and competent men could easily be had to serve on the jury. *Stout v. Hyatt*, 13 Kan. 232; *Railroad Co. v. Franklin*, 23 Kan. 74. There is an immense difference between discharging a juror and retaining him. To discharge him can seldom, if ever, do harm, while to retain him, if his competency is doubtful, may do immense injury to one party or the other." There was no error, therefore, in discharging these jurors, as there is no complaint that a fair jury was not obtained.

There is no objection made to the instructions, so that the only remaining question is in regard to the evidence. There is testimony in the record that the engineer and fireman saw the plaintiff below on the track for at least 70 rods; that she was walking in the same direction that the train was going. There is also testimony that tends to show that her mind seemed to be absorbed; that the whistle was not sounded until within about a car's length, when the plaintiff below attempted to get off the track, but was caught while attempting to do so, and sustained the injuries in question

There is also testimony that, had the whistle been blown at the proper time, to enable her to be apprised of the danger, she could, and in all probability would, have left the track, and the accident been avoided. In effect, the issue is that, although the plaintiff below was a trespasser on the railway track, still the employees of the company could not inflict the injuries charged upon her if by the exercise of ordinary care they would have been prevented. 2 Thomp. Neg. 1157; *Barker v. Savage*, 45 N. Y. 191, 194; *Brown v. Lynn*, 81 Pa. St. 510; *Railroad Co. v. Price*, 29 Md. 420; *Locke v. Railroad Co.*, 15 Minn. 350, (Gil. 283); *Nelson v. Railroad Co.*, 68 Mo. 593; *O'Keefe v. Railroad Co.*, 32 Iowa, 467; *Morris v. Railroad Co.*, 45 Iowa, 29. Compare *Lannen v. Gaslight Co.*, 44 N. Y. 459, affirming 46 Barb. 264. The rule is very clearly stated by Judge Thompson in his valuable work on Negligence, (pages 1105, 1157.) In *McKean v. Railway Co.*, 55 Iowa, 192, 7 N. W. Rep. 505, it is said the rule is required by humanity and reason, citing *Morris v. Railroad Co.*, 45 Iowa, 29. To the same effect, *Brown v. Railroad Co.*, 50 Mo. 461; *Railway Co. v. Doolittle*, 7 Neb. 481; *Burnett v. Railroad Co.*, 16 Neb. 332, 20 N. W. Rep. 280; *Cook v. Pickrel*, 20 Neb. 433, 30 N. W. Rep. 421; *Railway Co. v. Sue*, 25 Neb. 772, 41 N. W. Rep. 801. Even if it be conceded that the plaintiff below was unlawfully on the track, and did not look back to see if a train was approaching, still there is testimony in the record from which the jury would be warranted in finding that, after the engineer became aware of the perilous condition of the plaintiff below, he could, by the exercise of ordinary care, have stopped the engine. This was proper to submit to the jury, and, as it was fairly submitted, there is no valid ground on which to set the verdict aside. The judgment therefore is affirmed. The other judges concur.

PICKENS v. PLATTSMOUTH INVESTMENT CO. et al.

(Supreme Court of Nebraska. June 29, 1893.)

MECHANIC'S LIEN—RIGHTS OF VENDOR—PRIORITY.

1. The vendor in an executory contract for the sale of land will subject his rights in the property to be conveyed to a mechanic's lien by directly, though in conjunction with the vendee, contracting for those improvements for the construction of which such mechanic's lien is sought to be enforced.

2. If a vendee, in possession of real property by virtue of an executory contract for the purchase of the same, erects improvements thereon, the rights of the vendor in said property are not thereby, of necessity, postponed to the lien of the mechanic or material man under the mechanic's lien law. Such postponement can only be predicated upon a contract of the mechanic or material man with the vendor directly, or through his agent, and such essential contract must be proved as must any other necessary proposition of fact.

(Syllabus by the Court.)

Commissioners' decision.

Petition for rehearing.

For prior report, see 31 Neb. 585, 48 N. W. Rep. 473.

O. H. Ballou and Wm. L. Browne, for appellants. J. B. Strode and Matthew Gering, for appellee.

RYAN, C. This appeal has already received the consideration of this court, as will appear by a reference to 31 Neb. 585, 48 N. W. Rep. 473, where will be found the opinion of Cobb, J., reversing the decree of the district court of Cass county. A rehearing having been granted, it is necessary that the decree appealed from be examined anew in the light of the evidence upon which the cause was originally heard. In the transactions to be considered, there are two corporations codefendants, the names of which are so similar that without great care one is liable to be mistaken for the other. One of these corporations was the Plattsouth Land & Improvement Company, the other was the Plattsouth Investment Company. The liability to confusion in the use of these designations is well illustrated in the opinion above referred to, as reported in 31 Neb. 585, for there this case is entitled "William H. Pickens vs. Plattsouth Land & Investment Company et al." (Pickens v. Plattsouth Investment Co., 48 N. W. Rep. 473.) That these appellant corporations may not be confounded, more than usual care is necessary in stating the facts. The Plattsouth Land & Improvement Company originally owned the land upon which was built the Park House, for the erection of which the enforcement of a mechanic's lien was had in this case. Before any steps were taken for the construction of this building, the Plattsouth Land & Improvement Company made an executory contract with the Plattsouth Investment Company to convey to it the real property upon which was erected the Park House. The terms of this contract have not been put in evidence. Indeed, from the testimony it is somewhat doubtful whether this contract was oral or written. In the former opinion it was described as a "parol contract," which designation we are inclined to regard as a misnomer, for the following reasons: It is nowhere so spoken of by any witness. The only mention of it, and of the status of matters under it, is found in the record in the following language of Dr. Hertzman, whose relation to such company will hereafter appear. He testified as follows: "Question. The Plattsouth Land & Improvement Company sold a portion of this ground out there, known as the 'Livingston Heights,' to the Plattsouth Land & Investment Company? Answer. No, sir; the Plattsouth Investment Company had a contract. Q. When was that done? A. I could not tell you without referring to the contract. Q. Do you remember about the date? A. No,

sir; I don't. Q. Was that done prior to the time of the building of the Park House? A. Yes, sir. Q. How long prior? A. As far as dates are concerned, I could not give it to you exactly, but it seems to me it was some little while previous to that time. The contract will, of course, show, but I don't remember the dates. * * * Q. They [the investment company] have no interest in the real estate at present? A. Nothing; only that they hold a contract, and the payment they made, they have an equity in it. Q. Do you know what interest they have in it? A. I could not say at present. I know—I could not tell you at present. It would be impossible. If you will allow me, I can explain, possibly, so you can understand it. The fact of the matter is, they have no interest in it. Q. The improvements done by the investment company were done with the knowledge and consent of the improvement company? A. No, sir; they had nothing whatever to do with it. Q. Did they know of it? A. I suppose they knew we had bought the ground of them by contract. I expect they knew we were trying to boom the property, and they knew we were going to build. Q. Have their interests in this contract ever been closed out in any way,—the improvement company's interest under the contract? A. No, sir. Q. It just stands under contract still? A. Yes, sir. Q. You do not know how much the Plattsmouth Investment Company paid under that contract? A. I could not say exactly; no, sir. Q. Was the contract made a matter of record between the Plattsmouth Investment Company and the Plattsmouth Improvement Company? A. Yes, sir. Yes, sir; and it is in the record in the office of the company. Of course, we can record a contract, as I understand it, without being acknowledged. Q. I mean of record in the county clerk's office? A. No, sir. Question by the Court: Do you know about how much they paid the investment [improvement?] company on that contract? A. It seems to me it is in the neighborhood of \$1,100. I don't know exactly. The company has never paid any interest to the Plattsmouth Land & Improvement Company. They have never been able to, because the stockholders refused to pay. Q. What was the contract price? A. I don't know that without referring to the contract." From this testimony it seems established that, at the time when the contract was made to build the Park House, the Plattsmouth Investment Company held a written executory contract for the purchase of the real property upon which the Park House was to be built; that it had possession and control of said real property, and has paid on its purchase price about the sum of \$1,100; though at what date is entirely left to conjecture. It seems probable, also, that the Plattsmouth Land & Improvement Company had knowledge of the design of the investment company to boom the property, and with that view the Park House was to be

built. Whether or not the Plattsmouth Land & Improvement Company was more directly interested than above in the promotion of this enterprise is the question essential to the determination of this appeal. The foregoing evidence of Dr. Hertzman was presented, with a promise to define his relation to the two Plattsmouth companies above referred to, which, as it will now appear, is a matter of some little difficulty. Testifying, he said, in substance, that in July, 1887, he was a stockholder in the Plattsmouth Investment Company; was not a stockholder in the Plattsmouth Land & Improvement Company; was at that time its secretary, and so continues until this day. When shown a letter, (which is not found in the bill of exceptions,) and asked what meeting he referred to in it, Dr. Hertzman said: "I have referred to the meeting of the Plattsmouth Investment Company, of which I was elected secretary after Mr. Gratton resigned; not the Plattsmouth Land & Improvement Company, but the Plattsmouth Investment Company. That is signed by me personally, and not as secretary." When this resignation of Gratton and induction of Dr. Hertzman into the vacant office took place there is no means of determining. It would seem, however, that the doctor was, for a portion of the time covered by the history of this case, secretary of both these Plattsmouth companies, as well as a stockholder in the investment company.

Another personage who conspicuously figures is Dr. Samuel D. Mercer, who, in July, 1887, when the contract was made with Pickens for the erection of the Park House, was president of the Plattsmouth Land & Improvement Company, and was originally its treasurer. The contract which Mr. Pickens entered into for the erection of the Park House was in writing, and in terms was with the Plattsmouth Investment Company. In relation to its inception, Mr. Pickens testified, in substance, that the first notice he had that the building was going up was in the early part of June, 1887, when Dr. Mercer sent for witness, and gave him the plans and specifications for the Park House, to be erected on Livingston Heights. The evidence of this witness continued thus: "Question. Is this property, described and known as 'Livingston Heights,' the property I have read? Answer. That is what he told me,—Livingston Heights or Rural Park. I took the plans and specifications, and looked them over that day, and he asked me if I could not give him a bid on it that day, before I left Omaha; and I said 'No,' that it would require me a couple of days anyhow, and I had some business to do that day, and could not give it my full attention; but I gave him my idea of what I thought would be the actual cost of the Park House. So I brought the plans and specifications with me, and he told me that, as soon as I got my figures ready, to forward them to him, which I done,—my figures for the building of the Park House

on or about July— I don't know the date of that dispatch. I received a telegram from Mr. Hertzman some time in the fore part of July, 1887, to come up and sign contract for Park House. I went up there that evening, and we talked the matter over, and he added some porch,—some extra porch,—on the Park House, which amounted to about \$1,000. Then Mr. Hertzman and me had some talk. He told me that Mr. Gratton and Mr. Helmrod would be down next day to locate the building, and at that time I did not know just exactly who I was contracting with, or anything. I know that Mr. Hertzman was in Dr. Mercer's office all the time. They were in partnership there together, and I supposed it was all the same. Mr. Mercer received my bid, and handed it over to Mr. Hertzman. So the following day those gentlemen came down, and laid out the buildings, and numbered them where the buildings were to stand, and was to let me know the next day by telegram the number of the knolls where to put the buildings. They numbered them when they came down that day. They contracted for a dancing pavilion." Lest it might be understood that Dr. Mercer was one of the parties who came down, it is only fair to state that such was not the case. Mr. Pickens also testified as follows: "Q. Now, have you demanded payment? A. Yes, sir. Q. From whom? A. I have demanded payment from the parties with which I contracted, Dr. Mercer, Mr. Helmrod, and Mr. Gratton. I went and saw him about it. He was secretary—he claimed to be at that time—of some company. Q. Who, Mr. Gratton? A. Yes, sir. Q. Which company? Do you know? A. I don't know. I think he signed it the 'Plattsmouth Land & Investment Co.'" Continuing further, the witness Pickens testified as follows: "Q. State whether you did contract with Dr. Hertzman and these other men? A. Dr. Mercer was the man who gave me the plans and specifications in the first place to figure on the Park House plans, and specifications which I brought down here, and he told me to send them back just as soon as possible; that he needed them. He proposed to get some other figures. Q. Who was you building this building for? Did you know at that time? A. Yes, sir; I presumed it was for Dr. Mercer, and the Plattsmouth Land & Improvement Company or Investment Company, or whatever they call themselves. I did not know what they were. Q. Was Dr. Mercer down there while you was putting these improvements on there? A. No, sir. Q. Did you see him at any time after he gave you these plans? A. Yes, sir. Q. Did you talk to him about what you were doing? A. Yes, sir. Q. Did he know you were putting those improvements there? A. Yes, sir; he knew they had went there. I did not see him while we were putting them there, but he knew they were there, because he sent down for me just about the time I was going

to file my lien, and tried to compromise the thing with me in some way." The confusion which existed in the mind of Mr. Pickens as to the name of the exact party for whom he was erecting this building, from the foregoing evidence, will seem pardonable. In the first place, the Plattsmouth Land & Improvement Company, the holder of the legal title, contracted to sell a portion of the real property to the Plattsmouth Investment Company, which latter company, having taken possession of the property, with a view of erecting improvements thereon and booming it, contracted with Pickens to erect the Park House. Dr. Hertzman and Dr. Mercer occupied the same office. When Mr. Pickens visited this office, Dr. Mercer, who at that time was president of the Plattsmouth Land & Improvement Company, handed to Mr. Pickens the plans and specifications for the erection of the Park House, and seems to have spoken of the building about to be erected in such terms as would naturally lead Mr. Pickens to infer that the work was to be performed for the Plattsmouth Land & Improvement Company. It is true, the written contract, when formulated for the signature of Mr. Pickens, recognizes only the Plattsmouth Investment Company as the party with whom he was to contract. This company had possession of the property; has advanced at some time \$1,100 for the purchase of it. Its interest has not yet been foreclosed, though the testimony of Dr. Hertzman, its secretary, is that the rights of the investment company have been forfeited.

It seems to us upon a review of all the facts in this case, that the conclusion is unavoidable that these companies were engaged in a joint enterprise, to wit, the booming of this property; that, in furtherance of the interest of both parties, this contract was made for the erection of the Park House by the Plattsmouth Investment Company, as well as by the Plattsmouth Land & Improvement Company. Just who the written contract was made with is not determinative of these facts. Both these companies interested in the ownership of the property were parties to the contract; at least, by their conduct, led Mr. Pickens to believe that such was the fact. The principle governing in such cases is stated and enforced by Norval, J., in *Manufacturing Co. v. Kountze*, 30 Neb. 719, 48 N. W. Rep. 1123. The syllabus of that case, which was prepared by the writer of the opinion, was as follows: "In a contract for the sale of land, it was stipulated that the purchaser should erect a dwelling upon the premises within a stated time. The building was erected, but the labor performed and material furnished were not fully paid for. Held, in an action to foreclose a mechanic's lien, that the liens of the mechanic and material men have priority over the lien of the vendor for unpaid purchase money." Discussing the

facts of that case as governed by the statute giving a mechanic's lien, Judge Norval, in his opinion, said: The contract of sale in the case at bar not only authorized, but made it obligatory upon, the purchaser to erect a dwelling on the premises, of a certain value, within a fixed time. Further than this, Kountze stipulated to furnish not to exceed \$2,200 towards the erection of the building. The proof shows that Kountze advanced that amount and more, and that he approved the expenditure of the money. This is additional proof of the authority of the vendee to contract for the erection of the house, Kountze having in the sale authorized his vendee to make the improvement; and, in pursuance of that authority, Berlin procured the labor to be performed and the material to be furnished, the vendor thereby subjecting his lien for the unpaid purchase money to the liens that might be acquired by the laborer and material man for making the improvement. Where a vendee, owning the equitable title, contracts for the erection of a building upon the express authority of the owner of the legal title, it is but just that the liens of the mechanics should attach to the interest of both vendor and vendee in the premises, and be paramount to the lien of the vendor; and this rule does not in any manner contravene any statutory provision." In other words, section 1 of the mechanic's lien law, having provided that any person who shall perform any labor or furnish any material for the erection of any house by virtue of a contract, express or implied, with the owner thereof or his agent, shall have a lien to secure the payment upon such house and the lot of land upon which the same stands, is to be liberally and fairly construed. The owner of the lot, Kountze, having stipulated that improvements of a certain kind should be made thereon by one who held his agreement upon certain payments being fully made to convey, constituted the vendee his agent for the erection of the building required by said contract. The sale of the material and furnishing of the labor was under a contract with the agent of the owner, whose authority was to make the improvement required. Kountze did not actually assist in making a contract for the purchase of the material, and for securing performance of the necessary labor. He entered into such a contract as required another to do this, however, whereby that other was in fact his agent, either for the improvement of the property legitimately, or by overreaching the material man and laborer through misleading appearances. The law imputes the more honorable motive, and holds the implied agency an honorable one; wherefore it results from the statute that the right to a mechanic's lien arose as against the interest, not only of the vendor, but of the vendee as well. By this it was not held that where the owner of the land

sells it, and simply takes back a mortgage for the purchase price without in any way becoming a party to a contract for the erection of improvements, one who furnishes materials or labor upon a contract with the vendee alone can assert thereon a lien superior to that of the said mortgage duly recorded. Quite to the contrary, it has been recently held by this court, in *Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. Rep. 643, that where one furnishes money to build a house, for which he took a mortgage upon the premises whereon the erection was to be made, the record of such mortgage gave a priority to the rights of material men and mechanics who began to confer value upon the mortgaged property after the record of the mortgage. To subject a vendor's rights in the subject-matter of the sale to the claim of a mechanic's lienor, it must appear that, with respect to the value conferred by the labor or material of such lienor, there was a privity of contract through the vendee between the vendor and such lienor. This privity will not be implied from the mere fact that the mechanic's lienor, upon the faith of a contract between himself and such vendee, furnished labor or material; it must be established by the proofs, or as fairly inferable from the facts as any other independent fact proposition. As between the appellee, Pickens, and the Plattsmouth Land & Improvement Company, there were sufficient proofs to justify the district court in finding that the Plattsmouth Investment Company was the agent of its vendor for procuring the erection of the Park House upon the premises; or that court might properly have found from the evidence that the Plattsmouth Land & Improvement Company was a party to the contract for the erection of said house; and on either theory the decree should stand. The judgment of the district court is affirmed. The other commissioners concur.

LANCASTER COUNTY v. HOLYOKE, Coroner.

(Supreme Court of Nebraska. June 29, 1893.)

CORONER'S INQUEST—WHEN HELD—FEES—"VIEWING."

1. The word "viewing," as found in section 7, c. 28, Comp. St., means something more than looking, seeing, beholding. It means inspection and investigation; an inquiry by a coroner and a jury.

2. A coroner can lawfully hold an inquest upon the dead bodies of only such persons as are supposed to have died by unlawful means.

3. A coroner, without the impaneling of a jury, as provided by the statute, is not entitled to any fees for inspection and examination of the body of a person found dead in his county. (Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Hall, Judge.

Action by E. L. Holyoke, coroner, against the county of Lancaster, to recover fees for

viewing a dead body. There was a demurrer to the petition, which was overruled. Defendant brings error. Reversed.

N. Z. Snell, for plaintiff in error. Thos. C. Munger, for defendant in error.

RAGAN, C. This suit was brought in the district court of Lancaster county on a petition substantially as follows: (1) The plaintiff complains of the defendant, and says that the plaintiff is the duly elected and qualified and acting coroner of Lancaster county, Neb., and has been such officer since January, 1890. (2) That on the 12th day of February, 1891, plaintiff, as such coroner of said county, was duly notified that the dead body of a man, one Harry Campbell, supposed to have died by unlawful means, was found, and then was, in the city of Lincoln, Lancaster county, Neb. (3) Immediately upon such notification, the plaintiff, as such coroner, went to the place where said body was lying, a distance of three miles, and then and there found the dead body of the said Harry Campbell lying in the yards of the Chicago, Burlington & Quincy Railroad Company, in said county; and the plaintiff, as such coroner, then and there took charge of said body, and made a personal inspection and examination of said body, and of the surroundings, and found, upon examination thus made, that the said body was crushed and mangled, and that, from the heat of the body and the pools of blood and other evidences, the death was recent and from violence. The plaintiff also made an examination into the cause of said death without impaneling a jury, and investigated the probable causes of said death, and as to what persons or machinery had contributed thereto or caused the same. The plaintiff, also, as such coroner, then and there took charge of said body, and caused it to be removed to a place where it should be unexposed, and to be cared for. The plaintiff also took charge of the papers, valuables, and personal effects on and about the body, —a watch, his money, some jewelry, and private papers,—and sent them to the parents of the deceased. The plaintiff had the body of the deceased removed from the ground, where he was lying on a rail of the railroad track, with his one leg crushed flat, and his abdomen crushed also, and had the same removed to an undertaker's, and washed and dressed and cared for, and to be delivered to the parents of said Harry Campbell. On the 16th day of February, 1891, the plaintiff filed with the county clerk of Lancaster county a claim for viewing the body of said Harry Campbell, \$10; for mileage, 30 cents,—which claim was by the board of commissioners of said county disallowed, whereupon the plaintiff appealed the case to the district court. To this petition, the defendant, Lancaster county, filed a general demurrer, which the court overruled, and, the county electing to stand on said demurrer, the court rendered

judgment against the county for the claim sued for, and the county brings the case here on error.

It will be observed that the examination made by the plaintiff of the dead body was without a jury, and for this he claims to be allowed a fee of \$10, as provided by section 7, c. 28, Comp. St. The language of this section applicable to this case is: "For viewing the dead body, \$10." The office of a coroner is a very ancient one, and came with the common law to this country from England. The powers and duties of a coroner here are what they were at common law, except in so far as they have been modified by our statutes or institutions. At common law the coroner was required to hold an inquest over the body of a person who had died from visitation of God, by chance or accident, by his own hand, by the hand of another. 2 Hale, P. C. 62. But, at common law, suicide was a crime, and the goods of the deceased were forfeited to the king; and if any animal killed a person, or if a cart ran over him, this animal or instrument was forfeited. It is perhaps for this reason that the coroner, at common law, was obliged to investigate a death, although known to have been a suicide, or known to have been caused by some casualty. Our statute, however, (in section 97, c. 18, Comp. St.,) provides: "The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means." Under this the coroner has nothing to do with investigating the death of any person unless such person is supposed to have come to his death by unlawful means. If a person was known to have committed suicide, or if he was known to have come to his death from a stroke of lightning, or known to have received his death by a fall from a building, the coroner would have nothing to do with holding an inquest over the body of such persons. The statute last above quoted, when the coroner shall have been notified of the finding of a dead body of a person supposed to have died by unlawful means, requires the coroner to summon forthwith six lawful men of the county to appear before him at a time and place named in the warrant. This statute is mandatory, and if the coroner has received notice of the finding in his county of some one dead, and that person is supposed to have died by unlawful means, then it is the duty of the coroner to forthwith summon a jury, and proceed to hold an inquest, and ascertain the cause of the death of the person. Section 105 of the same chapter provides that this jury, having inspected the body, heard the testimony, and made all needful inquiries, shall return to the coroner their inquisition, in writing. It appears from this statute, then, that, in order for a coroner to act at all,—that is, in order for him to view the body of a person found dead in his own county,—he must have reached the conclusion that the person came

to his death by unlawful means; otherwise, he has nothing to do with the dead body. The statute does not provide on what notice or information the coroner may act, or what notice or information is sufficient to authorize him to hold an inquest; but, doubtless, that is a matter to be exercised by him in an honest and faithful manner, and he is invested, by virtue of his office, with the discretion to determine for himself whether he should or should not hold an inquest. Of course, he must not act from mercenary motives, and unnecessarily hold an inquest for the purpose of obtaining fees. But, when he does act, he can only act in the manner provided by law; that is to say, the coroner, by virtue of his office, has no right to hold an inquest alone. When a person has been found dead, and is supposed to have died by unlawful means, the statute provides that the facts as to the manner or means by which deceased came to his death shall be ascertained by a jury.

The contention of the plaintiff here is that the word "viewing," found in section 7 of said chapter 28, is used in its ordinary sense; and that, when the coroner has been informed that some one has been found dead in his county, and it is supposed the person came to his death by unlawful means, then, if the coroner goes and views this body, he has become entitled to the fee of \$10 mentioned in said section. The word "viewing," as here used, means something more than looking, seeing, beholding. It means inspection; investigation; an inquiry into the cause of the death of the person. And the coroner cannot alone make this inquiry, and he is not entitled to this fee unless he has, with a jury, held an inquest, as provided by law. The judgment of the district court is therefore reversed, and this cause is remanded, with instructions to sustain the demurrer to the plaintiff's petition. Judgment accordingly. The other commissioners concur.

KEITH v. LOSIER et al.

(Supreme Court of Iowa. May 27, 1893.)

ATTACHMENT—LIEN—PRIORITIES—CORRECTION OF JUDGMENT—PARTIES—EXECUTION SALE—LACHES.

1. Code, § 2628, provides that, during the pendency of an action affecting real estate, no interest can be acquired by third persons in the subject-matter, as against plaintiff's title. *Held*, that the filing of a bill in equity to subject certain land to the payment of a claim pending for judgment gives a lien on the land so affected, superior to that created by an attachment levied after the filing of the equity bill.

2. Where, in an action to quiet title, both plaintiff and defendant claim under decrees adjudging the land to have been the property of R., the fact that in proceedings by plaintiff to correct the decree, in his favor, recovered in an action against R. and wife, the representatives of the wife, then deceased, were not made parties, is immaterial.

3. The fact that the execution under which certain land was sold was issued in an equity suit in aid of an attachment, rather than in

the attachment suit itself, will not defeat the title of the purchaser at such execution sale, as against one claiming under a lien inferior to the attachment.

4. Where, in an action against R. and T. to subject to the payment of R.'s debt to plaintiff certain land that had been purchased by R. of T., the title to which still remained in T. to secure unpaid purchase money, T. files a cross petition, asking that his claim be adjudged a first lien on the land, and R., though answering, does not appear further, a decree establishing T.'s claim as a first lien is proper.

5. Where an attaching creditor, by seeking to defeat the priority of an earlier attachment, permits the statutory period of redemption from the execution sale under the earlier attachment to pass, equity will not interfere to permit redemption.

Appeal from district court, Franklin county; J. L. Stevens, Judge.

The facts of the case, without substantial dispute, are as follows: The defendant Losier is the administratrix of the estate of Johanna Cohn, deceased. On December 20, 1886, H. C. Riefe was the owner of a stock of goods at Charles City, Iowa, and was there engaged in selling the same at retail. On that day he traded said stock of goods to James Thompson, a resident of Franklin county, Iowa. In consideration of said stock of goods, and a payment of \$341 to be made in cash by H. C. Riefe, said Thompson agreed with him to convey to Agnes H. Riefe, wife of H. C. Riefe, the southwest quarter section 36-93-20, being the land in controversy in this case. On the same day the stock of goods was delivered to Thompson, but the \$341 cash difference was never paid by Riefe, but was afterwards made by special execution against the land, as hereinafter shown; Thompson in the mean time holding the deed, undelivered, as security. At that time, Riefe was owing Edson Keith & Co. \$641.20, and was owing Johanna Cohn about \$3,000. He was insolvent at the time. December 22, 1886, Edson Keith & Co. commenced an attachment suit against Riefe in the Floyd county district court; and on the 25th day of December, 1886, they caused a writ of attachment to issue to Franklin county, where the land in controversy is situated; and on the 28th day of December, 1886, the sheriff of Franklin county duly levied said writ on said land. On January 13, 1887, Edson Keith & Co. commenced a suit in equity in the Franklin county district court against H. C. and Agnes H. Riefe and James Thompson, setting forth the existing facts, and asking that the land attached be subjected to the payment of their debt, and that they have general equitable relief. They also asked for, and obtained and served, a temporary injunction, which was afterwards made perpetual on final decree, enjoining all the defendants from conveying or incumbering the said property until the further order of the court. On March 29, 1887, Edson Keith & Co. obtained a judgment for the amount of their claim in their attachment suit in the Floyd county court; and

the attachment was confirmed, and the judgment made a special lien on the attached property from the date of the levy. On the 18th day of May, 1887, they filed a transcript of their said judgment in the office of the clerk of the district court of Franklin county; and on the same day they filed an amended or supplemental petition in their equity suit theretofore commenced by them in the Franklin district court, setting out their judgment, and asking that the said attached land be decreed to be the absolute property of H. C. Riefe, and that their judgment be declared a special lien thereon from the date of the levy of the attachment, and that they have special execution against the land. All the defendants filed separate answers in said suit. Defendant Thompson filed also a cross petition, in which he claimed that there was due him, as a part of the purchase money, the sum of \$368.72, and that he held the title and the right of possession of the property as security for the payment of his said claim. He asked for judgment for the amount, and that it be adjudged a first lien on the land, and that special execution issue, etc. On June 14, 1887, a final decree was rendered in said equity suit by said Franklin county district court, wherein it was adjudged that Agnes H. Riefe had no interest whatever in said land, and that H. C. Riefe was the absolute owner thereof, subject to the claim of Thompson for purchase money, and establishing the lien of Edson Keith & Co. as of the date of the attachment, and ordering the lands to be sold under a special execution to be issued therein, and that the proceeds be first applied to the payment of Thompson's claims for purchase money, and next to the payment of Edson Keith & Co.'s judgment. On June 20, 1887, special execution was issued in said case, and was intended and attempted to be levied upon the attached land, and the attached land was intended and attempted to be sold under said execution on July 20, 1887. But by mistake of description the attached land was neither levied on nor sold, but other lands were so levied on and sold by mistake, which lands were in no wise involved in the suit, nor did Riefe have any interest whatever in them, nor were they subject to such levy in any way. At such sale, T. Binford was the execution purchaser. On July 5, 1888, said Binford filed a motion in said court to set aside said sale, under the provisions of the statute in such cases, having served notice of the same on all parties to the case. On October 22, 1888, this motion was sustained, and the sale was set aside, and the judgment and decree were reinstated, and another special execution was ordered against the attached land, the same as if no prior execution had been issued, or prior sale made; and such execution was issued November 19, 1888, and levied on said land November 21, 1888, and the land was duly sold thereunder on the

29th day of December, 1888, to Edson Keith, plaintiff herein. In pursuance of such sale the sheriff duly issued a sheriff's deed for the land to said Edson Keith on December 31, 1889, and on the title thus acquired he now stands in this court. On the 13th day of January, 1887, Johanna Cohn commenced an attachment suit against Riefe in the Floyd county district court. On January 14, 1887, she caused a writ of attachment to issue to Franklin county, which was levied on the land in controversy. On January 19th she also commenced an action in equity in aid of her attachment, and asked for, and obtained, a temporary injunction, restraining the defendants from disposing of or incumbering the land until the further order of the court; and such action is still pending, no further proceedings having ever been had therein. The writ was served on the various defendants January 20 and 21, 1887. The plaintiff was not a party to that suit. On February 9, 1887, she obtained a judgment on her claim. On February 12, 1887, she commenced an action in equity in the Floyd county district court to subject the attached land to the payment of her judgment, and she obtained a decree in said suit on the 15th day of November, 1889. Nor was plaintiff a party to this suit. On the 21st day of March, 1890, she caused special execution to issue against said land, and levied the same thereon, and on the 25th day of April, 1890, caused the land to be sold thereunder at sheriff's sale, at which sale she became the execution purchaser, and received from the sheriff a certificate of sale therefor. In this action, W. T. O. Rule, as sheriff of Franklin county, is a party defendant, and the action is aided by an injunction restraining the execution of a deed to the defendant. Each party, upon averments of ownership, asks to be decreed the owner of the land, and that the title be quieted. The district court gave judgment for the plaintiff, and the defendants appealed.

Ellis & Ellis, for appellants. Binford & Snelling and Taylor & Evans, for appellee.

GRANGER, J. 1. We should first determine the effect, as to the defendants, of the decree entered June 14, 1887, in the suit of Edson Keith & Co. v. Riefe and wife and Thompson. The argument makes it important to have in mind that Edson Keith & Co. commenced two suits,—one at law, in Floyd county, against H. C. Riefe, upon its claim, aided by attachment, and levied on the land in question December, 1886. Final judgment was entered in the suit March 29, 1887, on the claim, and sustaining the attachment. The suit in equity was commenced January 13, 1887, in Franklin county, where the land is situated, with Riefe and wife and Thompson as defendants, and the relief sought was that the land be sub-

jected to the payment of the debt being prosecuted to judgment in the law action. After the entry of judgment in the law action the petition in the equity action was so amended as to recite the fact of the judgment in the law action, and to ask that the attachment in that action be decreed, in the equity action, a lien on the land, and that plaintiffs have a special execution. Such a decree was entered, subject to a prior lien decreed in favor of defendant Thompson, on his cross action, for an unpaid balance on the purchase price for the land. The contentions of counsel render dates quite important. On the same day that Edson Keith & Co. commenced its equity action in Franklin county—January 13, 1887—Johanna Cohn commenced her law action, aided by attachment, in Floyd county, and on the next day levied on the land. The judgment in the law action of Edson Keith & Co. was entered March 29, 1887, and the same was pleaded in the equity suit May 18, 1887. Appellants urge that the equity suit was not "pending to subject the land in controversy until the filing of their amendment to their petition on the 18th of May, 1887." It is said that "an amendment cannot be made the basis of a decree having effect before the filing thereof," and some authorities are cited. It seems to us the proposition does not admit of a doubt, and we think that prior to the amendment the action was not pending to subject the land to the payment of a judgment, nor did it purport to be such. It was, however, an action to subject the land to the payment of a claim pending for judgment. It is also urged that a creditor, before judgment, cannot maintain a suit to set aside a fraudulent conveyance; and besides authorities cited, claimed to support such a rule, we are cited to Code, § 3150: "At any time after the rendition of a judgment an action by equitable proceedings may be brought to subject any property, money, rights, credits, or interest therein, belonging to the defendant, to the satisfaction of such a judgment." Without an intimation that we are in accord with such a view, we may say that, if the view is sustained, we do not see how it affects the validity of the decree assailed, for the reason that nothing in any case, or the statute quoted, can be construed as holding that a decree entered upon such a state of facts would not be a perfectly valid decree, when it became final. Conceding that in that case, upon proper issues made, the defendants would have been entitled to a decree, still it was but an erroneous judgment of the court, in a matter of which, both as to persons and the subject, it had complete jurisdiction; and, upon undoubted and unbroken authority, such a decree is as valid and binding when it becomes final as if not erroneous. We now speak of a decree as between the parties to it. Appellants contend that even if the decree, as between the parties, is valid, yet, as to other parties

claiming rights, it is not so. The rights of the parties to this suit depend upon the priority of their liens. If defendant had a lien prior to that of plaintiff, the decree in that suit would not bind her, for she was not a party thereto. But, if she had no lien before the commencement of the equity action, she could not, by a levy thereafter, create a lien, or acquire an interest against that of the plaintiff in the action. Such is the language and spirit of Code, § 2628.¹ The plaintiff, or Edson Keith & Co., by attachment, levied on the land December 28, 1886. January 13, 1887, it commenced its suit to subject the attached property to the payment of the debt. Defendant has no pretense of a lien prior to January 14, 1887, when the attachment was levied. The lien of plaintiff is as conclusive as if Riefe and wife had on the 13th day of January, 1887, in good faith, made their mortgage to create one; and, because of the pendency of the suit, third persons were required to take notice of it. Section 2628, supra.

2. Appellants say: "We doubt whether a correction of this decree, so as to affect the land in question, could be made, after the death of Agnes H. Riefe, without her heirs at law, to whom the real estate descends, being made parties to the proceedings. We are, however, quite certain that no execution could issue for the sale of this land upon a corrected decree, or upon any decree or judgment against Agnes H. Riefe, after her decease, without first re-establishing the right so to do by proper order, made in accordance with Code, § 3092, which provides the only method for selling such real estate upon execution." Both parties are in court, claiming title to the land in question under decrees, and adjudging it to have been the land of H. C. Riefe, and not that of Agnes H. Riefe. For the purposes of this suit, therefore, the ownership will be presumed to have been in H. C. Riefe. The principle is not different from a case in which parties contest for the title to land, each of whom traces his title to a common grantor. It may well be said that the issues in the case concede that H. C. Riefe was the owner of the land. Therefore, for the purposes of this suit, Agnes H. Riefe should be regarded as having no such interest as that her presence, or that of her heirs, was necessary. The administrator of his estate was served with notice of the pendency of the motion to correct the decree. The utter inapplicability of Code, § 3092, to this case, must be apparent. The section is a provision for cases in which a judgment has been obtained against a party in his lifetime, or the executor of his estate, and there is an attempt to subject

¹Code, § 2628, provides that "when a petition has been filed, affecting real estate, the action is pending, so as to charge third persons with notice of the pendency, and while pending no interest can be acquired by third persons in the subject-matter, as against the plaintiff's title."

the real estate to the payment of the unpaid judgment. Mrs. Riefe was not a judgment debtor.

3. The execution upon which the land was sold and purchased by the plaintiff issued in the equity suit, and it is urged that it could have been in the law case. The decree in the equity case directed the issuance of the execution, and, even if error, it is not available in this proceeding to defeat the title of the plaintiff. The difference in no way affected the defendants.

4. A claim is made that the decree is void because of the adjudication upon the answer of James Thompson in the equity case of Thompson Keith & Co. The adjudication in favor of Thompson was a judgment establishing his claim for the unpaid balance of the purchase price of the land against H. Riefe, and a decree against all parties, making his claim the first lien. It is said that Riefe and wife, after filing their answer, did not appear further, and that the answer was not a cross petition. The answer states the facts as to his claim, and, against all the parties, asks the relief granted. We think such a pleading is in the nature of a cross petition. But, aside from this, the decree in favor of Thompson, if void, would not render that in favor of the plaintiff void. It was entirely independent of the issues on which Keith & Co.'s relief, against Riefe and wife, was granted. The plaintiff in that action could not control the matter of notice upon the cross petition.

5. In the original decree one of the descriptive words of the land was erroneously written as "northwest," for "southwest," or was so illegibly written that it could not be known which descriptive word was intended. When the decree was corrected the description was made certain and correct. The description of the land was not a matter of controversy on the trial. The correct description appeared in other places in the decree, and the execution upon which the land was finally sold contained a correct description. There is nothing in these facts to invalidate the title of the plaintiff.

6. Appellant asks, if appellee's title is confirmed, that she be permitted to redeem from the sale. This is what should have been done at the outset. At every step, both in the legal and equitable proceedings, Keith & Co. was prior in its effort to obtain a lien, and, as we hold, had the priority. Its claim was small, and could have been discharged by appellant, with a large advantage to herself. Instead of doing so, she elected to contest for a priority of liens. Her claims to priority have not the support of equitable considerations, but are based largely upon objections to the forms and methods of procedure after the institution of the suit by Keith & Co. With a purpose to defeat the lien or title of the plaintiff in toto, she has permitted the statutory period of redemption to pass without in any way making an

offer, or manifesting a disposition, to redeem. Equity will sometimes grant such relief, but not upon the facts of this case.

We do not think it necessary to consider further questions in the case. The decree of the district court is in harmony with our views, and it is affirmed.

CALDON v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Wisconsin. June 21, 1893.)
RAILROAD COMPANIES — INJURY TO STOCK — FAILURE TO FENCE RIGHT OF WAY — CROSSING BY PRIVATE RAILROAD.

Rev. St. § 1810, as amended by Laws 1881, c. 193, (Sanb. & B. Ann. St. § 1810,) provides that every railroad corporation shall erect on both sides of its road (depot grounds excepted) sufficient fences, with openings and suitable farm crossings, and construct cattle guards at all highway crossings, and connect their fences therewith. *Held*, that a railroad company is bound to fence its track where it is crossed by a private logging railroad, by providing suitable guards or means to prevent domestic animals from going on its right of way, and is liable for damages to stock caused by its failure to do so.

Appeal from circuit court, Washburn county; R. D. Marshall, Judge.

Action by William Caldon against the Chicago, St. Paul, Minneapolis & Omaha Railway Company to recover damages for injuries to stock caused by failure of defendant to fence its right of way. From a judgment for plaintiff, defendant appeals. Affirmed.

The other facts fully appear in the following statement by LYON, C. J.:

At a certain point in Washburn county the railroad track of the defendant railway company is crossed by a private logging railroad, known as the "Crescent Springs Railroad," which is constructed entirely upon the land of the Shell Lake Lumber Company, and is owned and operated exclusively by that company, by steam power, for its own benefit, in carrying on its lumbering business. Such logging railroad is not fenced. The track of defendant's railroad is properly fenced and guarded, with the exception (if it be an exception) that the openings in the fences through which such logging railroad is laid at the crossing are not guarded by gates, bars, or cattle guards, to prevent domestic animals from going through them upon such track. Plaintiff's horses went through one of those openings upon defendant's railroad track, and were run against by a passing train, and injured. This action is to recover damages for such injuries. It was stipulated by the parties, on the trial, that the only question of negligence in the case is whether the railway company is bound to fence at the crossing of its track by the logging road of the lumber company. The circuit court held that it was bound by law to guard the openings at such crossing in some way to prevent

domestic animals from going through them upon the railroad track, and, having failed to do so, it was liable to the plaintiff for the injuries to his horses. The court further found that the statute requires the lumber company also to guard the crossing, and that, at his election, the plaintiff might have held that company for his damages. There is no question of the amount of damages or of contributory negligence. The stipulation disposes of the latter question. The plaintiff recovered judgment for the damages claimed and proved, and the railway company appeals therefrom.

S. L. Perrin and L. J. Rusk, for appellant.
L. H. Mead, for respondent.

LYON, C. J., (after stating the facts.) The determination of the case on this appeal depends upon the construction given to that portion of section 1810, Rev. St., as amended by chapter 193, Laws 1881, which reads as follows: "Every railroad corporation operating any railroad shall erect and maintain on both sides of any portion of its road (depot grounds excepted) good and sufficient fences, of the height of four and a half feet, with openings or gates or bars therein, and suitable and convenient farm crossings of the road for the use of the occupants of the lands adjoining, and shall construct and maintain cattle guards at all highway crossings, and connect their fences therewith, to prevent cattle and other domestic animals from going on such railroad." Sanb. & B. Ann. St. § 1810. The object of the statute is to keep domestic animals off railroad tracks, and thus avoid collisions of trains with such animals, which, when they occur, are frequently most disastrous to property and to the lives and limbs of persons on the colliding trains. The means chosen by the legislature to prevent such disasters is to require each railway company to fence both sides of its track through the entire length thereof, with the exception that it is not required to fence or otherwise guard its depot grounds, and with the qualifications that at highway crossings (where, of course, fences are impracticable) cattle guards should be constructed, and the fences along the track joined therewith; and that, at all other necessary crossings for the use of occupants of lands through which the track is laid, the openings for such crossings shall be properly guarded by gates or bars therein, to prevent domestic animals from passing through such openings onto the railroad track. This is the plain meaning of section 1810, although there is some inaccuracy or want of precision in the language employed therein. There is no qualification or exception in the section, or in any statute, which relieves the railway company from the duty of providing suitable guards or means to prevent domestic animals going upon the track of its railroad

through the openings in its track fences made by the crossing of the logging road. It is probable that the crossing in question is included in the term "farm crossing," as used in the statute, for the logging road is for the use of the owner and occupant of the adjoining land. A strict construction of the statute might require gates or bars to be placed in the openings made by the logging road; but because gates or bars would seriously interfere with the reasonable use of such road, and because, for the same reason, cattle guards are allowed to be used at highway crossings, instead of gates or bars, we think the statute should be construed to permit the use of cattle guards at the crossing in question. We cannot accept as sound the contention of counsel for the railway company that in any case a railway company may leave openings in its track fences (except adjacent to depot grounds, where such precautions are impracticable) without providing gates, bars, or cattle guards to prevent domestic animals from going upon the railroad track through such openings. We do not determine whether or not the lumber company is also liable for plaintiff's damages, for we regard that question as immaterial in the present case. The judgment of the circuit court is affirmed.

SMITH v. ZIMMERMAN.

(Supreme Court of Wisconsin, June 21, 1883.)

HOMESTEAD—PURCHASER NOT IN POSSESSION—ACTION TO ENJOIN EXECUTION SALE—COMPLAINT.

1. The purchaser of a homestead, though not in possession, may enjoin a sale thereof on an execution issued on a judgment rendered against the grantor while he owned and occupied the premises.

2. The complaint need not show that the premises were the grantor's homestead at the time of the issuing of the execution, and its levy.

Appeal from circuit court, Price county; J. K. Parish, Judge.

Action by H. S. Smith against John V. Zimmerman and others to enjoin the sale of a certain lot on execution. From a judgment for plaintiff, defendant Zimmerman appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

The plaintiff claims in her complaint to be the owner in fee of lot 4, in block 4, in the village of Prentice, Price county, and to have derived title thereto by deed of conveyance from John and Emma Sanborn, who owned and occupied the premises as their homestead until October 4, 1890, when they entered into written contract to sell and convey the same to W. A. Durkee for the sum of \$425, to be thereafter paid therefor, with interest. On the 8th of December, 1890, John P. and Emma Sanborn assigned this contract and their interest in the premises to the plaintiff, and executed

her a conveyance of said premises, the said Durkee then and still remaining in possession. September 19, 1890, and while said Sanborn owned and occupied said premises as a homestead, a judgment was recovered and docketed by the defendant Zimmerman against John P. Sanborn and one Dill; and he had issued and delivered to his codefendant Hunt, the sheriff of Price county, an execution upon which the latter had advertised said premises for sale, January 13, 1891, in order to satisfy said judgment, and would, it was alleged, unless restrained, sell said premises, and issue a certificate of sale hereof, as provided by law, which would create a cloud on the plaintiff's title. That said premises were exempt from sale on execution, being, at the time said judgment was docketed, owned and occupied as the homestead of the said Sanborn. The complaint prayed for an injunction restraining such sale, and for general relief. The defendant Zimmerman demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, but the circuit court made an order overruling the demurrer, from which the defendant Zimmerman appeals.

G. E. Schwindt, for appellant. E. W. Sand, for respondent.

PINNEY, J., (after stating the facts.) 1. The appellant contends that, because the plaintiff was not in possession of the premises when she brought her action, she cannot maintain it to remove a cloud upon the title. The action is not founded on the statute, (Sanb. & B. St. § 3180,) but is an application to the inherent jurisdiction which courts of equity possess to prevent or remove clouds on title to land, and which they have exercised from a very early period. Evidence allunde the record of the judgment becomes necessary to show that the premises in question, at the time of the recovery and docketing of the judgment by the defendant Zimmerman, were the homestead of the Sanborns, and that, while it is an apparent lien, it is in reality no lien or charge thereon. The Sanborns had a right thereafter to sell and convey their homestead, and the purchaser, the plaintiff, would take a valid title, free from the lien of the judgment. Sanb. & B. St. § 2983. The plaintiff, as such purchaser, has a right to maintain this action to procure an adjudication declaring that the judgment in question is not a lien or charge on the premises she had purchased, and to prevent a sale thereof by any process depending for its validity solely upon the judgment, although she is not in actual possession; otherwise, she might be without adequate remedy. The point raised by the appellant has been so frequently decided that further discussion is not necessary. *Pier v. City of Fond du Lac*, 38 Wis. 479; *Goodell v. Blumer*, 41 Wis. 436, 442, and cases cited.

2. The allegations of the complaint are sufficient to show that the plaintiff is entitled to the relief she seeks. The only objection made is that the complaint does not show that the premises were the homestead of the Sanborns at the time of the issuing of the execution, and its levy. This was not necessary. The execution, and sale under it, are but the means of carrying into effect the lien given by the statute. The statute makes judgments a lien on lands of the debtor, and no levy or seizure by the sheriff became or was necessary, and in practice there is no such thing as a levy of execution upon real estate. "All that is necessary to make a regular sale upon execution issued upon a judgment is to publish the notice of sale as required by the statute, and make the sale at the time mentioned in the published notice." *Shafer v. Insurance Co.*, 53 Wis. 361, 10 N. W. Rep. 381; *Hammel v. Insurance Co.*, 54 Wis. 72, 11 N. W. Rep. 349. The seizure is already made when the execution comes to the sheriff's hands. *Wood v. Colvin*, 5 Hill, 230, 231. No entry of a levy upon the execution is necessary to perfect the sale. *Colt v. Insurance Co.*, 54 N. Y. 595. The exemption which existed when the judgment was docketed could not be impaired by a sale of the premises, but would extend to the proceeds derived from such sale, while held by the Sanborns with the intention to procure another homestead therewith, for a period not exceeding two years. By the agreement of sale of October 4, 1890, from the Sanborns to Durkee, while the premises were clearly exempt, he became the equitable owner thereof, subject to the payment of the unpaid purchase money; the Sanborns holding the legal title as a security, merely, for its payment. The plaintiff has succeeded to the rights of the Sanborns. No sale of the premises on execution founded on this judgment can affect the rights of either the plaintiff or Durkee in the least degree. The circuit court properly overruled the defendant's demurrer. The order of the circuit court is affirmed.

YALE v. WATSON.

(Supreme Court of Minnesota. July 14, 1893.)

ACTION ON NOTE—LIABILITY OF INDORSER—PLEADINGS.

"To take care of" matured paper construed as meaning to take it up by payment or renewal, or to secure an extension of the time of payment.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

Action on a promissory note by Washington Yale against John Watson. Plaintiff had judgment, and defendant appeals. Reversed.

Larrabee & Gammons, for appellant. Jackson & Atwater, for respondent.

MITCHELL, J. This action was upon a promissory note executed to plaintiff by one Hill, the allegation of the complaint being that before the delivery of the note, and for the purpose of giving credit to the same, defendant indorsed as follows: "I hereby waive demand, protest, and notice of nonpayment, and for value received guaranty payment of the within note." The answer admits the execution of the note and of the guaranty indorsed thereon, but denies knowledge or information sufficient to form a belief as to how much has been paid on it. The answer then alleges that either about the date of the maturity of the note or a year afterwards Hill notified defendant that he was on his way to see the plaintiff "for the purpose of fixing up and taking care of said note;" that soon afterwards defendant saw plaintiff, and, after stating to him what Hill had said, asked him if the latter "had taken care" of the note, to which plaintiff replied that "Hill had called upon him, and taken care of said note;" that from that time (October, 1886 or 1887) until the commencement of this action (in 1892) the defendant never saw Hill or plaintiff, or either of them, or had any notice or information from either of them, or from any other source, that the note had not been "fully cared for and paid;" but, on the contrary, relying upon the statement of plaintiff, as before alleged, he supposed and believed that the note had been paid and canceled; that from the time of the execution of the note until September, 1889, Hill was perfectly solvent, and during all that time the full amount could have been collected by the exercise of ordinary diligence, but that since the date last named Hill has been, and still is, insolvent, and no part of the note collectible from him; that plaintiff has never used any diligence whatever to collect the note from Hill, although he knew that defendant was not the principal debtor, but only guarantor for Hill; that by reason of this lack of diligence on the part of plaintiff, and by reason of plaintiff's informing him that Hill had taken care of the note, defendant was deceived, and led to believe that the note had been paid, and by reason thereof did not proceed to collect the note or secure himself against his liability of guarantor, but, upon the contrary, believing the note had been paid, did nothing towards collecting it while Hill was solvent; that, if compelled to pay the note, he would now be unable to indemnify himself by recourse against Hill.

The trial court ordered judgment for plaintiff on the pleadings. The correctness of the ruling, of course, depends on the question whether the answer states facts sufficient to constitute a defense. Counsel have spent some time discussing the question whether the defendant was a guarantor or joint maker. While we have no doubt he was the former it makes no practical difference which he was. In either case it sufficiently

appears from the answer that, as between defendant and Hill, the latter was the principal debtor, and the former a mere surety, and that plaintiff knew that fact. Something is also said as to the negligence of plaintiff in delaying to attempt collection from Hill. This, of itself, would constitute no defense. Mere passive delay to collect the note from the principal debtor would not release the surety. *Benedict v. Olson*, 37 Minn. 431, 35 N. W. Rep. 10. The case, therefore, comes down to the question whether the facts set out in the answer are sufficient to constitute an estoppel in pais; and this mainly depends upon the effect to be given to the allegation that plaintiff informed defendant that Hill had "taken care" of the note. Had the allegation been that plaintiff informed defendant that Hill had paid the note, there could hardly have been any doubt that this, with the other allegations as to subsequent acts and events, would have constituted a good defense. But it is contended by plaintiff that the statement that the note had been "taken care of" was an ambiguous expression, that did not necessarily mean either that the note had been paid, or that an extension of time of payment had been given; that defendant had no right to rely on such a statement as meaning that either of these things had been done, but should have gone further, and ascertained from plaintiff whether either of these two facts existed; and, further, that it was at most a mere evidential fact, and not an ultimate one, which alone should be pleaded. In some respects the answer is somewhat peculiar, but we cannot agree with plaintiff's counsel as to meaning and construction to be given to the expression "taking care of a note." We think that in the language of street and office, and as understood among business men, to "take care of" matured paper means to take it up either by paying or renewing it, or at least to secure an extension of the time of payment, and that defendant was justified in so understanding it, and, if he did, and acted on the faith of it to his damage, the plaintiff is now estopped to allege a different state of facts. For this reason we think the court erred in ordering judgment on the pleadings. Order reversed.

HEYDERSTADT v. WHALEN et al.

(Supreme Court of Minnesota. July 14, 1893.)

VENDOR'S LIEN—SUBROGATION—EVIDENCE.

1. Evidence held to justify the findings.
2. Where a third person lends to the vendee of land money with which to pay the purchase money to the vendor, and as security therefor obtains from the latter a conveyance of the title to the land, the lender is subrogated to the rights of the vendor, and the rights of the vendee, homestead or otherwise, in the land, are subject to his lien for the money thus advanced.

(Syllabus by the Court.)

Appeal from district court, Scott county; Cadwell, Judge.

Action by August V. Heyderstadt against Mary Whalen, administratrix, William H. Weibeler, and others. Plaintiff had judgment, and defendant Weibeler appeals. Affirmed.

F. O. Irwin and Southworth & Collier, for appellant. Williams, Goodenow & Stanton, for respondent.

MITCHELL, J. This was an action to foreclose an equitable mortgage on 80 acres of land owned, or formerly owned, by the defendant Whalen. The substance of the defense was that the land was, at the date of the mortgage, Whalen's homestead, and that his wife did not join in its execution. The assignments of error go to the sufficiency of the evidence to justify the findings, the main point made being that it did not justify the finding that the mortgage was for the purchase money of the land. The land was school land which the state had sold on the usual long credit, one Diers being the owner and holder of the certificate of purchase. Diers sold the land to Whalen for \$500 cash, and \$1,000 on time, retaining the certificate and equitable title as security for the unpaid purchase money. Subsequently, Whalen borrowed \$1,000 of plaintiff, whereupon Diers, upon being paid in full, with the consent and at the instance of Whalen, transferred and assigned the certificate, and all his interest in the land, to plaintiff, to be by him held as security for the \$1,000 thus loaned to Whalen. This is the basis of plaintiff's lien. Thus far there is no dispute about the facts. Defendants' claim is that there was no evidence that plaintiff loaned the \$1,000 to pay the purchase money to plaintiff, or that it was used for that purpose; their contention being that it appears that Whalen was then owing Diers not to exceed \$400, and that not more than that amount of the money was paid to Diers. The evidence on this point is somewhat obscure and indefinite, but we are of the opinion that it is sufficient to justify a finding that Whalen was still owing Diers \$1,000, and that the whole of the money advanced or loaned by plaintiff was applied in liquidation of that debt. It does appear that Whalen had executed to Diers a mortgage on another tract of land to secure \$400 of the purchase money of the first-mentioned tract, (which was satisfied at the time of the loan by plaintiff,) but we think it is fairly inferable from the evidence that this was merely additional security for part of the \$1,000. Of course the rights of Whalen in the land were subject to Dier's claim for purchase money, and it needs no argument to show that if plaintiff advanced or loaned the money to pay Diers, and as security therefor took from him an assignment and transfer of the certificate of

purchase of the land, this was not the creation of any new lien, but that plaintiff merely stepped into Diers' shoes. This is the only point that we can discover in the case, worthy of special notice.

Judgment affirmed.

L. KIMBALL PRINTING CO. v. NORTHWESTERN GUARANTY LOAN CO.

(Supreme Court of Minnesota. July 14, 1893.)

ASSUMPSIT—SUFFICIENCY OF EVIDENCE—POWERS OF AGENT.

Evidence held to justify the findings.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Lochren, Judge.

Action by the L. Kimball Printing Company against the Northwestern Guaranty Loan Company on an account. Plaintiff had judgment, and defendant appeals. Affirmed.

Chas. J. Bartleson, for appellant. Young & Fish, for respondent.

MITCHELL, J. There is nothing in this case but a question of fact, upon which the evidence amply justified the findings. As suggested by the trial judge, the entire controversy was whether one Channel, as agent of defendant, had authority, actual or apparent, to order from plaintiff the printed matter, for the value of which this action was brought. It is suggested that there was no evidence that the item of circulars was for defendant's business, but we can see no substantial difference between that item and the remainder of the account.

Order affirmed.

STATE v. AHERN.

(Supreme Court of Minnesota. July 14, 1893.)

CRIMINAL LAW—REMARKS OF COUNSEL—HARMLESS ERROR—INTOXICATING LIQUORS—UNLAWFUL SALES—BURDEN OF PROOF.

1. In a criminal trial the attorney for the state, speaking to the jury upon a certain point, commented upon the fact that the defendant had not testified in his own behalf. This was error, but held harmless, for the reason that the evidence of defendant's guilt was conclusive and uncontradicted.

2. In prosecutions for an unlicensed sale of intoxicating liquor the burden is on the defendant to show that he had a license.

3. The quantity of liquor sold is immaterial, if it be less than five gallons.

(Syllabus by the Court.)

Appeal from district court, Goodhue county; Williston, Judge.

James P. Ahern was convicted of selling intoxicating liquors unlawfully, and appeals. Affirmed.

J. C. McClure and F. M. Willson, for appellant. H. W. Childs, Atty. Gen., and Geo. B. Edgerton, Asst. Atty. Gen., for the State.

DICKINSON, J. Upon the trial of an indictment for the sale of intoxicating liquor without a license, the county attorney commented upon the fact that the defendant had not testified in his own behalf as to the kind of liquor sold. This is admitted on the part of the state to have been error. It was a violation of an express provision of the statute passed for the protection of defendants in criminal cases, and the error would have been fatal, under ordinary circumstances. No apology by counsel, nor charge by the court, could be deemed to have certainly averted the consequences which might naturally result, or to have cured the error. But it was harmless, in this case, from the fact that the evidence so conclusively showed the defendant's guilt that the jury could not have returned a verdict for the defendant without willfully disregarding their duty, and it is not to be supposed that they would have done that. The evidence on the part of the state was complete, positive, and uncontradicted, and nothing appears to raise a doubt as to its credibility. It is unreasonable to suppose that the result might have been different if counsel had not made the improper remark referred to.

It has been repeatedly ruled in this court that it is for the defendant, in this class of cases, to prove that he has a license. The burden is not on the state to prove the contrary.

The second requested instruction—that the state must prove the sale of one pint of liquor, "and no more" was erroneous. The quantity was not material, if it was less than five gallons.

The third assignment of error is based upon a misconstruction of the plain meaning of the charge. Order affirmed.

KING v. McCARTHY et al.

(Supreme Court of Minnesota. July 14, 1893.)

EVIDENCE AT FORMER TRIAL.—ADMISSIBILITY.— HOMESTEAD OF WIDOW.

1. Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., (Minn.) 53 N. W. Rep. 639, followed, as to the admission of the testimony of a nonresident witness, given on a former trial.

2. Upon the preliminary inquiry in such cases, as to whether the witness is domiciled out of the state, or is likely to remain out of the reach of the process of the court, his own declarations of intention are admissible, in connection with evidence of the fact of his departure or absence from the state.

3. The homestead rights of the widow are limited to the land which her husband had actually devoted to homestead purposes, and was occupying as such at the time of his decease.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Kerr, Judge.

Action by Josias R. King, administrator de bonis non of J. C. McCarthy, deceased, against Mary McCarthy and others. Plain-

tiff had judgment, and defendants appeal. Affirmed.

For report on former appeal, see 52 N. W. Rep. 648.

Stevens, O'Brien & Glenn and J. F. Fitzpatrick, for appellants. G. M. Nelson, Thomas C. Fitzpatrick, and James Schoonmaker, for respondent.

MITCHELL, J. After the decision of the former appeal (52 N. W. Rep. 648) the defendants demanded and obtained a second trial of this action, as being one for the recovery of real property. The only questions presented on the present appeal are—First, whether the plaintiff laid the proper foundation for the introduction of the testimony of R. W. Bell on the former trial; and, second, whether the court allowed the defendant Mary McCarthy all the land to which she was entitled, as the homestead of her deceased husband.

1. It is not questioned but that a proper foundation was laid, within the rule of Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., (Minn.) 53 N. W. Rep. 639, for the introduction of the testimony of Bell on the former trial, provided no error was committed in the admission of evidence on the preliminary question. As the doctrine of that case is characterized as "extraordinary," it may be remarked that it does not go any further than many of the authorities, and not any further than the strictest of them, except that, where the evidence was taken down in full on the first trial by an official reporter, it does not require a showing that, with the exercise of reasonable diligence, the deposition of the nonresident witness could not have been taken out of the state. After a showing that Bell, who had resided for many years in St. Paul, had, about three and a half months before the trial, left the state, with his family, leaving no home or place of residence behind him, and, so far as his relations knew, had not been within the state since that time; that his brother in St. Paul had, since his departure, received frequent letters from him, dated at Chicago, New York, Indiana, Kansas City, and St. Louis, the latest being from the last-named place, about two weeks previously; that plaintiff had issued, and placed in the hands of the sheriff of Ramsey county, two subpoenas for him, (one over two months before the trial, and the other later,) to both of which the sheriff had returned that he could not be found,—the plaintiff was then permitted to introduce the deposition of Bell in another action, between different parties, taken about three or four weeks previously in St. Louis, in which he stated that he was a resident of St. Louis, giving the street and number of his place of business in that city. The admission of this statement in Bell's deposition is assigned as error on the ground that, as to defendant, it was mere hearsay. Bell was a party defendant to this action,

and the court seems to have admitted the statement as the admission of a party against himself. Whether it was admissible on this ground against the other defendants we have not found it necessary to consider. It will be observed that it was not admitted as evidence on any of the issues in the case, but only upon the preliminary question whether the witness was out of the jurisdiction of the court, and beyond the reach of its process, and was likely to remain so. While, in order to warrant the introduction of the testimony of an absent witness, given on a former trial, it is not always necessary that it should appear that he is actually domiciled abroad, yet the fact that he is is the most satisfactory evidence that he intends to remain abroad, and is not likely to return within the reach of process of the court. Whether he intends to return is a fact only positively known to himself, and upon that question his own declarations are admissible, in connection with other evidence of the fact of his departure or absence from the state. We do not understand that the competency of evidence upon a preliminary question of this kind, which is, to a certain extent, addressed to the sound discretion of the court, is governed by the same strict rules which apply to the admission of evidence upon the issues in the case. Anything which will reasonably satisfy the court that the absent witness is not likely to return within the jurisdiction of the state may be admitted. See *Wyatt v. Bateman*, 7 Car. & P. 586; *Austin v. Rumsey*, 2 Car. & K. 736; also, *Prince v. Blackburn*, 2 East, 250.

2. Under the assignments of error the second question is not really in the case. The court allowed Mary McCarthy a life estate in all the property which, according to the finding of fact, constituted the homestead of her husband at the time of his death, and the finding of fact is not assailed by any sufficient assignment of error. The widow's life estate was limited to the land to which her husband was entitled as a homestead at the time of his decease; and his right was limited to the land, not exceeding the statutory area, which he had dedicated to homestead purposes, and was actually occupying as such at the time of his decease. In this case there is neither finding nor evidence that at the time of the husband's decease he was occupying, as a part of, or as appurtenant to, his homestead, any more land than what the court allotted to the widow. Order affirmed.

FISK v. WESTOVER.

(Supreme Court of South Dakota. July 29, 1893.)

WRITS—EXEMPTION FROM SERVICE—NONRESIDENT SUITOR.

1. Section 5274, Comp. Laws, covers only the subject of the immunity of witnesses attending court from service of process, and does

not assume to regulate the exemption of suitors.

2. A nonresident suitor, coming into this state for the sole and only purpose of attending the trial of his case, such attendance being shown to be necessary, is privileged from service of civil process while coming to, returning from, and attending upon the court for the purpose of such trial.

(Syllabus by the Court.)

Appeal from circuit court, Hughes county; H. G. Fuller, Judge.

Action by Robert B. Fisk against J. Henry Westover. From a judgment setting aside the service of summons, plaintiff appeals. Affirmed.

Shunk & Hughes, for appellant. Horner & Stewart, for respondent.

KELLAM, J. This is an appeal from an order of the circuit court setting aside the service of a summons upon defendant. The affidavit upon which the motion was granted shows that the defendant (respondent) was a resident of the state of Illinois, temporarily in Hughes county, where the service was made, for the purpose, and only for the purpose, of attending the trial of two certain cases then pending in said court, wherein respondent was a party, and testifying therein. That his presence and attendance at said trials as a party were necessary and essential to the safe and proper conduct of the cases and the protection of his interests therein, and that the service was made during the time he was in attendance upon court. The first of said actions was tried on the 26th and 27th days of January, 1891, a verdict being returned in favor of respondent on the latter day. That after verdict, and before judgment was entered thereon, and before the departure of any train or other conveyance by which respondent could start for his home, the summons referred to was served upon him. The second case had not yet been reached for trial.

There seems to be no question about the facts, nor as to what the affidavit shows as to the circumstances under which the service was made, the only question discussed by counsel being whether the service of a summons under such circumstances should be allowed to stand and give the court jurisdiction over the defendant. Appellant quotes three sections of the Compiled Laws as controlling. Section 2505: "In this territory there is no common law in any case where the law is declared by the Codes." Section 4808: "No statute law or rule is continued in force because it is consistent with the provisions of the Code on the same subject; but in all cases provided for by this Code all statutes, laws, and rules heretofore in force in this territory, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated." And section 5274: "A witness shall not be liable to be

sued in a county in which he does not reside by being served with a summons in such county while going, returning, or attending in obedience to a subpoena." If said section 5274 was intended to cover the whole subject of exemption from the service of civil process during and on account of necessary attendance upon court, the correctness of appellant's conclusions could hardly be avoided; but we do not think it was. It only touches the subject of immunity of witnesses. While it reduced the common-law privilege of a witness to a statutory one, it left that of suitors unregulated. *Salhinger v. Adler*, 2 Rob. (N. Y.) 704. It must have been within the knowledge of the legislature that some privileges of the same character had almost from time immemorial been accorded by the general law to suitors, attorneys, judges, and other officers in actual and necessary attendance upon court; and although the cases have not been in exact harmony as to what circumstances would justify such immunity, the general principle is well established, and has been declared and applied in cases innumerable. Respondent did not base his motion on the ground simply that he was a witness, but that he was a nonresident suitor, whose rights and interests were then being litigated, and were about to be determined by one of the courts of this state, and that it was essential to the due protection of such rights that he be present at the trial. In a few instances, immunity has been denied to a foreign suitor under such circumstances. Prominent among such cases are *Bishop v. Vose*, 27 Conn. 1, and the more recent case of *Baldwin v. Emerson*, (R. I.) 15 Atl. Rep. 83. Concerning *Bishop v. Vose*, supra, the supreme court of Indiana, in *Wilson v. Donaldson*, 117 Ind. 361, 20 N. E. Rep. 250, says: "The only case cited by the appellant's counsel, which directly opposes the opinion which we accept as the correct one, is that of *Bishop v. Vose*, 27 Conn. 1, and that decision is not supported by authority, nor are any satisfactory reasons assigned for the conclusions of the court." Subsequently the United States circuit court for the district of Connecticut refused to apply the rule of *Bishop v. Vose* in a case where the foreign suitor thus served was the defendant. The reasoning of the opinion, however, is as forceful in respect to one party as the other. It says: "The inconvenience to which plaintiffs are subjected by being compelled to sue defendants in the state of which they are citizens is not so great as to justify the allowance of obstructions by means of legal proceedings which will preclude nonresident suitors from giving free and unrestricted attention to their cases when they are on trial. * * * The decision is confined to a nonresident defendant because the supreme court of Connecticut held in *Bishop v. Vose*, 27 Conn. 1, that a nonresident plaintiff was not protected

while in attendance upon the trial of his case in this state from the service of a new writ by summons." *Sewing-Mach. Co. v. Wilson*, 51 Conn. 595. A perusal of the cases in which the immunity of a suitor in attendance upon court has been declared discloses the fact that no distinction has generally been made between a plaintiff and a defendant. The reasoning of the courts is as applicable to one as to the other, and the rule of privilege has been applied indiscriminately. *Ex parte Hurst*, 1 Wash. C. C. 186; *In re Healey*, 53 Vt. 694; *Matthews v. Tufts*, 87 N. Y. 568; *Bank v. Ames*, (Minn.) 39 N. W. Rep. 308; *Henegar v. Spangler*, 29 Ga. 217; *Thompson's Case*, 122 Mass. 428; *Small v. Montgomery*, 23 Fed. Rep. 707; *Mitchell v. Circuit Judge*, 53 Mich. 541, 19 N. W. Rep. 176; *Palmer v. Rowan*, (Neb.) 32 N. W. Rep. 210; *Christian v. Williams*, 35 Mo. App. 297; *Wilson v. Donaldson*, supra; *Andrews v. Lembeck*, (Ohio.) 18 N. E. Rep. 483; *Parker v. Marco*, 136 N. Y. 585, 32 N. E. Rep. 989. The decision of the court below was in accord with the greatly preponderating weight of authority, and it is affirmed. All the judges concur.

LANTRY v. PARKER.

(Supreme Court of Nebraska. June 29, 1893.)

ADVERSE POSSESSION—WHAT IS—COLOR OF TITLE—POSSESSION BY AGENT—LIMITATION OF ACTIONS.

1. Where land is especially adapted to the purposes of grazing and hay growing, and one claiming ownership thereto has every year, for a period of more than 10 years, cut the grass and harvested and disposed of the hay from such portions of the land as its character permitted, so using the land in connection with, and in the same manner as he used, other tracts owned or claimed by him, and adjacent thereto,—there being at different periods fences or plowed strips, not entirely inclosing the whole, but of such a character as to indicate a connection between the tracts,—and where the person so using the land paid all the taxes thereon, and at intervals warned off trespassers, and distrained cattle thereon found grazing, *Acid*, that such acts constituted actual, continuous, notorious, and adverse possession for the statutory period.

2. A tax deed purporting on its face to convey title to land, although void for failure to comply with the statutes, affords color of title, under the general statutes of limitations.

3. One may plead adverse possession, and is entitled to the benefit of the statute relating thereto, although he was a nonresident, and absent from the state, during a portion or all of the period covered by his possession.

4. The possession of one's agents is, for the purpose of the statute of limitations, the possession of the principal.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Douglas county; Wakeley, Judge.

Action to quiet title by Victor G. Lantry against James M. Parker. Defendant had judgment, and plaintiff appeals. Affirmed.

Joseph H. Blair, for appellant. Lake, Hamilton & Maxwell, for appellee.

IRVINE, C. Victor G. Lantry brought this suit in the district court of Douglas county, against James M. Parker, to quiet his title to a tract of land designated as "Outlot 215," in the city of Florence.

In this petition, plaintiff alleged title and possession in himself, and averred that the defendant claimed under a tax deed which was void, and conveyed no title. The defendant, by a counterclaim, alleged title in himself by adverse possession, and alleged that shortly before the commencement of the suit his possession was forcibly invaded by agents of the plaintiff. The prayer was for an injunction restraining the plaintiff from molesting defendant in his possession of said tract, and for general relief. The district court found all the issues for the defendant, dismissed plaintiff's petition, quieted title in defendant, and enjoined plaintiff from asserting any interest in the property, and from interfering with defendant's possession.

Several questions are presented as to the admissibility of the evidence offered by plaintiff to establish his paper title. These questions it will not be necessary to determine. In Nebraska the law is settled that the operation of the statute of limitations is to vest absolute title in the occupant, when he has maintained an actual, continued, notorious, and adverse possession, under claim of ownership, for the statutory period. *Horbach v. Miller*, 4 Neb. 31; *Gatling v. Lane*, 17 Neb. 77, 22 N. W. Rep. 227. And, the operation of the statute being to vest title in the occupant, a title so acquired may be made the basis of an affirmative claim for relief, as well as it may be interposed as a defense. *Gregory v. Langdon*, 11 Neb. 166, 7 N. W. Rep. 871. If, therefore, the trial court was justified in finding the issue of adverse possession for the defendant, the nature of plaintiff's title was immaterial, and the decree was right.

The evidence is in some respects conflicting,—so much so that a finding either way upon this issue would probably have to be sustained. Upon the part of the defendant the evidence tended to show that defendant commenced to use the land in 1862 as a pasture, and continued such use until about 1870; that from that year he had used it continuously as hay land. In 1874 the defendant bought the land at tax sale, and in 1876 a tax deed was issued to him, the deed being void because of several defects admitted to be fatal. Since obtaining this deed the evidence tends to show that every year the grass has been cut, by Parker's agents, upon so much of the land as permitted this use; that the land is high, and somewhat rough; that it is partially surrounded by other land of Parker's, and that all this land is best adapted to the purposes of grazing and growing hay; that the particular tract in controversy has been so

used by Parker, continuously, in the same manner that he has used the other land owned or claimed by him, adjacent thereto; that, while the particular tract has never been entirely inclosed by defendant, Parker has, at different periods, erected fences and plowed strips in such manner as to clearly indicate that he was treating the land in connection with his other property, and as forming a portion of a more extended tract. The evidence also tends to show that Parker has paid all the taxes, and has at times warned herders to keep off the land, and has distrained cattle of others, grazing thereon.

This evidence is, we think, sufficient to justify the trial court in finding that defendant had the notorious, continuous, and adverse possession of the land for the statutory period. The law does not require that possession shall be evidenced by a complete inclosure, nor by persons remaining continuously upon the land, and constantly, from day to day, performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be, in its nature, adapted. In the case of arable land it is not necessary, in order to hold possession, that one should continuously have a crop in the ground. It is sufficient if, during the seasons of the year when crops are grown, the land be used for that purpose, and from harvest to seedtime one's possession is not interrupted, although during that period no acts of ownership may be exercised. So, here, we think that the protection of the grass during the growing season, and the cutting, curing, and disposal of the hay at the proper periods, constitute actual possession in the defendant, especially when taken in connection with his using it in like manner as the surrounding land, and his acts to prevent its use by others.

It is said that the evidence does not show that hay was cut from all the land, and that the actual possession exercised cannot be extended by construction to the unused portion, because the tax deed, void on its face, was insufficient to afford color of title. This question has already been settled. The case of *Sutton v. Stone*, 4 Neb. 319, merely holds that a void tax deed will not support the special limitation provided by the revenue law, and to the same effect is the case cited by plaintiff, of *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. Rep. 83. In *Gatling v. Lane*, 17 Neb. 77, 22 N. W. Rep. 227, and in the same case on rehearing, 17 Neb. 80, 22 N. W. Rep. 453, it is distinctly held that a tax deed, although void, does constitute color of title under the general statutes of limitation.

It is also contended that the defendant cannot claim the benefit of the statute because he has resided without the state during nearly the whole of the period since the tax deed was obtained. The proof shows

such to be the fact, the possession being through defendant's agents. This contention is founded upon section 20 of the Code of Civil Procedure, providing that if, when a cause of action accrues against a person, he be out of the state, the period limited for the commencement of the action shall not begin to run until he come into the state, and if, after the cause of the action accrues, he depart from the state, the time of his absence shall not be computed as any part of the period within which the action must be brought.

Section 17 of the Code provides that the absence from the state, death, or other disability, of a nonresident, shall not operate to extend the period within which actions in rem shall be commenced by and against such nonresident, or his representatives. Section 20, therefore, applies, and excludes the defendant from the benefit of the statute, unless this be an action in rem, within the meaning of section 17. Section 77 of the Code of Civil Procedure provides that service may be made by publication in actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists, wholly or partially, in excluding him from any interest therein, and such defendant is a nonresident of the state, or a foreign corporation. The validity of this statute, as sustaining decrees in suits to quiet title, was affirmed in *Watson v. Ulbrich*, 18 Neb. 186, 24 N. W. Rep. 732. It has also been affirmed by the supreme court of the United States in *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557. In the latter case, and in *Perkins v. Wakehan*, 86 Cal. 580, 25 Pac. Rep. 51, the jurisdiction of the courts, in such cases, to proceed against nonresidents upon service by publication, is based upon the power of a sovereign state to exercise jurisdiction over all property within its limits, and to adopt such reasonable legislation as will effectually enable the courts to reach out, and adjudicate titles to such property. In the California case it is said: "While a decree quieting title is not in rem, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment in rem." Mr. Justice Brewer, in *Arndt v. Griggs*, says that a state has control over property within its limits. "It cannot bring the person of the nonresident within its limits. Its process goes not out beyond its borders. But it may determine the extent of his title to real estate within its limits." Upon a similar question the supreme court of Indiana says, in *Easig v. Lower*, 120 Ind. 239, 21 N. E. Rep. 1090: "While the decree is not in rem, strictly speaking, yet it must be conceded that it fixes and settles the title to the land then in controversy, and to that

extent partakes of the nature of a judgment in rem." So the supreme court of the United States in *Boswell's Lessee v. Otis*, 9 How. 336, said: "A bill for the specific execution of a contract to convey real estate is not, strictly, a proceeding in rem, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service or process, it is substantially of that character." In *Pennoyer v. Neff*, 95 U. S. 714, Mr. Justice Field says: "It is true that, in a strict sense, a proceeding in rem is one taken strictly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a large and more general sense the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, for partition of real estate, foreclosing mortgages, or enforcing a lien. So far as they affect property in the state they are substantially proceedings in rem, in the broader sense which we have mentioned." Under sections 51 and 77 of the Code, our statutory action of ejectment may be brought against a nonresident, and service obtained by publication. These statutes are based upon the same principle as that relating to suits to quiet title. They are valid for the same reasons, and the nature of the action, when service by publication is resorted to, is, so far as this discussion is concerned, the same. In both cases they must be regarded, so far as the adjudication of title is concerned, as actions in rem. The object of the exception to the statutes of limitations contained in section 20 of the Code is to prevent the running of the statute in cases where, by the defendant's absence from the state, plaintiff is prevented from bringing his suit. He is not so prevented, by the defendant's absence, from beginning suit, either to quiet title, or in ejectment, and the reason of the exception does not apply in such cases. The object of the proviso quoted from section 17 was to prevent a too general application of section 20, and to permit the statute to run in those cases where, by constructive service, the plaintiff might proceed, notwithstanding defendant's absence. The term "actions in rem" was evidently used in section 17 in the same sense in which the courts have said that suits to quiet title upon constructive service are actions in rem.

We think, therefore, that the defendant was entitled to the benefit of the statute; and the trial court having found, upon evidence sufficient to sustain the finding, that he had had the actual, continuous, notorious, and adverse possession for the statutory period, the judgment is affirmed. The other commissioners concur.

JANES et al. v. HOWELL et al.

(Supreme Court of Nebraska. June 29, 1893.)

JUDGMENT—VACATION—FALSITY OF RETURN—MERITORIOUS DEFENSE.

A court of equity will not vacate a judgment at law merely on the ground that the officer's return, that he had served the summons on the defendant to the judgment by leaving a copy of the process at his usual place of residence, was false. It must also be averred and proved that the defendant to the judgment has a meritorious defense to the same.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Douglas county; Wakeley, Judge.

Suit by Oscar F. Janes and others against Samuel J. Howell and others to vacate a judgment obtained by defendants. From a decree vacating the judgment, defendants appeal. Reversed.

Cornish & Robertson, for appellants.
Brown & Talbott, for appellees.

RAGAN, C. On January 8, 1889, the appellants recovered judgment against the appellees in the county court of Douglas county. The return of the summons in the case is as follows: "On December 27, 1888, I received this writ, and on December 27, 1888, I served it, by leaving a certified copy of this writ, and indorsements thereon, at the usual place of residence of O. F. Janes and M. E. Janes, the defendants, in Douglas county, Nebraska. George Krall, Constable." The record of the judgment in the county court recites: "This cause came on for trial to the court. * * * Defendants did not appear. It appearing to the court that said defendants had been duly served with summons, and came not, default was made," etc. On June 3, 1889, the appellees filed in the district court of Douglas county their petition, in which they alleged the recovery against them in the county court of the aforesaid judgment; that during the month of January, 1889, and for some time previous thereto, they resided in said Douglas county; and that they had no knowledge of the commencement by the said Howell of an action against them, nor of the rendition of a judgment therein, until after the same was rendered. They further aver that no summons issued in the case was served upon them, in any way or form known to the law, nor was there any notice of any kind given them, or served on them, or either of them, of the commencement of Howell's action; that they had a good and valid defense thereto; that they had no adequate remedy at law,—and prayed that said judgment in favor of said Howell might be set aside, and held for naught, and that all the proceedings had thereunder might be set aside and annulled. The district court, by its decree, vacated the judgment, and the appellants bring the case here.

The decree will have to be reversed for the reason that there is neither pleading nor

proof on the part of the appellees that they have any valid defense to the claim on which appellants' judgment is based. The petition does state that they (the appellees) "have a valid defense," but this is a mere conclusion. The plea, to be good in this respect, must set out what the defense is,—state the facts,—so that the court can determine whether the facts constitute a defense. While there is some conflict, the weight of authority undoubtedly is that a court of equity will not enjoin a judgment at law merely on the ground that the process in the suit in which the judgment was rendered was not served on the defendant, or, in other words, that the return of the officer as to service is in fact false. To justify the interposition of a court of equity in such a case, it must be further shown that, if the relief sought be granted, a different result will be obtained from that already adjudged by the judgment alleged to be void. *Colson v. Leitch*, 110 Ill. 504; 3 Pom. Eq. Jur. § 1154, note, and cases there cited. It is, however, the settled law of this state that a court of equity will not set aside a judgment at law, regular on its face, when it is not shown that the judgment was rendered when no cause of action existed. *Osborn v. Gehr*, 29 Neb. 661, 46 N. W. Rep. 84. The decree of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion. Judgment accordingly. The other commissioners concur.

HOLDEN v. CURRY et al.

(Supreme Court of Wisconsin. June 21, 1893.)

INFANTS—AGENTS—GUARDIAN—APPOINTMENT—POWER—ACTION ON BOND—EVIDENCE.

1. Infants are not competent to appoint an agent.

2. Under *Sanb. & B. St. §§ 3936, 4013*, providing that, before appointing any person guardian of a minor, the court shall require him to give a bond, which shall not be deemed sufficient unless it shall have been examined and approved by the judge, and his approval indorsed thereon in writing, parol evidence is not admissible that the judge orally appointed a guardian, and approved his bond, prior to the time the records show such appointment and approval.

3. The agreement of a person, before being appointed guardian of an infant, to take an order of an administrator in payment of the infant's claim, does not bind the infant, or prevent an action on the administrator's bond for the amount of the claim.

4. In an action on the bond of an administrator *de bonis non*, parol evidence is not admissible that he received only a certain amount; but the judgment of the court on the accounting by him, charging him with a certain larger amount, is conclusive.

Appeal from circuit court, Iowa county; George Clementson, Judge.

Action by Alice Holden against William H. Curry and others. Judgment for defendants. Plaintiff appeals. Reversed.

The other facts fully appear in the following statement by **PINNEY, J.**:

This action was brought against the defendants, as sureties on the bond of one Parmalee, as administrator de bonis non of the estate of Martin Phelan, deceased, to recover the sum of one twenty-fifth part of \$7,530.10, being the sum of \$301.20, ordered by the county court to be paid to the plaintiff, as one of the distributees and of kin to the deceased, November 11, 1884. Martin Phelan died intestate, leaving as his heirs at law his brothers, Joseph Phelan, Richard Phelan, and James Phelan, and Julia Phelan, a niece, each entitled to one-fifth of his estate, and five nephews and nieces, entitled to another fifth, or one twenty-fifth each, and the plaintiff was one of the latter number. William T. Henry was appointed administrator of his estate, partly administered the estate, and died July 2, 1883. The said Parmalee was appointed administrator de bonis non October 2, 1883, the defendants becoming sureties on his bond as such. The account of Henry as such administrator, and also the account of Parmalee as administrator de bonis non, were filed for settlement, and an application for assignment of the residue of the estate was heard upon notice; and a decree was made thereon November 11, 1884, from which it appeared that the residue in the hands of Henry, at the time of his death, was \$12,785.85, and that said Parmalee was chargeable, as administrator de bonis non, with that sum, and that the residue in his hands was \$7,530.49, one twenty-fifth part of which was assigned to the plaintiff, who with her brother Joseph and her sister Johanna were each entitled to a like amount, and were then minors. Joseph Phelan, one of the brothers of the deceased, entitled to one-fifth, or \$1,503.50, had been paid by Henry, as administrator, \$2,500, for which he held his receipt, being a sum in excess of his share, of \$996.50, and this receipt was handed over to Parmalee as administrator de bonis non, and appears to have been received by him as an asset of the estate, and he was charged by the county court therewith in his final account. On the 14th of November, 1884, Richard Phelan, one of the brothers of the deceased, gave to Parmalee a receipt stating that he had received of the latter, "as administrator de bonis non of the estate of Martin Phelan, deceased, the sum of one thousand five hundred and three dollars and fifty cents; it being the full share of said estate, in its final distribution, coming to me, as per final judgment in the settlement of said estate." This appears to have been for the amount required to be paid under the judgment to the three minors last above named. The evidence shows that it was then intended to have said Richard Phelan appointed their guardian, so as to complete the distribution thus adjudged. On the 17th day of the same month, Parmalee gave an order to said Richard Phelan, directed to the brother Joseph Phelan, who had received \$996.50

more than his share, saying to him that "Richard having assumed the said sum of \$996.50 in his hands, over and above his said share, that he should settle with him for that amount." On the 24th of the same month, Richard Phelan, as guardian of the plaintiff, gave a receipt to said Parmalee, as administrator de bonis non, for the sum of \$300.70; "being for the full share of said estate, in its final distribution, coming to her, as per final judgment in the settlement of said estate." Richard Phelan, assuming to be guardian for said three minors, had taken of Parmalee said order on Joseph Phelan for the amount of their three shares, and for another small sum due to another distributee, and the question was whether this transaction was a valid payment and satisfaction of the share sued for by the plaintiff; it being denied that Richard Phelan was such guardian of the plaintiff as he assumed to be, or that he had any authority, as guardian or otherwise, to receive said order of Parmalee on Joseph Phelan in payment of the amount adjudged to be paid her by Parmalee as administrator de bonis non. After Parmalee's death, by order of the court, the plaintiff having demanded said sum of \$301.20 of Parmalee's sureties, she obtained leave to sue on his bond for the amount. There was no claim that she had been paid in any other way than by the receipt by her guardian as above of the order on Joseph Phelan. It appeared that this order was never paid, and Joseph Phelan refused to accept it. On the same day when Richard Phelan gave Parmalee the first receipt, as above stated, November 14, 1884, he filed his petition to be appointed as guardian of said three minor heirs; and evidence, against plaintiff's objection, was given to show that at the same time he tendered to and left with the county judge his bond, with sureties, bearing the same date, but the bond was not filed until the 12th of January next thereafter, when Richard Phelan was appointed such guardian, and letters were issued to him, bearing that date; that when said petition and bond were so presented the county judge said that they were right, and he was appointed guardian. Evidence was given to show that Richard Phelan agreed to accept, and did accept, the order of Parmalee on Joseph Phelan in payment of their distributive shares, but this was before the appointment was actually made; that since then nothing had occurred or been done about it. It appeared that Joseph Phelan and Richard Phelan had real estate for some considerable time thereafter in Iowa county, upon which they received rents; that it had been subsequently sold and disposed of. It was not claimed that Parmalee had been notified of the nonpayment of his order on Joseph Phelan. The defendants offered to prove that Henry, while acting as administrator, received all the property of the Phelan estate, except the sum of \$50 re-

ceived by Parmalee; that the latter, owing to his relations with Mr. Henry, but not because he was legally bound to do so, assumed to pay the amount that appeared to be due from Henry in the settlement of his account, although he did not actually receive the assets belonging to the estate, except said \$50; and that, therefore, the sureties were only bound for the latter amount. This evidence was excluded. At the request of the plaintiff's counsel the court charged the jury that the order given by Parmalee to Richard Phelan on Joseph Phelan, if not itself paid, did not constitute a payment of the amount due to the plaintiff on the settlement of Martin Phelan's estate, unless received by Richard Phelan under an express agreement to accept it as absolute payment, but refused to instruct the jury that Richard Phelan, as guardian of the plaintiff, had no right to accept of an order on Joseph Phelan as payment of the amount due his ward, unless the same was authorized by the plaintiff, or subsequently ratified by her, and that such assent or ratification would only be made after she became of age, and also refused to direct the jury to return a verdict in favor of the plaintiff for the sum of \$301.21, with interest. The court stated that the question to be determined was whether the \$300.70, for which the receipt in evidence was given, should be charged to her, because paid to one who acted as her agent, and really was her guardian some few weeks afterwards, and continued to be such until she became of age; that the question to be determined was, viewing all the circumstances in the case when this matter was adjusted between Mr. Parmalee and Richard Phelan, did the latter receive this order for \$996.50 upon his brother Joseph Phelan, in New York, as an absolute payment of the amount due to his wards? Did he receive it with the purpose and expectation of looking to his brother Joseph, and to him wholly and only, for the payment of this sum? If he did, the plaintiff could not recover. If he did not, then their verdict should be in favor of the plaintiff, for the amount claimed, and interest from November 11, 1884. Referring to the fact that Joseph Phelan had property in Wisconsin, the court told the jury that there was "no question but what Richard Phelan could have brought an action against him in the courts of this state, and compelled the payment of the amount of the order to him, as the guardian of his wards, but he did not see proper to take that course. Now the land is gone, the personal property is gone, and this claim is presented to the court as a claim that should be paid by the sureties of Mr. Parmalee,"—and that the jury were to decide whether it should be or not. The jury found for the defendants, and a motion for a new trial was made on the ground of the admission of improper evidence, objected to by the plaintiff, for the refusal of instructions

asked, and for error in the instructions given, and because the verdict is contrary to law and contrary to the evidence. The motion was denied, and the plaintiff appealed from the judgment against her for costs.

John F. Grace, Olin & Butler, and Eldon J. Cassoday, for appellant. J. M. Smith and Spensley & McIllellon, for respondents.

PINNEY, J., (after stating the facts.) Unless the plaintiff is concluded by the action of Richard Phelan in agreeing to accept, and in accepting, the order of Parmalee on Joseph Phelan, for \$996.50, in payment and satisfaction of the distributive shares of the three minors, the plaintiff and her brother and her sister, in the estate of Martin Phelan, deceased, it is plain that the defendants had no defense to the action, and the circuit court should have instructed the jury, as requested by the plaintiff, to find a verdict in favor of the plaintiff, for the full amount of her claim. The uncontroverted evidence shows that when the transaction between Parmalee and Richard Phelan, relied on as a defense, took place, the latter was not the lawfully appointed guardian of the plaintiff, or of her brother or sister, for all of whom he assumed to act. He was not their agent, because, by reason of their infancy, they were not competent, in law, to appoint an agent. There is no evidence to show that after the appointment of Richard Phelan as their guardian, January 12, 1885, they ever, in any way, ratified or confirmed what he had previously attempted to do in their behalf, nor that he assumed in any way to negotiate or deal with Parmalee in respect to the order.

1. A guardian of a minor derives his authority entirely from the act of the court appointing him such, and this must be evidenced by matter of record,—by the record of the court. The appointment cannot be shown in part by the record, and in part by matter in pais; and, of necessity, the record itself is the sole and conclusive evidence of the fact, and cannot be contradicted or varied by parol evidence. It imports absolute verity, and no allegation can be admitted against it. The statute provides that, "before appointing any person guardian of a minor, the court shall require such person to give bond to the minor, in such sum, and with such sureties, as the court shall designate and approve, conditioned" as in the statute prescribed. *Sanb. & B. St.* § 3966. And by section 4013 it is provided that "no such bond shall be deemed sufficient unless it shall have been examined and approved by the county judge, and his approval indorsed thereon in writing, and signed by him." All the prescribed conditions of the bond are prospective, and none of them have any relation to what has occurred in the past. The bond is therefore no protection or security to the ward for any interference or intermeddling with his

property by his guardian before he was appointed such. The evidence that the county judge verbally announced his satisfaction with Richard Phelan's bond, and that he was appointed guardian of these minors, was improperly received to vary and contradict the record. It was not competent, by such means, to carry back the authority conferred on the guardian by an appointment which the record declares was made January 12, 1885, in pursuance of a bond filed and approved on the same day, to sanction acts and transactions of the guardian occurring in the previous November, when he was not their guardian, and for the doing of which improperly the bond actually given afforded them no security whatever.

2. The appointment of Richard Phelan as guardian, January 12, 1885, could not relate back so as to validate acts done by him in relation to the property and estate of his wards previous to such appointment, and when he had no authority over them. *Huntsman v. Fish*, 36 Minn. 143, 30 N. W. Rep. 455; *Wiswell v. Wiswell*, 35 Minn. 371, 29 N. W. Rep. 166. The fraudulent or mistaken representations, even, of one who, without authority, assumes to act as guardian for an infant, afford no foundation for an equitable estoppel against the infant, or his guardian subsequently appointed, so as to bind the infant, or charge his property. *Sherman v. Wright*, 49 N. Y. 228. And, if the same party is appointed guardian, his rights and authority as such are the same as of one appointed who had made no such representations. The case of one acting as guardian for an infant, without authority, is not analogous to that of an executor de son tort, or of acts done by an executor or administrator before letters are issued to him, as no one can make himself guardian, for any purpose, by wrongfully intermeddling with the property or affairs of an infant. The doctrine of relation is an equitable one, and applies, in order to support a just title, as, where the proceedings necessary to vest or create it consist of several steps or acts, all of them will have reference, in point of time, to the principal or substantial part of the transaction. It will not be applied so as to work wrong or injustice. As the transaction by which it is claimed Richard Phelan agreed to take or did take the order of Parmalee on Joseph Phelan in payment of the distributive share of the plaintiff in Martin Phelan's estate, with which Parmalee was charged by the judgment of the county court, was without any authority, and void as against her, it was a matter of no concern to her what became of the property or estate in Wisconsin of either Richard or Joseph Phelan, and the circuit court erred in leaving it to the jury to find whether the plaintiff's claim should be paid by the defendants or not. Upon the plain and undisputed facts the plaintiff was entitled to recover her de-

mand, with interest. It was immaterial that Richard Phelan agreed, if such was the fact, before he became guardian, to take, and had in fact taken, the order in question, as payment.

3. The offer of the defendants to show that Parmalee never received, in fact, but \$50 of the property and estate of Martin Phelan, deceased, was inadmissible. The circuit court properly held that the judgment of the county court, charging Parmalee as administrator de bonis non, as already stated, was in this action conclusive, as against his sureties. *Heard v. Lodge*, 20 Pick. 58. This is the necessary result of the conditions of the bond. For the reasons stated the judgment of the circuit court must be reversed, and a new trial had.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

HASTINGS v. THOMPSON.

(Supreme Court of Minnesota. July 14, 1893.)

PROMISSORY NOTE—WHAT CONSTITUTES.

The fact that an instrument for the payment of a specific sum of money is made payable with current exchange on a place other than the place of payment does not prevent its being a promissory note.

(Syllabus by the Court.)

Appeal from district court, Dakota county; Crosby, Judge.

Action by Henry E. Hastings against A. J. W. Thompson. Defendant had judgment, and plaintiff appeals. Reversed.

H. V. Rutherford, for appellant. Stringer & Seymour, for respondent.

MITCHELL, J. The only point raised on this appeal is whether the instruments sued on are promissory notes, for, if they are, they are unquestionably negotiable under the law merchant. They are promises to pay specified sums of money in St. Paul, "with current exchange on New York city;" and the only question is whether this provision as to exchange renders the sums required to discharge them uncertain, within the meaning of the familiar rule that one of the essential qualities of a promissory note is that the amount to be paid must be fixed and certain, and not contingent. In the definitions of a promissory note or bill of exchange it is generally, if not always, stated that the amount necessary to discharge it must be ascertainable from the face of the paper itself, without having to refer to any extrinsic evidence. Construing this definition literally, it must be admitted that the instruments in question do not strictly fall within it, for, of course, extrinsic evidence must be resorted to in order to ascertain the rate of exchange at a given time between two places. Upon examination of the reports and text-books it is surprising

how little direct authority of any value is to be found as to the effect of the addition of such a provision to an instrument for the payment of money. Daniel, Randolph, and Tiedman state in general that such a provision does not affect the commercial or negotiable character of the paper, but none of them discuss it at any length, and all of them treat of the question as if it only went to the negotiability of the instruments, whereas the real question lies back of that, and is whether they are promissory notes or bills of exchange at all. Tied. Com. Paper, § 28a; Rand. Com. Paper, § 200; Daniel, Neg. Inst. § 54. We have found no English case directly in point, and none bearing on the question, except *Pollard v. Harries*, 3 Bos. & P. 335, where such an instrument was declared on as a promissory note. If the question was authoritatively settled in the leading commercial states of the Union or in the federal courts, we would be inclined, for the sake of uniformity, to follow their decisions; but we have been unable to find that the supreme court of the United States, or of either Massachusetts, New York, or Pennsylvania, has ever passed upon the question. The only cases, state, federal, or colonial, which we have found which may be considered as having passed on the question, are the following, which may be classified thus: That such instruments are not promissory notes: *Lowe v. Bliss*, 24 Ill. 168; *Read v. McNulty*, 12 Rich. Law, 445; *Bank v. Strother*, 28 S. C. 504, 6 S. E. Rep. 313; *Palmer v. Fahnestock*, 9 U. C. C. P. 172; *Saxton v. Stevenson*, 23 U. C. C. P. 503; *Bank v. Newkirk*, 2 Miles, 442; *Bank v. Bynum*, 84 N. C. 24; *Russell v. Russell*, 1 MacArthur, 263; *Fitzharris v. Leggart*, 10 Mo. App. 529; *Hughitt v. Johnson*, 28 Fed. Rep. 865; *Bank v. McMahon*, 38 Fed. Rep. 283. That such instruments are promissory notes: *Smith v. Kendall*, 9 Mich. 242; *Johnson v. Frisbie*, 15 Mich. 286; *Leggett v. Jones*, 10 Wis. 35; *Morgan v. Edwards*, 53 Wis. 599, 11 N. W. Rep. 21; *Bradley v. Lill*, 4 Biss. 473. In very few of these cases is the question discussed at any length, or considered on principle. Some of them were decided by courts of inferior jurisdiction, and in others the remarks of the court were obiter. Many of those which hold that such instruments are not promissory notes rest, without discussion, upon a strict literal construction of the rule that the sum to be paid must appear from the face of the paper without resort to extrinsic evidence. About the only cases where the question is discussed at any length upon principle or authority are *Smith v. Kendall*, *Bradley v. Lill*, *Morgan v. Edwards*, and *Bank v. McMahon*.

In view of this state of the decisions, while in mere numbers the decided weight of authority may be in favor of the contention of the defendant, we feel at liberty to decide the question in the way we deem

most in accordance with principle and business usages, and in accordance with the rule which, in view of such usages, the leading courts of the country are most likely to finally settle down upon. The following are, in brief, the considerations which have led us to the conclusion that such instruments ought to be held to be promissory notes under the law merchant:

1. The reason and purpose of the rule that the sum to be paid must be certain is that the parties to the instrument may know the amount necessary to discharge it, without investigating facts not within the general knowledge of every one, and which may be subject to more or less uncertainty, or more or less under the influence or control of one or other of the parties to the instrument. The provision for the payment of the current rate of exchange between the place of payment and some other place is not within the reason of this rule, or subject to the evils or inconveniences which it was designed to prevent. While the rate of exchange is not always the same, and while it is technically true that resort must be had to extrinsic evidence to ascertain what it is, yet the current rate of exchange between two places at a particular date is a matter of common commercial knowledge, or at least easily ascertainable by any one, so that the parties can always, without difficulty, ascertain the exact amount necessary to discharge the paper. It seems to us that within the spirit of the rule requiring precision in the amount to be paid a provision for the payment of the current rate of exchange in addition to the principal amount named does not introduce such an element of uncertainty as deprives the instrument of the essential qualities of a promissory note. A provision for the payment of exchange is very different from one for the payment of reasonable attorneys' fees in case of suit, as in *Jones v. Kadatz*, 27 Minn. 240, 6 N. W. Rep. 800. The latter introduces an element of uncertainty very different both in kind and degree from that introduced by the former. Not only is the amount of the attorneys' fees incapable of either easy or definite ascertainment, but the amount of it is more or less under the control of the holder of the instrument. Moreover, such a provision has never been considered in business circles as properly ancillary or incidental to commercial paper, or any part of its legitimate "luggage."

2. The law merchant, including the law of negotiable paper, is founded upon, and is the creature of, commercial usage and custom. Custom and usage have really made the law, and courts, in their decisions, merely declare it. The law of negotiable paper is not only founded on commercial usage, but is designed to be in aid of trade and commerce. Its rules should, therefore, be construed with reference to and in harmony with general business usages, and, as far as

possible, with the common understanding in commercial circles. This was the very purpose of the statute of Anne placing promissory notes on the same footing as bills of exchange, and thus setting at rest a question upon which there had been some difference of opinion in the courts. Now, we think we are safe in saying, and justified in taking notice of the fact, that if bankers or other business men accustomed to dealing in commercial paper were asked whether such an instrument is a promissory note, and whether they would deal with it as negotiable paper, the answers would, in almost every instance, be unhesitatingly in the affirmative. We have no doubt but that this is the way in which such paper is generally looked upon and treated in commercial and other business circles; and, if so, the court should, as far as possible, make their decisions to conform to this general custom and understanding. We recognize the importance of simplicity and certainty in the terms and conditions of commercial paper; and appreciate the objections to permitting it to be loaded down with unnecessary "luggage," but we cannot see, under all the circumstances, and especially in view of what we believe to be the commercial usage, that any practical evil will result from permitting the addition of such a provision for the payment of current exchange on the principal amount. Nor are we disposed, as a rule, to extend the quality of negotiable paper to contracts for the payment of money beyond the strict limits of the already established rules of law; but to exclude from that category paper like that under consideration would be to exclude the very class of paper which ought to be held negotiable, if any promissory notes ought to be so held,—paper given and taken in commercial transactions, properly so called; for rarely, if ever, would a provision for exchange be incorporated in any other.

Order reversed.

HARRIS v. JOHNSTON et al.

(Supreme Court of Minnesota. July 14, 1893.)

POWER OF ATTORNEY—INDORSEMENT OF NOTES—CONSTRUCTION.

Each of several tenants in common of real estate executed a several and separate power of attorney authorizing the agent to sell the land and execute warranty deeds of his interest in the property, and "to sell and indorse any promissory notes that may be taken and secured by mortgage" on the property. *Held*, that the power did not authorize the agent to bind his principal as indorser, jointly with the other cotenants, of a note taken payable jointly to them all.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; WILLIS, Judge.

Action by Jonathan N. Harris against John Johnston, A. J. Smith, and others. Plaintiff

had judgment, and defendants Smith and others appeal. Reversed.

Lusk, Bunn & Hadley, for appellants. S. E. Hall and Young & Lightner, for respondent.

MITCHELL, J. The defendants in the record, Johnston, Smith, Searle, and the two Bushnells, being the owners as tenants in common of certain lands, each of them, other than William M. Bushnell, executed a separate power of attorney to William M. Bushnell, (Exhibits A and C of the complaint.) William M. Bushnell, for himself, and as attorney for the other defendants, under these powers, sold some of the land, and took as security for the purchase money (as we infer) the promissory note described in the complaint, payable to the order of all five of the defendants jointly, and subsequently sold and transferred it to plaintiff with what purported to be a joint "indorsement" or "guaranty" of all the payees. This action is brought on this indorsement or guaranty. The defense is that it was not authorized by the power, because—First, it is a contract of guaranty of payment, and not of "indorsement;" second, the separate powers did not authorize the agent to bind either of the defendants jointly with the others; and, third, that the instrument was not a promissory note. The third ground has been decided adversely to defendants' contention, at the present term, in *Hastings v. Thompson*, 55 N. W. Rep. 968. We do not find it necessary to consider the first, because, in our judgment, the second is decisive of the case. It is as fundamental as it is elementary in the law of agency that a formal instrument conferring authority will be construed strictly, and can be held to include only those powers which are expressly given, and those which are necessary and essential to carry into effect those which are expressed. While all these parties had an interest in the land, the powers of attorney were several and separate, and authorized the sale and conveyance of the interest of each, and the disposition of the notes and mortgages taken for purchase money therefor separately, and not jointly, with the interest of the others. The authority in each instance was to convey by warranty deed the interest of the grantor of the power in the property. It could hardly be claimed that this would authorize the attorney to execute a joint deed in behalf of all the owners, of the whole of any tract, so as to bind each by covenants of warranty of the title not only of his own interest, but also of the interests of his cotenants. So, too, with the authority to indorse notes "taken and secured by mortgages on any of said lots." This must be construed in connection with what precedes. It evidently refers to notes taken for the interest of the grantor of the power, and running to him separately, and not notes taken for the interests of the other owners of

the property, or to notes running to him and them jointly. In accordance with the doctrine already announced, it is held that authority to bind a principal as a party to a negotiable instrument, unless otherwise expressed, is authority to bind him separately, and not conjointly with another; or, to state the rule more generally, a power to an agent to act for his principal, in the absence of anything to show a different intention, must be construed as giving authority to act in the separate individual business of his principal. *Daniel, Neg. Inst. § 276; Stainback v. Read, 11 Grt. 281.* This has been held to be the rule even where binding him conjointly with another does not affect him injuriously. *Bank v. Gay, 63 Mo. 33.* In this case, by joining one of the defendants jointly with the others in an indorsement of a joint note running to all, each of them is made liable, not merely for that part of the note belonging to him, and which was taken for his interest in the property, but for the entire amount of the note, taken for the interest of all, and belonging to all. This was clearly not authorized by the power. It may be, as suggested, that in real-estate transactions of this kind it would have been more convenient to have provided for the execution of joint deeds, taking back joint notes and mortgages, and for joint indorsements. If so, it would have been very easy, if the parties so desired, to have executed joint powers of attorney to that effect; but they have not done so, and there is nothing in the separate powers expressing or indicating any such intention. Judgment reversed.

ARMSTRONG v. ARMSTRONG et al.

(Supreme Court of Minnesota. July 21, 1893.)

WILLS—CONTINGENT REMAINDER.

A will construed, and held to create a contingent remainder.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Kelly, Judge.

Action by George C. Armstrong against Jane C. Armstrong and others. Judgment, from which plaintiff appeals. Affirmed.

Eller & Hord, for appellant. H. F. Stevens and J. D. Armstrong, for respondents.

GILFILLAN, C. J. Assuming that the interests or estates of the children of the testator in the estate left by him are remainders, then they come under the classification of contingent remainders. A remainder is contingent while the person to whom, or the event upon which, it is limited to take effect remains uncertain. *Gen. St. 1878, c. 45, § 13.* The estate, real and personal, is devised and bequeathed to the trustees, to be held for the benefit of the wife during her lifetime, "and after her death for the benefit of my children, (or their survivors),

in the proportion that each would be entitled to under law—that is, share and share alike—had this will not been executed, until my children shall become of lawful age." The precedent estate vested in the trustees was to continue during the life of the wife, and, in case she died while any of the children should be minors, then to continue during the minority, which precedent estate was created, partly, at any rate, in order that the children surviving, when that estate should cease, might take share and share alike. It is not disputed that, if the words "share and share alike" refer to the principal of the estate, a contingent remainder was created, for the provision that the survivors shall so share renders it uncertain to whom the remainder will pass on the termination of the precedent estate. To avoid this inevitable conclusion it is suggested that the clause we have quoted, especially the words "share and share alike," apply only to the income of the estate; but that part of the will treats only of the body of the estate. The subsequent part of it makes provision for disposition of the income during the precedent estate, without any regard to the idea of equality in sharing it among the children or their survivors. In the first place, so much of the income during the life of the wife as may be necessary for the reasonable support and comfort of her and the children is to be paid to her for that purpose. That might take the entire income. And the surplus, if any, was to become part of the principal estate. In the second place, in case the wife should die during the minority of any of the children, the trustees were directed to pay to the guardian or guardians, not the equal share of each child in the income, but "such reasonable sum, quarterly, as may be necessary for their support and education, until they shall respectively become of age," which might take all the income. No question is made as to the validity of the will. Its plan is apparent and simple. It is to keep the estate together till the death of his wife, and the arrival at majority of any children, minors at her death, and that it shall then go to the children then alive.

Order affirmed.

VAN AUKEN v. CHICAGO & W. M. RY. CO.

(Supreme Court of Michigan. June 30, 1893.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—INSTRUCTIONS—SUNDAY LAW—VIOLATION—WHAT CONSTITUTES.

1. In an action against a railroad company for injuries received at a highway crossing, it appeared that the railroad crossed the highway obliquely; that the night was very dark; that the horses approached the crossing on a walk, but no stop was made to listen before crossing. The driver and those in the carriage testified that they looked and listened, but saw and

heard nothing. The engine was moving backward, and the evidence was conflicting as to whether there was any light at the rear end of the cab. *Held*, that the question of plaintiff's contributory negligence was for the jury. Grant and Long, JJ., dissenting.

2. There was no error in an instruction that the blowing of the whistle and the ringing of the bell a mile away from the crossing would give no warning to those about to cross the track, when taken in connection with the further instruction that the object of the signal was to warn people about to cross, and hence should be given within such a reasonable distance as would fairly notify those about to cross, and when also considered in connection with defendant's request to charge that the law required a railroad company to sound its warning signals not less than 40 rods from the crossing, but it did not require them to be sounded within 40 rods of the crossing, nor within any other distance except a "reasonable distance."

3. There was no error in directing the jury to answer "Yes" to defendant's requested submission to the jury of the question as to whether the whistle was blown at all after leaving H. and before reaching the place of the accident, where the testimony clearly showed that the whistle was blown.

4. How. St. § 2015, provides that no person shall do any manner of labor, business, or work, or take part in any sport, game, or play, on the first day of the week. *Held*, that plaintiff was not engaged in an unlawful enterprise, within the statute, in riding from a railway station to her home in a quiet manner, on a Sunday evening.

Error to circuit court, Van Buren county; George M. Buck, Judge.

Action by Elizabeth Van Auker against the Chicago & West Michigan Railway Company for injuries received at a public highway crossing by reason of defendant's negligence. Judgment for plaintiff. Defendant brings error. Affirmed.

Smiley, Smith & Stevens, for appellant. George W. Merriman and Bondeman & Adams, for appellee.

MONTGOMERY, J. The question of most importance involved in this case is that of the contributory negligence of the driver of plaintiff's vehicle when they approached the crossing where the accident occurred. The scene of the accident is indicated by the diagram appended to the opinion of Mr. Justice GRANT. The highway and the railroad do not meet at right angles, so that in traveling from the west towards the railway track the view would not be directly in the face of an approaching train. The night when the injury occurred was very dark. The evidence shows that when approaching the crossing the horses were on a walk. No stop was made for the purpose of listening, but the driver and those in the vehicle testified that they looked for an approaching train, but saw none, and that they listened and did not hear any signal. The engine was running backward, and the testimony is conflicting as to whether there was any light at the rear end of the cab. The question presented is whether it was the duty of the driver, under the circumstances, to bring his team to a stop in order to listen for an ap-

proaching train. Our decisions have settled the law as follows: First. A railroad track is, in and of itself, a warning of danger, calling upon one about to cross to use his senses, and to look and listen for approaching trains. *Railroad Co. v. Miller*, 25 Mich. 274. Second. It is not incumbent in all cases for the driver to stop his team, if the track is clear, and he can safely rely on his sense of sight. *Guggenheim v. Railway Co.*, 66 Mich. 158, 33 N. W. Rep. 161; *Thomas v. Railway Co.*, 86 Mich. 504, 49 N. W. Rep. 547; *Richmond v. Railway Co.*, 87 Mich. 390, 49 N. W. Rep. 621. Third. As to whether, in a particular case, the driver is justified in relying upon his sense of sight alone, must, we take it, depend upon the circumstances of the case presented. No case precisely analogous to the one under consideration has been decided by this court. In *Mynning v. Railroad Co.*, 64 Mich. 93, 31 N. W. Rep. 147, it appeared that on a dark and stormy night the deceased was killed while crossing the track, under circumstances which showed conclusively the negligence of the railroad company; that he was acquainted with the railroad crossing at the street in question; that he walked at a rapid pace towards and upon the railroad track, without checking his speed, or stopping or looking or listening, or taking any precaution whatever, to ascertain whether a train was about to pass; that others who were about to cross, whose opportunities for observation were no better than those of deceased, saw and heard the train. Mr. Justice Champlin, in rendering the opinion of the court, said: "Ordinary care would have required him to at least look up and down the track before crossing; and if the night was so dark as to make it difficult to distinguish a train approaching, then ordinary care would have called upon him to resort to his sense of hearing, and to pause and listen before entering upon the place of danger." In *Brady v. Railroad Co.*, 81 Mich. 616, 45 N. W. Rep. 1110, it appears that the driver of the vehicle was familiar with the crossing; that the railroad track, for some distance before crossing the highway, runs through an orchard; that the trees coming near the surface of the ground, together with other trees and bushes there, partly obscured the view of persons going southward of any train going to the southeast. The track crossed the highway obliquely. The track extends from north to south, and the highway runs in a northwesterly and southeasterly direction. It appeared that the plaintiff, sitting on the hounds of his wagon between the two hind wheels, drove upon the track without stopping, although he testified that he looked in both directions. The court held as matter of law that he was guilty of contributory negligence. In the opinion Mr. Justice Long states: "The circumstances stated by the plaintiff showed conclusively that he was not using ordinary care in approaching the crossing. Here was a crossing so much obstructed by intervening

objects that, according to his testimony, he could not see a train coming from that direction—riding, as he was, upon the hounds of his wagon—until he was within 20 or 25 feet of the crossing, and then only a little distance up the track,—some few rods. He was riding with his back turned in the direction from which the train was approaching, and he knew that it was about time for its approach; and yet he drove along and upon the track without stopping; and even when his horse halted on reaching the track he urged her forward with the lines. * * * It was shown further that there was a mill near the crossing, which was in operation, and creating some noise and confusion. Others standing near there saw the train approaching, and had heard the sounding of the whistle at the crossing above. Some of them attempted to call the attention of the plaintiff to the train's approach, but were unable to do so, as he appeared to take no note of what was passing. As the facts are presented by this record, it was the duty of the plaintiff to have stopped his team, and to have taken some precaution to ascertain if the train was approaching, which he knew was about due." And further, it was said: "A greater duty was imposed upon the plaintiff in the present case by the fact that he knew the crossing to be a dangerous one. He knew its condition, and that he would be unable to see the train until arriving at the crossing. He had no right to close his ears, and drive along without stopping, when he must have known that the noise of his wagon and of the mill would shut off the sound from the approaching train." In the present case there was no obstruction other than the darkness, which, of course, would not have prevented the plaintiff and her companions from seeing a headlight. The sense of sight was therefore as safe a guide as in the daytime, unless it be held that travelers are guilty of contributory negligence as matter of law in not anticipating that trains will be run in the open country without headlights. We think the law ought not to be so. It is most unusual and extraordinary for this to occur. And we think it should be at least a question for the jury as to whether a traveler is in fault in failing to anticipate and guard against such an unusual thing as the running of a train without a headlight. The case might be different in a yard where switching is done, and where cars are switched in the nighttime without the use of a headlight, as was the fact in the Mynning Case.

Exception is taken to the language of the court in that portion of the charge where it is said: "The blowing of the whistle and the ringing of the bell a mile away from the crossing would, of course, give no warning to people about to cross the railroad track." The court added this: "The object of it is to warn people about to cross the railway track that a train is approaching, so that the

warning should be given within such a reasonable distance as would fairly notify people who are about to cross the track of the approach of the train." We think there was no error in this part of the charge, when read in connection with the whole charge, and when it is considered in the light of the request of defendant's counsel which had been given by the court immediately preceding, as follows: "The law requires of a railroad company that it cause the whistle to be blown not less than forty rods from the crossing. It is not required to be blown within forty rods of the crossing, nor within any other distance except a reasonable distance." The court added to this: "The law does not require the whistle to be blown within forty rods, nor does it specify the exact distance at which the whistle shall be blown and the train hands begin ringing the bell. That distance, however, should be a reasonable one. It must be more than forty rods, but it must be a reasonable distance." It must be remembered that preceding this charge the court had already directed the jury that, if the whistle had been sounded at St. John's crossing, and the plaintiff and her party could have heard it by remaining quiet and listening, and they were at such a point that it was their duty to remain quiet and listen at the time, they would be guilty of contributory negligence if they did not hear it. It is evident from this that the court was calling the attention of the jury merely to what would be a reasonable distance under the statute which requires the whistle to be sounded. We see no error in that part of the charge.

Counsel for defendant requested the court to charge as follows: "It does not appear from the testimony of the plaintiff herself that she looked and listened for a coming train when the vehicle in which she was riding was approaching the track; and, as she was more familiar with the locality than her driver, and as she has the burden of proving her personal freedom from contributory negligence, and as she was bound herself to look and listen for a coming train, she has not shown her personal freedom from contributory negligence, and she cannot recover in this action." The plaintiff was called as a witness, and testified that she could remember nothing except going to Hartford and starting homeward. She was injured in her back, and her limbs paralyzed so that she was unable to walk, and a great share of the time since the injury she had been entirely helpless. The last recollection, she testifies, she has was the party leaving Hartford going towards home, and that it was a dark night. The witnesses called in her behalf, who were her companions in the buggy in which she was riding, however, testified that before they reached the crossing, and at some point which is not very definitely fixed, the plaintiff did look and was apparently listening to see if she could hear the ap-

proach of a train. We think there was some evidence from these witnesses proper to be submitted to the jury upon the question of her due care in approaching the crossing, and that the jury, under the general charge of the court, were fully and fairly instructed upon this branch of the case, and the rights of the defendant fully guarded.

Counsel for defendant requested the court to submit the following special questions of fact to be found by the jury: (1) Did the train in question make a rumbling noise as it passed over the bridges before reaching the place of the accident? (2) If the driver, Cavanaugh, had been listening for the coming train as he drove towards the track, could he have heard the train in question as it crossed the bridges? (3) Was there any noise which prevented plaintiff and her party from hearing the approaching train when they were within 100 feet from the track? (4) Was the whistle blown at all after leaving Hartford, and before the place of the accident? The court submitted the first three questions. To the first the jury answered, "Yes;" and to the second and third answered, "No." The fourth question the court refused to submit to the jury, but directed them to answer "Yes," which they did. It is contended upon the part of defendant that the direction of the court to answer "Yes" was prejudicial to the rights of the defendant, for the reason that it had a right to know whether the jury were finding the facts in accordance with the evidence, or whether the jury entirely overlooked and ignored the evidence upon a given point when it was all one way; and whether the jury were applying the law as given by the court to the facts as they found them. The court was not in error in directing the answer to this question, for, as is well said by the court in directing the answer, "the testimony was all one way." It was shown by witnesses both for plaintiff and defendant, and not disputed, that the whistle was blown after the train left Hartford and before it reached the crossing, and there was no testimony tending in any degree to contradict this. Whether it was blown soon after the train left Hartford, at St. John's crossing, or at some other point on the road, is in dispute; but the question was not directed to the point as to where it was blown, but whether it was blown at all after the train left the village. These special questions to the jury are intended for the purpose of a finding upon some particular questions of fact in dispute on the trial. *Fowler v. Hoffman*, 31 Mich. 215; *Pigott v. Engle*, 60 Mich. 221, 27 N. W. Rep. 3. There could have been but one answer to the question, and that was the affirmative one, which the court properly directed.

Defendant further requested the court to charge as follows: "It appears by the testimony on the part of the plaintiff that at the time of the accident the plaintiff was en-

gaged in an unlawful occupation, in that she was driving from the railroad station on Sunday, for pleasure, and not in any work of charity or necessity, and for this reason the defendant is not liable to the plaintiff for injuries resulting from the negligence of its employees." This question was not presented by the oral argument, but we pass upon it because it is insisted upon in the brief of counsel. How. St. § 2015, provides: "No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play, on the first day of the week. The foregoing provision shall not apply to works of necessity and charity, nor to the making of mutual promises of marriage, nor the solemnization of marriages. And every person so offending shall be punished by fine not exceeding ten dollars for each offense." It cannot be said that under the testimony in this case the plaintiff was engaged in any unlawful enterprise, even within the terms of this statute, in riding from the railway station to her home in a peaceable and quiet manner on a Sabbath evening. If she had been engaged in an unlawful enterprise within the meaning of the statute, she would be subject to the penalty fixed by the statute. In nearly all the states it has been held under quite similar statutes that a party traveling upon the highway upon a Sabbath, either from necessity or pleasure or business, who is injured by a collision with a railway train at a crossing, is not barred from recovery against the railroad company for its negligence from the fact that the injury occurred on Sunday. *Knowlton v. Railway Co.*, 59 Wis. 278, 18 N. W. Rep. 17; *Jacobus v. Railway Co.*, 20 Minn. 130, (Gil. 110); *Railway Co. v. Frawley*, 110 Ind. 18, 9 N. E. Rep. 594; *Smith v. Railroad Co.*, 48 N. J. Law, 7; *Carroll v. Railroad Co.*, 53 N. Y. 134. It was said in *Sharp v. Township of Evergreen*, 67 Mich. 443, 35 N. W. Rep. 67: "A person has the right to travel on a public highway on Sunday for any lawful purpose, and the township charged with the duty of keeping such highway in repair is liable for injuries received under such circumstances, the same as if received on a week day." The request was properly refused.

Judgment is affirmed, with costs.

MCGRATH, J., concurred with MONTGOMERY, J.

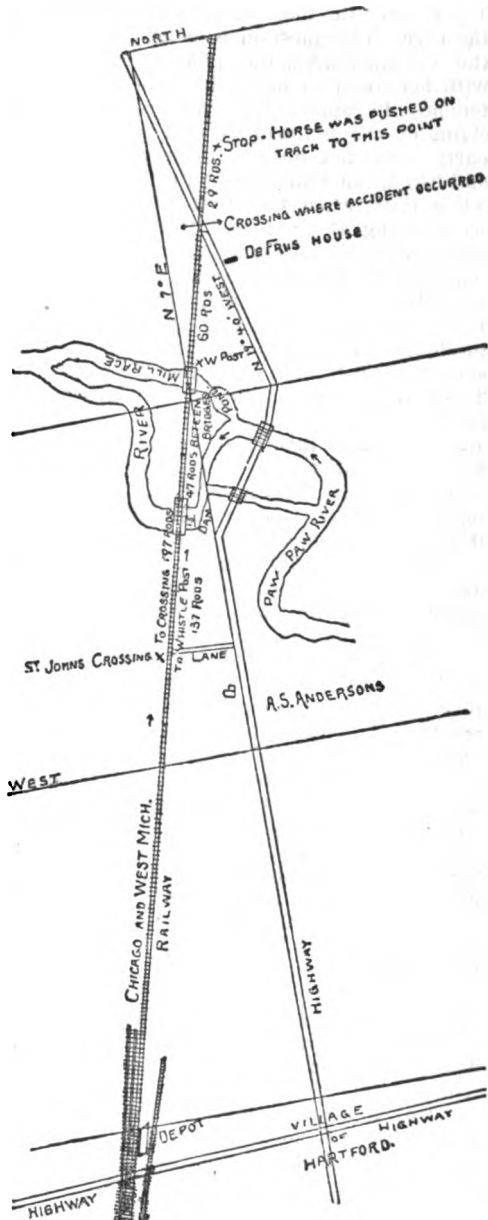
HOOVER, C. J., (concurring.) To permit the recovery of a judgment for negligence against a railroad in a case where the injured party drives upon a straight track in daylight the circumstances should be exceptional. And, while darkness may reasonably make the use of the senses—other than sight—the more imperative when approach-

ing a track, the necessity and uniform use of headlights may well lead travelers to expect and rely upon them. In the present case we must assume that the engine and caboose made comparatively little noise, which, if heard, might naturally lead to the inference that it was distant, or upon another railroad, which the absence of a headlight would be likely to confirm. The reflection from the headlight upon the end of the caboose, if where it could be seen, might be equivalent to a headlight, but from the relative directions of the railroad and highway we cannot say that it should have been seen; that being a proper question for the jury. The inference should not be drawn that absence of light excuses negligence, but under the facts in this case we cannot say as matter of law that the plaintiff did not exercise the care and caution which the ordinarily prudent traveler upon a country highway would have exercised. In my opinion, the circuit judge was right in submitting this question to the jury.

LONG, J., (dissenting.) I am unable to distinguish this case upon principle from *Mynning v. Railroad Co.*, 64 Mich. 93, 31 N. W. Rep. 147, and from *Brady v. Railroad Co.*, 81 Mich. 610, 45 N. W. Rep. 1110, and am of the opinion that under the circumstances shown the plaintiff and her party should have stopped and listened before entering upon the track. In actions for negligent injuries the burden of proof is upon the plaintiff to show that the defendant is entirely responsible for the injuries, and that negligence on the part of plaintiff does not contribute thereto; and negligence on the part of the driver of a team is imputable to the plaintiff under well-settled rules in this state. The evidence in this case shows beyond dispute that the train with which plaintiff collided was making great noise, and the plaintiff and her party could undoubtedly have heard its approach if they had stopped. The fact that it was so dark a night that one could scarcely see the length of the team necessitated that the plaintiff should exercise more than ordinary care; and, as said in *Mynning v. Railroad Co.*, supra, if it was difficult to distinguish an approaching train, then ordinary care required a resort to her sense of hearing, and to pause and listen before entering upon this place of danger. This it is not pretended she did do, and I think the court should have instructed the jury that the plaintiff, under such circumstances, could not recover.

GRANT, J., (dissenting.) I think the court should have directed a verdict in this case for the defendant, on the ground of the plaintiff's own negligence. She, and those who were with her at the time of the accident, testify that the night was very dark; so dark that they had difficulty in finding their team, which had been hitched to the

fence by the roadside, to await the arrival of the excursion train upon which two of the party were to come. The situation of the railroad and of the highway appears in the following diagram:



The distance from the depot to the crossing along the railroad is a little over a mile; from St. John's crossing, where it is conceded that the whistle was blown, to the crossing is one-half mile; from Anderson's to the crossing, in a direct line, is over half a mile; from the depot to the first bridge is about three-quarters of a mile. Plaintiff and all the members of her party, including the driver, were entirely familiar with the situation. They knew that they were nearing this

crossing, which, under all the authorities, is a warning of danger. Trains are liable to approach at any time, and at a high rate of speed. The care to be exercised must be measured by the danger which is imminent. The greater the danger, the greater must be the care. The question is what care, under the circumstances, the plaintiff and those with her owed to themselves and to the defendant in approaching the crossing. The claim of the plaintiff is that she and her party were not obliged to stop their team and listen, but that they had performed their whole duty when they looked back, as they were riding along, to see if they could see signs of an approaching train, and had listened, as well as they could, amid the noise made by their carriage and their two horses. If this constitutes in law proper care and prudence on their part, then the verdict should be sustained; otherwise it should not. The road was gravel, mixed with clay. William Cavanaugh testified that the wagon was making a little rattling on the stones, and again that the wheels made a little noise running over the pebbles. Another of plaintiff's witnesses, Mr. Hilliard, said that it was what was called a "gravel road," covered with a gravelly cement; that it packed, and was as hard almost as stone. One of the party, Miss McShannock, testified that the wagon was making no more noise than an ordinary wagon would make. It is apparent that two horses, and a carriage containing four passengers, going over such a road, would make considerable noise, even upon a walk. It is moreover apparent that the only listening done was done while they were engaged in ordinary conversation. One of the party—John McShannock—testified: "Question. What did you do in the way of listening to hear if there was anything coming? Answer. Well, we all listened. Wasn't making any great amount of noise talking." Miss McShannock testified that they chatted and visited until they got within a little way of the track. Mr. McShannock testified that they were engaged in ordinary conversation, and were sometimes laughing. The only evidence that plaintiff looked or listened comes from one of the party, who says: "I know she looked around,—moved around in her seat. She was looking that way. I don't know whether she did or not. I supposed she did from her movement." She herself testifies that she remembers nothing that occurred. There is no evidence in the record that they all at one time ceased talking and listened. It requires but little noise in close proximity to one to prevent hearing another and greater noise at a distance, which would otherwise be distinctly heard. The night was still. There was no intervening object to obstruct the hearing. All the witnesses agree to this. In daylight the train would have been in plain sight of the plaintiff all the way from the village. The little mound or rise of ground was not above the line of

vision, and could therefore have formed no obstruction to hearing. If plaintiff could not see, it became her clear duty to stop and listen. In *Brady v. Railroad Co.*, 81 Mich. 616, 45 N. W. Rep. 1110, the plaintiff was held guilty of negligence in attempting, without stopping and listening, to cross a railroad track so obstructed by intervening objects that he could not see a train approaching from one direction until he was within from 20 to 25 feet of the crossing. In that case plaintiff was alone, and, sitting upon his wagon, was approaching the crossing at a walk, and was looking for a train, which he knew was about due. He testified that he did not hear because the wind was blowing the sound from him. He was held guilty of contributory negligence. It was there said: "A person familiar with a railroad crossing, having been frequently over it, and knowing its location, when approaching the same is under the highest possible obligation to observe such precautions as are needful to avoid a collision; and failure so to do is contributory negligence that will prevent recovery for damages, if any accrue;" citing *Haas v. Railroad Co.*, 47 Mich. 401, 11 N. W. Rep. 216. The highest possible obligation certainly requires the exercise of every reasonable precaution to avoid the danger. It certainly makes no difference in what manner one's view of a railroad near a crossing is obstructed, whether by trees, or embankments, or by intense darkness. The duty in the one case is no other or different than in the other. If Brady, whose view was obstructed by trees, could not recover, on account of his own negligence in not stopping and listening, neither should plaintiff in this case, whose view was obstructed by intense darkness. If there is any difference in principle between the two cases, I am unable to discover it.

It is proven beyond controversy that, had the plaintiff and her party stopped their team and listened at any point within 10 rods of this crossing, they would have heard the approaching train, and the distressing accident would not have occurred. Under the evidence, when they were 5 rods from the crossing, the train was from 15 to 20 rods therefrom, and, of course, the distance between them and the train was about 5 rods less. Besides, it is a matter of common experience and knowledge that one can, upon a still night, with nothing to obstruct the hearing, or distract the attention, hear an approaching train in time to avoid collision at a crossing. To hold otherwise would be "to fly in the face" of a fact known to all, and to discredit our own senses. What plaintiff's witnesses heard, under circumstances as favorable or more unfavorable, certainly plaintiff must be held able to have heard if she had listened. One Fred F. Allen was driving over this same road on his way home from the depot at the same time, and heard the train when it was 20 or 25 rods distant. He also tes-

tified that he had heard the train on still nights, going over this piece of road, when he was a mile away. This witness had his wife and child with him. One Orange Hutchins was living at the Anderson Place, marked upon the diagram. He was 20 rods from the train, and after the accident heard the voices at the crossing half a mile distant. John Srackengust came to Hartford on the same train, and walked home on this same road. When at Anderson's he heard the train, and heard the whistle on the St. John's crossing. Joseph De Vries lived close by this crossing, and was therefore in the same direction from the approaching train as was the plaintiff. He heard the train come over the bridges. R. W. Stickney also came to Hartford on this train, went into the depot and remained a while, and when he came out he heard the train going across the bridge, three-quarters of a mile distant. He was more than twice as far from the first bridge as was the plaintiff when nearing the crossing, and more than three times as far from the second bridge. Henry Thomas was approaching another crossing when this same train came along, and testified that he was driving within 10 or 15 rods of the crossing, when his attention was attracted by the rumbling noise of the train. The above were all witnesses for the plaintiff. For the defense one August Ament, who lived 70 rods north of this crossing, testified that on a still night he could hear trains crossing these bridges. The driver, Cavanaugh, testified that when about four rods from the crossing he started his horses from a walk into a trot, but he thinks that they came to a walk when within about two rods of the crossing, and the first knowledge he had of an approaching train was when the horses stepped upon the plank of the crossing, when he "noticed the locomotive loom up."

I think this case is ruled by *Brady v. Railroad Co.*, supra. It is true that in that case Brady knew that a train was about due, but that can make no difference with the rule. Railroads have the right to run trains out of schedule time, and are constantly doing it. It is the duty of every passenger upon a public highway to approach these crossings with the same care and caution as he would if he had the knowledge that a train is due. When one drives, on a dark night, upon them, without stopping to listen, he is, in my judgment, guilty of gross negligence. He not only disregards his duty towards himself, but his legal duty to those who are traveling upon railroads, for he endangers not only his own life, but the lives of others. See *Grostick v. Railroad Co.*, 90 Mich. 594, 51 N. W. Rep. 667; *Apsey v. Railroad Co.*, 83 Mich. 432, 47 N. W. Rep. 319.

Railroad companies and travelers upon the

highway are alike bound to the exercise of great care in approaching these dangerous places. The former are liable if they neglect the statutory signals. But this does not justify the latter in assuming that they will hear these signals without stopping to listen when they cannot see. If these signals were given, and the traveler should drive his team upon the crossing without stopping and listening, he would certainly be guilty of negligence, and liable in damages for all the injury which resulted. Neglect of duty by either does not excuse the negligence of the other. When both neglect this plain duty, both are equally guilty, and neither can recover, because each, by the exercise of proper care, could have avoided the accident. The rule as to care must apply to the citizen in his individual as well as in his corporate capacity. The rule requiring the traveler to stop and listen when he cannot see is reasonable. It imposes no hardship or inconvenience. A stop of a few seconds would, in this instance, have warned them of the approaching train. Upon what principle of reason or justice can plaintiff and her companions be held excusable for not doing so? They do not say, nor is it claimed, that they could not have heard the noise of the train if they had stopped. They only say that they believe that they could have heard the whistle and bell without stopping the noise which they themselves were making, and which was under their own control.

The plaintiff and her companions ask the jury to believe their opinions that, notwithstanding that the noise made by their horses and carriage and their conversation was sufficient to drown the noise of the train until it struck them, yet it was not sufficient to drown the noise of the whistle and bell, and that they would have heard them had they sounded. And this, too, in the face of her other witnesses that they heard the train at a much greater distance from the track than was she, and that they also saw the lights upon it. If one must use all his senses, it is his clear duty to put himself in condition to use them, otherwise he has not complied with the law, which requires him not only to listen, but to listen attentively. The duty to stop and listen is supported by the following authorities: *Railway Co. v. Stommel*, 126 Ind. 35, 25 N. E. Rep. 863; *Railway Co. v. Beale*, 73 Pa. St. 504; *Mynning v. Railroad Co.*, 64 Mich. 93, 31 N. W. Rep. 147; *Chase v. Railroad Co.*, 78 Me. 353, 5 Atl. Rep. 771; *Flemming v. Railroad Co.*, 49 Cal. 253; *Henze v. Railroad Co.*, 71 Mo. 636; *Pence v. Railroad Co.*, 63 Iowa, 746, 19 N. W. Rep. 785; *Merkle v. Railroad Co.*, (N. J. Err. & App.) 9 Atl. Rep. 680. Beach, *Contrib. Neg.*, says, (section 181): "In attempting to cross the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all the courts

enforce this reasonable rule. It is also so consonant with right reason and the dictates of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily routine of life, that it should seem to be scarcely dependent upon the authority of decided cases in law courts. The traveler on the highway must even come to a halt for this purpose; but he is not required to get out of his wagon, and go forward on foot for the purpose of looking, especially when such a course would not have prevented the collision, but would rather have exposed the traveler to the very peril it was designed to avoid." In *Mynning v. Railroad Co.*, supra, it is said: "Ordinary care would have required him [the traveler] to at least look up and down the track before crossing; and, if the night was so dark as to make it difficult to distinguish a train approaching, then ordinary care would have called upon him to resort to his sense of hearing, and to pause, if need be, and listen, before entering upon the place of danger." In *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. Rep. 529, plaintiff, in company with others, was riding along the public highway, and drove upon the track without stopping. In that case, as in this, plaintiff's testimony was that she and her companions did not see the train. It was there said: "It is the duty of the traveler upon a highway about to cross a railroad track to make vigilant use of his senses in order to ascertain whether there is present danger in crossing. * * * It is true that the wind was blowing in nearly an opposite direction from that from which the train was coming, but several of the plaintiff's witnesses heard the train, and we have no doubt that if the plaintiff or Adams had given heed and listened they would have discovered its approach, and could thus have avoided the accident." In that case it was proven that the whistle was not sounded 80 rods from the crossing, as required, and the negligence of the defendant was regarded as proven. See, also, *Grippen v. Railroad Co.*, 40 N. Y. 50. It is said in *Chase v. Railroad Co.*: "The verdict is clearly wrong. The rule is now firmly established in this state, as well as in courts generally, that it is negligence per se for a person to cross a track without first looking and listening for a coming train. If his view is unobstructed, he may have no occasion to listen, but, if his view is obstructed, then it is his duty to listen, and to listen carefully. And if one is injured at a crossing by a passing train or engine, which might have been seen if he had looked, or heard if he had listened, presumptively he is guilty of contributory negligence; and, if the presumption is not repelled, a recovery for the injury cannot be had. This [the obstruction] would make it his duty to listen, and to listen carefully and attentively. To do this, if riding in a sleigh, and especially

with bells attached, it would become necessary to stop his horse, for surely he could not listen carefully and attentively without stopping his horse, and thus stilling the noise of his own team." This was what was called a "wrecking train." It had been sent out to repair a fallen bridge near by. After repairing the bridge they returned to Hartford, late in the day, to await orders. It arrived at Hartford at about 7 o'clock, where it awaited for an excursion train to pass. The engine and tender were built solid, and the tender was about 10 or 12 feet shorter than the ordinary kind of tenders. The cab projected out over the tender. Defendant's witnesses testified that a red light was hanging from a hook in the center of the back end of the roof of the cab. This is the customary place for hanging a lantern in running backward. There were two white lights on the front of the engine, near the pilot, one light on each side of the caboose towards the rear end on the corner, and one on the rear and near the top. The engine was in front of the train running backward. Its headlight was burning, and reflected against the end of the car behind it. It was necessary to run the train in this manner, because there was no turntable between the fallen bridge and the place of the accident. It was not, therefore, negligence per se to run this engine backward. This oftentimes becomes necessary. In *Mahlen v. Railway Co.*, 49 Mich. 585, 14 N. W. Rep. 556, a passenger train was running without a headlight, and this was excluded by the court from the consideration of the jury. Several of the witnesses for the plaintiff saw the lights upon the train and in the caboose where there were several men. Judgment should be reversed, and a new trial ordered.

SMITH v. BLAKE.

(Supreme Court of Michigan. July 26, 1893.)

MORTGAGE ON FOUNDRY — PROPERTY COVERED — MACHINERY — ACTION TO ENJOIN REMOVAL — DEFECTIVE COMPLAINT — FAILURE TO DEMUR — EFFECT — ERRONEOUS TEMPORARY INJUNCTION — WHEN CONTINUED.

1. A mortgage on real estate used as a foundry and machine shop covers machinery which was placed by the owner in a building erected by him many years before foreclosure of the mortgage, though some of the machines were not fastened to the soil, because they were so heavy it was not necessary; especially where the parties understood that such property was covered by the mortgage.

2. Where, in an action by the mortgagee and purchaser at foreclosure sale, brought after such sale, against the mortgagor, to enjoin the removal of such machinery, defendant failed to demur, the bill will not be dismissed on a demurrer clause in the answer because the bill does not allege that the articles named are fixtures, or show any claim thereto by defendant or threat to remove it, or because the injunction was issued on information and belief, though such objections would have been fatal on demurrer, since such defects could have been remedied by amendment.

3. Where a preliminary injunction is improperly granted because the requisite facts are not alleged in the bill, and it is permitted to stand until the hearing, at which time sufficient equity appears on the proofs presented, the injunction will be perpetuated.

Appeal from circuit court, Cheboygan county, in chancery; C. J. Pallthorp, Judge.

Action by Sarah L. Smith against Henry A. Blake to enjoin the removal of certain machinery from a foundry of which plaintiff is the mortgagee and purchaser at foreclosure sale. From a decree for plaintiff, defendant appeals. Affirmed.

George E. Frost, (Oscar Adams, of counsel,) for appellant. Henry W. MacArthur, (George W. Bell, of counsel,) for appellee.

HOOKER, C. J. Complainant is the owner of a mortgage upon certain premises in the city of Cheboygan, used as a foundry, machine shop, and blacksmith shop. This mortgage was made December 14, 1882, for \$2,000, with interest at 8 per cent., and was foreclosed by advertisement, the premises being bid in for \$2,402.61 by the complainant, who (the bill states) will become entitled to a sheriff's deed upon July 3, 1892, at which time her investment will amount to \$2,594.82. The bill is filed to restrain the defendant from removing certain machinery upon the premises, viz.: One iron planer; one upright power drill; one shaper; three iron lathes; one wood lathe; one upright engine; one horizontal boiler; one band saw and frame; one rip saw and frame; one foundry cupola furnace and blower; the belting, shafting, pulleys, and boxes necessary for the running and management of the above machinery.

It is contended that the bill must be dismissed under the demurrer clause in the answer, for the following reasons, viz.: (1) The bill does not allege that the articles named are fixtures; (2) that it fails to show any claim of the property in controversy by the defendant, or threat of removal; (3) that no injunction can properly issue upon information and belief. Had a demurrer been filed, these objections would have been fatal. But the law does not favor the raising of technical questions after hearing upon the merits, and will not permit the dismissal of a bill upon a demurrer clause in the answer unless the bill is fatally defective, and past remedy by amendment. *Barton v. Gray*, 48 Mich. 164, 12 N. W. Rep. 30; *Bauman v. Bean*, 57 Mich. 1, 23 N. W. Rep. 451; *Lamb v. Jeffrey*, 41 Mich. 720, 8 N. W. Rep. 204. The bill impliedly states that these articles are part of the realty. When we read this sixth clause in the light of the whole bill, no other inference can be drawn. The failure to allege threats could have been the subject of amendment in the court below, and probably would have been had any one considered it necessary. Threats were not even proved, but, as defendant's

answer claimed this property to be personalty, not covered by the mortgage, and this question was all that was litigated, we may consider the intention to remove admitted. This brings us to the merits of the case. The proof shows that all of these articles were placed in a building erected many years ago for a foundry and machine shop by the owner of both, and, while some of the machines were not fastened to the soil or building, they were heavy, and it was unnecessary. All were adapted to the business for which the building was erected. Furthermore, the preponderance of the proof shows that the parties understood that this property was to be covered by the mortgage. We think the decision of the circuit court in holding that the mortgage covered these articles was in accord with the Michigan authorities.

A point is made that an injunction cannot properly be granted when the bill fails to allege the requisite facts upon the oath of the complainant. That is true where the injunction sought is preliminary, but we see no reason why relief by injunction cannot be based upon proof presented upon the hearing. In this case, while the injunction should not have been allowed, it was permitted to stand until the hearing, and, "sufficient equity appearing," it should be perpetuated. *Clark v. Young*, 2 B. Mon. 57. The record may be remanded, with directions that complainant be allowed to amend her bill, whereupon the decree may stand affirmed. Complainant will recover costs of both courts. The other justices concurred.

MORELAND et al. v. HOUGHTON et al.
(Supreme Court of Michigan. July 25, 1893.)

On motion for rehearing. Decree modified.

For former report, see 54 N. W. Rep. 285.

PER CURIAM. A motion for a rehearing having been made in this case, our attention is challenged to the fact that a larger sum was due upon the mortgage than the amount due to the complainants, and for the security of which it was assigned to plaintiffs. The appellant Van Wagoner was entitled to this excess. The case will be remanded to the court below to ascertain and determine the amount actually due upon the mortgage, and the decree below will be modified to the extent that on the sale of the mortgaged premises, or on payment of the amount found due upon the mortgage into court, the money shall be applied—First, to the payment of the sum due complainants, with interest and costs; and, second, the balance, if any, shall be paid to the appellant Van Wagoner, to the amount of his claim. Neither party will recover costs in this court.

PEOPLE v. COOK.

(Supreme Court of Michigan. July 25, 1893.)

PROSTITUTION—PROCUATION—CHARACTER OF SOLICITED FEMALE—PREVIOUS USE OF HOUSE.

1. A person who solicits a female, who is at the time a prostitute, and inmate of a house of ill fame, to become an inmate of another such house, is not guilty of a violation of 3 How. St. § 9286, which provides for the punishment of any person who solicits a female to enter such house for the purpose of "becoming" a prostitute.

2. In a prosecution for the violation of 3 How. St. § 9286, which provides that every keeper of a house of ill fame, resorted to for the purpose of prostitution, and every person who shall solicit a female to enter such house for the purpose of becoming a prostitute, is guilty of a felony, etc., it need not appear that the house which the female was solicited to enter had already been resorted to for the purpose of prostitution, but it is sufficient if the house was prepared and intended for such purpose.

Error to superior court of Grand Rapids; Edwin A. Burlingame, Judge.

Margaret C. Cook was convicted of soliciting certain females to enter a house of ill fame resorted to for the purpose of prostitution, for the purpose of becoming prostitutes, and she brings error. Reversed.

Maher & Salsbury, for appellant. A. A. Ellis, Atty. Gen., and Alfred Wolcott, Pros. Atty., for the People.

LONG, J. Respondent was convicted in the superior court of Grand Rapids, under an information charging that she did solicit and induce Emma Hahn and Lillie Pale, females, to enter a house of ill fame, situate at Woodside, resorted to for the purpose of prostitution and lewdness, for the purpose of becoming prostitutes. It appeared that at the term of court at which the respondent was tried, and before her trial came on, one Frank Smith had been prosecuted and convicted under an information charging that he did solicit and induce one Anna Nelson, a female, to enter a house of ill fame in the city of Grand Rapids, resorted to for the purpose of prostitution and lewdness, for the purpose of becoming a prostitute; and that Lillie Pale—named in the information against respondent—was a witness against said Frank Smith; and also that said Anna Nelson was to be used as a witness against the respondent, her name being indorsed on the information for that purpose. The same panel of jurors remained during the term of court, and several of them who served on the panel in the case against Frank Smith were called in the case against the respondent. Counsel for respondent examined these jurors on voir dire. They were asked if they served as jurors in the case of People vs. Frank Smith, and heard Lillie Pale testify. This was answered in the affirmative. Counsel then asked: "Did you, from the evidence in that case, form any opinion as to her character for virtue and chastity?" The answer, under objection from the prosecution,

was excluded. Five jurors who sat in the case of Smith remained on the panel in the present case. Lillie Pale was called as a witness for the prosecution, and testified substantially that on Sunday, December 12, 1892, the respondent asked her to go to Woodville, into a house of prostitution, to become a prostitute. On the next day she saw the respondent again, who gave her 50 cents to pay her fare and that of Anna Nelson on the train to go there, the respondent at the same time telling her that other girls were going, and to go to the depot, but not to recognize her there. The witness also testified that before that time she had had illicit intercourse with a man for pay. This was only a few days before the respondent solicited her to go to Woodville. The testimony tended to show that the house to which the respondent solicited these girls to go was a new one, but the witness Lillie Pale testified that the respondent said it was a sporting house. The statute under which the prosecution was had reads: "Every person who shall keep a house of ill fame, resorted to for the purpose of prostitution or lewdness, and every person who shall solicit or in any manner induce a female to enter such house for the purpose of becoming a prostitute, or shall by force, fraud, deceit, or in any like manner procure a female to enter such house for the purpose of prostitution or of becoming a prostitute, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the state prison not more than five years, or in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment, in the discretion of the court." 3 How. St. § 9286.

It is contended by counsel for respondent that the conviction must be set aside for the reasons: (1) That there was no evidence that the house to which these females were asked to go had ever been resorted to for the purpose of prostitution or lewdness. (2) That the words used in the statute, "for the purpose of becoming a prostitute," implies a change of state or condition, and that these females were shown to have already become prostitutes before being solicited. (3) That the testimony did not show that the respondent solicited Lillie Pale to go to this house, and that what was said amounted to nothing more than an inquiry if she would go to a sporting house. (4) That the court erred in permitting the jurors who had formed part of the panel on the trial of Frank Smith to sit in this case.

1. The testimony tended strongly to show that the respondent had prepared this house at Woodville as a house of prostitution, and visited Grand Rapids for the purpose of soliciting females to go there for the purpose of prostitution. It is not a necessary element of the offense that the house should already have been resorted to for such a

purpose by other females. The gravamen of the offense is in soliciting females to enter such house for the purpose of becoming prostitutes; that is, a house designed and kept for that purpose, whether it had already been resorted to by others for that purpose or not. If the testimony of Lillie Pale is true, the respondent had prepared a house for the purpose of prostitution,—“a sporting house,” as she told the witness.

2. The offense was charged in the language of the statute,—that is, soliciting females to enter a house of ill fame, kept for the purpose of prostitution and lewdness, for the purpose of becoming prostitutes. There was some testimony tending to show that these girls had already entered upon a life of shame, and that when the respondent found them they were then, or had been, inmates of a house of prostitution. The question is therefore presented whether the legislature intended to create an offense under the statute which should apply to one who solicits a female, who is already a prostitute, to enter a house of prostitution, and especially where the female so solicited is at the very time an inmate of a house of prostitution. The language of the statute is peculiar: “Every person who shall solicit or in any manner induce a female to enter such house for the purpose of becoming a prostitute,” etc. It is contended by counsel for respondent that the word “becoming,” as used in this statute, implies a change of state or condition, and that one who is already a prostitute cannot, within the meaning of the statute, become what she already is. The court, speaking of this subject to the jury, said: “It is not a question of removing prostitutes from this city to some other town, to get rid of them. The statute is aimed at the person who is so depraved as to become the go-between between innocent girls and houses of ill fame, or between women and houses of prostitution, by means of solicitation. If the court should charge that the legislature intended to forgive the person whose business it was to solicit women of pronounced bad character from one house of ill fame to another, (which I shall not charge,) then, in such case, it would be a matter of serious deliberation whether Lillie had become such a notorious prostitute, she being a young girl of seventeen or eighteen, and never, so far as the evidence in the case is concerned, had submitted her person to a man until a few days before the alleged solicitation, as to whether she was what would be termed a common prostitute.” The court had evidently overlooked the testimony of Lillie Pale. She was asked: “What were you doing at this time? What were you employed at,—what work, if any? Answer. I was in a sporting house. It would have been a week Sunday night that I had been there. Mrs. Cook came on Sunday night. That sporting house was located next door to

Nellie Angell's, what was called ‘No. 50 East Fulton Street,’ and was kept by a Mrs. Wilson. Question. Had you been ‘doing business’ there, as you call it? A. Yes, sir. Q. By ‘business’ you mean entertaining men for pay, as sporting women do? A. Yes, sir. Q. Having illicit intercourse with men for pay; that is what you mean by ‘business?’ A. That is what I mean; yes, sir.” The court, in its charge, did not direct the jury whether the respondent could or could not be convicted if the girl Lillie Pale was a common prostitute at the time she was solicited to go to Woodville, but left that question an open one, putting the case to the jury upon the theory that the evidence would not warrant them in finding she was a prostitute at that time. The charge was misleading to the jury, and the court should have construed the statute so that the jury might have had such construction as a guide in their deliberations. There was strong evidence that the girl was a common prostitute, and then actually in a house of prostitution. The clause under which the information was filed makes the offense complete when the solicitation is of females to become prostitutes. Some force must be given to the word “become;” and it is evident that the legislature did not intend to make the offense complete by the mere soliciting of a female who was already a prostitute, and in a house of ill fame, to go from that place into another house of like character. The next clause of the act makes it an offense to procure a female by force, fraud, deceit, or in any like manner, to enter such a house for the purpose of prostitution. The same statute also punishes in like manner all persons who keep houses of prostitution resorted to for lewdness. The court should have directed the jury that if they found the female Lillie Pale a common prostitute, and actually in a house of prostitution at the time respondent solicited her to go to Woodville, the respondent should be acquitted of the offense charged in the information. The other questions raised need not be noticed. Judgment reversed, and new trial ordered. The other justices concurred.

RYNALSKI v. INSURANCE CO. OF STATE OF PENNSYLVANIA.

(Supreme Court of Michigan. July 25, 1893.)

**FIRE INSURANCE—CONDITIONS OF POLICY—PROOFS
OF LOSS.**

Failure to furnish proofs of loss within 60 days after a fire, as required by a policy of insurance, will not forfeit the right of an assured to recover on the policy in the absence of a provision making such failure a cause of forfeiture, even though the policy contained a stipulation that no action could be maintained on it until after full compliance with all its requirements. *Steele v. Insurance Co.*, 53 N. W. Rep. 517, 93 Mich. 81, followed.

Error to circuit court, Bay county; George P. Cobb, Judge.

Action by John Rynalski against the Insurance Company of the State of Pennsylvania on a policy of insurance. From a judgment for defendant, entered upon a verdict directed by the court, plaintiff brings error. Reversed.

Lindner, Porter & Haffey, (James Van Kleeck, of counsel,) for appellant. Simonson, Gillett & Courtright, for appellee.

MONTGOMERY, J. This is an action on a Michigan standard policy of insurance. The circuit judge directed a verdict for the defendant, on the ground that the plaintiff failed to show that proofs of loss were furnished within 60 days after the fire. There is no question that proofs were furnished before suit; indeed, the defendant's plea sets up that such proofs were furnished, and asserts as a defense that the plaintiff was guilty of fraud and false swearing in making the proofs. The suit was instituted within the 12-months limitation fixed by the policy. The case is ruled by *Steele v. Insurance Co.*, 93 Mich. 81, 53 N. W. Rep. 517. Judgment reversed, and a new trial ordered. The other justices concurred.

KENNEY v. RANNEY.

(Supreme Court of Michigan. July 26, 1893.)

RECEIVERS—ACTIONS AGAINST—CONVERSION—WHAT CONSTITUTES.

1. Trover may be brought against a receiver, as such, without leave of court.

2. One who sells property as under a mortgage which was not included therein is liable for the conversion, whether he knew it was not included or not.

Error to circuit court, Wayne county; Cornelius J. Reilly, Judge.

Action by Patrick Kenney against Frederick T. Ranney for conversion. Plaintiff had judgment, and defendant brings error. Affirmed.

Griffin & Warner, for appellant. Durbin Newton, for appellee.

HOOVER, C. J. Ryan Bros., of Detroit, dealers in knit goods, were succeeded by the Peninsular Knitting Company, of which John T. Ryan was vice president, which, becoming involved, on April 1, 1891, gave a mortgage upon its stock and property to Balch to secure a note of \$15,000. On April 9th proceedings were begun in chancery to foreclose this mortgage, and defendant was appointed receiver, and ultimately sold the property mortgaged, by order of court. The plaintiff is a dealer in yarn at Chicago, and had an arrangement with Ryan Bros. to send them yarn subject to their approval, to be returned if they did not subsequently agree upon a price. Plaintiff, being ignorant of the change in the firm of Ryan Bros.,

sent them a bundle of yarn under the arrangement. It was received by the Peninsular Knitting Works about a week before the foreclosure proceedings were begun, and was set aside by Ryan as plaintiff's property. It was subsequently sold with the other property by the receiver, and the plaintiff brings trover against him.

Defendant's counsel contends that his receivership protects him from an action, without leave of court first obtained; but this appears to be in conflict with the case of *Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. Rep. 303, where it was held that an officer of court obtains no immunity from liability for a tort by reason of his office.

It is also claimed that the jury should have been instructed that if the receiver sold in ignorance of plaintiff's ownership, and turned over the money as directed by the court, before notice, he was not liable. The court did instruct the jury that if Ryan did not notify, or attempt to notify, defendant of plaintiff's ownership, a verdict should be rendered for the defendant. Under the proofs, this must have been understood by the jury as a direction that defendant could not be found guilty of the conversion if he had acted in the belief that the yarn belonged to the knitting company, and was covered by the mortgage, and this was quite as favorable an instruction as the defendant was entitled to. We understand it to be the settled law that when one, by a trespass, takes the property of another, and sells it, he is liable for the conversion, and that no demand is necessary, and the question of good or bad faith is not necessarily involved. This doctrine is applied daily in cases against sheriffs and constables, where property is unlawfully seized and sold upon execution. The defendant wrongfully took property of the plaintiff, and sold it. It is not a defense to say, "I supposed I had authority to do so." He should have seen to it that he sold no property except that mortgaged. *Gibbons v. Farwell*, 63 Mich. 344, 29 N. W. Rep. 855; *Pingree v. Railroad Co.*, 66 Mich. 148, 33 N. W. Rep. 298; *Allen v. Kinyon*, 41 Mich. 281, 1 N. W. Rep. 863; *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. Rep. 775; *Hake v. Buell*, 50 Mich. 89, 14 N. W. Rep. 710; *Daggett v. Davis*, 53 Mich. 35, 18 N. W. Rep. 548. We find no error in the record, and the judgment will be affirmed.

LONG, J., did not sit. The other justices concurred.

COREY v. WEBBER et al.

(Supreme Court of Michigan. July 25, 1893.)

ASSUMPSIT—MONEY PAID BY GARNISHEE.

Where a garnishee discloses that he, as maker of a note, owes defendant, as payee thereof, and pays the money to the sheriff, by whom it is remitted to plaintiff, it cannot be recovered from the latter by an assignee of the note as money had and received.

Error to circuit court, Ionia county; Vernon H. Smith, Judge.

Assumpsit by Lorenzo Corey against Oscar Webber and Clarence W. Chapin. Defendants set up a counterclaim, which was disallowed, and they bring error. Affirmed.

Frank A. Miller and William O. Webster, for appellants. N. O. Griswold, for appellee.

MONTGOMERY, J. The sole question in this case is whether the plaintiff is liable to the defendants for money coming into his hands, under the circumstances stated below, as in an action for money had and received. The facts are that on October 14, 1890, the firm of Trip & Delanoy, of Mamaroneck, N. Y., were indebted to one C. T. Cadwell in the sum of \$505.27, and that on that day the firm made its note, payable to the order of said Cadwell two months after date, to secure the payment of said amount. This note was, before maturity, indorsed by Cadwell to defendants, and transferred in the regular course of business, and for value. In the fall of 1890 the plaintiff brought suit in a New York court having jurisdiction against Cadwell, and garnished Trip & Delanoy. Trip & Delanoy thereupon made disclosure, and paid the money over to the sheriff, who remitted it to the plaintiff. It does not appear whether the note was due at this time or not. It is claimed by the defendants that under these circumstances the plaintiff should be held to have received this money for the use of defendants, and is liable for money had and received. It is clear that the payment of this money to the plaintiff by Trip & Delanoy in no way affected the defendants' right to sue and recover upon their note. They acted at their peril in making such payment. *Hosley v. Scott*, 59 Mich. 420, 26 N. W. Rep. 659; *Hitchcock v. Miller*, 48 Mich. 603, 12 N. W. Rep. 871; *Hirth v. Pfeiffe*, 42 Mich. 31, 3 N. W. Rep. 239. The question of whether Trip & Delanoy could themselves recover back the money paid to plaintiff cannot, perhaps, be definitely solved from the facts appearing on this record. The general rule, however, is that money paid under judicial process cannot be recovered back, the remedy being, if any, by a reversal of the judgment, and, if this cannot be done, the payor is without remedy. *Bish. Cont. § 272*; *Walker v. Ames*, 2 Cow. 428; *Cobb v. Curtiss*, 8 Johns. 470. Have these defendants, who have lost nothing by the action taken by the plaintiff, a greater right than Trip & Delanoy are shown to have? We think not. The remedy by an action for money had and received is comprehensive, and may be employed in a great variety of cases where the right to a fund in possession of defendant exists; but it should not be so extended as to create rights which do not exist either at law or equity. It is conceived that where no privity exists between plaintiff and defendant, and where the plaintiff has no title to

the fund, and where also it appears that there is no relation of trust, legal or equitable, no right exists in the plaintiff to demand the money, and hence that no remedy by action for money had and received can be applied.

The cases cited by counsel for defendants do not, as we read them, establish any rule in conflict with the foregoing statement. In *Beardslee v. Horton*, 3 Mich. 563, defendant was agent of one Mrs. Culver, and, as such, collected the money in question,—a specific thing in the hands of the agent. By an assignment the title to this passed to the plaintiff. He was permitted to recover after demand and refusal. In *Moore v. Mandlebaum*, 8 Mich. 433, the defendant was an agent of the plaintiff, and held the money sought to be recovered as trustee. In *Walker v. Conant*, 65 Mich. 194, 31 N. W. Rep. 786, the money was paid to the defendant under a mistake of fact, the circumstances showing that the defendant had no right to receive the fund. He would therefore hold the money subject to an equitable trust. In that case it was said: "There need be no privity of contract alleged or proved other than such as arises out of the fact that the defendant had received the plaintiff's money, and which, in equity and good conscience, she ought not to retain." The question presented in this case, as reported in 65 Mich. 194, 31 N. W. Rep. 786, was disposed of on demurrer, but the case was again before the court after the facts had been developed on a trial, and is reported in 69 Mich. 321, 37 N. W. Rep. 292. It there appeared that the situation of Mrs. Conant had been changed, so that in equity she could not be asked to return the money. "She received it in good faith in satisfaction of a just and equitable claim, and when it was due on honor and in conscience." It was held, therefore, that the plaintiff could not recover. It will be seen that in each of these cases there was either privity, or a right in the plaintiff to the specific money which was the subject of the action. So in *Martin v. Sheridan*, 46 Mich. 95, 8 N. W. Rep. 722, the plaintiff was the actual owner of the fund. The cases decided elsewhere, cited by counsel, are similar. In *Brand v. Williams*, 29 Minn. 238, 13 N. W. Rep. 42, plaintiff and defendant held successive attachments. The sheriff realized enough to pay all the attachments. The defendant fraudulently induced the sheriff to pay over to him all the proceeds of the sale. It seems clear that the plaintiff had a right to the funds in the hands of the sheriff, and the defendant's appropriation of the fund was wrongful. In *Bank of the Metropolis v. First Nat. Bank of Jersey City*, 19 Fed. Rep. 301, the money received was the avails of a check. The court said: "The indorsement by the plaintiff for collection was notice to all parties subsequently dealing with the check that the plaintiff did not intend to transfer the title to the paper or the ownership of the

proceeds to another." No case has been cited by defendants' counsel, nor have we in our research found one, which goes the length of sustaining the contention of defendants. On the other hand, the cases of *Patrick v. Metcalf*, 37 N. Y. 332; *Butterworth v. Gould*, 41 N. Y. 450; and *Hathaway v. Town of Cincinnati*, 62 N. Y. 441, —are not distinguishable in principle from the present. The rule is thus stated in *Hathaway v. Town of Cincinnati*: "Where a debtor owes a debt which two persons not in privity with each other severally claim, and the debtor pays the debt to one in recognition of his claim and in repudiation of the claim of the other, and it turns out that the latter was the rightful claimant, he cannot recover of the former the money paid by the debtor." The same rule is held in *Butterworth v. Gould*, in which case it was said: "In such case, moneys are not received by the defendant to the plaintiff's use." In the present case it is not contended that there was any intention on the part of Trip & Delaney to create any trust, or pay any money, to the use of defendants. There was no title in the defendants to the fund, no trust created, and no privity between them and the plaintiff. Moreover, the plaintiff was by the act of Tripp & Delaney in making payment of this claim disarmed, and could no longer pursue his debtor. It would be a manifest injustice to permit others to reap the fruits of plaintiff's diligence, and, in case of the insolvency of his debtor, deprive him of all remedy, where, as in this case, he has in good faith successfully pursued a legal remedy for the collection of his debt. The judgment will be affirmed, with costs. The other justices concurred.

SWEET v. COLLETON et al.

(Supreme Court of Michigan. July 25, 1893.)

ASSUMPSIT—SUFFICIENCY OF EVIDENCE.

In assumpsit it appeared that defendants were sureties for B. on a contractor's bond conditioned to pay all indebtedness for a city improvement; that B., becoming in arrears, sought assistance of plaintiff on giving him as security an order on the city for estimates as they should become due; that defendants induced the city not to accept such order, and plaintiff declined to furnish the money to B.; that the parties then met at a bank, and, by indorsing B.'s note to him for \$500, plaintiff procured the money of the bank, and gave it to defendants to pay the laborers to whom B. was indebted. Plaintiff and B. testified that the money was procured on plaintiff's credit alone, and that defendants promised plaintiff that if he would get the money, and give it to them, they would repay him. Defendants denied making any promise whatever to plaintiff. *Held*, that the testimony was sufficient to support the finding that defendants agreed to repay the \$500 to plaintiff.

Error to circuit court, Kent county; Allen C. Adair, Judge.

Action in assumpsit by Martin L. Sweet

against Michael Colleton and Adolph Leitelt. Plaintiff had judgment, and defendants bring error. Affirmed.

Fletcher & Wanty, for appellants. Gustave A. Wolf, (Bundy & Travis, of counsel,) for appellee.

MCGRATH, J. One Britton had entered into a contract with the city of Grand Rapids for improving a street. Defendants were sureties upon his two bonds, conditioned, one to pay all indebtedness for labor and materials, and the other for the performance of the work. In the course of the work Britton had become in arrears to his employes, and applied to plaintiff for assistance in getting the necessary money with which to liquidate this indebtedness. Plaintiff agreed to assist him, and to secure plaintiff Britton gave him an order upon the city for estimates as they became due. Before the order was presented to the city for acceptance, and before plaintiff had advanced any money or incurred any liability, defendants, who knew of the indebtedness, who had become suspicious of Britton, and of whom certain of the unpaid laborers had demanded their pay, induced the city officials to refuse to accept the order given by Britton to plaintiff. Thereupon plaintiff declined to furnish the money or lend his assistance. Britton then arranged a meeting between defendants, plaintiff, and himself at the bank of which plaintiff was president. At that meeting Britton executed a note for \$500, plaintiff indorsed it, and the amount was paid over to defendants, who applied it to the liquidation of the labor claims. The case was tried without a jury, and the court found "that on November 16, 1887, the parties to this action, together with said Britton, met, and the following arrangement and agreement was made: The plaintiff was to advance \$500 to the defendants, to be paid to said laborers and material men, and the defendants were to repay the same to plaintiff; that the money was so paid to and received by defendants; and defendants then and there agreed to repay the same to plaintiff, which they never did, and absolutely refuse to do."

It is insisted that the testimony does not support this finding. Plaintiff testified that he told defendants that, as the order had been countermanded, he would not have anything to do with the matter; and they said "if I would pay the money over to them they would pay me back. That on the strength of that the note was made and delivered over to the bank, and the money was paid over to Colleton. The money was obtained on my credit. They did not say they would pay the bank, because they knew the bank was loaning it on my credit, —on my indorsement. They did not say they would pay the note if Britton didn't. They said they would pay me. The bank

loaned this money entirely on my indorsement." Defendants deny any promise whatever. Britton was wholly irresponsible. The theory of plaintiff, supported by Britton, is that defendants were brought to the bank for this very purpose. Defendants' theory, that they were sought out and brought there for the sole purpose of receiving the money, is unsupported by the circumstances. Their presence was not necessary to enable Britton to procure the money upon his own credit. They had frustrated his plans for getting the money, and did not in that interview withdraw their opposition to the acceptance of the order. Their action was not calculated to strengthen Britton's credit. Plaintiff had required the order as security, and had not relied on Britton's responsibility. Without the order plaintiff had no indemnity. The testimony of plaintiff and Britton, corroborated as it is by the circumstances, supports the finding. It is a mere play upon words to say that plaintiff did not advance the money. He caused it to be furnished. This suit is not brought upon the note, but upon defendants' promise. The relation of debtor and creditor did not exist between Britton and plaintiff when the promise was made by defendants. Theirs was the original promise upon which plaintiff relied. Defendants did not promise to pay the note or the bank. Plaintiff did not expect Britton to pay, and did not afterwards look to him. When defendants made the promise it was to pay an indebtedness to plaintiff, then originating. It was a promise to pay their own debt. Although the money obtained was used to pay a debt for which Britton was primarily responsible, yet it was one for the payment of which defendants were being importuned and were sureties. Their purpose was to promote their own interests. The consideration was therefore ample.

In *Potter v. Brown*, 35 Mich. 274, Potter had failed in the performance of an undertaking to become cosigner of a note, and to pay the note at maturity, in consideration of which promise Brown signed it. The note was a joint and several note, signed by Brown with Shively and Maynard, and was payable at the bank to the order of the cashier. There was evidence tending to show that the note was intended to be used to pay Shively's debt, but, as between Brown and Potter, the loan was obtained on behalf of Potter. The court says: "The fact that Potter might use the money for Shively's benefit would not make it any the less Potter's money, and the ultimate purpose to which it was to be applied could not control. The note was a new debt, created to borrow money of the bank, which Potter was to receive and advance as his own to Shively."

The test to be applied is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person;

whether the party promising contracted an independent obligation of his own, or whether his position to the creditor was that of surety merely. The liability of defendants was in no sense contingent, unless we assume what defendants do not claim, viz. that their promise was to pay the note in case of Britton's default. Defendants insist that they made no promise. The giving of the note to the bank was not the original promise, not did it concern defendants how the money was procured. The credit was given to them. They promised to pay plaintiff. That promise was an independent one. As between the parties to this suit, Britton's liability, if any, was contingent, and his promise must be regarded as collateral if, in any event, plaintiff could enforce it.

The judgment is therefore affirmed.

MONTGOMERY, J., did not sit. The other justices concurred.

BURK v. SPROAT.

(Supreme Court of Michigan. July 25, 1893.)

DEED—DELIVERY—REVOCATION.

The owner of a homestead executed a deed thereof to her niece, who was living with her, and at the same time executed a will, which did not specifically mention the homestead, but which made the niece the residuary devisee. After submitting them to the inspection of probate officers, she delivered them to B., a neighbor. Thereafter she demanded the deed from him, and destroyed it, afterwards stating that it had not been delivered. *Held*, that there had been no such delivery as would prevent a revocation of the deed.

Appeal from circuit court, Kent county, in chancery; William E. Grove, Judge.

Suit by Ella Burk against Emily A. Sproat. Decree for defendant. Complainant appeals. Affirmed.

Maher & Salsbury, for appellant. Arthur C. Denison and Loyal E. Knappen, for appellee.

LONG, J. This bill is filed to establish the complainant's title to a certain piece of land in Kent county, and to procure the cancellation of a deed which she claims clouds her title. It appears that the land formerly belonged to R. G. Chaffee, the husband of Mary G. Chaffee, and was by him conveyed, with other lands, to his wife, a short time before his death, in 1886. The 40 acres in question constituted the Chaffee homestead, and on May 8, 1888, Mrs. Chaffee executed a deed of the same to the complainant. On the same day she also made a will, by which she disposed of all the other of her real estate and personal property. In the seventh clause of the will she states: "I give, bequeath, and devise all the rest of my real and personal estate to Ella Burk, to whom I am under many obligations." These papers—the deed and will—were prepared by a neigh-

bor of Mrs. Chaffee, and after their execution it is claimed she stated she would submit them to the judge of probate, and, if they were all right, she would deliver them to Lucius C. Burt, to be held by him until her death, when he was to deliver the deed to the complainant, and the will to the defendant, who was named by the will as executrix. The complainant and defendant are nieces of Mrs. Chaffee, and at the time of the execution of the deed and will the complainant was living with her. A short time after these papers were executed Mrs. Chaffee took them to the probate office, and showed them to the probate register, and was advised that they were all right in form. In the early part of September, 1888, Mrs. Chaffee, who was then about 60 years of age, was stricken with paralysis. Soon after this she sent for Mr. Burt, who resided about a mile from her, and delivered the papers—the deed and will—to him, saying, as it is claimed, that he knew what to do with them. A few weeks after the papers were handed to Mr. Burt it was arranged that the complainant should visit her mother in Kansas, and that during that time Mrs. Chaffee should stay with the defendant and her husband at Grand Rapids. She went there on Saturday, October 13th. Two days before going to live with the defendant she took the deed from Mr. Burt, and two or three days later destroyed it. After she had gone to live with the defendant she made and delivered a deed of the land to her. Mrs. Chaffee lived about two and a half years after this deed was made. She died in March, 1891. The defendant's deed was placed on record soon after Mrs. Chaffee died. Defendant and her husband are in possession of the premises in controversy, claiming under the deed from Mrs. Chaffee.

It is contended by the complainant (1) that the deed to her from Mrs. Chaffee conveys the absolute title, and that the delivery to Mr. Burt was intended to be a delivery to her, to take effect after the death of the grantor, who had no right to recall it; (2) that, though there was no absolute delivery of the deed, and Mrs. Chaffee had the power to recall and destroy it, yet the complainant took title under the will, which has since been probated, and is therefore in a position to contest the title claimed by the defendant under her deed, and does contest it on the ground that Mrs. Chaffee, at the time of its execution, was mentally incompetent to make a deed, and was unduly influenced to make it. Defendant contends (1) that the bill is multifarious; (2) that the complainant's remedy is at law; (3) that there was no delivery of the deed to complainant; (4) that Mrs. Chaffee was mentally competent to make a deed to defendant, and was not unduly influenced to make it. The court below found from the evidence that the deed made by Mrs. Chaf-

fee to complainant was never delivered to her, but was intended by Mrs. Chaffee as a testamentary disposition, and was subsequently revoked; and that the deed to the defendant from Mrs. Chaffee was made and delivered to defendant, and was free from fraud or undue influence, and that Mrs. Chaffee was mentally competent to make it. The court thereupon dismissed the bill, with costs.

We need not discuss the points raised by the defendant's counsel that the bill is multifarious, or that complainant has a remedy at law. It is apparent from the evidence in the case that the deed to complainant was never delivered to her to take effect as a deed, or was ever placed by Mrs. Chaffee in the hands of Mr. Burt for delivery, so that she had no right to revoke it at any time before her death; and the evidence falls short of proving that Mrs. Chaffee was mentally incompetent to make the deed to the defendant, or that any fraud or undue influence was practiced upon her by the defendant, or any one in her behalf, which caused her to make it. The question of the delivery of the deed to complainant to take effect presently is one of intent. After Mrs. Chaffee had recalled it, she stated that it was never delivered. Mr. Burt, when called upon by Mrs. Chaffee to give it back to her, did so at once, and without question. He therefore never made any claims to its possession until Mrs. Chaffee died. It is evident from the whole transaction that Mrs. Chaffee and Mr. Burt both understood that, in order to constitute a delivery, it would be necessary to put it into the grantee's hands; and, not intending to make a delivery, Mrs. Chaffee left it with Mr. Burt, so that she could recall and revoke it at pleasure. In *Schuffert v. Grote*, 88 Mich. 650, 50 N. W. Rep. 657, a deed was made from father to son, and actually delivered to the grantee. The father said he did not want it to go on record, and the son handed it back to him. The father afterwards destroyed it, and made a new deed to another. It was held that it was clearly his intent to make only a testamentary disposition of his property, and that his deed was subject to revocation. In the present case the deed was never delivered to the grantee, but placed in the hands of Mr. Burt, who was clearly the agent of the grantor, and not of the grantee. In *Pennington v. Pennington*, 75 Mich. 600, 42 N. W. Rep. 985, the deed was delivered to Mr. Niles, to be delivered to the grantee after the death of the grantor, and it was held that it was subject to the grantor's right to rescind or alter it at pleasure. There were as strong reasons in that case for holding a delivery of the deed as in the present. The question under the case is one of intent, to be established by proofs. We are satisfied that Mrs. Chaffee never intended to place the deed to the com-

plainant beyond recall, and she did recall and destroy it before deeding to defendant. We need not set out the testimony given upon the trial by which complainant sought to establish the fact of Mrs. Chaffee's mental incompetency, and the exercise of undue influence over her by the defendant. It is not satisfactory, and falls short of showing either. We think the court below reached the correct conclusion, and the decree below will be affirmed, with costs. The other justices concurred.

COOK v. CANNY.

(Supreme Court of Michigan. July 25, 1893.)

ACTION AT LAW BETWEEN PARTNERS.

Where persons enter into a partnership agreement, whereby one of them agrees for a certain amount to assign to the other an interest in a patent which was to be the basis of their partnership, an action at law will lie for failure to make such payment.

Error to circuit court, Wayne county; Cornelius J. Reilly, Judge.

Action by George W. Cook against Charles O. Canny for breach of contract. Judgment for plaintiff. Defendant brings error. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

On September 5, 1888, complainant filed an application for letters patent of the United States for improvements in underground conduits for electrical conductors. October 12, 1888, plaintiff and defendant entered into written articles of agreement for a partnership, by which the plaintiff agreed to assign to defendant an undivided one-third interest in the invention and the patent which might be obtained therefor in consideration of \$1,000, which the defendant agreed to pay as follows: \$300 in cash as soon as notice was received of the allowance of the patent; a monthly payment of \$30 per month for eight months from the date of allowance, and \$460 on the 1st day of September, 1889, if said conduit should be a practical success, and should perform the duties specified and required for such work. The agreement further provided for carrying on the business after the allowance of the letters patent, and defined the duties of each partner. These provisions are not necessary to a determination of the case. The letters were issued, and the assignment duly made to the defendant. Plaintiff admitted payments of \$303.75. The defendant claimed to have paid \$464. Plaintiff gave evidence tending to show that the conduit was a practical success. Defendant gave evidence tending to show the contrary, and that the contract was abandoned by mutual consent. The court instructed the jury that, if the conduit was not a practical success, or if the contract was abandoned by mutual consent, the plaintiff could not recover. At the request of the defendant the following special

question was presented to the jury, viz.: Do you find that the conduit was a practical success? which question the jury answered in the affirmative. Verdict and judgment for the plaintiff for \$840.95.

J. W. Donovan, for appellant. Frank T. Lodge, for appellee.

GRANT, J., (after stating the facts.) 1. It is first insisted by defendant that a suit at law cannot be maintained on account of the partnership relations. The sum sued for does not grow out of their partnership transactions subsequent to the formation of the partnership. It is an independent consideration, which defendant agreed to pay the plaintiff for an interest in the letters patent which were to form the basis of their subsequent partnership relations and dealings. The sum which the defendant agreed to pay was to launch the enterprise in its very inception. This case, therefore, forms one of the exceptions to the rule that one partner cannot maintain an action at law against his copartner for work done or money expended in the partnership. An agreement to pay money or to furnish stock for the purpose of launching the partnership is an individual engagement of each partner to the other, and the defaulting partner may be sued in an action at law upon his agreement. It is entirely separate and distinct from the partnership accounts, and this forms the true test in determining whether an action at law will lie by one partner against his copartner. 1 Story, Eq. Jur. § 665; Brown v. Tapscott, 6 Mees. & W. 119; van Ness v. Forrest, 8 Cranch, 30; Currier v. Rowe, 40 N. H. 72; Neil v. Greenleaf, 28 Ohio St. 570; Howard v. France, 43 N. Y. 593; Crater v. Bininger, 45 N. Y. 545; Lindley, Partn. 1024.

2. The court instructed the jury that under the contract defendant was obligated to pay the \$30 per month, irrespective of the question whether the conduit was a practical success. In view of the fact that the jury found that it was a practical success, it becomes unimportant to determine this question. If the instruction was error, it was error without prejudice. Judgment affirmed. The other justices concurred.

DE COO v. WOODWORTH.

(Supreme Court of Michigan. July 25, 1893.)

MORTGAGE—SUBROGATION OF EXECUTOR.

A testator devised to his son a mortgage which the latter had given deceased, on condition that the son pay his sister a certain sum. Under an agreement between them, the sister gave the executor a receipt "in full for the legacy" to her on the surrender by him of a note against her husband, of about the same amount; and the son gave the executor his note for the amount that he was to pay his sister, plus a small sum owing by him to the payee, and the latter agreed to cancel the mortgage to deceased. Held, that the executor, on failure

of the son to pay his note, was not entitled to foreclose the mortgage to enforce payment of the legacy to the sister. Grant, J., dissenting.

Appeal from circuit court, Eaton county, in chancery; Frank A. Hooker, Judge.

Action by Abraham De Coo against John Woodworth to enjoin the foreclosure of a certain mortgage by advertisement. From a judgment for defendant, plaintiff appeals. Reversed.

Dean & McCall, for appellant. Huggett & Smith, for appellee.

MCGRATH, J. Complainant had given a mortgage to his father, who died testate in May, 1888, leaving the mortgage to complainant, charged with the payment of decedent's debts, his funeral expenses, the erection of a monument upon the family burial lot, and the payment of \$400 to complainant's sister, Mrs. Burson. Defendant was named, appointed, and qualified as executor. Complainant had, in 1888, paid the funeral expenses and debts, and had erected the monument. Woodworth had a personal claim against the husband of Mrs. Burson, of \$457, for which he held Burson's notes. He regarded this claim of little value, and considered complainant as solvent. In November, 1888, he made an arrangement with Mrs. Burson by which he was to surrender her husband's note, take her receipt in full for the legacy, and take complainant's note for \$400, and look to him for that amount. This arrangement was carried out. Burson's note was surrendered, Mrs. Burson gave her receipt "in full for the legacy," and complainant gave his note to Woodworth for \$400, payable one year after date. The receipt given by Mrs. Burson was filed in the probate court. No assignment of Mrs. Burson's claim was asked for or taken. Defendant's version of the transaction is as follows: "Question. Did you at the time agree with Hannah Burson and her husband to take the note or obligation of Abraham De Coo for \$400, in payment of her legacy? Answer. Yes, that was the agreement upon which the note was surrendered. Q. Soon after your return home, did you see Abram De Coo, Jr., in relation to this matter, state to him the arrangement that you had made with Hannah Burson and her husband, and request him to give you the note of four hundred dollars? A. Well, it was, I think, in May. I went down to Grand Ledge, and I stayed with Abram over night, and I told him there that I had made this arrangement; and he gave me a note, at my request, for four hundred and twenty dollars, in payment of this legacy, and some other business." Complainant testifies that when he gave the note to defendant the latter agreed to close up the estate, and discharge the mortgage. Defendant does not deny this. His testimony is as follows: "Q. To refresh your recollection, at the time Mr. De Coo gave you the \$400 note, did you not state

to him, in the presence of his wife, that everything was 'fixed up satisfactorily? Come up, and we will go to Charlotte, and discharge the mortgage? A. I did not; not in them words. Q. Did you say so in substance? A. I will state what I said: I stated then that we would come out some time, and straighten the business all up, and I would get my discharge, and the discharge of the bondsman. Q. And you meant, of course, that that included the discharge of the mortgage? A. Yes, of course; all of the business. Q. Was there anything said, at the time you took the note, that you took it in payment of the legacy? A. I think there was. Well, nothing in particular said, more than this. Abe and I settled up, and added \$20 that he also owed me, and put it all in one note. Q. What was said about your taking the note in payment of the legacy? A. Well, we was to meet at Charlotte, and settle up the business. Q. You say this was after he had given you the note? A. Yes. Now, this was not the talk, but it was my supposition,—that he would come out, and the whole thing would be settled up, so that I could get my discharge; and that would include the discharge of the mortgage. This I said to Abe; that some time we would go out to Charlotte, and we would settle the whole matter up so that I could get my discharge. After this note was signed, I went and saw Abe, and wanted him to go to Charlotte and fix this matter up, so that I could get the release of Mr. Hudson, who was on my bond. There was a day set, and on that day I came down here. I came for the purpose of making a final settlement." He says, further: "I never asked him to pay the note but once, and that was about six months after it became due. At the time I took the note, I considered him perfectly solvent. If I had known his financial condition, I would not have taken this note. I never expected to get my pay on the Burson note."

Defendant kept the note for 1 year and 10 months, then returned it under cover, and, as executor, commenced a statutory foreclosure of the mortgage. His theory now is that he was mistaken in regard to complainant's solvency at the time that the note was given, and that he had a right to surrender the note, and sue on the original obligation. But the original obligation was due to Mrs. Burson. Complainant was released from that obligation, and assumed another,—the indebtedness of Burson. Mrs. Burson receipted in full for the legacy. Woodworth filed that receipt in the probate court. Complainant gave his personal obligation to Woodworth, and both parties agreed that the mortgage should be discharged, the estate closed, and Woodworth's bondsmen released. Complainant owes defendant \$400, but, in consideration of his assumption of the promise to Woodworth, the latter agreed to discharge the mortgage and

close up the estate. The very security which he claims the right of succession to, he agreed to discharge, and that agreement entered into the consideration for the note. He cannot now be allowed to revive the mortgage, nor can he be permitted to use his office as executor to enforce payment of an obligation running to himself. The decree below is reversed, and a decree entered here for complainant, with costs of both courts.

LONG and MONTGOMERY, JJ., concurred. HOOKER, C. J., took no part.

GRANT, J., (dissenting.) In 1876, complainant purchased from his father certain land, a part of which is involved in this suit. The purchase price was \$3,200, and he executed to his father a mortgage for \$2,200 to secure the unpaid purchase price. The father died testate, devising to complainant this mortgage, charged with the payment of a legacy of \$400 to his daughter, Mrs. Burson, a sister of complainant, his just debts and funeral expenses, and the erection of a gravestone. Defendant was appointed executor of the will. Defendant commenced a foreclosure of this mortgage by advertisement, and complainant filed the bill in this cause to restrain the foreclosure proceedings upon the ground that he had paid the debts, funeral expenses, the legacy to his sister, and had erected a suitable gravestone or monument. There were no debts to pay, and it is conceded that complainant paid the funeral expenses, and erected the monument. But it is denied that he paid the legacy to his sister. Mrs. Burson's husband was indebted to defendant in the sum of \$450, borrowed money. It was arranged between complainant, defendant, Mrs. Burson, and her husband that the \$400 bequeathed to Mrs. Burson might be applied on the debt due from Mr. Burson to defendant, and that complainant would pay the amount of the legacy to defendant. The arrangement was carried out, and defendant credited Mr. Burson, with the \$400, and took a receipt from Mrs. Burson, acknowledging the receipt of the legacy. The receipt read as follows: "Received of John Woodworth, executor of the estate of Abraham De Coo, deceased, the sum of \$400, being payment of my legacy in said will, and as heir at law of said deceased." Thereupon, complainant gave his note to defendant for \$420, which included the amount of the legacy, and \$20 which complainant owed defendant. The note was due one year from date. Complainant did not pay the note when it became due, whereupon defendant returned the note to him, and commenced the foreclosure proceeding.

Complainant has no equities. He has not paid the legacy, or any part thereof. The executor paid it for him, and under an agreement with him. He has not come into court with clean hands. He has not

complied with the rule that "he who asks equity must do equity." Under the arrangement, defendant succeeded to the rights of Mrs. Burson, and had the same right to foreclose the mortgage for the payment of the legacy as he would have had if Mrs. Burson had received nothing. The note by complainant to defendant was not given and received in payment. The mortgage was not discharged, and complainant was not entitled to a discharge until he himself had paid the legacy. Complainant having failed to pay the note, the defendant had the legal right to return the note, and resort to his rights under the mortgage. Since the note was not received in payment, its only effect was to extend the time of payment. Complainant can relieve his land from the lien of the mortgage by paying the \$400, with interest from November 12, 1888, the time when defendant paid it for him. Decree should be affirmed, with costs.

HICKEY v. MICHIGAN CENT. R. CO.
(Supreme Court of Michigan. July 25, 1893.)
NUISANCES—OVERHANGING TREES — ABATEMENT—NOTICE.

1. Where branches of a tree overhang a right of way, constituting a nuisance, the railroad company may remove the projecting parts without giving notice, when the adjoining owner knows that the company claims they are a nuisance, and desires their removal, which he refuses.

2. The fact that the company offered him money to remove them does not give him a right to further notice.

Error to circuit court, Saginaw county; Chauncey H. Gage, Judge.

Action by James Hickey against the Michigan Central Railroad Company for injury to trees. Judgment for plaintiff. Defendant brings error. Reversed.

Hanchett, Stark & Hanchett, for appellant. Tarsney & Wicker, for appellee.

MONTGOMERY, J. The plaintiff was the owner of land adjoining the right of way of defendant, and had planted trees upon the land within his inclosure, and very near to the fence which is claimed by him to mark the line. It is claimed by the defendant that as a matter of fact the railroad company's right of way included the lands upon which the trees were grown. It would appear, however, that the plaintiff had fenced in all the lands within his present inclosure many years ago, and it is probable that he has acquired title by adverse possession. However this may be, it appears to us that the case was tried below, on the part of counsel for both parties, with the understanding that the title to the soil upon which the trees were growing was in the plaintiff. We shall treat the case, therefore, as though the title to the land, up to the line of the fence, was in the plaintiff. The branches of the trees in question overhung the right of way of

defendant to such an extent that at times they brushed against the face of the engineer, when his duties required him to lean out of his cab for the purpose of maintaining a lookout. On the 24th of September, 1891, the employes of defendant trimmed the branches of the trees up to the line of the fence. No claim is made that the trees were damaged beyond this, or more than was necessary to remove the overhanging branches. The questions presented are whether these overhanging branches constituted a nuisance; whether, as a nuisance, the defendant had the right to cause them to be removed; and whether, before removing them, it was necessary to serve notice upon the plaintiff, that he might have the opportunity to remove them; and, if so, whether the notice which he had of the defendant's desire that they be removed was sufficient.

The plaintiff's testimony was as follows: "These trees had grown so that their limbs and branches extended over the fence into the railroad company's right of way ten or fifteen feet beyond the fence. In the spring of 1891, Mr. Sullivan, the road master of the Michigan Central Railroad Company, came to me, and said that the trees and their overhanging branches were a nuisance to the railroad company for the reason that the engineers could not see ahead along the right of way on the curve there at my place. We talked awhile about the matter, and he finally offered me ten dollars for permission to cut down or remove the trees. I refused this offer. He said then, 'You had better take it, or some day I will get an order to cut down those trees, and then you won't get anything.' He also said that he would see the superintendent, and find out if the company would give me any more than ten dollars for the trees. Neither Sullivan nor any one else representing the railroad company ever saw me about the trees after that, and I never received any other offer for my trees." The circuit judge instructed the jury as follows: "It is the view of the court that it was the duty of the railroad company, having operated that road with these branches there for so long a time, to have notified Mr. Hickey that they were an obstruction, to a certain extent, to the line of their road; that he must remove the branches, or remove his trees, or that they did not desire them any longer to grow upon their land, which they had a right to do, without any reference to the obstruction of the view of the track; and that he must cut down the branches, or remove the trees, or they would do so. Then, if he refused, they might, of their own motion, remove the branches from the line of the right of way. I base this opinion largely upon the case cited for the defendant, of *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 302."

We think this instruction was erroneous. It is stated, without limitation, in *Wood on*

Nuisances, (section 834:) "Any person injured by a nuisance, to the extent that he may maintain an action at law therefor, may remove so much of the nuisance as is necessary to secure to himself immunity from damage therefrom; but he must not be guilty of any excess therein, for, as to all excess of abatement, he will be a trespasser." At section 838 it is said: "The party judges at his peril, and if he errs in judgment he is answerable for all the damages that ensue; and if, in the exercise of the right, a breach of the peace is involved, he is answerable, by indictment, for the results." This general rule is, however, subject to exception. It is stated in *Wade on Notice*, (section 480h:) "Where the act complained of is one of positive wrong or willful negligence, or the security of life and property is endangered, and the danger seems imminent, the party threatened with the injury may abate the same without giving notice to the wrongdoer, or waiting for him to remove it. Where, however, the nuisance is merely permitted to exist, and the case is not very urgent, notice, and an opportunity to remove it, is essential, before the complaining party would be justified in forcibly abating the same." The case of *Earl of Lonsdale v. Nelson* is understood to hold that nuisances created by act of omission may not be abated except after notice; but in the opinion in that case, by Justice Best, it was stated as follows: "There is no decided case which sanctions the abatement, by an individual, of nuisances by omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred." This case is referred to in *Jones v. Williams*, 11 Mees. & W. 181, in which case the court, laying down the rule that the alienee of land upon which a nuisance exists at the time of his purchase is not liable to an action without notice, said: "We do not rely on the decision in *Earl of Lonsdale v. Nelson* as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz. a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord Wynford's dictum is in favor of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the nonremoval of a nuisance erected by another." It is worthy of note that it was conceded in the briefs of the counsel in *Jones v. Williams* that the notice or request is unnecessary before abating the nuisance of overhanging branches, the reason being stated that any person may lawfully stand in the highway over which the trees

overhang, and there cut them. In *Cooley on Torts*, (page 567,) it is stated: "It is a nuisance if the branches of one's trees extend over the premises of another, and the latter may abate it by sawing them off." In *Wood on Nuisances*, (section 112,) it is said: "Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off, or have his action for damages, and an abatement of the nuisance, against the owner or occupant of the land on which they grow, but he may not cut down the tree. Neither can he cut the branches thereof, beyond the extent to which they overhang his soil." See, also, *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. Rep. 623. The purpose of notice, in such case, when required, it is evident, is to give to the owner the opportunity of himself abating the nuisance.

It is undisputed, from the testimony in this case, that the plaintiff knew that the railroad company claimed that these trees were a nuisance, and desired their removal. The fact that they went so far as to offer him \$10 to do what he was legally bound to do did not, we think, confer upon him a right to exact further notice. He must be presumed to have known what his legal rights were. In the face of this, and with knowledge of the fact that the nuisance was objected to by the railroad company, he, in effect, said: "I refuse your offer of the gratuity of ten dollars." We think he is not in a position to insist that he was entitled to further notice. The judgment will be reversed, with costs, and a new trial ordered.

LONG, J., did not sit. The other justices concurred.

DEYO v. VAUGHN.

(Supreme Court of Michigan. July 26, 1893.)

SALE—ACCEPTANCE OF OFFER.

Plaintiff, after receiving a telegram from defendant in answer to his dispatch asking the price of a horse, wired that he would take it if perfectly sound, in reply to which defendant wrote him that the horse was sound, and if he took him it must be closed and the horse taken away without delay. Plaintiff then wrote a third person to call on defendant, pay him the money, and procure the horse, which he did some time thereafter. *Held*, that the contract was not completed till the horse was delivered to such person.

Error to circuit court, Jackson county; Rollin H. Person, Judge.

Action by James C. Deyo against Sewell S. Vaughn for breach of warranty of a horse. Judgment for plaintiff. Defendant brings error. *Affirmed*.

Thomas A. Wilson, for appellant. Thomas E. Barkworth, for appellee.

LONG, J. Plaintiff, a dealer in horses, on April 14, 1891, wired defendant from New York, asking the price of a certain horse called "Golden Rod," then owned by defendant, at Jackson, this state. To this communication defendant replied by wire on the 16th, saying: "\$500 lowest for soft bay horse Golden Rod." Upon receipt of this message, and on the same day, plaintiff again wired defendant, saying: "Take him, blanket, girth, halter, if perfectly sound." The following day, April 17th, defendant wrote plaintiff, saying, in substance: "The horse is sound and right without fault. If you take him, it must be closed and the horse taken away without delay." April 19th the plaintiff wrote Mr. Hatch, at Jackson, requesting him to go to defendant, pay him \$500, and procure the horse in question, and ship him to New York. Two days after the defendant had written the letter to plaintiff, the horse, in being exercised by defendant's employe, struck and injured his left fore leg, which slightly lamed him. The defendant treated the limb by bathing it with liniment, which resulted in removing a portion of the hair. About a week after the writing of the letter by defendant, Mr. Hatch called at defendant's residence for the horse. At this time there was a bunch on the leg, produced by the injury, about the size of a half hickory nut. The defendant called Mr. Hatch's attention to the injury, and explained how and when it happened, and told Hatch he could do as he had a mind to about taking the horse. The next day Hatch called on defendant, received the horse, paid the consideration, and shipped it to plaintiff in New York. At the time the horse left defendant's stable he was not lame, and was sound and all right, except the bruise spoken of. The horse reached New York on the 26th, and on the following morning plaintiff claims to have discovered that this leg was badly swelled, and the horse lame. He was kept by plaintiff about two months, and then returned to defendant, in whose possession he remained over Sunday, and on Monday morning was sent back to plaintiff's barn, after which time defendant did not see him. July 15th thereafter this suit was commenced, based upon a warranty of soundness, and alleging a breach of such warranty.

The main controversy in the case is, was the injury to the horse one with which defendant could be charged under his contract of warranty? It is claimed by defendant that the injury occurred after the title to the property had passed to plaintiff, and that therefore, he is not liable in this action; that the contract was completed at the date of the posting of the letter to Hatch. On the other hand, it is contended by the plaintiff that that contract was not completed until the delivery of the horse to Hatch. The court below held with the plaintiff upon the construction of the contract. The court was not in error in this interpretation of

the contract. The plaintiff's proposition was to take the horse at the price named, if he was perfectly sound. Defendant accepted the terms of the proposition, but added: "If you take him, it must be closed and the horse taken without delay." It is said that there is no substantial variance between the terms of plaintiff's offer and defendant's acceptance; but there is a material difference. The acceptance left the question open to be determined by the plaintiff whether he would take the horse at once, and under it he was bound to decide whether he would comply with defendant's demand. The proposition of defendant was tantamount to saying: "I will take the \$500 you offer on condition only that you take the horse immediately. If you do not conclude to do so, I do not accept your terms." It is not true that under such circumstances the minds of the parties had met so that the contract was completed. Neither can it be said that the posting of the letter by plaintiff to Hatch completed it. Until the plaintiff had in turn notified the defendant that he would take the horse as defendant proposed, it was not completed; and this was not done until Hatch called upon the defendant, a week later. In any view of the case, the contract cannot be said to have been completed until that time. The defendant himself could have withdrawn the offer up to that time, and the plaintiff could have refused the offer. Defendant so construed it at the time Hatch called for the horse, telling Hatch he could do as he had a mind to about taking him away. It is evident from this that he did not then regard the sale as a completed one. It is the rule that, where an offer is by letter, the usual mode of acceptance is by sending a letter announcing a consent to accept. There are other modes of acceptance, which are equally conclusive upon the parties, but in the present case no letter was written to defendant accepting his proposition. Mr. Hatch, the agent of plaintiff, was directed to go to defendant, pay the money, and take the horse. He did not go until a week after, and at that time defendant might have said: "You have come too late. My proposition was an immediate delivery. The plaintiff cannot have the horse. He has not accepted my offer to take it without delay." If this position had been taken by the defendant, and he had refused to deliver the horse, no one would have claimed that plaintiff could have recovered him in an action. To make a completed contract, the minds of the parties must meet; and, where a proposition is in writing, the acceptance must be absolute, and identical with the terms of the proposal. The authorities cited by defendant's counsel do not meet the case presented by this record. This disposes of the main question, as we view it, in the case. There are other questions raised by brief of counsel for appellant. We have examined them, and find no error. Judgment affirmed. The other justices concurred.

WARDLE v. HUDSON.

(Supreme Court of Michigan. July 25, 1893.)

LIMITATION OF ACTIONS.

An action brought under Acts 1873, No. 82, § 17, by the receiver of an insolvent mutual fire insurance company, to recover an assessment levied against a member, by order of the court, to liquidate the liabilities of the company, is barred by the statute of limitations if commenced six years after the assessment fell due.

Error to circuit court, Ionia county; Vernon H. Smith, Judge.

Action by Clarence B. Wardle, receiver of the Home Mutual Fire Insurance Company of Ionia, Clinton, and Montcalm Counties, against Joseph L. Hudson, formerly composing the firm of R. Hudson & Son, to recover an assessment. From a judgment for plaintiff, defendant brings error. Reversed.

Clute & Clute, for appellant. C. B. Wardle, in pro. per., (George E. Nichols, of counsel,) for appellee.

LONG, J. The plaintiff company, of which Mr. Wardle is receiver, organized and began doing business in 1879 by virtue of Act No. 82, Pub. Acts 1873, and the amendments thereto. From its organization up to 1884, its membership grew to about 2,000, at which time the company became insolvent, and failed to collect assessments from many of its members. The insolvency becoming apparent, the commissioner of insurance of the state served upon the officers of the company a notice to close up its affairs unless, within 60 days, they made assessments, and paid up their losses and debts. The company failed to do this, and upon petition of the commissioner the plaintiff in this suit was appointed receiver by an order of the court. The receiver found that the indebtedness amounted to about \$22,000, and he proceeded to assess upon all members a sum sufficient to pay the debts and liabilities. Two policies had been issued to the defendant,—one September 24, 1880, and the other September 1, 1882,—in the usual form of the policies issued to members. The receiver assessed against the defendant, upon those policies held by him, the sum of \$33.08. This assessment was made May 25, 1885, in accordance with the order of the court, under section 17 of the act under which the company was organized. The total amount of assessments made was \$50,000, the amount assessed against each member being in proportion to the amount of the insurance or interest of each member. This assessment became due and payable to the receiver from the defendant on July 15, 1885. The defendant has been a resident of the state during all the intervening years up to the present time. This assessment not having been paid by the defendant, this action in assumpsit was commenced on February 24, 1892, to recover the same. Defendant pleaded the statute of

limitations. The court below found the above facts, but held that the action was not barred by the statute of limitations, and gave judgment in favor of the plaintiff. Defendant brings error.

The only question raised in this court is whether the action is barred by the statute of limitations. Section 17 of the act provides that the receiver may sue in assumpsit to recover the moneys so assessed. It is admitted that these moneys became due and payable July 15, 1885,—more than six years before the action for their recovery was commenced. Defendant insists that the case is governed by section 8713, How. St., which provides that "all actions of assumpsit or upon the case founded upon any contract or liability, express or implied," must be brought within six years next after the cause of action shall accrue, and not afterwards, and that the obligation of the defendant to pay grows out of the contract relations between the parties, and hence falls within the terms of this section. It is contended, however, by plaintiff's counsel, that, for several reasons, the statute does not run against this claim. The first is that, when the commissioner determined to wind up the affairs of the company, he began suit in the circuit court for Ionia county, under sections 9, 15, and 17 of the act of 1873, and upon filing the petition, as required by section 17, plaintiff was appointed receiver, and made the assessment as required by the act; that this was the first step in the suit; that, the assessment not having been paid, the bringing of the present action is but the second step in the same proceeding. This claim has no force. If the amount became due and payable to the receiver on July 15, 1885, the action was barred before this suit was commenced, unless, for some other reason, such claims are brought out of the statute. It is contended, however, that there was no privity of contract between the receiver and the defendant, either express or implied, and that the only basis of liability is created by the statute under which the proceedings are being had to wind up the affairs of the company, and under which the receiver was appointed, and that the claim, therefore, is nothing more or less than a specialty by statute; hence that the statute of limitations has no application, and that statute can apply only to cases where there was a privity of contract between the parties to the action, and no other. "Specialty by contract" means some right or cause of action given by statute which does not exist at common law. In such cases the nature or cause of action does not depend, in any degree, upon any contract relation. There is no original obligation whatever created by the act of the parties. In the present case the defendant, if liable at all, could be made so only by the contract existing between him and the insurance company. The evidence of this contract is the application and

the policy. Section 1 of the by-laws of the company declares that the application shall be made a part of the contract of insurance, and be considered a warranty. The statute confers on the receiver merely the authority to levy and collect the assessment, which, without this authority, rests with the board of directors. Any defense which a party might make against an action brought by the injured party is equally available, and may be made with like effect, when the action is instituted by the receiver. *High, Rec. § 205; Vermont & C. R. Co. v. Vermont Cent. R. Co., 46 Vt. 792; Bango v. Duckinfield, 18 N. Y. 597.* The rule seems to be well settled that the statute of limitations does not begin to run on a deposit note given by a member of a mutual insurance company when he agrees to pay a sum certain, or any part thereof, when required, and which, by its terms, is part of the absolute funds of the company, until an assessment is laid. *Bigelow v. Libby, 117 Mass. 359; In re Slater Mutual Fire Ins. Co., 10 R. I. 42.* In the present case the assessment had been made more than six years prior to suit brought. If this had been made by the board of directors, no question could have been raised but that any action would have been barred. The receiver stands in no better position. The case of *Smith v. Bell, 107 Pa. St. 352*, is quite similar in principle to this. It was held that the action for the assessment could be brought at any time within six years, as the statute of limitations commenced to run at the date of the assessment. The court below was in error in holding that the action was not barred. Judgment below must be reversed, and judgment entered here for defendant for costs of both courts. The other justices concurred.

LENTZ v. TEUTONIA FIRE INS. CO.

(Supreme Court of Michigan. July 25, 1893.)

INSURANCE—ACTION ON POLICY—LIMITATIONS.

Under a policy providing that no action thereon can be maintained unless commenced within 6 months after the loss, and that the company shall have 60 days to make payment, an action cannot be commenced after the 6 months, though there were negotiations for a settlement, where, within 60 days after loss, the company repudiates liability, thereby excusing proof of loss.

Error to circuit court, Lenawee county; Victor H. Lane, Judge.

Action by Henry C. Lentz against the Teutonia Fire Insurance Company. Judgment for defendant. Plaintiff brings error. Affirmed.

J. C. Winne, for appellant. Wood & Bird, for appellee.

MONTGOMERY, J. Action on a policy of insurance. The loss is alleged to have occurred on the 23d of October, 1889. Three

grounds of defense were urged in the court below: First, that the property burned was not covered by the policy; second, that no proofs of loss were furnished; third, that the suit was not commenced within the time limited by the policy. The circuit judge directed a verdict for the defendant on the ground that the policy did not cover the property burned. The record contains the substance of all the testimony. If it appears that there is any conclusive reason why no recovery should be had, the judgment should not be disturbed. *Dunning v. Calkins*, 51 Mich. 556, 17 N. W. Rep. 54; *Monaghan v. Insurance Co.*, 53 Mich. 238, 18 N. W. Rep. 797. The policy contains a provision that "no suit or action on this policy shall be sustainable in any court of law * * * unless such action shall be commenced within six months next after the loss shall occur." The suit was not instituted until the 5th day of May, 1890,—6 months and 12 days after the fire. This delay operates to bar recovery, unless it is excused by the act of the company. This is claimed by the plaintiff. It appears that the adjuster of the company called upon the plaintiff, in company with the local agent, shortly after the fire, and, as the plaintiff testified, then agreed to pay him \$25 by way of compromise; but on the 22d day of December he was informed by the local agent that the company denied any liability, the agent at that time offering to credit him \$12.50 as a premium on a new policy of insurance. This he declined to accept. He now treats the repudiation of the liability as excusing him from furnishing any proofs of loss, and justifying an action on the policy. Assuming that he is right in this contention, it unfortunately demonstrates that he was not delayed in bringing suit by the negotiations. Had he furnished proofs of loss the day the fire occurred, the company would be entitled to 60 days within which to make payment by the terms of the policy. He could not, therefore, have brought suit earlier than December 22d. He now brings suit without furnishing proofs of loss, on the claim that the company's refusal to pay waived such proofs. This he was entitled to do on December 22d, the earliest day at which he could have brought suit had he furnished proofs. This distinguishes the case from *Voorhels v. Society*, 91 Mich. 469, 51 N. W. Rep. 1109, and brings the case directly within the ruling in *Law v. Association*, (Mich.) 53 N. W. Rep. 1104.

Judgment affirmed, with costs. The other justices concurred.

PEOPLE v. PALMER.

(Supreme Court of Michigan. July 26, 1893.)

HOMICIDE—INSTRUCTIONS—MANSLAUGHTER.

1. On trial of defendant for killing his brother, it appeared that, after a dispute be-

tween them in a saloon, defendant armed himself with a gun, and deceased remained in the saloon, and armed himself with a revolver. Defendant, on returning, called to his brother, who was in the rear of the saloon, to come up. The evidence was conflicting as to who fired first. There was evidence that deceased, after arming himself had threatened to kill defendant if he crossed his path. *Held*, that the court should have given the substance of a requested instruction that, in considering which was the aggressor, and the probable character of the assault, the jury should consider the threats made by deceased, and the purchase and exhibition of the loaded revolver by him, as a person who has made threats against the life of another, and purchased and loaded a revolver a few minutes before, is more likely to make an assault than a person who has made no threats.

2. There being evidence from which it might have been found that defendant had no malice towards deceased, but that, after being attacked by deceased, he, in the heat of passion and in the excitement and confusion caused by the assault, fired the fatal shot, an instruction should have been given on manslaughter.

Error to circuit court, Saginaw county; John A. Edget, Judge.

William Palmer was convicted of murder, and appeals. Reversed.

John E. Nolan, (George W. Weadock, of counsel,) for appellant. A. A. Ellis, Atty. Gen., and Wm. R. Kendrick, for the People.

MONTGOMERY, J. The respondent was convicted of murder in the second degree. The offense charged was shooting and killing his brother. The testimony on the part of the people tended to show that on the day of the shooting the respondent and his brother had some words of dispute in a saloon, and that the respondent left the saloon, deceased remaining there. That the respondent proceeded to arm himself with a double-barreled shotgun, and returned to the saloon. The deceased had in the mean time armed himself with a revolver. The respondent stepped up to the door of a screen which divided the front from the rear portion of the saloon, and called out to his brother: "Come up! Come up!" The deceased stepped forward, and the respondent fired, and the shot resulted in fatally wounding the deceased. There was testimony also tending to show that the deceased fired upon the respondent before the respondent fired at him. There was some testimony on the part of the respondent that he procured the shotgun to go hunting; that he had no intention of using it against his brother, and that when he called out in the manner in which he did, "Come up! Come up!" he did so in a bantering way.

The charge of the learned circuit judge was, in the main, unusually clear. One of the requests prepared by respondent's counsel, to which no reference was made by the charge, we think should have been given. There was evidence showing that deceased had made threats against the respondent; that he threatened to shoot him if he ever crossed his path. These were made by the

deceased on the day of the shooting, and after he had armed himself with the revolver. Respondent's counsel asked an instruction as follows: "In considering which of the brothers, Albert or William, was the aggressor, and the probable character of the assault, you should carefully weigh and consider the previous threats made by Albert, and the purchase and exhibition of the loaded revolver by him, as a person who has made threats against the life of another, and purchased and loaded a revolver a few minutes before, is more likely to make an assault than a person who has made no threats." This request should have been given, or its substance covered by the general charge. *People v. Harris*, (Mich.) 54 N. W. Rep. 648, in which case it was said: "The testimony tending to show the animus of deceased was, in view of the conflict of testimony upon that point, competent as bearing upon the question as to which was the assailant." See, also, *Holler v. State*, 37 Ind. 57; *Stokes v. People*, 53 N. Y. 164.

We also think the court should have defined the offense of manslaughter, and instructed the jury that, if the testimony warranted it, they might convict of the lesser offense. See *Hurd v. People*, 25 Mich. 411; *Maher v. People*, 10 Mich. 212; *Pond v. People*, 8 Mich. 150.

It is possible that the instruction of the circuit judge upon the subject of self-defense was so favorable to the respondent as that, were this the only question in the case, we might be able to say that no harm was done by the omission to define the offense of manslaughter; but, as the case is to be reversed on other grounds, it is not necessary for us to determine this question. There was evidence from which the jury might have found that the respondent had no malice towards the deceased, but that, after being attacked by deceased, he, in the heat of passion, and in the excitement and confusion caused by the assault, fired the fatal shot, thus reducing the offense to manslaughter, even though the jury would be able to say that the assault did not excuse the homicide. The conviction must be reversed, and a new trial ordered. The other justices concurred.

RUPPEL v. ADRIAN FURNITURE MANUF'G CO.

(Supreme Court of Michigan. July 25, 1893.)

TROVER — UNUSUAL ARTICLE OF FURNITURE — PROOF OF VALUE—QUESTION ON APPEAL.

1. In trover for a bedroom set, it appeared that the set was the first constructed after a unique design invented by plaintiff, an expert wood carver, and could not be said to have an ascertained market value. Testimony was given by experts of its value. *Held*, that a witness who had worked 10½ months on the set, and testified that he knew how much time plain-

tiff had spent on it, was properly permitted to state how much it would cost to make another just like it.

2. Where defendant, in such action, is a corporation, and claimed on the trial that it had a lien on the property for lumber and machine work which went into its construction, and that plaintiff agreed that the set might remain until the bill was paid, it cannot be heard to say, on appeal, that the detention of the property by its president was without its authority.

Error to circuit court, Lenawee county; Victor H. Lane, Judge.

Action of trover by Charles Ruppel against the Adrian Furniture Manufacturing Company for the conversion of a bedroom set. From a judgment for plaintiff, defendant appeals. Affirmed.

Westerman & Westerman, for appellant. J. C. Winne, for appellee.

McGRATH, J. This is a trover for a bedroom set partially constructed by plaintiff upon defendant's premises. But two questions are presented. A witness called by plaintiff was asked how much it would cost to replace the set, or make another set just like it. Plaintiff was an expert wood carver. The set had been the first constructed after a unique design invented by plaintiff. It was richly carved. It could not be said to have had an ascertained market value. The witness had himself worked upon the set 10½ months, and had testified that he knew how much time plaintiff had spent upon it. Other testimony had been given by experts of its value. Such opinions were, at best, but estimates. It was competent, in connection with such testimony, to show the actual cost of construction. Property is often the subject of legal valuation, concerning which no proof of value in the market can be given, because it is not brought into the course of trade, and it is incapable of any estimate in that mode. The value, in such case, is to be ascertained from such elements of value as are attainable.

The only other question raised is that the detention of the set by the president was without authority of the company, and he alone is liable in tort to plaintiff. This question does not seem to have been raised upon the trial below. On the contrary, the defense below was that the company had a lien upon the property for lumber and machine work which went into its construction. A bill for this work and materials, including other claims in favor of defendant and against plaintiff, was presented; and it was claimed that, for the lumber and machine work, defendant had a lien, and, further, that, upon presentation of the bill, plaintiff agreed that the set might remain until the bill was paid. Defendant cannot now, and here, be heard to say that the conversion was not its act. The judgment is affirmed. The other justices concurred.

PEOPLE'S SAV. BANK v. EBERTS et al.
(Supreme Court of Michigan. July 25, 1893.)

RES JUDICATA.

In an action by L. against a corporation, the court found that L.'s alleged title to certain lands was invalid, and the corporation subsequently brought ejectment against L.'s grantees, who set up the same title on which L. had relied. *Held*, that the judgment in the former suit was conclusive of the rights of the parties.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Ejectment by the People's Savings Bank against William H. Eberts, John M. Eberts, and Lena Howard. Plaintiff had judgment, and defendants bring error. Affirmed.

John Miner, (Morgan E. Dowling, of counsel,) for appellants. C. J. O'Flynn, for appellee.

GRANT, J. The issues in this case are the same as those in *Lafferty v. Bank*, 76 Mich. 35, 43 N. W. Rep. 34. The defendants in this case are the grantees of Martha Lafferty, the complainant in that suit, and are therefore her privies. After that case was decided the plaintiff brought this action of ejectment against the defendants, who were in possession. In the present case each relies upon the same conveyances, the same proceedings, and the same facts, as were those in the former suit. The issues and facts will be found fully stated in that opinion, and it is unnecessary to restate them now. That suit was planted upon the theory that she had a good and valid title to the land in controversy, and that the title claimed by the People's Savings Bank, obtained under a sale authorized by the probate court, was void, and created a cloud upon her title. The title of the bank was there held valid, and Martha Lafferty's alleged title was held to constitute a cloud upon the title of the bank. The question is therefore *res adjudicata*. It is the well-settled rule that courts will not review former decisions made by the same court in the same cause, and on the same facts. *Hickox v. Railway Co.*, (Mich.) 53 N. W. Rep. 1105, and authorities there cited. Judgment affirmed. The other justices concurred.

EWING v. AINGER et al.

(Supreme Court of Michigan. July 26, 1893.)

LIBEL—MEMBER OF BOARD OF SUPERVISORS—COMPENSATION—PAY FOR SERVICES ON COMMITTEE—WHEN BOARD NOT IN SESSION—LEGALITY—AMBIGUOUS PUBLICATION—QUESTION FOR JURY.

1. In an action of libel, for publishing an article charging a supervisor with receiving unlawful compensation for his services, plaintiff admitted the receipt of the money, but claimed that he received it for committee work, and that the article charged him with receiving it for his services while the board was in session. Defendants claimed that the article charged plaintiff with unlawfully receiving it

for committee work. The article was ambiguous as to the services for which the extra compensation was charged to have been received. *Held*, that the meaning of the article was for the jury.

2. How. St. § 502, provides, specifically, the compensation that shall be allowed a supervisor for his services and mileage, to be audited by the board, and paid by the county, to be in full for all services and expenses in attending the meetings of the board, and for all services and expenses while acting upon any committee of the board, during its sessions, and that any supervisor receiving further compensation for such services shall be guilty of a misdemeanor, etc. *Held*, that a member of such board is not entitled to receive compensation for services as a member of a committee of the board while the board is not in session.

Error to circuit court, Eaton county; Frank A. Hooker, Judge.

Action by John W. Ewing against Daniel B. Ainger and Charles E. Baxter to recover damages for libel. From a judgment entered on the verdict of a jury in favor of defendants, plaintiff brings error. Affirmed.

James M. Powers, for appellant. Huggett & Smith, for appellees.

LONG, J. Defendants are the owners and publishers of the *Charlotte Republican*, a newspaper printed and published at Charlotte. This action is brought to recover damages for libel in the publication of two articles by the defendants in their paper. One was published July 24, 1891, and the other August 20th of the same year, and relate to the action of the plaintiff while a member of the board of supervisors of Eaton county. The first article, as set out in the declaration, is substantially as follows: "Another Chapter on John Ewing. Editors *Republican*: Some portions of the records and doings of the board of supervisors may be of interest to the taxpayers of the county. October session of 1884, several petitions were presented to the board to abolish the office of county drain commissioner. A committee of three was appointed to investigate and report. A majority reported as follows: 'Would respectfully report that in our opinion such a course, at this time, would be inexpedient and prejudicial to the best interests of the county.' Mr. Ewing moved that the majority report be adopted. Motion prevailed. Moved to proceed to the election of drain commissioner, the same man being elected by eleven votes. January 5, 1885, a committee of three appointed on drainage. Moved that all matters relating to drains and drainage, brought up at this session of the board, be referred to the committee, when appointed. Amended by adding the words, 'and that the said committee be authorized to receive statements from persons in regard to reports in circulation respecting the action of the present drain commissioner in his duties as such commissioner.' Amendment prevailed, and original, as amended, carried. Mr. Ewing being appointed on the commit-

tee. January 8, moved that the board deem it inexpedient for the committee to visit the Milbourn extension drain. Motion prevailed. January 15, committee made a report, which is on file in the clerk's office, a part of which is as follows: "That there be a committee appointed from this board, whose duty it shall be to hear grievances from any parties, arising from any irregularities of said commissioner; and, if said charges seem to warrant the action of the board of supervisors before their next regular session, then it shall be the duty of said committee to have the board called together, that they may take action on said charges. And we do recommend that, as we have not a satisfactory report from said commissioners, that he be requested to make, on or before the 18th of February next, to said committee, an itemized statement, etc., which was done by said commissioner, and is now on file in the clerk's office." Not one word authorizing Reformer Ewing to spend so many days at three dollars per day, and travel so many miles at ten cents per mile. A claim for damages having been presented for certain acts of the drain commissioner, on October 18, 1885, Mr. Ewing, for the committee, submitted the following report: 'Would report that we have carefully considered the same, and we do not believe the county is in any way responsible, and would refer you to Michigan Reports, vol. 49, page 479, [Dawson v. Township of Aurelius, 13 N. W. Rep. 824,] which says: "A township is not responsible for the defaults and misconduct of its drain commissioner in the performance of his statutory duties." Your committee would report the said claim back to this body with the recommendation that the same be disallowed. Motion prevailed.' Then he brings claim for \$61.80, as stated last week by your correspondent. He figures very liberally on his own claims, but reports a claim of Dr. E., and moves that it be allowed at five dollars,—one-half the amount claimed. He reports the claim of Dr. A., of forty-five dollars, and moves that it be allowed at twenty dollars. All this without regard to the value of the services performed. Many more such instances could be cited, but these are sufficient to convey an idea of his methods on the board. Oh, yes, he loves the taxpayer, as the following items will show: The total amount received by him from the taxpayers of Eaton county in the last eight years, so far as found, foots up to \$848.62, and this does not include what he has received from his own town as supervisor. We even find that he had drawn from the county treasurer, for his services in caring for the poor of his township since November, 1883, the sum of \$92.50, being \$11.50 per year. We doubt if the poor families in the county, receiving help, will average as much for the same length of time; the supervisors of Benton, Bellevue, and

Vermontville, combined, only drawing \$121.74 for their services. We mention these towns, as each have a village. Economy for the taxpayer, you see, is his motto. We now present a tabulated statement of the amount drawn by him for services and mileage for the various sessions of the board, and the amounts to which he was lawfully entitled." The tabulated statement is not set out here, but consists of a statement of the number of miles charged for travel, and miles which it is claimed he was entitled to; days charged, and days he was entitled to; and the amount of claimed overcharge in each year from 1883 to and including the session of the board in 1891; making a total for per diem and mileage of claimed overcharge of \$200.82. Continuing, the article reads: "Now, to be fair with Mr. Ewing, his attention is called to the above table, and he is invited to select out such items therein as he deems to be wrong, and state to the public wherein they are incorrect; and we ask Mr. Ewing to state, over his own signature, what the distance (by the nearest traveled route) is from his home to Charlotte. To be exact, is it not 13½ miles? Also we ask him what the statutory fee allowed members of the board of supervisors per mile is. And, again, to state the statute which allows him fees as supervisor for any work, except during the session of such board. When he does this, we have a long list of others to call his attention to; and, like Banquo's ghost, these inquiries will not down until they are answered, and until this modern reformer has himself reformed. Oh, yes, he loves the taxpayer, and is 'very careful of the people's money,' when he 'gets it.' One of the Taxpayers." The second article, as set out in the declaration, is as follows: "We have waited patiently to hear Reformer John deny the charges made in the Charlotte Republican, of taking money from the treasury that did not belong to him, yet we have heard nothing drop. Let her drop, John." The defendants, under their plea of the general issue, gave notice, among other matters of defense, that the statements contained in the articles were true. These articles were put in evidence on the trial. It was admitted by plaintiff that he received the several sums of money mentioned in the tabulated statement, but he claims he received them for services on committees at times when the board was not in session, and that at such times, and for such services, he could lawfully take this compensation. It was further insisted that the articles charged him with receiving such moneys at times when the board was in session. The court below directed the jury that the first article charged the plaintiff with having taken this \$200.82 unlawfully, and that it was libelous per se, and could be defended only by showing its truth. He also directed the jury that there was a con-

troversy between counsel as to its meaning.

Counsel for plaintiff, it seems, contended in the court below, and he now contends here, that the article charges plaintiff with having received the money for mileage in attending sessions, and for services during such actual attendance, for a greater number of days than the statute allows, and as extra compensation, which he had no right to take. On the other hand, it was claimed by defendants' counsel in the court below, and is now claimed, that the article simply charged the plaintiff with having received the money for work done when the board was not in session, and that money so received was unlawfully taken; and it was further claimed that this statement was true. The court below left the question of the meaning of the article for the determination of the jury, saying: "Does it mean, and does it convey the impression upon the face, to the ordinary observer or reader, that the amounts and items charged here are for services or mileage performed in attending the sessions of the board, respectively, merely, or does it convey the impression that the items here include the amounts at other times, such as that mentioned in the proof,—for instance, work done upon committees at times when the board was not in session; mileage to and from one place to another, when it might be supposed to be necessary that such committee should work while the board was not in session? To determine this question, you are to take into consideration the entire article, and determine from that whether it will bear the latter construction. If it will, then, of course, evidence of money received, if unlawfully received, for such attendance upon committees, could be legitimately used to swell the aggregate to \$200.82." Of the second article, the court directed the jury that there could be no doubt of its meaning, and that it plainly charged that the plaintiff took money from the county treasury that did not belong to him; that the publication of the two articles was not denied, and unless the defendants had proved both substantially and wholly true, in the sense they should be read, the verdict should be for the plaintiff.

The court was not in error in leaving the meaning of the first article to the determination of the jury. It was for them to say whether one reading it would be led to believe that it charged, or intended to charge, the plaintiff with having taken this money for services while on the board, and for more days than the statute allows, or whether it was simply intended to charge, by the article, that he took it for services when the board was not in session. The article is ambiguous, and it became a question of fact, for the jury, to determine its meaning. The language does not necessarily imply that the money was taken while the board was in session. The article asks Mr. Ewing "to state the statute which allows him fees as super-

visor for any work, except during the session of such board." There is no doubt that where the language of an alleged libel is ambiguous, and capable of being understood in an innocent and harmless, as well as in an injurious, sense, its true interpretation is for the jury. *Lewis v. Chapman*, 18 N. Y. 371; *Edwards v. Chandler*, 14 Mich. 471.

It was a very material question, on the trial of this case, what interpretation the court or jury might give the article. If it applied to moneys unlawfully received while the board was in session, there was grave doubt whether there was sufficient proof of its truth, while, on the other hand, it was admitted that plaintiff received the money for doing committee work when the board was not in session, and it was claimed by plaintiff, as matter of law, that he had a right to receive it. This claim raises the other important question in the case. The court below directed the jury that the board of supervisors had no authority to appoint such committees, and pay for services performed outside the session of the board, and that receiving money under such circumstances was unlawful. How. St. § 502, provides: "Each member of such board of supervisors shall be allowed a compensation of three dollars per day for his services and expenses in attending the meetings of said board, and six cents a mile for each mile necessarily traveled in going to and returning from the place of such meeting, to be audited by the board and paid by the county; which compensation of three dollars per day shall extend to and be allowed for the first twelve days of any continuous regular session, and six days only for an adjourned session of said board, and for the first three days only of any special session of said board, of which special session there shall be no more than two in any one official year, which said amount shall be in full for all services rendered and expenses in attending the meetings of such board of supervisors, and for all services and expenses incurred while acting upon any committee of said board of supervisors during the session of said board; and any supervisor receiving further or other compensation for such services shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars." It is contended by counsel for plaintiff that the statute prohibits committees appointed by the board from receiving compensation only during the session of the board, and that any services rendered by a member while on a committee may be charged for and paid, if such services are rendered while the board is not in session. It is evident from the reading of the statute that the legislature intended to fix and establish the maximum amount that the members of the board of supervisors could receive for services rendered to the county, and not to leave it to the board to extend it beyond the

limit fixed by this statute. In *Kennedy v. Gies*, 25 Mich. 83, the statute of 1871, relative to the compensation of the board of auditors of Wayne county, came before this court. That statute, after fixing the salary of the auditors, recited, "which shall be in full for all services and expenses and traveling fees in attending upon the duties of the office," and making it a misdemeanor for any auditor to receive further or other compensation. It was held that the statute was valid under article 10, § 10, of the constitution. It was said in that case: "It is true that statutes and constitutions have sometimes given express power to certain township, county, or city officers, or board, to audit and allow their own claims for services, though this, when given, has generally been for some supposed necessity, or where it could be of little moment, and subject to some restrictions as to amount, or to review by some other tribunal. And it may, we think, be laid down as the sound and only safe rule that such power can only be given by express words or necessary implication, and should never be recognized when the language used, when interpreted by the light of the past legislation and history of the state, will permit a reasonable and probable inference of a contrary intent." If the statute were to be given the construction contended for by the plaintiff, it would be rendered wholly nugatory. Any member of a committee could be appointed by the board to act outside of, and beyond the session of, the board, and the absolute power would rest with the board to allow such member for any number of days and number of miles traveled, in its discretion. There would be no tribunal to review the action of the board, and it would leave the board judges of their claims, without any power of review. Clearly, it was not the intent of the legislature to do this, but to fix the maximum amount which the members of the board might receive. The court below was correct in the construction of this statute.

Some other questions are raised. We have examined them, but do not deem it necessary to discuss them. The case was presented to the jury under a very full and fair charge, and the jury found in favor of the defendants. Judgment affirmed.

HOOKER, C. J., did not sit. The other justices concurred.

FILER v. SMITH.

(Supreme Court of Michigan. July 25, 1893.)

FALSE IMPRISONMENT — WHAT CONSTITUTES — ARREST ON SUSPICION — JUSTIFICATION — QUESTION OF LAW — INSTRUCTION — EVIDENCE.

1. Whether the facts in a particular case constitute probable cause, which justifies an officer in arresting a person without a warrant, on information that a felony has been committed, and on suspicion that the person ar-

rested is the guilty party, is generally a question of law, for the court.

2. In an action for false imprisonment, it appeared that defendant, a sheriff, received from the sheriff of another county information that one R. and a Mrs. N. had eloped, taking with them her five children. In the letter was a description of both, and a photograph of R. On receiving a telegram from defendant that the man wanted was at his city, the sheriff who sent the letter replied that he had a warrant for R.'s arrest, and requested that he be arrested; and defendant arrested plaintiff, who was not R., but a traveling salesman. He had been in the city five days, and boarded where there were several other boarders, and where, three days before, a woman who first gave her name as C., and afterwards as N., and who had two children, was arrested for larceny. There was a resemblance between the photograph and plaintiff, but in the letter R.'s age was given as 50, while plaintiff was 36. Plaintiff at no time manifested any concern regarding the woman, and there was no evidence of any intimacy between them. Defendant made no inquiry as to plaintiff's business, or as to his relations with the woman. When arrested, plaintiff exhibited letters, tax receipt, and his memorandum book, with his name on it. Held, that the jury should have been instructed that defendant was not justified in arresting plaintiff.

3. An instruction is misleading which states that if defendant had good reason to, and in good faith did, believe that plaintiff was guilty of adultery, he was warranted in making the arrest on such charge, and holding him therefor, since a prosecution for adultery can only be instituted by the husband or wife of one of the guilty persons, and an officer, whatever his suspicions may be, has no right to make such an arrest.

4. Such instruction is also erroneous because there was no charge of adultery against plaintiff, and no ground for suspecting him guilty of such offense, though there was such charge against the man for whom he was mistaken.

5. It is error to permit defendant to testify as to the opinions of third persons, given after the arrest, touching the resemblance between such photograph and plaintiff, both of the latter being in court.

6. Evidence of the advice of attorneys, given defendant after the arrest, was improper.

7. Where, in such case, the declaration alleges the publication in a newspaper of an account of plaintiff's arrest, it is error to exclude the publication from the evidence.

Hooker, C. J., and Montgomery and Long, JJ., dissenting.

Error to circuit court, Muskegon county; Albert Dickerman, Judge.

Action by Alvah C. Filer against William H. Smith to recover damages for false imprisonment. From a judgment, entered on the verdict of a jury in favor of defendant, plaintiff appeals. Reversed.

L. K. Soper, for appellant. Chamberlain & Cross, for appellee.

MCGRATH, J. Plaintiff had been for some five days at Muskegon, engaged in soliciting orders for trees and shrubbery, and had taken several orders. He boarded at a private house, at which several other persons were at the time boarding. Defendant, who is the sheriff of Muskegon county, on the 14th of December, 1891, received from one Cane, the sheriff of Isabella county, by letter, information, that in August, 1891, one

Reynolds had eloped from Mt. Pleasant with a Mrs. Nichols, the pair taking with them the five children of the latter. The letter contained the description of Reynolds and Mrs. Nichols, and a photograph of the former. On receipt of this information, defendant telegraphed to Cane that he thought his man was at Muskegon. Cane replied, stating that he had a warrant for Reynolds' arrest, and requested that he be arrested and held. He was arrested accordingly. Cane arrived the next day, and declared that plaintiff was not the man, and plaintiff was discharged, and he now brings suit for false imprisonment. The defense was that defendant acted in good faith; that there was a striking resemblance between the photograph and plaintiff, and that on the 11th of December a woman who had been boarding at the same place had been arrested for larceny; that this woman had at first given her name as Campbell, and again as Nichols. The court instructed the jury that "in all cases of felony an officer has a right to arrest without a warrant, and may arrest on suspicion alone, and may justify such arrest by showing facts and circumstances upon which, in good faith, he had the suspicion of the guilt of the party arrested, and such suspicion, if well grounded, may be a complete justification of the arrest of the party charged. So that, in this case, if you find that the defendant had good reason to believe, and in good faith did believe, that the plaintiff, Filer, was guilty of the crime of adultery, then defendant would be warranted in making the arrest upon such charge, and holding him therefor."

This instruction could not fail to mislead the jury, under the circumstances of this case. A prosecution for adultery can only be instituted in this state by the husband or wife of one of the parties to the crime. Whatever suspicions an officer may have, he has no right to make an arrest for adultery, of his own motion. There was no charge of adultery against Filer, though there was against the man for whom he was mistaken, and no ground for suspecting him guilty of that offense.

If a warrant was in fact issued, defendant would have had an undoubted right to arrest Reynolds. *Drennan v. People*, 10 Mich. 169. The question here is, was defendant justified in arresting plaintiff, under the circumstances detailed by him? He claims to have relied—First, on the resemblance indicated by the photograph; and, second, upon the fact that the woman arrested December 11th gave her name, on one occasion, as "Nichols." Reynolds was described in the letter as 50 years of age. Plaintiff was 36. This woman had two children. The fugitive had five. There was nothing suspicious about plaintiff's conduct. Defendant had seen him several times before the arrest under circumstances which indicated that plaintiff knew that he was the sheriff. Plaintiff

was present at the house when the sheriff was there with Mrs. Campbell in his custody. Plaintiff knew of her arrest, and the sheriff knew that he was aware of the fact of her arrest. Plaintiff evinced no uneasiness because of her arrest, nor had he manifested any concern regarding it, more than might have been manifested by any one of the boarders at the house. He continued to remain there for several days after her arrest. Mt. Pleasant was but about 100 miles away. It appears that, at the boarding house, plaintiff was known as Mr. Filer, and the woman, as Mrs. Campbell. There was no testimony that defendant had at any time before the arrest made any inquiry, at the boarding house or elsewhere, as to the nature of plaintiff's business; his name; the length of his stay at Muskegon; what his relations were with Mrs. Campbell or Mrs. Nichols; or as to how long Mrs. Campbell had been in the city. Nor was there any evidence of any improper relations between plaintiff and Mrs. Campbell, or that there had been any intimacy between the two, or that there was anything more than a boarding house acquaintance between them. When plaintiff was arrested, he protested against his arrest; insisted that his name was not Reynolds, but that it was Filer; exhibited his memorandum book, with the name "A. C. Filer" printed in gilt letters upon the back; took from his pocket certain letters that he had received at Muskegon, addressed to A. C. Filer, and showed the postmark thereon; exhibited a tax receipt for taxes paid at Kalamazoo; and later gave the name of a cashier of one of the banks at Kalamazoo, and desired that he be telegraphed to. But, notwithstanding, he was locked up at 1 o'clock in the daytime, and kept in jail, in the ward with other prisoners, for 30 hours.

It is undoubtedly true that an officer is justified in making the arrest of a person formally charged with an offense, though it turns out that the person so charged be innocent. So, if he makes an arrest for a felony without a warrant, although he has no personal knowledge, but acts upon information received from one whom he has reason to rely upon, although it may be that the person so charged is not guilty, or no felony in fact be committed. *Samuel v. Payne*, 1 Doug. 359; *Hobbs v. Branscomb*, 3 Camp. 420; *Holley v. Mix*, 3 Wend. 350; *Burns v. Erben*, 40 N. Y. 463; *Cahill v. People*, 106 Ill. 621; *Orock. Sher.* § 49; 1 Chit. Crim. Law, 22. In *Williams v. Dawson*, referred to in *Hobbs v. Branscomb*, supra, Buller, J., laid down the rule "that if a peace officer, of his own head, takes a person into custody on suspicion, he must prove that there was such a crime committed." The rule is laid down by Mr. Bigelow, in his work on Torts, (4th Ed., p. 140,) that the officer, in executing his process, must arrest the person named in it. If he do not, though the arrest of the wrong person was made through a mere mistake, it

may be a case of false imprisonment; citing *Coote v. Lighthworth*, Moore, 457; *Dunston v. Paterson*, 2 C. B. (N. S.) 485. A number of authorities may be cited in support of this rule: *Add. Torts*, § 805; *Davies v. Jenkins*, 11 Mees. & W. 754; *Gwynne*, Sher. 99; *Griswold v. Sedgwick*, 6 Cow. 460; *Lavina v. State*, 63 Ga. 513; *Hays v. Creary*, 60 Tex. 445; *Comer v. Knowles*, 17 Kan. 436. I do not think, however, that an officer who, through an honest mistake, and after such investigation into the facts and circumstances as the particular case enables him to make, upon a charge of felony, arrests a party, having reasonable grounds to suppose him to be the guilty party, and the one named in his warrant, is liable to the arrested party, who turns out to be innocent, for whatever damages he may suffer in consequence of the arrest. Such a rule would materially interfere with the apprehension of fugitives from justice. Probable cause is a justification for criminal proceedings. Criminals who seek safety in flight are usually apprehended through officers in other localities, and by means of photographs and descriptions of the person. As is said in *Brockway v. Crawford*, 3 Jones, (N. C.) 433, the law encourages every one—as well private citizens as officers—to keep a sharp lookout for the apprehension of felons, by holding them exempt from responsibility for an arrest or prosecution, although the party charged turns out not to be guilty, unless the arrest is made, or the prosecution is instituted, without probable cause, and from malice. In *Eanes v. State*, 6 Humph. 53, a murder had been committed in Franklin county by one Payne, who made his escape, and the governor issued a proclamation offering a reward for the apprehension of the criminal. One Martin was arrested in Sullivan county. The particulars of personal description annexed to the governor's proclamation applied in some respects to Martin, and in others did not. The court say: "The liberty of the citizen is so highly regarded that the officer arresting a supposed felon without warrant must act in good faith, and upon grounds of probable suspicion that the person to be arrested is the actual felon. If he may not, under such circumstances, make an arrest, the escape of criminals would be but little obstructed by the official proclamation of governors, and the police of the state, instead of being, as public policy urgently requires, vigilant and effective, would be altogether the contrary." The rule was laid down in *Malinleini v. Gronlund*, (Mich.) 52 N. W. Rep. 627, that a private person has a right to arrest a man on suspicion of felony, without a warrant, but if he does, and it turns out that the wrong man is imprisoned, he must be prepared to show, in justification—First, that a felony has been committed; and, second, that the circumstances under which he acted

were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff committed it, or was implicated in it. This rule is supported by a long line of authorities. *Cooley*, *Torts*, (2d Ed.) p. 202, and cases cited. But, as Mr. Cooley says, "A peace officer may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief, he will be excused, even though it appear afterwards that in fact no felony has been committed." 7 Amer. & Eng. Enc. Law, p. 675, and cases cited. In *Rohan v. Sarvin*, 5 Cush. 281, the court say: "The public safety, and the due apprehension of criminals charged with heinous offenses, requires that such arrests should be made without warrant by officers of the law. Constables and other peace officers, acting officially, the law clothes with greater authority than private persons, and they are held to be justified if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony; and this is all that is necessary for them to show in order to sustain a justification of an arrest for the purpose of detaining the party to await further proceedings, under a complaint on oath, and a warrant thereon." Upon the same principle, and for the same reason, an officer making an arrest upon a warrant, or upon knowledge that a warrant is out, of one whose person is unknown to him, who can, under the circumstances, only act, if he act at all, upon photograph or description, or both, should be excused, if he act honestly and prudently, making such inquiry and examination as the circumstances of each particular case affords him an opportunity to make. It is practically impossible to apprehend runaways in any other way, and the protection of society from these major crimes demands that some latitude be given to these officers of the law, who are separated from local influences and clamor, and must be presumed to act fairly and honestly. But in all such cases, where the facts are not disputed, the question of probable cause is one of law, for the court. *Hamilton v. Smith*, 89 Mich. 222, 227; *Burns v. Erben*, 40 N. Y. 463; *McCarthy v. De Armit*, 99 Pa. St. 63. To afford a justification, there must be not only a real belief, and reasonable grounds, for it, (1 Chit. Crim. Law, 15,) but, where there is an opportunity for inquiry and investigation, inquiry and investigation should be made. In *Holley v. Mix*, 3 Wend. 350, the court, referring to an arrest made upon information received, say: "The officer should not, however, receive every idle rumor, but should make such diligent inquiry touching the truth of the charge as the circumstances will permit, before he assumes to arrest one upon the information of another."

Defendant was bound to use all reasonable means to avoid possible mistake, and the arrest of an innocent man. *Stanton v. Hart*, 27 Mich. 539, 541. He was not justified in relying upon a personal resemblance, as indicated by a comparison with a photograph, (*Sugg v. Pool*, 2 Stew. & P. 198,) especially as there was, within easy reach, means of identification. He says he did not know, and did not ask, plaintiff's name or business, until after the arrest. A few moments devoted to inquiry at the boarding house would have revealed the situation, and would have shown that there was no reason for associating him with the woman in question. An officer is not warranted in relying upon circumstances deemed by him suspicious, when the means are at hand of either verifying or dissipating those suspicions without risk, and he neglects to avail himself of those means. The case made by defendant did not justify the arrest, and the jury should have been so instructed.

The court erred in admitting the testimony of defendant as to the opinion of Hunsburger and Johnson, given after the arrest, as to the resemblance between the photograph and plaintiff. Both plaintiff and photograph were in court, and before the jury.

The testimony of the attorneys as to the advice given to defendant was clearly inadmissible. It did not appear just what facts were stated upon which the advice was predicated. In no event could advice given after the arrest was made justify the arrest. Even though admissible as bearing upon the question of subsequent detention, it should appear that it was predicated upon a full disclosure of all the facts, an examination of all the evidences of identification offered by plaintiff, and a disclosure of whatever suggestions had been made by plaintiff regarding his identity. The opinions of these witnesses as to the resemblance between plaintiff and the photograph were likewise inadmissible.

The fact of the publication in a newspaper of the fact of plaintiff's arrest was set up in the declaration; and as tending to show the publicity given to that fact, and consequent injury, the publication should have been admitted. It was a plain, unvarnished account. Its publication was privileged. The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts, causing the damage, were the necessary or legal and natural consequence of the wrongful act. The publication was such a natural, usual, and ordinary consequence of defendant's act that it must be

deemed to have been contemplated. It follows that the judgment must be reversed, and a new trial ordered.

GRANT, J., concurred.

MONTGOMERY, J., (dissenting.) I agree with my Brother McGRATH that it is generally a question of law as to what constitutes probable cause to justify an arrest without warrant. But it is apparent at a glance that the rule is not one susceptible of establishing a general test, by which the question may be determined in all cases. Generally, it is a justification if sufficient facts are known to the officer to justify a reasonable belief that a crime has been committed, and that the party arrested is the guilty party. I am not prepared to say, however, that it should be held, as matter of law, in the present case, that the resemblance of the plaintiff to the photograph of the person alleged to have committed the offense is not, when coupled with the other facts proven, sufficient to justify the officer, but whether there was justification must depend upon the closeness of the resemblance between the photograph and the person arrested. It is manifest that this precise question is one that cannot be determined as matter of law, and should, therefore, be submitted to the jury. The language of the court in *Cochran v. Toher*, 14 Minn. 385, (Gil. 297) is peculiarly applicable to this case: "It is manifest that no finding of specific facts could be made by the jury, not embracing a conclusion as to the reasonable effect of the same in fact, from which, under any rule of law, the court could pronounce the conclusion, as a legal inference, that they did or did not constitute reasonable cause." In the present case it would seem that the party arrested had recently come to the county of his arrest; that he was boarding at the same house with a woman who was believed to answer somewhat to the description of the woman with whom the party accused had eloped. The officer, at the time of the arrest, had in his possession a photograph of the accused party, and had information that a warrant was issued for his arrest, and, upon discovering a resemblance between the present plaintiff and such accused party, caused the plaintiff's arrest. In my judgment, whether the arrest was justified under these circumstances depended upon whether the resemblance was so striking as to be convincing to a man of ordinary prudence and good judgment, and this question should have gone to the jury. I concur with my Brother McGRATH on the other grounds. The judgment should be reversed, and a new trial ordered.

HOOKE, C. J., and LONG, J., concurred with MONTGOMERY, J.

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**EDWARDS v. COMMON COUNCIL OF
VILLAGE OF THREE RIVERS.**

(Supreme Court of Michigan. July 26, 1893.)

**DEFECTIVE SIDEWALK—NEGLIGENCE—EVIDENCE—
STATEMENT OF LAW BY COUNSEL.**

1. In an action against a village for injuries from a defective sidewalk, it was proper, for the purpose of showing negligence on the part of the village, to permit the president thereof to testify that he knew of the condition of the walk, that the defect could have been repaired in twenty minutes, and that shortly before the accident he had called the attention of the village marshal to it.

2. It being immaterial whether the president of the village called the attention of the chairman of the street committee to the defect, defendant was properly refused permission to show his failure to do so.

3. Plaintiff's contention being that the injury resulted in the swelling of the ankle and cracking of the skin of the foot, and that this condition was continuous to the time of the trial, plaintiff was properly allowed to exhibit her limb, that its then condition might be seen.

4. It being contended by defendant that the condition of the foot and ankle was the result of eczema, and that she had been troubled with it before the injury, the physician testifying for defendant should, in addition to his testimony that the injured limb was covered with eczema, have been permitted to have testified to a scar on the other limb, which, in his opinion, was the effect of the disease before the injury.

5. While counsel have no right to read law to the jury, they may state so much of the law as they claim it to be as may enable them to lay before the jury an intelligent idea of the force, effect, and bearing of the testimony.

Error to circuit court. St. Joseph county.

Action by Callista Edwards against the common council of the village of Three Rivers. Judgment for plaintiff. Defendant brings error. Reversed.

H. O. Bliss, Howell, Carr & Barnard, and H. P. Stewart, for appellant. B. E. & L. F. Andrews, for appellee.

LONG, J. This action was brought to recover damages for an alleged injury to plaintiff on one of defendant's sidewalks, which, it was claimed, was so far out of repair that it was not reasonably safe and fit for travel. Plaintiff had verdict and judgment for \$675.

It is claimed that plaintiff, while proceeding along this walk, stepped into a hole four or five inches deep, where a plank had been left out. She was caught by her toes, which were turned up, and her foot and ankle sprained. That before this time she was a strong woman, but by reason of the injury the foot and ankle became swelled, and the skin from the toes to the ankle cracked open in fine cracks, developing into sores, from which she had not been able to be cured at the time of the trial, nearly two years after the injury. It is claimed that the defendant had notice of the defective condition of the walk before the accident, and neglected to repair it. On the trial the defense was that plaintiff's limb was diseased with eczema, and had been for many years

prior to the injury, and that plaintiff was suffering from disease, and not from the injury. It was claimed that immediately after the injury the limb was not properly treated, and its condition at the time of the trial was the result of such improper treatment. The defense was also interposed that defendant had no notice or knowledge that the walk was out of repair.

Several assignments of error relate to the admission of testimony. The president of the village was called as a witness for plaintiff. He testified that he knew of the bad condition of the walk before and at the time of the plaintiff's injury, and shortly before that time had called the attention of the village marshal to it. He saw the loose plank, and noticed that one was gone; that on one occasion, before the plaintiff's injury, he stepped into a hole there, and his foot was caught; and that it would not have taken 20 minutes to have fixed this place. Error is assigned upon the ruling of the court in permitting the witness to state how long it would have taken to have fixed the walk. The chairman of the street committee was called as a witness, and asked by defendant's counsel if the president of the village called his attention to the condition of the walk. This was ruled out by the court. The court was not in error in its ruling upon these questions. It was proper to show the negligence of the village in permitting the walk to be out of repair. The president knew its condition, and that by 20 minutes' work it could have been remedied. He communicated this fact to the village marshal, whose duty it may have been to repair it; and these facts were properly permitted to be shown on the trial. Whether the president of the village called the attention of the chairman of the street committee to its condition or not could not matter. The village had notice of the defect, and time to repair it, before the accident.

The court directed the jury that the burden of proof was upon the plaintiff to show the defective condition of the walk, notice to the village, and that after such notice the village had had time to repair it. On the question of damages, the court gave certain requests which the plaintiff tendered, and fully and fairly covered the grounds of defense claimed.

It was said, however, that the court erred in permitting the plaintiff to exhibit her limb to the jury. There was no error in this. It was claimed by her that the swelling of the limb and cracking of the skin was the result of the injury, and that this condition was continuous down to the time of the trial. She was asked to exhibit the limb, that the jury might see its then condition. It was for this purpose only that the limb was exhibited to the jury. This was not improper, under the ruling of this court in *Langworthy v. Township of Green*, (Mich.) 54 N.

W. Rep. 697; *Graves v. Battle Creek, Id.* 758.

Defendant introduced testimony of physicians tending to show that the condition of the limb at the time of the trial was due to a disease called "eczema," and not from the injury; and the plaintiff called other physicians, who gave their opinions that the condition was the result of the injury. The court directed the jury that if they believed the infirmity existed prior to the injury, and the disease was only aggravated by the injury, the plaintiff could not recover; that the burden was upon the plaintiff to show that her limb was sound and well at the time of the injury. Dr. Ikeler was called as a witness for defendant. He had examined the limb some time prior to the trial, and testified that the left or injured limb was covered from the ankle to the knee with inflammatory eczema and enlarged veins; that the right limb was dry about the middle of the leg, and that he found an old cicatrix, left by some former ulceration in that limb. Counsel for plaintiff asked to have stricken out what the physician said about former ulcerations of the right limb. The court then asked, "You can only judge of the appearance, I suppose?" and was answered in the affirmative. The court then struck out the answer. Witness was then asked what was the cause of the scar. This was objected to, and ruled out by the court. This was error. It was the vital question in the case whether the plaintiff was suffering from the injury received, or from the effect of disease, with which it was claimed she had formerly been afflicted. Her own physician testified that she had eczema, and the defendant contended that she had it before the injury. Dr. Ikeler was of the opinion that the scar upon the right leg was the effect of that disease before the injury, and the court should have permitted the defendant to make such proof as it could. The theory of the declaration and the tendency of the plaintiff's proofs were that the condition of the limb at the time of the trial was wholly due to the injury, and not from disease; and the defendant had a right to rebut it. The answer given and proofs offered had a tendency to contradict the plaintiff's claim.

Counsel, in opening the defense to the jury, stated that "the law does not require the village of Three Rivers—" when he was interrupted by plaintiff's counsel with the remark that the jury must take the law from the court; and the court interposed and said, "You have no right to state what the law is." This ruling is assigned as error. The court was in error in confining counsel to a bare statement of facts. While counsel have no right to read law to the jury or to usurp the province of the court in this respect, they have the undoubted right to state so much of the law as they claim it to be as may enable them to lay

before the jury an intelligent idea of the force, effect, and bearing of the testimony upon their case, either before or after the testimony is in the case. *Fosdick v. Van Arsdale*, 74 Mich. 305, 41 N. W. Rep. 931.

Some other errors are claimed, but we do not think they are likely to occur on another trial, and will not be noticed. For the errors pointed out the judgment must be reversed, and a new trial ordered.

GRANT, J., did not sit. The other justices concurred.

REDMOND v. DELTA LUMBER CO.

(Supreme Court of Michigan. July 26, 1893.)

MASTER AND SERVANT—NEGLIGENCE—INFERENCES FROM ACCIDENT—SUFFICIENCY OF EVIDENCE.

1. In an action by an employe for personal injuries caused by the failure of certain machinery to work properly at the particular time of the accident, plaintiff must prove that defendant was negligent, and it cannot be conjectured from the mere fact of the accident.

2. Plaintiff was injured because a certain machine which he was operating in a sawmill did not stop when he removed the lever in the manner required for stopping it. The evidence showed that the machine worked perfectly immediately before and after the accident, and had worked well for six months prior thereto. *Held*, that there was no evidence of negligence that would justify the submission of the case to the jury.

Error to circuit court, Schoolcraft county; Joseph H. Steere, Judge.

Action by Edmond G. Redmond against the Delta Lumber Company for personal injuries caused by defendant's negligence. From a judgment entered on the verdict of a jury in favor of defendant, plaintiff appeals. Affirmed.

J. D. Turnbull, for appellant, cited *Seybolt v. Railroad Co.*, 95 N. Y. 562; *Caldwell v. Steamboat Co.*, 47 N. Y. 291; *Edgerton v. Railroad Co.*, 89 N. Y. 227; *Curtis v. Railroad Co.*, 18 N. Y. 534; 16 Amer. & Eng. Enc. Law, 353; *Thomp. Neg.* 1227; *Cooley, Torts*, (2d Ed.) 796; *Whart. Neg.* § 422; *Add. Torts*, 596; 16 Amer. & Eng. Enc. Law, 449; *Holbrook v. Railroad Co.*, 12 N. Y. 243; *Sedg. Dam.* (6th Ed.) 752, (592); 14 Amer. & Eng. Enc. Law, 904; *Bridges v. Railway Co.*, L. R. 6 Q. B. 877, 891; *Tuttle v. Railroad Co.*, 48 Iowa, 236; *Cummings v. Furnace Co.*, 60 Wis. 603, 18 N. W. Rep. 742, and 20 N. W. Rep. 665; *Mulcairns v. City of Janesville*, 67 Wis. 24, 29 N. W. Rep. 565; *Kearney v. Railway Co.*, L. R. 6 Q. B. 759; *Briggs v. Oliver*, 35 L. J. Exch. 163; *J. Russell Manufg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 127, 128; 1 *Shear. & R. Neg.* §§ 59, 60.

Moore & Moore, O. W. Dunton, and J. W. McMahon, for appellee.

HOOKER, C. J. The plaintiff was employed to operate a machine called a "jack," used for drawing logs into defendant's saw-

mill. This jack consisted of an endless chain, upon which the logs were held by iron spurs, and was operated by power applied through iron gearing to one of the pulleys upon which the endless chain ran by means of a belt running upon a friction pulley. This belt was loose, and was designed to run the jack when it was tightened, by bringing a third and movable pulley down upon the belt, which was done by pulling down a lever. When the lever was released, the effect was to remove this pulley, thereby loosening the belt, and stopping the machine. The heavier the load upon the jack, the more power was required upon the lever to keep the jack in motion, owing to the tendency of the belt to slip upon the pulley. Logs drawn up by the jack were unloaded upon skids on either side of the jack, and from the skids to the carriages upon which they were sawed. The skids being nearly full, plaintiff drew a log up with the jack, which, falling upon the skids, crowded another log against a log upon the saw carriage, which in some way caused one of the logs to be thrown against plaintiff, seriously injuring him. The cause of the accident appears to have been the failure to stop the jack. Plaintiff claims to have released the lever, and that the jack did not stop as it should have done.

Plaintiff's counsel contends that the failure of the machine to stop when the lever was released raises a presumption of negligence, thereby making it necessary for defendant to show an absence of negligence upon its part. On the other hand, the defendant maintains that plaintiff's failure to release the lever caused the accident. Proof was offered to the effect that the jack worked properly immediately after the accident, and the plaintiff himself testifies that it had worked properly for 60 days before, and up to the time when he was hurt, when it suddenly failed to respond to the release of the lever. No proof was offered which tended to show that the machine was out of repair, unless the testimony that it failed to work was such proof. Counsel for plaintiff contends that, if the jury should find that the accident resulted from the failure of the machine to respond to the release of the lever, it necessarily follows that it was from abnormal causes, and that in such case the law presumes negligence, and the onus is upon the defendant to show the cause of this accident, or at least that it was not due to its fault. He cites a number of authorities, several of which are New York cases, to sustain his view of the law. They seem to be cases of injury to passengers by carriers, or to property by warehousemen, in both of which classes of cases the defendants are under obligations to exercise a high degree of diligence. Without implying that the rule contended for is the law of this state in such cases, (a matter upon which we find it unnecessary to express an opinion,)

the doctrine cannot be applied to the facts in this case; the general rule being that negligence cannot be presumed from the fact of the injury, and, though it may be inferred from facts proved, it cannot be based upon guesses or conjecture. In *Mining Co. v. Kitts*, 42 Mich. 41, 3 N. W. Rep. 240, an employee at a mine was injured by the fall of a bridge. The cause was unexplained. The court held that, while it might be guessed or surmised that there was negligence somewhere, it did not extend beyond conjecture, and that, if the master was to be held liable under such circumstances as were disclosed by the record in that case, on mere guesses or inferences respecting the existence of fault somewhere, the rule that an employee assumes the ordinary risks of his employment would be wholly done away with. "When a servant demands from his master compensation for an injury received in his service it is necessary that he trace some distinct fault to the master himself." 42 Mich. 39, 3 N. W. Rep. 242. In *Hewitt v. Railroad Co.*, 67 Mich. 66, 34 N. W. Rep. 659, an engineer was injured in a collision with a flat car, which half an hour previous had run from a side track onto the main track, and stopped partly off the track. Various theories were suggested as to what caused the car to run from the siding, but there was no proof. In answer to special questions the jury found that the wind blew it off, and that it was not intentionally put there by any one. The court held that, while negligence might be inferred from circumstances proved, it could not from conjecture, and set aside the verdict. See, also, *Early v. Railway Co.*, 66 Mich. 349, 33 N. W. Rep. 813; *Miller v. Railway Co.*, 90 Mich. 230, 51 N. W. Rep. 370; *Robinson v. Wright*, (Mich.) 53 N. W. Rep. 938; *Toomey v. Steel Works*, (Mich.) 50 N. W. Rep. 850. In the present case there is no evidence tending to show that the machinery was out of repair, unless it is to be assumed from the alleged fact that it did not stop when the lever was released. On the contrary, all of the evidence showed that immediately before and after the accident it was in working order. If there were anything to show that the machine had been out of order, and that its working was spasmodic or uncertain, there might be room for the contention that defendant was negligent in not keeping it in repair; but the mill was put in good order in the spring, and the jack had worked perfectly up to the time of the accident, clearly indicating that defendant could have no notice that repairs were necessary. It had a man about the mill who looked after the machinery, and there was no proof that he was incompetent or neglectful. *Miller v. Railway Co.*, 90 Mich. 230, 51 N. W. Rep. 370. Nor is there anything to indicate that an inspection would have prevented this accident. It is contended that on a former occasion the jack had drawn a log too far, but our attention is not called

to any proof showing the cause. We cannot, therefore, say that there was any occasion to warn the plaintiff "that this machinery was liable not to obey the lever, and not work as designed." An effort was made to show that this accident might have been caused by the use of rosin upon the belt, but we are pointed to no proper evidence of such fact. An examination of the record reveals no evidence of negligence on the part of defendant that would have justified the circuit judge in submitting the case to the jury. Judgment affirmed. The other justices concurred.

MARQUET v. LA DUKE.

(Supreme Court of Michigan. July 26, 1893.)

DAMAGES—COMPLAINT—SUFFICIENCY OF EVIDENCE—ADMISSIBILITY—PLEADING AND PROOF—VARIANCE.

1. Where, in an action for injuries to a child by being bitten by a bear owned by defendant, the declaration alleged that defendant occupied and controlled the premises where the bears were kept, and that he opened them to the general public, a judgment for plaintiff cannot be assailed because the proof failed to show that such grounds were owned by the public.

2. The declaration alleged that the grounds "were open as a place of recreation to people in a public way, and were uninclosed, free access being given to said grounds," from certain avenues on the south and north. *Held*, that it was not necessary, to entitle plaintiff to recover, to prove that the grounds were uninclosed, there being evidence that free access to the grounds was given from the streets.

3. An allegation that a driveway passed through the grounds is sufficiently supported by evidence that a driveway which had no gate at one end had been put across the grounds for the convenience of people passing through who wanted to go to an hotel standing thereon, and that it was frequently used by persons, especially footmen, going from one street to the other.

4. Where it is alleged in the declaration that the child was passing through the grounds contiguous to the hotel when bitten, and not that it was in the driveway, it is immaterial that there was no evidence to support an allegation that the bears could seize people within the driveway, since such allegation is surplusage.

5. Where there was evidence that defendant was the keeper of the bear, that the place was public, in the sense that the people had free access thereto from the streets, and that the child was bitten at the place alleged, the court properly refused to direct a verdict for defendant.

6. Evidence was properly admitted to show how such grounds were occupied and kept, as bearing on the questions of defendant's negligence and the publicity of the place.

7. It was not error to admit evidence that defendant ordered and paid for supplies for the hotel on such grounds, as bearing on the question of his proprietorship.

Error to circuit court, Menominee county; John W. Stone, Judge.

Action by Julian Narcisse Marquet, by Narcisse Marquet, his next friend, against Anton La Duke, to recover damages for injuries sustained by being bitten by a bear kept by defendant. From a judgment entered on the

verdict of a jury in favor of plaintiff, defendant brings error. Affirmed.

The following is a copy of the declaration in the case: "State of Michigan. In the circuit court for the county of Menominee. Julian Narcisse Marquet, by Narcisse Marquet, His Next Friend, vs. Anton La Duke. Julian Narcisse Marquet, by his next friend, Narcisse Marquet, of the city of Menominee, in said county, plaintiff herein, by Sawyer & Walte, his attorneys, complains of Anton La Duke, defendant herein, of a plea of trespass on the case, filing this declaration, entering rule to plead, etc., as commencement of suit, for that whereas, the defendant above named, on October 24, 1891, and for a long time previous thereto, had occupied and controlled the Eagle Hotel, a public house, situated in the city of Menominee, Mich.; that there were public grounds surrounding said hotel, to which the public was invited, and through which it, the public, was freely permitted to pass; that said Eagle Hotel, on said 24th day of October, was occupied as a public house of entertainment, and the grounds about the same were open as a place of recreation to people in a public way, and were uninclosed, free access being given to said grounds from Ogden avenue, a public street on the south, and from Dunlap avenue, another public street upon the north; that upon the said 24th day of October, and for a long time, to wit, for one month or more previous thereto, the defendant kept two black bears in the grounds about said hotel, between it and Ogden avenue; said bears were untamed, savage, and ferocious, which was well known to the defendant; that said bears were not confined or excluded from contact with people who passed through said grounds, save and except by a chain fastened to a collar about their necks, and connected to a post in the ground at the other end, said chain being ten or twelve feet long; that there was a way or road leading from Ogden avenue to Dunlap avenue, aforesaid, through the grounds above mentioned, and near where the bears aforesaid were placed, along which way people, men, women, children, and vehicles were allowed and invited to pass by said defendant. In close proximity to said bears, so close that said bears could seize persons passing along the same; that on said 24th day of October, aforesaid, the plaintiff herein, a boy between five and six years of age, in company with other children, was passing through the grounds contiguous to said Eagle Hotel, near where said bears were chained, when, without any negligence on the part of the plaintiff, one of said bears so kept and owned by defendant as aforesaid seized plaintiff in a ferocious manner, with its paws and teeth, and lacerated, bit, bruised, and scratched him, making large wounds in his head and body with its claws and teeth, and otherwise lacerated and injured the plaintiff, whereby his under jaw was broken in three places, his left arm broken in two places, and his

shoulder smashed in a frightful manner, and other injuries then and there did to the plaintiff, whereby he has suffered great physical pain and anguish, having to undergo painful surgical operations by reason thereof, being confined to his bed in a critical condition for a long time; that said injuries were caused solely on account of the negligence, carelessness, recklessness, and heedlessness of the defendant, who was well aware and had full knowledge and notice of the ferocious and savage nature and ugly disposition of said bears; that said defendant was negligent, heedless, reckless, and careless in keeping said bears in a place so exposed, without providing a watch or guard over them, and without placing a fence or pen around them, and defendant was guilty of recklessness and negligence in keeping said bears in the open grounds, where people could come in contact with them; that it was heedless and reckless to keep said bears in such an exposed place, fastened with a chain as long as the one with which they were fastened on said day; that it was negligent in said defendant to keep said bears anywhere without having them securely guarded and protected, that children of tender years could not come in contact with them; that plaintiff suffered great damage by reason of the biting, scratching, wounding, bruising, breaking, and lacerating as aforesaid, whereby he was caused great pain and suffering, and permanently disabled and crippled, to wit, to the amount of ten thousand (10,000) dollars, together with the costs in and about this action incurred and expended. Sawyer & Waite, Attorneys for Plaintiff."

J. M. Opsahl, (B. J. Brown, of counsel,) for appellant. Sawyer & Waite, for appellee.

HOOKER, C. J. The defendant appeals from a verdict and judgment rendered against him, in favor of a child of six years of age, who was bitten by a bear alleged to have been kept by defendant. Upon the argument it was contended that the proofs did not support the allegations of the declaration in the following particulars, viz.: (1) That the grounds where the child was bitten were public grounds, and open to the people in a public way; (2) that they were uninclosed; (3) that the driveway passed through them; (4) that the bears were so close to the driveway that they could seize persons upon it; (5) that the plaintiff was on the driveway without negligence when seized.

If it is to be held that the grounds must have been owned by the public, to support the declaration, it must be admitted that the declaration was not supported by the proof. But the plain meaning of the declaration is that defendant occupied and controlled the premises where the bears were kept, and that he opened them to the general public. The statement that they were

uninclosed is qualified by the explanation that free access was given from streets on the north and south. Proof that sustains this interpretation of the declaration is not wanting in the record. There was also evidence tending to show that the road or driveway passed through the grounds as alleged. There was evidence that the driveway had no gate at one end, and that the driveway had been put there for the convenience of people passing through who wanted to go to the hotel, and that it was frequently used by persons, especially by footmen, going from one street to the other. We find no proof sustaining the allegation that the bears could seize people within the driveway, but it is immaterial, and may be treated as surplusage, as the declaration does not allege that the child was in the driveway when seized by the bear, but states that he was passing through the grounds contiguous to the hotel when seized. There being proof that the defendant was the keeper of the bear, that the place was public, in the sense mentioned, and that the plaintiff was bitten at the place stated, there was enough to go to the jury, and the trial court properly refused to direct a verdict for the defendant. This disposes of the 1st, 2d, 12th, and 13th assignments of error.

A point is raised over the admission of evidence tending to show how the grounds were occupied and used. We think, however, that this was admissible, as bearing upon the question of negligence. If defendant kept a bear in a place that he knew to be frequented by the citizens with his acquiescence, the degree of care required would be greater than it would be if the locality were more private. It also bore on the question of the alleged publicity of the place. This disposes of the 3d, 5th, and 6th assignments of error.

A number of witnesses testified to dealings with the defendant in relation to supplies furnished for the hotel, and, while we may not be impressed with the justice of the finding of the jury upon the subject, we must recognize the fact that evidence tending to show that defendant ordered and paid for such supplies tended to show his proprietorship. The 4th and 9th assignments apply to evidence of this kind.

W. Reindl, a witness for the defendant, testified upon direct examination that he was a brewer, and sold beer to the defendant for the saloon that was kept on the premises. He stated that John La Duke, defendant's son, kept the hotel, and that defendant owned the saloon. He knew that defendant owned the saloon because he was his bondsman. On cross-examination he stated that he concluded that the son ran the hotel, and was in possession of the premises, because they showed him the lease from defendant to his son, and told him so. He said that was all the way he knew,

whereupon the court struck out his answer, except as to his statement that he saw the lease. In so doing, the court committed no error, as the evidence was hearsay. We find no error, and the judgment must be affirmed. The other justices concurred.

ANGELL v. LOOMIS.

(Supreme Court of Michigan. July 26, 1893.)

ASSUMPSIT CONTRACT — EVIDENCE — VARIANCE — COPY OF LETTER — FRAUDULENT INTENT — RESPONSIVENESS OF ANSWER — TENDER.

1. In an action to recover the amount paid for a contract appointing plaintiff general agent in certain counties, because of misrepresentations the declaration counted specially on the contract, naming the counties covered, and generally on the common counts. The proofs showed that the contract had, by subsequent agreement, been changed by substituting other counties. *Held*, that the contract, thus changed, was properly admitted in evidence, (1) because the change was immaterial, and (2) because it was admissible under the common counts.

2. A copy of a letter purporting to have been written by plaintiff to a third person is not admissible to contradict plaintiff's testimony, where the only evidence of the existence of the letter was defendant's testimony that he knew plaintiff's handwriting, and that he had had such a letter in his possession, but was satisfied it was lost.

3. Evidence as to whether defendant intended any fraud is inadmissible, as the result to plaintiff is the same whether defendant acted in good or bad faith.

4. In answer to an interrogatory to name some of the prominent members of an association "at that time" witness stated "most of the state and city officers at Richmond, Va., were members, and there were other prominent members in various states whose names I cannot tell." *Held*, the answer was properly excluded, as not responsive to the question.

5. Defendant appointed plaintiff agent for the sale of books in a certain territory of which defendant was a nonresident. After receiving the books, plaintiff sought to rescind the contract, and deposited the books in the railroad warehouse, notifying defendant that they were subject to his order. *Held*, that the tender of the books to defendant was sufficient.

Error to circuit court, Eaton county; Frank A. Hooker, Judge.

Action by Edmund W. Angell against Frank S. Loomis to recover on account of misrepresentations the amount paid on a contract. Plaintiff had judgment, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

Defendant's brother was the president of the Loomis National Library Association of Richmond, Va. In the absence of his brother, defendant appears to have been acting for the association, and was the only person with whom the plaintiff dealt. June 16, 1887, plaintiff made a written contract with this association, by which he was to become its manager for certain counties in the state of Michigan, named in the contract.

The clause of the contract, material to this case, reads as follows: "Said second party also agrees to commence his work with a

stock of not less than two thousand (2,000) dollars' worth of goods, and that he shall pay at least nine hundred (900) dollars to said first party on receipt of said goods, and make such disposition of the money to be collected for them under this contract as is hereinafter set forth. It is also agreed that during the continuance of this agreement said second party shall retain one dollar and a half (\$1.50) out of each paid-up initiation fee, for the purpose of using to get new goods as they may be desired or needed from time to time. That, in consideration of the faithful performance of his aforesaid duties, he shall, from the remaining sums so collected by him from paid-up initiation fees, draw as salary an amount not exceeding one hundred and sixty-six and sixty-six hundredths (166.66) dollars per month, and send the surplus that exists to said first party. It is also agreed that said second party shall withdraw from this business all the capital put in by him at the end of one year, and resign such position if he so desires, first party to have one month notice of such intention."

Plaintiff's evidence showed that he was ignorant of the value of the books, and relied upon the representations made by defendant. During the negotiations, defendant explained to plaintiff why he was required to advance the money, which he said would be repaid to him at the expiration of the contract; that he would receive books to the value of \$2,000, which would be security for such repayment. Defendant lived in Vermontville, Mich., and July 20, 1887, in response to a message from defendant, plaintiff went to Vermontville, to receive and examine the books. He then asked defendant if he thought they were worth \$2,000, to which defendant replied that he did not think they were, but that they were worth about \$1,200, and that the wholesale price was from \$.90 to \$1.10 each, whereupon plaintiff paid \$700, and gave his notes for \$200. The books were shipped to plaintiff at Grand Rapids, and he entered upon the business provided for in the contract, which he continued till some time in August. He then learned that the books were worth at wholesale only \$.22 each. Plaintiff then went to defendant, at Vermontville, and demanded the money back. Defendant told him that he did not think that he had made as thorough a trial as he ought to; told him to try it a while longer, and if he could not make it work he would give him back his money. Plaintiff went back to Grand Rapids, and remained till the last of August. Meanwhile he wrote two letters to defendant, which were not answered. He then learned that defendant had removed to Chicago. He then packed up the books, and deposited them in the depot of the Detroit & Milwaukee Railroad Company at Grand Rapids, but without any direction marked thereon, or any instructions to the depot master what to do with them. He then went to Chicago, found the defendant, again demand-

ed his money, and informed him that the books were at this depot, subject to his order. He then brought suit to recover back the \$700 on the ground of the fraudulent representations as to the value and price of the books.

The declaration contained a special count and the common counts. Plea, the general issue. Verdict and judgment for plaintiff. Eight errors are assigned.

H. F. Pennington, for appellant. R. A. Hawley and Huggett & Smith, for appellee.

GRANT, J., (after stating the facts.) 1. Objection was taken to the admission of the contract in evidence, because of a variance between the contract set up in the declaration and the one introduced in evidence. The only variance consisted in the change of counties. By a subsequent agreement, indorsed upon the back of the original agreement, certain other counties were substituted for those mentioned in it. The objection is not good, for two reasons: (1) The change was immaterial, and in no manner affected the issue involved. That part of the contract which was material was correctly set forth. (2) Plaintiff was entitled to recover on the common counts, under which the contract was admissible. *Johnson v. Insurance Co.*, 39 Mich. 33.

2. When plaintiff was cross-examined he was shown a copy of a letter purporting on its face to have been written to one Taylor, and denied having written such a letter. The purpose in introducing the letter was to contradict plaintiff's statement, made to defendant shortly after he received the books, that he could get no agents. Taylor was not produced as a witness, nor was there any evidence to show that such a letter had ever been received by him. Defendant testified that he knew plaintiff's handwriting, and that he had had such a letter in his possession, but that he was satisfied it was lost; that he had searched for it, but did not state where. We think the copy was properly excluded. We think the defendant's rights could not have been injuriously affected by the exclusion of the letter. It had no bearing upon the false representations made.

3. After defendant had given his version of the transaction, the plan of the association, and had testified that he had been engaged in the business of publishing and selling books, had been in the employ of the association, and subsequently become interested in another, his counsel then stated to the court: "I want to ask him, to show by him that the plan was entirely feasible, and that the company did a large business. Also I want to show that there was nothing to prevent this man getting along in this territory, provided he went to work industriously, and used judgment." After the offer was

rejected, counsel further stated: "I ask to be allowed to show by this witness his knowledge of the trade; that he has knowledge of the quality of the books, and the prices that they retail for, and the plan that was pursued by this Loomis Library Association; that he knows no reason why this man, the plaintiff, should not have made a success of this business. It has this bearing: What right has this man to make a perfectly valid contract to do a perfectly valid thing, and not give it a fair trial, but go down to Grand Rapids a couple of weeks or such a matter, and then say he will repudiate it?" This also was rejected. The ruling was correct. It was an omnibus proposition, containing some matters which were competent, some that the witness had already testified to, and others which were incompetent.

4. This assignment involves the admission of evidence. It has no exception on which to base it, and will not, therefore, be considered.

5. Defendant was asked if he intended any fraud, which question was excluded. It is contended that defendant was acting for the association, and unless he knowingly and intentionally committed a fraud he cannot be held liable. Plaintiff's right of recovery did not depend upon defendant's intent. The result to plaintiff was the same whether he acted in good or bad faith. The measure of damages in case of recovery was fixed, and could not be affected by the intent. The ruling of the court was therefore correct. *Holcomb v. Noble*, 69 Mich. 398, 37 N. W. Rep. 497; *Totten v. Burhans*, 91 Mich. 495, 51 N. W. Rep. 1119.

6. The testimony of E. G. Loomis, the president of the association, was taken by deposition, under a stipulation that the testimony should be read in court, subject to any objection which might be made if it was taken in open court. An interrogatory was, "Name some of the prominent members of such association at that time," to which the answer was, "Most of the state and city officers at Richmond, Virginia, were members, and there were other prominent members in various states, whose names I cannot tell." The answer was properly excluded, as not responsive to the question.

7. The court, in instructing the jury on the question of tender, said: "Now, where parties are residents of the same town, it is usual, as in the case of a horse, to take it back, and tender it to the person; but if it is other property that naturally belongs to a warehouse, and the person is a transient, it is proper to leave it at a warehouse, subject to the order of such person, and give notice of the fact; and I think, if that was done in this case, it would be a sufficient tender if it was done within a reasonable time, as soon after the discovery as could consistently be made." Defendant had left the state. Plaintiff had de-

posited the goods, and notified him where they were, and that they were subject to his order. The tender was sufficient.

8. The court, after a full and fair charge, said at the close: "Of course, all that I have said before at this term with regard to evidence and the right of the jury to determine the facts in a case, applies equally here." What the court referred to, and its meaning, are clear from the next sentence: "The burden is upon the plaintiff to establish his case by a preponderance of proof. You will determine what facts are established, and base your verdict upon them." This sentence is the substance of what had before been said, and there is no possibility that it was misunderstood by the jury, or that defendant was prejudiced by it.

Judgment affirmed.

HOOKER, C. J., did not sit. The other justices concurred.

SCHLOSS et al. v. FELTUS.

(Supreme Court of Michigan. July 26, 1893.)

SALE—BONA FIDE PURCHASERS.

In replevin it appeared that S. purchased the goods in question of plaintiffs by samples on credit, withholding the fact that he was insolvent; that, before the goods were examined with reference to acceptance, they were transferred to R., a creditor, with S.'s entire stock to be credited on account, S., at the time, stating to R. that plaintiffs' goods ought to be sent back; that R. immediately transferred the stock to defendant; that defendant paid nothing on account of the transfer to him until after the replevin was brought. Held that, as against plaintiffs, defendant was not a bona fide purchaser.

Error to circuit court, Chippewa county; Joseph H. Steere, Judge.

Action in replevin by Emanuel Schloss and others, trading as Schloss Bros. & Co., against Lyman Feltus. Defendant had judgment, and plaintiffs bring error. Reversed.

H. M. Oren, (Julian G. Dickinson, of counsel,) for appellants. John W. McMahon, (M. C. Burch, of counsel,) for appellee.

McGRATH, J. This is replevin to recover merchandise from one claiming as purchaser from an alleged fraudulent vendor. Smith & Hassock, in September, 1891, were carrying on a lumber business at Raber, Chippewa county, and kept a general store in connection therewith. Mueller & Raber, of Chicago, made advances to Smith & Hassock from time to time, and took their lumber product. On September 19, 1891, Smith was at Detroit, and gave a verbal order to plaintiffs for a quantity of merchandise. From Detroit, Smith went to Chicago, and saw Mueller & Raber; from Chicago, returned to Raber, arriving there on Saturday, September 29th. Before reaching home, Smith had learned that Mueller & Raber had refused to accept certain drafts

which Smith & Hassock had drawn upon them for further advances, and on his way to Raber, at St. Ignace, Smith met Mr. Raber, who was also on his way to Raber to investigate the affairs of Smith & Hassock, who were largely in arrears to the firm of Mueller & Raber. Learning of this condition of things, Smith telegraphed from St. Ignace to one Kelliher, another creditor of the firm of Smith & Hassock, informing him that his account was in danger, and Kelliher arrived at Raber on Sunday morning, and prepared to take out a writ of attachment on Monday morning. Mr. Raber also arrived at Raber on Saturday, the 29th. All of the parties sat up all night Sunday night, and on Monday morning, as early as 1 o'clock, Kelliher had attached and Raber had secured a bill of sale of all the assets of the firm of Smith & Hassock, including the goods purchased from plaintiffs. While en route to Raber, and at St. Ignace, presumably by appointment, Mr. Raber met defendant, who was a member of the firm of Lyman Feltus & Co., who were carrying on business in that vicinity, the firm being composed of Feltus and Mueller and Raber, and informed him of the purpose of his visit to Raber. He says that he told Feltus that he was going down to investigate affairs, and, in case he decided not to continue the business there, he wanted him to go over there and buy the business; and "I asked him if he would consider that, and, if he did that, I would let him know when I had come to a conclusion, and, if so, to come over there, and he said he would." Feltus was on hand at Raber Tuesday morning, and Raber assigned to him the entire stock and assets received from Smith & Hassock. The goods were replevied October 6, 1891. Mueller & Raber simply credited Smith & Hassock, upon their indebtedness, with the amount agreed upon as the value of the assets transferred; paid the amount of Kelliher's attachment; and agreed with Smith to pay certain labor claims, none of which, however, were paid until November following, and the total amount of which was less than \$2,300. Defendant was charged upon the books of Mueller & Raber with the value which they fixed upon the assets at the time of the transfer of the same to Feltus, and he paid nothing on the alleged purchase until after the goods had been replevied. Hassock had simply a working interest in the business. The goods had been bought on credit, and had been ordered from samples. They had arrived at Raber but a short time before Smith & Raber arrived there. Most of them were still in the original packages. When Smith arrived, he told Hassock that the goods were to be sent back, and, before the transfer to Mueller & Raber, he told Raber that they ought to be sent back. There was testimony tending to show that, when the goods were ordered, Smith misrepresented the financial status

of the firm, and, when asked, withheld knowledge of the actual situation of affairs. It is clear, also, that, before the transfer to Mueller & Raber, he had not examined the goods with reference to their acceptance. The evidence clearly tended to show that when Smith undertook, by the transfer of the goods, to exercise an act of ownership over them, he did so knowing that he could not continue the business. Under this state of facts, defendant was not a bona fide purchaser, nor were Mueller & Raber, so far as plaintiffs' right of recovery was concerned. The stock of goods and other property transferred to them were valued at \$10,000, the amount advanced to Kellher was \$1,143.94, and the judgment for defendant in the court below was \$1,120.92, leaving a margin still of \$7,735.14. It is unimportant, therefore, whether the payment of Kellher's claim was or was not a part of the consideration for the transfer, or whether that payment would constitute Mueller & Raber bona fide purchasers to that extent.

It is well settled that actual payment in good faith is needed to complete a bona fide purchase, and, in any event, a purchaser from a fraudulent vendee can only be protected to the extent of payments actually and in good faith made. *Dixon v. Hill*, 5 Mich. 404; *Kohl v. Lynn*, 34 Mich. 360; *Webster v. Bailey*, 40 Mich. 641; *McGraw v. Solomon*, 83 Mich. 442, 47 N. W. Rep. 345. If Smith, at the time that the order was given, misrepresented to plaintiffs the financial condition of the firm, and plaintiffs, in reliance upon the representations made, gave him credit, or if he, before he accepted the goods, knew that he could not continue the business, he was chargeable with accepting and transferring the goods with an intent not to pay for them, and plaintiffs were entitled to recover. *Whitten v. Fitzwater*, 129 N. Y. 626, 29 N. E. Rep. 298. Smith was the only member of the firm who saw the samples, and who knew the kind and quality of the goods ordered. For the purpose of an acceptance of goods, the vendee must have had an opportunity of exercising his judgment with respect to the articles sent. The acceptance must be something more than a mere receipt; it means some act done after the vendee has exercised, or had the means of exercising, his right of rejection. *Benj. Sales*, p. 139. In the case of *Nicholson v. Bower*, 1 El. & El. 172, 28 Law J. Q. B. 97, there had been no specific goods selected and fixed on in advance. Bower had made a verbal sale of a quantity of wheat by sample, to be delivered by rail in London. The wheat was received at the London depot, and warehoused by the railway company, and the purchasers sent a carman to get a sample, and, after inspecting it, told him not to cart the wheat home, at present. The purchasers were really in insolvent circumstances, and, immediately after the interview with the car-

man, determined to stop payment, and they therefore thought it would be dishonest to receive the wheat, although equal to sample, when they knew they could not pay for it. Held, that there had been no acceptance in fact, and a verdict in favor of the assignors of the purchaser was set aside.

The judgment must be reversed, and a new trial ordered.

LONG, J., did not sit. HOOKER, C. J., and GRANT, J., concurred. MONTGOMERY, J., concurred in the result.

HOUGH v. COMSTOCK.

(Supreme Court of Michigan. July 26, 1893.)

ACCOUNT—MONEY LOANED—ACTION TO RECOVER
—VOLUNTARY PAYMENTS—QUESTION FOR JURY
—EVIDENCE.

1. In an action for balance due for money loaned, defendant, who was plaintiff's sister-in-law, testified that his mother spent some two or three years at her home; that he, at different times, expressed the intention of paying his share towards his mother's support; that she never asked him for money; and that the sum claimed was voluntarily paid her, as his contribution to such support. *Held*, that the question as to whether any of the money claimed by plaintiff was money voluntarily paid on his mother's board was for the jury.

2. It was not error to admit evidence of the value of the support of plaintiff's mother during the time in question, where the set-off, of which notice was given, was practically abandoned, and defendant did not claim an agreement that plaintiff would pay any particular sum, but merely his share.

Error to circuit court, Jackson county; Erastus Peck, Judge.

Action by Edward A. Hough against Hattie E. Comstock to recover an alleged balance due on an account for money loaned by plaintiff to defendant. From a judgment entered on the verdict of a jury in favor of defendant, plaintiff brings error. Affirmed.

Thomas E. Barkworth, for appellant.
Austin Blair, for appellee.

HOOKER, C. J. Edward A. Hough, the plaintiff, brought this action against his sister-in-law, the defendant, for money which he claimed to have loaned to her, and paid for her at her request. It appears that, soon after defendant moved to Jackson, plaintiff's mother came to visit her, and spent, upon that and other occasions, altogether, some two or three years at her home, being supported by her. Defendant testifies that, on several occasions, plaintiff expressed the intention of assisting her in supporting his mother, and contends that all money procured from him was given her for such purpose, and that she did not receive any of it as a loan. The testimony in support of such claim is as follows: Defendant, being the witness, was asked: "Question. What conversation did you have with

Mr. Hough in regard to her support and expenses there, at any time? Tell us what that was. Answer. I went in the office one day, and he gave me \$40, and I took it; then I went back after he had gone out on the road, and I gave it back to his bookkeeper, Miss Pettitt. When he came home again, I was in the office, and he handed it back to me, in money. Said he did not intend I should have paid that back, and he expected to bear his share of the burden of his mother's support. I said, if I was able, I should not want him to, but I was not; he was a great deal better off than I. And he said that was all right, he expected to do it, and I thought he ought to. This conversation occurred just before his mother went north the first time." Being interrogated by Mr. Barkworth about a conversation with him, the witness testified: "Q. Didn't you talk with me about it? A. I certainly did, generally; came to your office, when you had the claim for collection, to see what could be done about it; objected to the amount on the ground that I had supported his mother, and he promised to help me in that regard. Was willing at that time to turn over a mortgage to him, if he would allow me what was just and right for the support of his mother. He promised to assist me in taking care of the old lady. I never said I would turn over a mortgage for the amount, provided Mr. Hough would not recognize the moral obligation resting upon him for the support of his mother. I sent Hough a list of mortgages to select from, but expected he would allow me for his share of support. Did not expect to pay the whole, and did not say I had no legal claim against him. Q. Didn't you state to me that, so far as the money was concerned, or Mr. Hough's claim to have loaned you, that you had it; that there was no trouble about that? A. I don't deny I had the money. I don't deny it here. I do deny that I ever asked him for it. He offered it to me. Did not get money in his absence. If I ever got any money of Miss Pettitt, she drew the check at his order. Q. Now the fact with regard to his mother coming there was that you invited her to come first, wasn't it? A. Yes, on a visit. Q. And that when she got there the situation was mutually pleasant, and you requested her to stay. Isn't that true? A. I didn't say anything about it to her. She stayed. Did not insist on her staying. Nothing was said about it. She just came, and lengthened out her visit; and during the time Mr. Hough told me he expected to pay his share of his mother's expenses. Q. What share did he say? A. I don't know. That is what I am trying to find out,—what he considered his share. * * * Q. Do you swear positively you did not have on December 1, 1889, from Mr. Hough, \$74.83, for payment of the McKinstry bill? A. Why, certainly, I did not. There is the receipt in my name. Q. Didn't

you get a check from Miss Pettitt on that particular date? A. I don't think I did, because I never asked him to pay my bills. I never asked him for any money. He always offered it to me. * * * Q. At the time these moneys were obtained, he had not said a word to you about his mother? A. He had. Mother came in the fall of 1883, in August, and the spring following I had a talk with plaintiff. He gave me the \$40 before I went away, because I went right home, and fixed up her room."

Errors are assigned as follows: (1) That it was improper to admit testimony of the value of the support of the old lady by the week. (2) That the court erred in submitting to the jury the question whether any of the moneys claimed by the plaintiff to be due were payments voluntarily made to apply upon the mother's board. (3) That the court erred in instructing the jury that they might find that part of the moneys delivered to defendant by the plaintiff were voluntarily advanced to, and received by, her, on the understanding that they were to apply on his share of the expenses of his mother's maintenance at the defendant's house. (4) That the court erred in submitting any question of fact to the jury.

If the testimony of defendant, quoted, is true,—viz. that the payments were voluntarily made by the plaintiff, and not upon defendant's request, and were made and received as contributions to the support of the mother,—the law will not justify the inference of a promise to repay. The implication of a promise does not follow the payment and receipt of money, where the facts are inconsistent with it. *Galloway v. Holmes*, 1 Doug. (Mich.) 330; *Wilson v. Wagar*, 28 Mich. 452; *Hunt v. Sackett*, 31 Mich. 18; *Manufacturing Co. v. Dole*, 43 Mich. 370, 5 N. W. Rep. 412; *Strong v. Saunders*, 15 Mich. 339; *St. Jude's Church v. Van Denberg*, 31 Mich. 287; *Godfrey v. White*, 43 Mich. 171, 5 N. W. Rep. 243; *Woods v. Ayres*, 39 Mich. 345; *Cicotte v. St. Anne's Church*, 60 Mich. 552, 27 N. W. Rep. 682; *Peters v. Gallagher*, 37 Mich. 407; *Coe v. Wager*, 42 Mich. 49, 3 N. W. Rep. 248.

It is not for us, nor was it for the circuit judge, to determine the amount of credence to be given to the defendant's testimony, and he would not have been justified in refusing to allow the jury to determine whether these payments were gratuitous contributions or not.

The remaining question refers to the testimony of defendant in relation to the value of the mother's support. Although there was a notice of set-off, it is clear that it cut no figure as a defense, being practically abandoned. The defendant did not claim an agreement by the plaintiff that he would pay any particular sum or portion of the expense of his mother's maintenance; merely, that he would pay his share. But upon that basis she was claiming a large sum to have

been paid for that purpose. We think it was proper to show the expense incurred, as compared with the amount paid. Had the amount paid exceeded the value of this support, it would have been a strong argument in plaintiff's favor, while defendant strengthened her case if she showed the amount paid to her to be only a reasonable share of her expenditures. We find no error in the record, and the judgment will be affirmed. The other justices concurred.

SHUFELT v. FLINT & P. M. R. CO.

(Supreme Court of Michigan. July 25, 1893.)

ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

A woman approaching a railroad crossing, in a lumber wagon drawn, at a walk, by two horses, when on high ground, about 100 feet from the track, looked for approaching trains, but, without stopping, she drove on, not hearing or seeing the train until the horses were on the track. From the hill to a wood pile 18 or 20 feet from the track, and parallel with it, the track, in one direction, could not be seen, but from there to the track there was an unobstructed view in either direction. *Held*, that it was contributory negligence for her not to stop, and listen and look, before going on the track, and it was proper to direct a verdict for defendant. Montgomery and McGrath, JJ., dissenting.

Error to circuit court, Osceola county; J. Byron Judkins, Judge.

Action by John Shufelt against the Flint & Pere Marquette Railroad Company for injuries to a team from a collision at a railroad crossing. Verdict was directed for defendant. Plaintiff appeals. Affirmed.

Charles A. Withey, for appellant. C. M. Beardsley and O. F. Wisner, for appellee.

GRANT, J. I concur with my Brother MONTGOMERY that there was no negligence in the rate of speed of the defendant's train, or in the piling of the wood along its track. I think the circuit judge was correct in directing a verdict for the defendant.

1. The plaintiff's wife, herself, was guilty of contributory negligence. The road was dry and hard. She had two horses, and a lumber wagon with a box, and a spring seat fixed upon the box. She did not stop her team to listen. She had been for a long time familiar with the crossing, and had frequently driven over it. When upon the little rise of ground from 90 to 100 feet from the crossing, she looked to the west, and saw no train approaching. The horses were accustomed to the cars, and were not afraid. They were farm horses. She said she was on a slow walk. She did not stop, and the horses stepped upon the track just as the train struck them. If the wood pile, from the rise of ground to the track, obstructed her view of the approaching train,

it was her duty to stop and listen when nearer the track. Had she stopped upon the rise of ground, it is quite probable that she would have heard the train. She testified: "I did not stand still. My horses were on a walk, and when I got there I pulled on the lines, and came almost to a standstill, and looked and listened if I could hear the cars, and I did not hear them; so I went along. I was on a slow walk. I did not stop. I drove right onto the crossing. The horses were between the rails when I first saw the train. When I got on to the track the train was right there." She did not listen for any train or signals, from the rise of ground to the track. She evidently assumed that there was no danger of the approach of a train before she could get across. In this she was not in the exercise of common prudence, either for her own safety, or that of those travelling upon the railroad. *Van Auken v. Railroad Co.*, 55 N. W. Rep. 971, (decided at the present term,) and authorities there cited. But, according to the evidence of her own witnesses, when she came within 20 feet of the track she could have seen the train, had she looked. It is no excuse to say that she was looking to the east. The track to the east was in plain view for some distance back from the crossing. The danger, if any, was from the other direction. She could, however, have looked both ways in an instant, and had ample time to stop within 20 feet. While she was walking her team, according to her own testimony, less than 100 feet, the train, which was running at a lawful rate of speed, ran about 80 rods. Passengers upon the highway must be charged with knowledge of the lawful rate of speed at which trains may run, and must govern themselves accordingly. Trains are not limited in the rate of speed they may run in the country, and across the public highways, where the travel is limited. The commerce of the country demands rapid transit. *Robinson v. Railroad Co.*, 79 Mich. 328, 44 N. W. Rep. 779. These trains must run where the view is obstructed by cuts, by embankments, by trees, and other things. He who does not choose to stop and listen, where he cannot see, must suffer the consequences of his own negligence. My own view of the duties of travelers upon the highway, in approaching railroad crossings when they cannot see, are fully expressed in *Van Auken v. Railroad Co.*, supra, and the authorities there cited.

2. The court was, in my judgment, correct in holding that it was conclusively established by the evidence that the statutory signals were given. I deem it proper to refer to the entire testimony in the case on this point, and the circumstances surrounding each witness who has testified thereto, in order that there may be no misapprehension of the facts to which the law is to be applied:

Mrs. Shufelt's testimony amounts simply to this: that, if the signals were given, she did not hear them. The only reason she had for saying that they were not given was because she did not hear them. She was in the midst of the noise made by two horses and a lumber wagon traveling over a hard road, and did not listen from the time she left the rise of ground until she reached the track. Miles J. McKay was sitting on his horse, 30 or 40 rods south of the crossing, facing west of north. Was watching the train all the time until it came around the curve. He was waiting for a man who was coming across a farm near where he stood. His testimony, on direct examination, is: "I did not hear any signal, whistle, or bell." On cross-examination, he said: "I was not paying particular attention to the whistle and bell. Had no occasion, that I knew of, particularly." Virgil Wells and his brother were driving with a team about half a mile north of the crossing, saw the train come around the curve, and testified: "We did not hear the train whistle or ring any bell." On cross-examination he said: "I did not hear whistle or bell. They might have sounded. I did not hear them. That is as much as I can say about it." Cephas Wells was with the last witness at the time. He testified: "I saw the train a minute or two, —a second or two. I did not hear it whistle or ring. We were within hearing distance. I did not notice any indication of a whistle, by a puff of steam or anything. I was watching it as it rounded the curve." Cross-examination: "I wasn't paying any attention to see if the whistle or bell sounded. I wasn't interested. All I can say on that subject is, I didn't hear it." Timothy Fee was a farmer whose house was about 40 rods west of the highway, and 30 rods south of the railroad. He was in his field west of his house, cutting corn. He said: "I did not notice the train when it passed. I did not hear it whistle or ring. It is a general occurrence for trains to pass there every day. I paid no attention to the like. I was within hearing distance, but I did not hear it." Cross-examination: "I paid no attention to the train. I might have seen it, but did not remark it. I can't say I saw it. I don't remember whether I did or not. I won't swear it did not ring or whistle, either. I did not hear it to draw my attention. Trains pass and re-pass so frequently I pay no attention, unless they whistle to drive the stock off." Justus Berry lived 80 rods north of the crossing. From his house the railroad is visible from the curve to the crossing. He was at work in his field west of the house, and saw the train just as it came out of the curve. He said: "I can't say positively whether it whistled or rung, or either. I can always hear them plain, and usually note it; but I can't say, in regard to that special train, whether it did or didn't. I don't remember hearing it. I did when they got

down to the crossing. I heard them toot the alarm. I thought it was cattle. They were then behind the wood pile, very close to the crossing, I should judge." The above is all the evidence, on the part of the plaintiff, on the subject of signals.

The engineer of the train testified positively that he sounded the whistle for the crossing. The fireman and conductor also testified that the whistle was blown. The conductor testified that the train was behind time; that he had passengers for Grand Rapids. Was anxious to make the connection at Reed City, and was listening for the sound of the whistle. The bell was rung automatically, by air; and the brakeman testified it was last started at Chase, seven miles west; that it rung continuously from then till the time of the accident; and that he stopped it after the accident. The engineer also testified that the bell was ringing. Joseph Finsterwald was at the depot in Reed City, waiting for this train. He testified that while standing upon the platform he heard the crossing whistle; that at the time it whistled he was walking with another man to the west side of the depot to get a cigar; that on hearing the whistle for the crossing he remarked to his companion that they would not have time to get the cigar; that his companion, who was one of the employees of the depot, replied that they would have time, as the train stopped a few minutes. They got the cigar, and on their return saw the train standing about half a mile up the track. Nathaniel Clark, a resident of Reed City, was coming towards the south, on this same road, about 80 rods north of the crossing. He heard the crossing whistle,—two whistles. Shortly after that he heard the whistle again. He was then going up a grade in the road, and the crossing was hidden from his view. On reaching the top of the grade, he saw the train backing up. He testified: "I know, by sound, the first whistle I heard was for Walker's crossing. The next would be about the curve west of the highway. I am positive I heard the whistle, and also heard the bell ring." Augustus Roberts lived about a hundred rods south of the crossing. Was in his field, sowing grain, and heard a whistle. He said: "It seemed the usual short whistle, and I did not pay any attention to it. It was a locomotive whistle for the crossing." Afterwards, he saw the train backing up. Samuel Wolfe is a farmer, and has lived in the vicinity 21 years. He was in the smoking car of the train. He testified that he had been noticing the whistles for several crossings west of this one. He heard the whistle for this crossing. He wanted to take the train north at Reed City, and knew that this train was late. Louis Barrett lived in Reed City. Was approaching the crossing from the depot at the time. He did not see the train until it was standing on the track near the crossing. Was familiar with locomotive

whistles. Supposed the crossing whistles to be two whistles,—two long blasts. Heard two whistles, and said it might have been more. Marcus Laffer was at the depot, waiting for the train. Was standing between the rails. There was quite a crowd upon the platform. He was facing west, watching for the train. Saw steam escape, and then heard the sound of the whistle, after which the train came down, and stopped about half a mile from the depot. There were one or two blasts of the whistle, and the steam sailed to the south. "I saw one puff of steam, and heard a short blast of the whistle, and there were two or three long puffs of steam, and two or three sounds." John I. Edwards was waiting at the depot to take the train. Walked to the extreme west end of the station, and stood looking west up the track. Heard the usual whistle for the crossing. William Hogan lived at Reed City. Was about 30 or 40 rods east of the crossing. Heard the train coming, and saw it. Heard the whistle, and saw the escaping steam. The train was just then rounding the curve west of the crossing. It was the crossing whistle. On cross-examination he said that the first whistle was blown around the curve, where he could not see the curve. He went out for the purpose of driving some cows off the track. John Finkbeiner testified: "Heard the train when it was coming to Reed City. Heard the whistle, but did not know whether it was for the crossing or for the curve." Fred Kopuick was working in a mill east of the crossing,—the same mill where the two last witnesses were employed. Heard two whistles. Afterwards, he heard another one, and then saw the train backing up. F. C. McCollum, a physician, was on the train. Had been reading a few days before how they made signals by whistles, and recollected that two toots, followed by two short ones, were the signal for a crossing, and, having nothing else to do coming home, watched all the crossings. He heard two whistles, followed by two short ones, and knew that this was the last crossing before entering Reed City. He said: "I am positive the signal whistle I heard on that train was for that crossing." George Forest was on the train. Heard the whistle for this crossing. He said it was a regular crossing whistle,—two long and two short. Barlow Davis, postmaster at Evart, was at the depot, standing on the track, when the train came around the curve. He remembered very distinctly that it whistled, and that the whistle he heard was the usual signal for a crossing.

Of the six witnesses for plaintiff, not one was paying any attention, or listening for the signals. One did not even hear the train. The testimony is purely negative, and of the weakest character. We know from common experience that people usually pay no attention to sounds to which they are daily accustomed. All these witnesses lived

for several years in close proximity to this railroad, where these signals were given many times daily. Placing this testimony in the strongest light for plaintiff, and it shows only that these six witnesses were in position where they might have heard the signals, had they been paying attention and listening; but they were not, and therefore they cannot tell whether they were given, as some of them frankly state. The duty to give these signals is imposed by statute, and the presumption is that defendant's employes performed it. It was therefore incumbent upon plaintiff to overcome this presumption by competent evidence, from which the jury might justly infer the fact that the duty was disregarded. Whether, in the absence of any evidence by the defendant, a case was made for submission to the jury, we need not determine. Of the 15 witnesses who testified for the defendant, 6 were upon the train, were paying attention, and swear positively that the signals were given. Of the other 9, 7 swear positively that they heard them, and the fair inference from the testimony of the other 2 is that the signals they heard were the regular crossing signals. The danger signals are so different from the crossing signals that one would readily note the difference. To submit the question to the jury, under this evidence, would be equivalent to saying to them that they might base their verdict upon prejudice, and not upon the facts proven. A verdict for the plaintiff, under this evidence, would be a reproach upon the jury who rendered it, and upon the court which permitted it to stand.

This precise question was involved in *Railroad Co. v. Miller*, 25 Mich. 275, where the evidence on the part of the plaintiff was substantially the same as in the present case. The charge of the court, substantially, directed a verdict, and this court held that if the verdict had been contrary to the instruction the court should have promptly set it aside. It has also been decided by the court of appeals of New York. *Culhane v. Railroad Co.*, 60 N. Y. 137. It is there said: "It is proved by the positive oath of the two individuals on the engine, one of whom rang it, and by two others, who witnessed the occurrence, and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened, or gave heed to the presence or absence of that signal. As against positive affirmative evidence, by credible witnesses, to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching, and listening for it; that their attention was directed to the fact, so that

the evidence will tend, to some extent, to prove the negative. A mere, 'I did not hear,' is entitled to no weight, in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence, justifying a submission of the question to the jury as one of fact." *Beauchamp v. Mining Co.*, 50 Mich. 163, 15 N. W. Rep. 65, is not decisive of this case. There is no similarity in the facts, which are not stated in the opinion. Young *Beauchamp* was struck by a stone when he was 500 feet from the defendant's mine. No statutory warning was there required. The sole question was not, as in this case, whether the warning was given, but also whether, if given, it was sufficient. There was no stated time for these blasts. The warning was usually given by the cry of "Fire" by the miners. If that warning cry were given, still the question remained, for the determination of the jury, whether it was sufficient. There was evidence tending to show that the warning was given from two to five minutes before the blast, and while the deceased was in a store a still further distance from the mine, and that when he was struck he was behind an elevation where he could neither see the mine, nor be seen by the miners. The writer of this opinion was the circuit judge before whom that case was tried. The issue involved, so far as the notice is concerned, will appear from the following portion of the charge: "If the defendant cried out from near its mine, 'Fire,' it must go further, and cry out in such a way that any persons within reach of where these stones were liable to be thrown would naturally be expected to hear the warning or alarm so given. As to whether such notice was given, you will take into account the surroundings, the situation, the distance to the road, the place where the boy was hit, and whether there was a hill or elevation between him and the place where these men were at the mine when the signals were given." The defendant requested the court to charge, not only that the warning cry was given, but that it was sufficient to warn the deceased, who was out of sight, behind an elevation, and these two propositions were united in the same request.

The judgment is affirmed.

LONG, J. I concur in the result reached by my Brother GRANT, on the ground that the plaintiff should have stopped, and looked and listened, before attempting to cross the track.

HOOKER, C. J., (concurring.) The plaintiff's wife approached the defendant's railroad, in a lumber wagon, upon a highway. A bank and wood pile obstructed a view of the track as she approached. The wood pile commenced about a rod from the highway, and extended 15 rods along, and parallel with, the track, at a distance of 18 feet therefrom. From the crossing the railroad could be seen

for a distance of 80 rods. She drove upon a walk, and when her horses' feet were between the rails she saw the train, and tried to turn them off from the track, but was struck by the engine, and injured. Aside from any other question raised by this record, that of contributory negligence is conclusive. It was her duty to look both ways, after getting where she could see, before venturing upon the track, and she should have taken sufficient time to do so, though it became necessary to stop her team for the purpose. At a point 18 feet from the track, and while yet in a place of safety, she could have seen the train for a quarter of a mile, and the fact that she did not see it until it was close to her is conclusive of the fact of her negligence, in the absence of exculpatory facts. A person is not justified in driving upon a straight track, in the face of an approaching train, without looking for it, and obstructions to the view, in proximity to the track, increase the obligation of extreme caution. Many decisions of this and other courts sustain the doctrine, which we will not further notice, in view of the full and repeated discussion of the question to be found in our reports. The judgment should be affirmed.

MONTGOMERY, J., (dissenting.) The plaintiff brought this action to recover damages for injuries occasioned by a collision of the defendant's passenger train with the plaintiff's team, which at the time was being driven by plaintiff's wife. The declaration avers that the train was running at an unusual rate of speed; that the defendant had caused wood to be piled near the track in such manner as to obscure the view of the train as it was approaching the crossing, and that the engineer of the train, upon approaching the crossing, failed to give the statutory signals, by ringing the bell and blowing the whistle. At the conclusion of the plaintiff's testimony the circuit judge directed a verdict for the defendant, principally upon the ground that the testimony failed to show the negligence complained of. There was no such unusual rate of speed shown as constituted negligence, nor was the piling of the wood, in the manner in which it was piled, negligence, in and of itself; so that the substantial ground of negligence was the failure to give the crossing signals. The evidence adduced on the part of the plaintiff was, it is true, in a sense, negative evidence; but we are constrained to hold that it was not so in any such sense as to justify us in holding, as matter of law, that it had no tendency to prove the failure to give the statutory signals. From the nature of the case, the only way it could be proven by the plaintiff was by offering testimony of those who had an opportunity to hear the signals, and who were in such a position that they must have heard them, if they were in fact given. *Mrs. Shufelt*

testified as follows: "Question. What do you say as to whether this train whistled or not? Answer. I didn't hear the train whistle. It didn't whistle. Q. What do you say as to whether it rang the bell? A. I didn't. It didn't ring any bell there. I didn't hear it, if it did." Four other witnesses were called, who testified that they did not hear the bell ring, or the whistle sound.

The question is whether this testimony, standing by itself, uncontradicted, tended to establish the fact that the defendant omitted this duty. While the testimony offered to contradict this claim was strong, and may have been convincing, yet it will not do to establish, as a rule of law, that testimony which has a tendency to prove a fact may be withdrawn from the consideration of the jury because it is overborne by contradictory testimony. In such case the proper course is to submit the question to the jury, under proper instructions as to the weight of negative testimony, as compared with positive evidence; and if the jury disregard such instructions, or if their verdict is founded rather upon prejudice than a due consideration of the testimony, it becomes the duty of the trial judge to exercise his power to set aside the verdict on this ground. This may be a case in which a result adverse to the defendant upon this ground would call for the exercise of this power. Upon this we are not called upon to express an opinion, but have no doubt that if the occasion arises for the exercise of such power the learned circuit judge will not hesitate to perform his duty in that regard. The case is very similar to that of *Beauchamp v. Mining Co.*, 50 Mich. 168, 15 N. W. Rep. 650. It was said in that case: "There was direct evidence in the case that a warning was given, in the usual and customary manner, before the blast was fired, and witnesses testified that they did not hear any warning, although within hearing distance at the time. Under such circumstances, while we might fairly suppose that a jury would believe testimony of a positive, rather than that of a negative, character, yet so many other considerations enter into the inquiry as to whether a sufficient warning was given, or not, that it would be unsafe, as a general rule, for the court to withdraw such a question from the consideration of the jury. The relative positions of the several witnesses; the manner in which they were engaged at the time; their apparent interest or bias; their appearance upon the stand,—these and other matters require attention and deliberation; and, where the trial judge declines to take the case from the jury, the case should be an exceeding clear one, that would justify this court in finding error. The question whether any—and, if so, a sufficient—notice was given was one of fact, upon which the evidence, though perhaps weak upon one side,

was conflicting, thus bringing it clearly within the proper province of the jury to pass upon. If any error was committed by the jury, the remedy is not in this court, but in the court below, upon a motion for a new trial, or to set aside the verdict." See, also, *Guggenheim v. Railroad Co.*, 66 Mich. 150, 159, 33 N. W. Rep. 161. The circuit judge apparently relied upon the case of *Railroad Co. v. Miller*, 25 Mich. 275. In that case it was said: "It was also claimed on the trial that the bell of the locomotive of this train was not rung on the approach to the crossing; and, though there was some evidence on the part of plaintiff tending to show this, most of her witnesses merely saying they did not hear or notice the bell, but some of them stating that it was not rung, the evidence on the part of the defendant was so overwhelming and convincing to the contrary that the judge, in giving the case to the jury, remarked that it seemed to him that under the evidence the ringing of the bell could hardly be seriously questioned, but that he left it to the jury. This remark was well warranted, and the evidence was such that, if the specific question had been left to the jury, and they had found the bell was not rung, the court should have promptly set aside the verdict." In the case last cited the question was not withdrawn from the jury, but was submitted under instructions. It is proper to add that the expression of the circuit judge's opinion as to the weight of this testimony is not in accordance with the rule now obtaining in this state. *Blackwood v. Brown*, 32 Mich. 104; *Chase v. Iron Works*, 55 Mich. 139, 20 N. W. Rep. 827; *Baird v. Randall*, 58 Mich. 175, 24 N. W. Rep. 659.

2. It is contended, however, by the defendant, that, even if the circuit judge erred in his conclusion upon this question, the plaintiff was, as matter of law, guilty of contributory negligence, and that, therefore, the case should not, in any event, have gone to the jury. The testimony offered on the part of the plaintiff tended to show that the highway over which Mrs. Shufelt was driving passed through a cut, and that, as she approached the track from the north, the bank, and the wood pile thereon, to the westward, obstructed her view of the track at the point where the train would be when she was opposite the pile of wood. Photographs were introduced in evidence, taken at a distance of 108 feet from the track, and at a distance of 75 feet, respectively. At the first point which she reached when approaching the track, namely, the one distant 108 feet, she had an unobstructed view of the track for a very considerable distance to and beyond the point where the track curved to the left, and it is claimed that she could also see a train approaching the crossing from a point 75 feet distant; and the photograph taken at this point, with the train abreast of the wood pile,

makes it apparent that the smokestack and parts of the upper portion of the cars would be discernible. But when she reached this point the train with which the collision occurred must have been at a considerable distance up the track, and the line of vision would be above the top of the cars, at the point where they must have been if on a level with the point opposite the wood pile. The plaintiff offered testimony tending to show that as the crossing was approached the view of the approaching train would be obscured for a distance of 3 or 4 rods, at least, until within 18 or 20 feet of the track, when the track was clear to view again. Mrs. Shufelt testified as to the care that she exercised, as follows: "Question. When you got on the top of this hill, what did you do to see whether there was a train coming, or not? Answer. I slacked up my team, and looked. Q. They were on a walk then, were they not? A. Yes, sir. Q. And if you slacked up— A. I came pretty near to a standstill, to see if I could hear anything of them. Q. Were you expecting a train? A. No, sir; I was expecting the train had got to Reed City long before I got to the track. Q. What did you do? A. I looked to see if I could see any cars coming. Q. Looked to the west? A. I looked to the west and east too. Q. You didn't hear anything? A. I didn't hear anything. Q. Or see anything? A. Or see anything. Q. What did you do then? A. I went along. Q. The team on a walk or trot? A. On a walk." She further testified that it was because of the obstruction of the bank and wood pile that she could not see the cars coming; that she heard no signal. And in answer to a question on cross-examination: "Q. From the top of the hill down to the crossing, you were looking west, were you not? A. Yes; I was looking west and east too. Q. When looking west, you looked to see the cars coming? A. I turned my head first one way, and then the other, to see if I could see the cars coming." She further testified: "The horses were between the rails when I first saw the train. When I got on the track the train was right there,—right close by." With this testimony, that she looked carefully at the top of the hill, and that she continued to look to the east and west, before us, we think it is not competent to say, as matter of law, that she was guilty of contributory negligence because she failed to stop in a distance of 18 or 20 feet, where a view of the cars could be obtained. The distance from where she was sitting in her seat, to the heads of the horses, must have been some 10 or 12 feet; so that she could not have traversed to exceed 8 or 10 feet after passing the point where the train was obscured from view. If she was in fact looking in the other direction at this moment, it was not necessarily negligent; and it appears that she did, in fact, discover the train as early, at least, as the horses reached the

first rail of the track, as she pulled the team to the left, and the train striking the horse nearest to the track caused the injury. The fact that the plaintiff had looked when within a few rods of the track, and when her view was unobstructed; the fact that the train was behind time, so that she had some reason to believe that no train was approaching; and the fact that, according to the testimony of plaintiff's witnesses, no signals were given,—when taken in connection with the testimony of Mrs. Shufelt, that she did in fact look both ways, we think, justified the submission of the question of contributory negligence to the jury. The case is not unlike *Guggenheim v. Railroad Co.*, 57 Mich. 488, 24 N. W. Rep. 827; *Id.*, 66 Mich. 150, 33 N. W. Rep. 161. See, also, *Cooper v. Railroad Co.*, 66 Mich. 263, 33 N. W. Rep. 306, in which case it was said: "It is a wholesome precaution for persons approaching a track of a railroad to look both ways, and to listen for approaching trains, and it is what is generally required. But it is not a rule of universal application. Every case must depend on its own circumstances." See, also, *Richmond v. Railroad Co.*, 87 Mich. 374, 49 N. W. Rep. 621; *Evans v. Railroad Co.*, 88 Mich. 442, 50 N. W. Rep. 386. These latter cases, it is true, were cases in which the traveler was lulled into a sense of security by appearances created by the defendant. But in the present case it appeared that no train was due at the time, and that the plaintiff had in fact looked up the track before passing the point of obstruction; and to hold that she was negligent, as matter of law, under the circumstances of this case, is to hold that she must have kept her eyes constantly towards the west, to the neglect of a like duty to note the approach of any train that might be coming from the east. See, also, the case of *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679. In that case it appeared that for a considerable distance before the crossing was reached a view of the railroad was obstructed, so that it was not until a traveler was within 15 or 20 feet of the track that he could get an unobstructed view of the track to the right. One witness testified that, if the plaintiff was in a buggy, his horse would be within 8 feet of the track before he could get a good view of it in both directions. The deceased was driving along with his wife, in a buggy. It appeared that they stopped at some distance back from the track to listen for any train that might be passing, and while there a train on one of the other roads passed by, going out of the city. They then drove ahead to the track, and just as they reached the track, and while apparently watching the train that had passed, they were struck by one of the defendant's trains, coming from the right, at the rate of 20 to 40 miles an hour. It was held, under the circumstances of that case, that the question of contributory negligence

was for the jury. In *Greeny v. Railroad Co.*, 101 N. Y. 419, 5 N. E. Rep. 425, it was said of a case similar to the one under consideration: "Whether she looked exactly at the right moment, or in each direction in proper succession, or from the place most likely to afford information, cannot be determined, as matter of law; and whether, upon the whole, and in view of all the surrounding circumstances, including the negligent conduct of defendant, she exercised due care, was a question which the trial court could not decide for itself, but was bound to submit to the jury, as one which they alone could answer." See, also, *Kellogg v. Railroad Co.*, 79 N. Y. 72. In *McGill v. Railroad Co.*, (Pa. Sup.) 25 Atl. Rep. 540, negligence of the railroad company was shown, and it was further shown that the deceased stopped, and looked for a train, about 50 feet distant from the track. The court say: "The only question on the motion for judgment of nonsuit was his alleged contributory negligence, in not stopping and looking and listening at a point where he could have had a better view of the approaching train. According to the opinion of some of the witnesses, from the position which he occupied from the end of the bridge, he could have seen, over the box cars, etc., the top of the smokestack of the engine, and top of the passenger coaches. As to that, however, the testimony was somewhat conflicting. It is reasonably certain, however, that he neither heard nor saw the rapidly-approaching train, because it cannot be presumed that he would willfully drive upon the track in front of the train, to his own sure destruction. Conceding, for the sake of argument, that there was some evidence tending to show that the deceased was guilty of contributory negligence in not stopping at a point where he might have had a more unobstructed view, that evidence should have been submitted to the jury, under proper instructions as to the principles of law involved. It was their exclusive province to consider and weigh the testimony, and draw therefrom such conclusions of fact as, in their judgment, were warranted." See, also, *Ellis v. Railroad Co.*, 138 Pa. St. 506, 21 Atl. Rep. 140; *Newhard v. Railroad Co.*, (Pa. Sup.) 26 Atl. Rep. 105. The case of *Haas v. Railroad Co.*, 47 Mich. 401, 11 N. W. Rep. 216, we think, is clearly distinguishable from the present. In that case the deceased, after checking his team for an instant, two or three rods from the crossing, went forward on a brisk trot until the heads of his horses came in collision with the engine. In the present case the plaintiff's wife approached the crossing with the team under perfect control, and the only fault, if any, was that she failed, at the very instant when she could have discerned the train to the west, to look in that direction. The jury might have found, if they believed her testimony, that she was directing her attention to the east. This was a question

for the jury. The judgment should be reversed, and a new trial ordered.

McGRATH, J., concurred with MONTGOMERY, J.

COOK v. FOSTER et al.

(Supreme Court of Michigan. July 26, 1893.)

MORTGAGES—MERGER—ESTOPPEL—FORECLOSURE—NOTICE—DEED—ACKNOWLEDGMENT.

1. Where a mortgagor executes a deed to a second mortgagee, fraudulently including a provision that the grantee shall assume and pay the first mortgage and a third mortgage, of which the grantee knows nothing, and the deed is not delivered, but put on record by the grantor, and is repudiated by the grantee as soon as its contents are known, and there is no change of possession of the property, and no surrender of the mortgage and note, there will be held to be no merger.

2. The grantee in the deed is not estopped by the record thereof to deny the merger, as against an assignee of the third mortgage, where the second mortgage appears of record, undischarged.

3. Under 2 How. St. § 8500, providing that notice of foreclosure sale shall state the amount claimed to be due at the date thereof, the sale will not be void, where the amount stated included a sum due on the day after its date, but it was not published until several days thereafter, and it does not appear that there was bad faith, or that any one was misled.

4. Under 2 How. St. §§ 8501, 8505, providing that a mortgage sale shall be made by the sheriff or undersheriff, and the deed executed by the officer making the sale, where sale is made by an undersheriff the deed executed by him may be acknowledged by the sheriff, acting as a notary public.

Appeal from circuit court, Hillsdale county, in chancery; Victor H. Lane, Judge.

Suit by Chauncey F. Cook against Martin L. Foster, Jane Foster, and Rachael G. Porter, to set aside a deed, and to foreclose a mortgage. From a decree dismissing the bill, complainant appeals. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

Defendant Martin L. Foster was the owner of the land in controversy. At the date of his purchase it was subject to a mortgage of \$600, dated October 15, 1881. Foster and his wife, who was the daughter of defendant Porter, executed to Mrs. Porter a mortgage for \$1,419, October 6, 1883. September 12, 1884, they executed a third mortgage, for the sum of \$700, to one Huff. October 11, 1886, the Huff mortgage was discharged. On the same day another mortgage was executed by Foster and his wife to one Knowles, for \$761.25. The consideration for this mortgage was the payment of the Huff mortgage, and a small amount which Foster owed Knowles. This mortgage, while dated and acknowledged October 9th, was not, in fact, executed until the 11th. On October 11th, Foster and his wife executed a warranty deed to Mrs. Porter, the express consideration in which was \$3,000. It was made subject to the mortgage

for \$600, and also to the Knowles mortgage, and also contained the statement that the grantee, Mrs. Porter, assumed and agreed to pay these mortgages. This deed and the Knowles mortgage were both recorded October 11th, the former at 2:45 P. M., and the latter at 2:35 P. M. A short time previous to the execution of this deed, Foster applied to Mrs. Porter for a further loan of money, which she refused. This request by Foster was for \$42, with which to pay interest on the first mortgage. Mrs. Porter testified that she then proposed to him that she would buy the first mortgage if he would give her a deed of the land, and that she would enter into a contract with him, giving him the privilege of selling the farm, and making all he could over and above her claim. Foster, on the contrary, testified that her proposition was to pay the mortgages if he would deed to her, and give him the privilege of selling, and make all he could over and above the mortgages. Foster finally accepted the proposition, and promised to make out the deed, and Mrs. Porter let him have the \$42. Two days afterwards he wrote to Mrs. Porter that he had paid the \$42 on the mortgage, and would make out the deed the next day. The deed was executed, and left by Foster with the register of deeds for record. Foster testified that he directed the register of deeds to send the deed by mail to Mrs. Porter. This, evidently, was not done, and when, some months afterwards, Mrs. Porter's husband went to the register of deeds, with Foster, to see about the matter, Foster produced the deed from his pocket, and handed it to Mr. Porter. Until this time, neither Mrs. Porter nor her husband had any knowledge of the contents of the deed, and all they knew about it was what Foster had told them. Mr. Porter was present at the conversation between his wife and Foster in regard to the deed. On receiving the deed from Foster, he immediately read it, and returned it to him, stating that it was not such a deed as was agreed upon. He reported the fact to his wife, who thereupon repudiated the deed, and commenced a foreclosure of her mortgage by advertisement. The land was sold, bid in by Mrs. Porter, and a sheriff's deed executed to her. Mr. Porter, at the request of his wife, purchased the first mortgage. Mrs. Porter testified that she knew nothing about the Huff mortgage. Foster did not inform her that he intended to execute a new mortgage to Knowles, and make the deed subject to that. Foster remained in possession of the farm. Mrs. Porter's mortgage was not discharged, nor was it or the note surrendered or canceled. Complainant purchased the Knowles mortgage in reliance upon the record, and in the belief that Mrs. Knowles' mortgage was merged in the deed to her. Upon learning of the foreclosure proceedings, he filed the bill in this cause to set aside the sheriff's

deed to defendant Porter, and to foreclose his mortgage. The court below entered a decree dismissing the bill.

James S. Galloway, for appellant. F. A. Lyon and A. B. St. John, for appellee Porter.

GRANT, J., (after stating the facts.) The court below found that the deed from Foster to Mrs. Porter was fraudulent and void. The testimony was taken in open court, where the circuit judge had the opportunity to see the witnesses. It is conflicting, but we think that the conclusion of the learned circuit judge is fully justified by the evidence. It follows, therefore, that Mrs. Porter was justified, as against Foster, in repudiating the deed, and in foreclosing her mortgage. There can be no merger where the transaction is tainted with fraud on the part of the mortgagor and grantor, and where the mortgagee and grantee has acted in good faith. *Bank v. Webb*, 56 Mich. 383, 23 N. W. Rep. 51. It is the well-established rule, in determining the question of merger, that the intent is the controlling consideration. If it be for the interest of him in whom the estates are united to keep the mortgage alive, the law will not imply an intent to merge. 4 Kent, Comm. 103; 15 Amer. & Eng. Enc. Law, 324-327; *Stanton v. Thompson*, 49 N. H. 272; *Campbell v. Carter*, 14 Ill. 286; *Bank v. Webb*, supra. Where mortgaged premises were conveyed by a mortgagor to a mortgagee in satisfaction of the mortgage, and for the purpose of avoiding the expense of a foreclosure, and the notes and mortgages were surrendered, the conveyance was held not to operate a merger, where there was an intervening mortgage, of which the grantee was ignorant. *Brooks v. Rice*, 56 Cal. 423. See, also, *Fuller v. Lamar*, 53 Iowa, 477, 5 N. W. Rep. 606; *Richardson v. Hockenbuhl*, 85 Ill. 124.

In the well-considered case of *Stanton v. Thompson*, supra, after citing and commenting upon the authorities, the court says: "We think it may be deduced from the authorities quoted that, when the estates of the mortgagee and mortgagor are united in the former, he has, in equity, an election to keep the mortgage title on foot, and that whenever it is for his interest, by reason of some intervening title or other cause, that the mortgage should be upheld as a source of title. It will not, at law, be regarded as merged." It was well said in *Bank v. Webb*, supra: "Few persons, unlearned in the law, are acquainted with the doctrine and effect of merger." In the present case there was no change of possession of the mortgaged premises, no actual delivery of the deed, no knowledge of the intervening mortgage, no surrender of the mortgage or note, and a prompt repudiation of the fraudulent deed. Under these facts, it cannot be held that a

merger was intended. *Campbell v. Carter*, supra, relied upon by complainant's counsel, does not support his contention. In that case the mortgagee had recovered judgment on both the notes and mortgage, and was endeavoring to enforce satisfaction. The mortgage was not signed by the wife. The mortgagee proposed an absolute conveyance, with covenants of warranty and the release of dower, in satisfaction and discharge of the debt. The proposition was accepted, the deed executed, the judgment satisfied, and the mortgage discharged, and all evidence of indebtedness was canceled. The court held that there was no doubt as to the real intention of the mortgagee. The distinction between that case and the present one is apparent.

2. The logical result of this rule is that purchasers, intervening mortgagees, and their assignees are not justified in relying upon the record of the deed in the office of the register of deeds as showing merger, because this question of fact cannot be determined from the record of the deed alone. 1 Jones, Mortg. §§ 474, 872, and authorities there cited. The rule is founded in good sense. When mortgages are paid, it is common to discharge them of record. Had the mortgage in question been discharged of record, there would be much force in the contention that complainant had a right to rely upon the record, and that Mrs. Porter would thereby be estopped to deny the merger. But the mortgage was not discharged, and this was sufficient to put the complainant upon inquiry. *Alken v. Railway Co.*, 37 Wis. 469.

3. It is contended that the foreclosure sale is void because (1) the notice of foreclosure sale included more than was due at the date of the notice; and (2) that the execution of the sheriff's deed was not properly acknowledged.

The notice of sale was dated October 8th, and included a sum which became due on the 9th. The notice was not published until the 18th, and the publication was continued for the proper time thereafter. The statute requires that the notice shall state the amount claimed to be due thereon at the date of the notice. 2 How. St. § 8500. It is not necessary that the notice be dated, in which case the time of the first publication will be taken as the date. 2 Jones, Mortg. § 1854; *Reading v. Waterman*, 46 Mich. 107, 111, 8 N. W. Rep. 691. But there is no evidence that the defendant Porter acted in bad faith in including the sum of \$300 more than was actually due at the date of the notice, nor that any one was misled thereby. It is said in *Jones on Mortgages*, (section 1855:) "The fact that the notice states a larger sum to be due than is actually due does not affect the validity of the sale, if no actual injury or fraudulent purpose is shown." This rule is sustained by the following authorities: *Hamilton v. Lubukee*, 51 Ill. 415;

Klock v. Cronkhite, 1 Hill, 107; *White v. McClellan*, 62 Md. 347; *Ramsey v. Merriam*, 6 Minn. 168; (Gil. 104.)

The deed was executed by the undersheriff, and the acknowledgment was taken by one Myron G. Wood, a notary public. Mr. Wood was at that time a sheriff of the county. The statute provides that such sale shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, undersheriff, or deputy sheriff of the county, and the deed executed by the officer or person making the sale. 2 How. St. §§ 8501, 8505. Mr. Wood, in taking the acknowledgment, did not act as sheriff, but as a notary public. We think the acknowledgment valid. Decree affirmed, with costs.

LONG, J., did not sit. The other justices concurred.

MERRIMAN et al. v. JACKSON CIRCUIT JUDGE.

(Supreme Court of Michigan. July 26, 1893.)
APPEAL FROM PROBATE COURT—FAILURE TO PROSECUTE—REINSTATEMENT.

1. 2 How. St. § 6784, provides that if any person aggrieved by the act of a judge of probate shall, without fault on his part, omit to claim or prosecute his appeal, the circuit court, if it shall appear that justice requires a revision of the case, may allow an appeal to be prosecuted as if taken seasonably. Held, that the clause "or prosecute his appeal" refers to the appeal from the determination of the judge of probate, and not to the proceedings in the probate court.

2. This right is not taken away by section 6782, as amended by Act 174, Laws 1887, providing that on appeal from the probate court, if the party fails to file a certified copy of the proceedings in the circuit court within 30 days, the appeal shall be of no effect, but may be reinstated on application made within the first 10 days of the next term.

Application by Howard L. Merriman and others for mandamus against the judge of the circuit court of Jackson county. Denied.

Barkworth & Blair, Smith & Ware, and Austin Blair, for relators. Eugene Pringle and Wilson & Cobb, for respondent.

MONTGOMERY, J. This is an application for a mandamus to compel the respondent to vacate an order permitting an appeal to be made from an order admitting a will to probate, under section 6784, 2 How. St. It appears that a previous appeal had been taken by the contestant Dwight Merriman, and that by reason of his failure to file his record in the circuit court within the time allowed by section 6782, 3 How. St., the appeal was dismissed. Section 6784 provides that "if any person aggrieved by any act of the judge of probate, shall, from any cause, without default on his part, have omitted to claim or prosecute his appeal according to law, the circuit court, if it shall appear that

justice requires a revision of the case, may, on the petition of the party aggrieved, and upon such terms as it shall deem reasonable, allow an appeal to be taken and prosecuted with the same effect as if it had been taken seasonably." It is contended by the relators that the words "or prosecute" must be construed to refer to the proceedings in the probate court, but we do not think the statute open to this construction. The appeal referred to is very plainly an appeal from the determination of the judge of probate, and we think the language susceptible of but one interpretation, so that by the very terms of section 6784 an aggrieved party has the right to petition for leave to appeal, either where he has failed or omitted to claim an appeal, or has failed or omitted to prosecute his appeal.

A more serious question is whether section 6782 amends this section by implication, so as to take away the right to an appeal upon a showing such as is required by section 6784 in all cases where the aggrieved party has once claimed a right to an appeal. Section 6782, as amended by Act 174, Laws 1887, provides, in effect, that the party appealing shall file a certified copy of the proceedings in the circuit court within 30 days after an appeal is taken, and, in case of failure to do so, "such appeal shall cease to be of effect, and the order or decree so appealed from shall stand as though such appeal had not been taken: * * * provided, that the circuit court to which the appeal is taken shall have power, upon application within the first ten days of the term of court next succeeding the expiration of such thirty days, for filing such certified copy, to reinstate said appeal, when the party making the appeal has been prevented from making the same by circumstances not under his control." It is urged that this proviso covers the whole ground covered by section 6784, and provides another and different method of procedure in case of neglect to prosecute the appeal. We think, however, that the two sections may stand together. The one, namely, section 6782, provides the manner of reinstating the appeal which the party has taken, and limits the right to reinstate such appeal to the first 10 days of the term next succeeding the expiration of the 30 days allowed for filing his appeal. It is to be noted that no showing of merits is required upon such an application. It is not even essential that the circuit judge shall determine that justice requires a revision of the case. The only question to be considered is the question of the default of the party in failing to follow his appeal within the time. If he fails to do so, or fails to excuse the default, then the appeal shall cease to be of effect, and the order appealed from shall stand as though such appeal had not been taken. If this is the attitude of the party in law, then section 6784 confers the right to a dilatory appeal,

if he is able to bring himself within the provisions of this section. Under this section, something more than an excuse for his default is necessary, and that is that he has failed to claim or prosecute his appeal according to law without default on his part, and that justice requires a revision of the case. Repeals by implication are not favored, and where, as in this case, the two statutes can be read together, and given a construction which will allow both to stand, such construction should be adopted. The showing made before the respondent was sufficient to excuse the omission of Mr. Merriman, unless it be held that he is chargeable with the default of his attorney; but we think that where an appellant employs an attorney in regular standing, and does all that he is required by the advice of his attorney to do to perfect an appeal, he ought not to lose his right to an appeal, where justice requires a revision of the case, through the neglect or oversight of the attorney. *Loree v. Reeves*, 2 Mich. 134; *Capwell v. Baxter*, 58 Mich. 571, 25 N. W. Rep. 493; *Babcock v. Perry*, 4 Wls. 31. We think that there was sufficient to call upon the circuit judge to exercise his discretion, and do not think that discretion has been abused. The writ will be denied, with costs. The other justices concurred.

ALBERTS v. VILLAGE OF VERNON.

(Supreme Court of Michigan. July 26, 1893.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—EVIDENCE—INSTRUCTIONS—ASSIGNMENTS OF ERROR.

1. Where, in an action for personal injuries caused by being tripped by a loose board in a sidewalk, it appeared that the walk was old, and the stringers decayed, evidence is competent, as tending to show a long continuance of the defect, from which it might be inferred that defendant town had notice of this condition, that no repairs had been made on the walk for more than a year prior to the accident.

2. Evidence is competent as tending to show that the boards were loose, that a witness was tripped by a board in the walk eight months before the accident.

3. Evidence is competent that, shortly after the accident, defendant caused the walk to be taken up and repaired.

4. An assignment of error, that "the court erred in not directing a verdict for defendant," is too general to be reviewed on appeal.

5. An instruction that the jury might find for the plaintiff if they believed that the defect had continued for such a time prior to the accident that the want of knowledge implied want of due care on the part of defendant, is not open to the objection that it ignores the question of contributory negligence, where the court, in another part of the charge, had instructed on the law applicable to contributory negligence.

6. Error cannot be predicated on an instruction given in language substantially like an instruction requested by appellant.

Error to circuit court, Shiawassee county; William Newton, Judge.

Action by Helen M. Alberts against the

village of Vernon for personal injuries caused by a defective sidewalk. From a judgment for plaintiff, defendant brings error. Affirmed.

Watson & Chapman, for appellant. A. L. Chandler, (S. F. Smith, of counsel,) for appellee.

HOOKE, O. J. The plaintiff was injured by falling on defendant's board sidewalk, being tripped by a loose board. The proofs show that the walk was old, and the stringers so rotten that they would not hold nails driven into them. Evidence was given tending to show that no repairs had been made upon said walk for more than a year; and William Shoemaker, a witness for plaintiff, testified to being tripped by a loose board in said walk some eight months before the accident to the plaintiff. The court admitted this, against defendant's objection and exception, as tending to show a long continuance of the defective condition of the walk, from which it might be inferred that defendant had notice of its worn and rotten condition. No error was committed in this. *Dotton v. Albion*, 50 Mich. 129, 15 N. W. Rep. 46; *Corcoran v. City of Detroit*, (Mich.) 54 N. W. Rep. 692; *Moore v. Township of Kenoskee*, 75 Mich. 332, 42 N. W. Rep. 944; *Campbell v. City of Kalamazoo*, 80 Mich. 655, 45 N. W. Rep. 652; *Girard v. City of Kalamazoo*, 92 Mich. 610, 52 N. W. Rep. 1021. That the witness fell, had no especial significance, except in connection with the fact that the boards were loose. In connection with the proof that no repairs were made subsequently, and before the accident to plaintiff, it was material.

The same witness stated that he was employed by the city to take up the walk soon after the accident, and that he found the stringer rotten, and had no difficulty in lifting the boards therefrom. It is said here that the fact that the city caused the walk to be taken up and repaired was not competent evidence to show that the walk was in bad condition. This point does not appear to have been made below, and the record indicates that the removal of the walk, affording the opportunity to learn particularly its condition, was the point aimed at. Incidentally, it was drawn out that it was removed at the instigation of defendant. No error was committed in receiving this testimony.

Defendant's first request was as follows, viz.: "In this case, your verdict will be for the defendant." An assignment of error is made in the same language. This is not a good assignment of error, under rule 12, which requires assignments of error to be special. It does not point out the reason for the request, and leaves the court and opposing counsel to ascertain as best they may whether the case is not defective in some particular. So far as we discover, however, the

court was justified in submitting the case to the jury.

In discussing the question of notice, the trial judge said to the jury: "The notice required in the proviso may be actual notice to the street commissioner, or by personal knowledge of such officer, or by the existence of the defects complained of being of such long standing that it might and ought to have been known, and that the want of knowledge may, under given circumstances, imply want of due care; and, in the absence of proof of actual knowledge, you will determine from all the evidence in the case whether the walk, at the place the plaintiff claims she was injured, had been, prior to that time, out of reasonable repair, and not in a reasonably safe and fit condition for public travel, and whether it had continued for such length of time prior to the accident that the want of knowledge may, under the circumstances of this case, imply want of due care on the part of the village in keeping the sidewalk in repair. If you so find, in view of all the evidence in the case, and the inferences naturally to be deduced from such evidence, you can find for the plaintiff, in the language of the statute, 'such just damages as will compensate her for the injury sustained.'" Counsel for defendant assert that this ignored the question of contributory negligence. A judge cannot easily discuss all questions in a case at once. The question of contributory negligence was not overlooked, and we cannot assume that the jury was led to disregard the instruction on that subject because it was not repeated in connection with the discussion upon the question of notice. This instruction regarding notice might have been more specific, but it was correct in substance. *Stebbins v. Keene Tp.*, 55 Mich. 552, 22 N. W. Rep. 87; *Id.*, 60 Mich. 214, 26 N. W. Rep. 885; *Woodbury v. City of Owosso*, 64 Mich. 239, 31 N. W. Rep. 130. Error is assigned upon it for the reason that it did not state "that notice could not be presumed unless the defect was so open and notorious, of long standing, and of such a character as would attract passers-by, and the burden of proof of these facts is on the plaintiff." Defendant's counsel did not see fit to ask for more particular instruction, nor did he take any exceptions by which the attention of the judge could have been called to the omission.

The jury was instructed: "For there can be but one action for the injury. From a request which I shall give you on the part of the defendant, I will charge you, further, that if the plaintiff had knowledge or was aware of the dangerous condition of the walk, and purposely ventured along it, seeing or knowing of the threatened danger, that would be contributory negligence on her part, and she could not recover." It is contended that this unduly restricted the jury upon the subject of plaintiff's negligence. The language is substantially like

that of defendant's fourth request, which was given, and which, we think the court had a right to assume, covered the question from defendant's standpoint.

We call attention to the fact that a record of a few pages would have been sufficient to raise all questions in this case. The judgment of the circuit court will be affirmed. The other justices concurred.

HECOCK v. VAN DUSEN et al.

(Supreme Court of Michigan. July 26, 1893.)
TRESPASS—EVIDENCE—REVIEW ON APPEAL—FINDINGS—ASSIGNMENTS OF ERROR.

1. An assignment of error, "that the court erred in rendering judgment for the defendants," will not be considered on appeal.

2. Where, in trespass, there is evidence that defendants had, prior to the commencement of the action, entered upon the land in question, and cleaned off a portion thereof, a finding to that effect will not be disturbed on appeal.

3. An assignment of error, in trespass, that the court erred in finding certain tax deeds, under which the appellant claimed title, void, is not sufficient to entitle him to a review of the facts upon which such conclusion of law is based.

4. In trespass, plaintiff claimed under a deed from the auditor general, conveying the land to him on account of delinquent taxes assessed thereon. The court found that the levy for township, highway, and school purposes was in excess of the amount authorized, and that there were irregularities in the proceedings to levy and collect the tax. *Held*, that a judgment for defendant, based on such findings, would not be disturbed on the ground that there was no finding that the land was sold for the unauthorized tax.

Error to circuit court, Monroe county; Edward D. Kinne, Judge.

Trespass by Thomas L. Hecock against Charles Van Dusen and others. From a judgment for defendants, plaintiff brings error. Affirmed.

Randall & Corbin, for appellant. John O. Zabel and Gouv. Morris, for appellees.

MCGRATH, J. This is an action of trespass, and is before us for the second time. 80 Mich. 359, 45 N. W. Rep. 343. The case was tried without a jury, and error is assigned upon the findings. The first, second, and fourth assignments are disposed of by the former opinion. The sixth assignment of error, viz. "that the court erred in rendering judgment for the defendants," does not conform to the requirements of rule 12, and will not be considered.

There was evidence tending to show that defendants had, prior to the commencement of this suit, entered upon the land, and cleaned off a portion thereof, and the finding will not be disturbed.

The fifth assignment of error is as follows: "The court erred in finding plaintiff's tax deeds, or any one of them, void." The court

found, "as a conclusion of law," that the tax deeds introduced by plaintiff were invalid. Plaintiff excepted to the finding "that, as a matter of law, all of plaintiff's tax deeds are void." The court's conclusion of law is not to be regarded as a finding of fact, and neither the exception taken, nor the assignment of error, entitles appellant to a review of the facts found, upon which the conclusion is based.

Upon the argument the deeds for the years 1875, 1877, 1878, and 1880 were conceded to be invalid. The court found that for the years 1871, 1873, 1876, and 1879 the levy for township, highway, and school purposes was in excess of the amounts authorized. But it is insisted that there is no finding that the lands were sold for the unauthorized taxes. The court finds that plaintiff offered in evidence certain deeds from the auditor general, "purporting to convey to the plaintiff the above-described premises on account of delinquent taxes assessed thereon for the years * * *, for which said taxes and land was sold to plaintiff. The court finds from the evidence the following irregularities in the proceedings to levy and collect the taxes on the land in controversy for the several years for which said deeds were given." No such question was raised in the court below. The contest there was as to the validity of the assessments for the purposes named. Plaintiff filed requests for findings, but no allusion is made in the record to this question. As to these years, the questions actually tried were entirely immaterial, if the fact was that the unauthorized taxes were not included in the amounts for which the land was sold. In *Stockle v. Silsbee*, 41 Mich. 615, 618, 2 N. W. Rep. 900, as to the title for 1869, the finding stated that its invalidity was based in part upon state and county taxes returned as delinquent; and this court held that the objections to the state and county taxes were not plausible, and that it was not shown that any particular township, school, or highway tax was among those for which a sale was made. In the same case the sale for 1871 was found to have been made "for said state and county and other taxes," and the court say: "Although this is a little indefinite, it is, perhaps, to be understood as a statement that the sale was made for all the taxes mentioned in the finding as having been levied for that year. This would include township, highway, and school taxes, as well as those levied for the state and county." In the present cases, we think the court must be understood as referring to, and treating of, defects in the proceedings to levy and collect taxes, which were included in the term, "delinquent taxes assessed," for which said lands were sold. The judgment must therefore be affirmed. The other justices concurred.

SCOTT v. WHELAN, Township Treasurer.
(Supreme Court of Michigan. July 26, 1893.)

**REPLEVIN—WHEN LIES—PERSONAL PROPERTY
SEIZED FOR TAXES.**

Replevin will not lie for the recovery of personal property seized by a township treasurer for the payment of a tax, part of which is valid.

Case made from circuit court, Eaton county; Frank A. Hooker, Judge.

Replevin by Anson Scott against Elmer B. Whelan for the recovery of certain personal property seized by defendant, as township treasurer of Chester, for the payment of a tax. There was judgment for defendant. Cause certified to supreme court as a case after judgment for review. Affirmed.

Garry C. Fox, for plaintiff. Huggett & Smith, for defendant.

McGRATH, J. This is replevin for personal property seized by the defendant, a township treasurer, for the payment of taxes. Unoccupied lands, the title to a part of which was held by the son, by virtue of an unrecorded deed recently given by the father, was assessed as one parcel to the father, for the general tax. After the seizure of the personal property, the father (complainant herein) tendered to defendant his proportionate share of the taxes, giving a notice in writing of the description of a parcel owned by him, and refused to pay the remaining tax upon the parcel owned by his son, and, upon refusal of defendant to accept, demanded the return of the property seized; and, being refused by defendant unless he would pay the entire tax, the plaintiff brought replevin. The circuit judge held that, the authorities having jurisdiction to impose an assessment upon the plaintiff, and the same being in part valid, replevin would not lie for the property seized by the treasurer, and gave judgment against plaintiff for the amount of the tax. The property was seized for the payment of a tax, regular in form, and lawful on its face. Plaintiff was in no sense a stranger to the tax. *Hill v. Wright*, 49 Mich. 229, 13 N. W. Rep. 523.

The judgment is affirmed.

HOOKE, C. J., took no part. The other justices concurred.

RYAN v. ROCKFORD INS. CO.

(Supreme Court of Wisconsin. June 21, 1893.)
ACTION ON INSURANCE POLICY—EVIDENCE—FORGERY—WAIVER—NEW TRIAL.

1. In an action on an insurance policy, defendant claimed that plaintiff was not the owner of the premises on which the burned buildings were located. Plaintiff claimed title through a deed from his wife made in 1884. *Held*, that evidence that the printed blank on which the deed was written was not printed until 1888, and that his wife died in 1884, supported a finding that the deed was a forgery.

2. A loss on a policy occurred August, 1888. In October the company notified plaintiff that it denied all liability on the policy. In November a clerk in defendant's office, in the usual course of business, notified plaintiff that his premium note was due, and asked him to remit, which he did. The company, by its officers, at once offered to return the same, and notified plaintiff that it was subject to his order. *Held*, not a waiver of any defense to the policy.

3. Plaintiff, in several trials on a policy of insurance, had based his claim to title in the property insured on a deed alleged to have been executed by his wife, and, on a final trial, judgment was rendered against him, on the ground that the deed was forged. He moved for a new trial, on the ground of newly-discovered evidence, claiming that his brother would testify that there was a genuine deed to plaintiff, which was lost, and that the deed used on the trial was forged by a magistrate, since deceased. *Held*, that the motion was properly denied.

Appeal from circuit court, Rock county; John R. Bennett, Judge.

Action by P. E. Ryan against the Rockford Insurance Company on an insurance policy. Judgment for defendant. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by **LYON, C. J.**:

This action was brought upon a policy of insurance against loss by fire of certain buildings and their contents. The policy was issued by defendant insurance company to plaintiff, and bears date June 15, 1888. The insured property was burned during the life of the policy, to wit, on August 14, 1888. Due proofs of loss were made. The defendant company having denied liability under the policy, this action was commenced December 8, 1888. The complaint is in the usual form of complaints in like actions. The defense stated in the answer of the insurance company is based upon the statement of plaintiff, in his written application for the insurance, (a copy of which is indorsed on the policy,) that he was the absolute owner of the property to be insured, and upon stipulations in the policy that such statement should be a warranty and part of the policy, and the policy should be void if the same was untrue, or "if the assured shall not be the sole and unconditional owner in fee of said property, both at law and in equity." It is alleged in the answer that such statement was false, and that the plaintiff was not the unconditional owner of the insured property in fee. On the above issue, after a trial at the April term, 1889, of the circuit court, resulting in a disagreement of the jury, trial was had at the November term, 1889, which resulted in a verdict and judgment for plaintiff. On appeal this court reversed the judgment for error, and remanded the cause for a new trial. For a history of the case to that time, see 77 Wis. 611, 46 N. W. Rep. 885. An inaccuracy is found in the report, which should be corrected. It is said it was conceded that the premises upon which the insured buildings stood were conveyed to Ellen Ryan, wife of the plaintiff, April 24, 1884. The conces-

sion is that she was the owner of said premises at that date, but it is gathered from the record that the title thereto accrued in 1876. The cause was again brought to trial at the January term, 1892, of the circuit court, before Judge Bennett, sitting for Judge Siebecker, who was disqualified to try it, because he had been of counsel therein. A jury was waived. The cause was tried and determined on very much the same testimony as was introduced on the former trial, at the November term, 1880. The court found as fact that a certain alleged conveyance of the premises in question by Ellen Ryan to her husband, the plaintiff, dated April 24, 1884, was never executed by her, but is a forgery, and conveyed no title to plaintiff, and that plaintiff was not then or at any other time the owner of the premises of which the insured buildings were part and parcel. Such alleged conveyance is claimed to have been burned with the insured property, and the only proof of any conveyance by Ellen Ryan to the plaintiff was the record made July 13, 1888, of the alleged deed of April 24, 1884. Ellen Ryan died September 21, 1884. Upon such finding, judgment for defendant insurance company, dismissing the complaint, was ordered and entered, May 26, 1892. A motion for a new trial was filed in March, 1892, probably after the court had orally announced its decision and judgment, but it does not appear that the court ruled directly upon it. On July 11, 1892, a motion for a new trial for newly-discovered evidence, based chiefly upon an affidavit of Thomas H. Ryan, a brother of plaintiff, was submitted. The court denied the motion. Plaintiff has taken two appeals to this court,—one from the judgment dismissing his complaint, and the other from the order denying his motion for a new trial for newly-discovered evidence. A sufficient statement of the testimony will be found in the opinion.

Bashford, O'Connor & Polleys, for appellant. H. W. Chynoweth, for respondent.

LYON, C. J., (after stating the facts.) I. The appeal from the judgment will first be considered. The judgment is attacked upon three grounds: (1) For insufficiency of proof; (2) for erroneous rulings on objections to the admission of testimony; and (3) for an alleged waiver by the insurance company of its defense to the action. These several grounds assigned for a reversal of the judgment will be considered in their order.

1. Does the testimony support the findings and judgment? It is undisputed that until April 24, 1884, the plaintiff was not the owner of the premises of which the insured buildings were part and parcel, but the title in fee thereto was in his wife, who died, intestate, in September of the same year, leaving surviving her several children, the issue of their marriage. The contention of plaintiff on all the trials was that on April 24, 1884,

his wife conveyed such premises to him by deed duly executed and delivered. Unless she did so at that time, plaintiff was never the owner of the insured buildings, and the policy in suit by its terms is null and void, because of the warranty therein that he was the absolute owner thereof, and the stipulation that, if he was not the sole and unconditional owner thereof in fee, both at law and in equity, the policy should be void. No claim was made on either trial that Mrs. Ryan ever executed to plaintiff any conveyance of the premises other than that recorded July 13, 1888. The instrument thus recorded was lost; probably was burned in the fire which destroyed the insured buildings. The record thereof was read in evidence on the trial. Much testimony was given on the trial tending to show that Mrs. Ryan executed the instrument in question in April, 1884. Her acknowledgement thereof purports to have been taken and certified by Ira P. Bacon, Esq., a justice of the peace. Bacon died some time during the winter of 1887-88. On the part of the insurance company it was satisfactorily proved that the instrument recorded July 13, 1888, purporting to have been executed April 24, 1884, by Mrs. Ryan, was a printed blank deed, filled up in writing, and that such blank deed was printed by M. J. Cantwell, of Madison, and had printed upon it Mr. Cantwell's business card. It was also satisfactorily, almost conclusively, proved that such blank deed was not printed until the spring of 1887, or later, and hence the instrument had no existence before that time, and could not have been executed by Mrs. Ryan, who died in September, 1884. On this testimony the circuit court found that the alleged deed, upon which alone the plaintiff rested his claim of title to the insured property, was a forgery. The finding is fully supported by the proofs, and we are unable to conceive any admissible theory of the case which will support different findings. We cannot, therefore, reverse the judgment for insufficiency of proof.

2. Against objections by plaintiff, statements made by Mrs. Ryan to her daughter, on April 25, 1884, to the effect that she executed the deed, and her reasons for doing so, were excluded; and testimony was admitted to show that Justice Bacon, whose name does not appear as an attesting witness to the instrument in question, attested other deeds acknowledged before him about the same time, and that witnesses called on behalf of the insurance company were allowed to testify to the general reputation for truth and veracity of one of plaintiff's witnesses at a place 15 miles distant from his residence. The above rulings are inconsequential, and, if erroneous, are insufficient to work a reversal of the judgment. Strike out the testimony received under objection, and assume the daughter would have testified that, on the day after the deed from Mrs. Ryan to plaintiff purports to have been

executed, Mrs. Ryan told her daughter she executed it, and gave the most satisfactory reasons for doing so; still the proof is overwhelming that the instrument recorded in the register's office, July 13, 1888, and on which alone the plaintiff rested his claim of title to the premises in question, was a forged instrument, and the title never vested in plaintiff by virtue thereof, but descended to the heirs of Mrs. Ryan at her decease. Hence the challenged rulings, in any view of the case, are not fatal to the judgment.

3. As to the alleged waiver by the insurance company of its defense to the action. Under date of October 4, 1888, the company notified plaintiff, by letter, that it denied all liability on the policy, and at the same time returned to him his proofs of loss. In November, 1888, a clerk of the company, in the usual course of the business of the office in which he was employed, but without the direction or knowledge of any responsible officer or agent of the company, sent plaintiff a notice that his premium note for \$16.35 would become due December 1, 1888, and asking him to remit the amount before November 20th, and authorizing him, if he did so, to retain 25 cents. After November 20th plaintiff remitted the amount of his note to the company. The company, by its officers, at once offered to return such money to plaintiff, and notified his attorney of the fact, and where the money was deposited, subject to the plaintiff's or their order. Plaintiff has not accepted the money thus offered to be returned to him. The testimony clearly shows that the sending of such notice was a pure mistake, made by one having no sufficient knowledge of the facts; that it was entirely unauthorized by any person having authority to bind the company; and that it was repudiated by the company, and the money thus sent by plaintiff was at once tendered to him after the mistake was discovered, and before the plaintiff could possibly have been prejudiced thereby. In the foregoing transactions we find no element of an estoppel, or any valid waiver by the insurance company of its defense to the policy. We are aware of no case which enforces a waiver under such circumstances. The case of *Dohlantry v. Insurance Co.*, 53 N. W. Rep. 448, 83 Wis. 181, cited and relied upon by counsel for plaintiff, entirely fails to support their position. In that case the acts which were held to operate as a waiver of the forfeiture of the policy there in suit were the acts of the board of directors and authorized officers of the company, done with full knowledge of all the facts. The difference in the two cases is radical and controlling. This case is not ruled by the *Dohlantry* Case. We conclude that, on the appeal under consideration, the judgment of the circuit court must be affirmed.

II. We are now to determine the appeal from the order overruling plaintiff's motion to vacate the judgment, and for a new trial,

for alleged newly-discovered evidence. The contention of plaintiff on the several trials of the action, and on the former appeal to this court, was that he obtained title to the premises of which the insured buildings were part and parcel under the conveyance from his wife recorded July 13, 1888, and the only general question litigated on those trials was whether that instrument was executed by Mrs. Ryan, or was a forged instrument. All other questions were subsidiary thereto. The affidavit of Thomas H. Ryan, submitted in support of the motion for a new trial, if true, shows conclusively (and the plaintiff now admits) that the instrument thus recorded was forged by Ira P. Bacon in 1887, to the knowledge of Thomas H. Ryan, and by the latter was uttered as true by placing it where it probably would be accepted and acted upon as a genuine document. We do not say that these transactions constitute the legal offenses of forging a deed, and of uttering it as true, for it may be doubtful whether the intent to injure or defraud any one, which is an essential ingredient in those crimes, was present. Rev. St. §§ 4454, 4455. Yet, on the principle that a person must be presumed to intend the natural and reasonable consequences of his acts, those transactions on the part of Thomas H. Ryan and Bacon, as detailed by the former, come unpleasantly near constituting those crimes as defined in the statute, for there is apparent good reasons for saying that the natural tendency of those transactions would be to defraud the children and heirs of Mrs. Ryan of their inheritance from their mother, as well as to defraud the insurance company. But, however that may be, those transactions, considered from a moral standpoint alone, involve turpitude on the part of the actors therein, and seriously impair the credibility of Thomas H. Ryan, who deposes thereto. There is another feature in the affidavits in support of the motion for a new trial which is worthy of notice. Plaintiff testified that he retained the deed of April 24, 1884, in his possession until after the death of his wife, five months later, when he left it with his brother Edward J. Ryan, for safekeeping; that, about a year and a half before recording it,—that is, early in 1887,—he obtained the deed from Edward, and placed it with other papers in the safe of Mr. Lynch, in Madison, where it remained until he took it to the register's office for record, July 13, 1888; and that he took it from that office after it was recorded, and kept it until it was lost or burned. Thomas H. Ryan, in his affidavit, fixes the date of finding the mutilated deed at the residence of his brother Edward late in the summer or early in the fall of 1887. At that time, according to plaintiff's testimony, the deed was in Lynch's safe, in Madison, instead of Edward J. Ryan's residence, in Waunakee, 15 miles distant from Madison. But this very significant discrepancy is read-

fly disposed of in an affidavit of plaintiff that he was mistaken in his testimony, and that it was considerably later in the year before he withdrew the deed from Edward, and deposited it with Lynch. An affidavit of Mr. Lynch was also read on the hearing of the motion for a new trial, to the effect that plaintiff left some papers with him for safekeeping some time after June, 1887. He also states that, as he is informed and verily believes, among these papers there was a deed from Ellen Ryan to plaintiff, but he abstains from saying that he ever read or saw any such deed, or has any personal knowledge that any such deed ever existed. It may further be observed that the fair inference from plaintiff's testimony is that he kept the alleged deed off the records to prevent a creditor who had recovered a large judgment against him from attempting to collect the same out of the land. Thus, on the motion for a new trial for newly-discovered evidence, the case presents the following features: (1) The plaintiff prosecuted the case vigorously for more than three years through three trials in the circuit court, and one appeal to this court, on the sole theory that the original of the deed recorded July 13, 1888, was a genuine conveyance by his wife to him of the premises upon which the insured buildings stood, and the insurance company defended the action at great expense, on the sole ground that such instrument was not the deed of Mrs. Ryan, but was a forgery. This motion for a new trial admits that the company was right, and that the instrument was forged. The plaintiff now desires to change his ground, and to be allowed further to prosecute the action, on the new theory that, by another instrument, never recorded, and now lost or destroyed, Mrs. Ryan conveyed such premises to him. This, of course, is a radical change of the grounds of action, which is not favored by the courts, especially after the action has been long pending. (2) The doubt and uncertainty whether the instrument last above mentioned ever existed is caused by the failure of plaintiff (if he ever had it) to record the same, and the reason which he gives for such failure is that he thereby intended to conceal his ownership of the property to prevent his creditor from collecting a judgment against him. The motive was a fraudulent one, and meets with no favor in the law. (3) According to his own showing, plaintiff had control of the alleged substituted instrument, and had it in his actual possession several times, the first time soon after such substitution. He must be presumed to have known the handwriting of his late wife, and of his brother, whose name appeared as a witness to the instrument. A glance at their alleged signatures would have disclosed to him that they were not genuine. But, important as the instrument was to him, carefully as he had preserved it, and guarded the secret of

its existence, he did not bestow that glance upon it. In this there is a degree of laches which, under the peculiar circumstances of this case, the court will not entirely disregard, but will give it due weight in determining whether a new trial should be granted or denied. (4) The person by whom it is proposed to prove the substitution of the forged deed for the alleged genuine one is self-impeached. He admits his voluntary connection with and participation in the fraud, if not crime, to which he proposes to testify, and thus greatly weakens, if he does not destroy, the probative force of his testimony. (5) The newly-discovered testimony charges a magistrate, since deceased, with a gross fraud, if not crime, committed by him without apparent motive. It is too late for him to make any defense to the charge, and the opportunity to blacken his memory should not be granted lightly in a case where, as here, the court has any discretion to prevent it. (6) A jury was waived in the case, and Judge Bennett, before whom it was tried, was required to determine the facts established by the testimony. The denial of the motion for a new trial is equivalent to a ruling that the alleged newly-discovered evidence would not change the result were a new trial granted. After a careful examination of all the testimony, and upon due consideration thereof, and of all the reasonable probabilities of the case, we are constrained to say that, had Thomas H. Ryan testified as a witness upon the trial to the statements contained in his affidavit, and had the court refused to find that Mrs. Ryan ever conveyed the premises in question to her husband, we could not, as at present advised, hold that such refusal was error; hence we are of the opinion that the alleged newly-discovered evidence would not probably change the result were a new trial granted. *Grace v. McArthur*, 76 Wis. 641, 45 N. W. Rep. 518. If there is a case in the books in which a new trial has been granted where so many and so persuasive reasons combined to prompt the court to deny it, we have failed to find it. Certainly, no such case has been cited by the learned counsel for plaintiff. We conclude that the court properly denied the motion for a new trial, and that the order in that behalf should not be disturbed. Order affirmed.

DRUMMOND v. CITY OF EAU CLAIRE. (Supreme Court of Wisconsin. June 21, 1893.)

STREET GRADES—UNLAWFUL CHANGES—FILING CLAIMS—PLEADING DAMAGES.

1. Plaintiff filed with the clerk of defendant city a claim reading, "For damage caused by change of grade, \$1,500." On its being disallowed, an appeal was taken, whereupon plaintiff filed a complaint for damages for unlawful change of grade. *Held*, that the cause of action had not been changed from a claim for damages for a lawful change of grade to damages for an unlawful change.

2. For an unlawful change of street grade a city is liable to an abutting owner for all damages naturally resulting therefrom, against which it cannot offset appreciation in value of the property, in common with other property in the locality, caused by the change.

Appeal from circuit court, Eau Claire county; J. K. Parish, Judge.

Action by David Drummond against the city of Eau Claire. Judgment for defendant. Plaintiff appeals. Reversed.

The other facts fully appear in the following statement by CASSODAY, J.:

It appears from the record that March 19, 1890, the plaintiff filed with the city clerk of said defendant, for the action of its common council thereon, his claim for damages caused by the change of grade in front of his premises, in the sum of \$1,500. That thereafter said claim was, by the common council, referred to its judiciary committee, April 2, 1890, and on the same day said committee reported said claim back to said council, with the recommendation that the same be disallowed. That thereupon, and on the same day, the said common council took final action on said claim, and disallowed the same, and each and every part thereof. That April 18, 1890, the said plaintiff duly appealed therefrom to the circuit court for Eau Claire county. That thereupon, and while the cause was so pending in said circuit court, the parties thereto stipulated and agreed, in writing, that an issue be formed therein by the plaintiff serving and filing his complaint therein within 20 days thereafter, and by the defendant serving and filing its answer or demurrer thereto within 20 days thereafter. That thereupon, and within the time named, the plaintiff filed and served his complaint in said action, setting out, in effect, his ownership to the premises described, and which premises fronted north on Bridge street, and west on Second avenue, in said city; that during 1880 the said city, by its common council, by ordinance duly approved and published, duly established the grade on said streets, and which had for a long time previously been duly established as such grade; that the plaintiff's buildings were erected with reference to such grade so established; that in March, 1886, by proper proceedings, said grade was re-established on said Bridge street and said Second avenue, in front of the plaintiff's said premises, in accordance with the grade theretofore existing and established; that in March, April, and June, 1889, the said city attempted to change the grade so previously established in front of the plaintiff's said premises, and states the several particulars wherein it failed to comply with the charter of said city; that during the fall of 1889 the defendant filled up and graded said street, in front of and adjoining the plaintiff's premises, to a height of about five feet and nine inches above the former level of said street, as theretofore established in 1880, and re-established in 1886, but

which filling was without authority in the charter; that the effect of the raising of said grade had been to make the floor of said building about five feet below the said street, and thereby greatly damage and injure the plaintiff, and lessen the value of his property; that the plaintiff was thereby obliged to incur large expense in raising his buildings, and filling up his land and the basement of his buildings, so as to make said premises conform to such new and unauthorized grade, and that the plaintiff had thereby been damaged in the sum of \$1,500; that the claim therefor had been presented, filed, and disallowed by the common council, as mentioned, and the plaintiff appealed therefrom, as mentioned, wherefore he demanded judgment for the amount of said claim, with interest. To that complaint the defendant demurred on the ground that the same did not state a cause of action, which demurrer was overruled by the trial court, and the order overruling the same was affirmed by this court. 79 Wis. 97, 48 N. W. Rep. 244. Upon said cause being remanded to the circuit court the defendant answered, by way of admissions and denials, and alleged that the plaintiff did not file his claim, or any claim, for the cause of action or injury set forth in the complaint, and denied that the claim so filed and disallowed was for the cause of action or injury set forth in the complaint, and attempted to justify such change of grade in the months of March, April, and June, 1889. At the close of the trial of the issue so formed by said answer the jury returned a verdict in favor of the defendant, and against the plaintiff. From the judgment entered thereon the plaintiff brings this appeal.

Wickham & Farr, for appellant. L. A. Doolittle, for respondent.

CASSODAY, J., (after stating the facts.) The defendant seeks to justify the judgment on the ground that the claim filed by the plaintiff with the city clerk for the action of the common council was for damages by reason of the lawful change of grade in front of the plaintiff's premises, whereas the complaint based upon such claim, served and filed after the cause was appealed to the circuit court, is for damages by reason of the unlawful change of such grade; and in support of his contention he relies upon *Smith v. City of Eau Claire*, (Wis.) 53 N. W. Rep. 744. In that case the claim filed stated the facts in detail, and clearly showed that the damage claimed was for a lawful change of grade; and it was merely held that the plaintiff could not, on appeal, change his cause of action by claiming damage for an unlawful change of grade. In the case at bar the claim filed was general; being, simply, "For damage caused by change of grade, \$1,500." It did not even describe the plaintiff's premises. But it does not appear that the plaintiff had any other premises to

be affected by such change of grade, and the common council acted upon it, and disallowed it, without regard to its informality; and then, in the stipulation between the parties for formal pleadings, such filing, disallowance, and appeal are recited, and it is therein stated that the plaintiff claims "damages of said city for changing the grade of Bridge street, a certain highway of said city in front of the premises of said plaintiff," therein described. The complaint filed and served in pursuance of that stipulation was expressly based upon that claim, and the sufficiency of that complaint was sustained on demurrer by the trial court, and the order sustaining the same was affirmed by this court. 79 Wis. 97, 48 N. W. Rep. 244. Such being the state of the record, we cannot hold that the complaint falls to state a cause of action, nor that the claim filed was insufficient to sustain the action.

2. It seems to be conceded that the attempt to re-establish the grade of the street in question was abortive, and that the raising of the same several feet in front of the plaintiff's premises was without any lawful authority. This being so, it is manifest that the plaintiff is entitled to recover any damages sustained by reason of such trespass upon, and injury to, his premises. *Crossett v. City of Janesville*, 28 Wis. 420; *Hamilton v. City of Fond du Lac*, 40 Wis. 47; *Dore v. City of Milwaukee*, 42 Wis. 108; *Meinzer v. City of Racine*, 68 Wis. 241, 32 N. W. Rep. 139; *Id.*, 70 Wis. 561, 38 N. W. Rep. 280; *Id.*, 74 Wis. 166, 42 N. W. Rep. 230; *Addy v. City of Janesville*, 70 Wis. 401, 35 N. W. Rep. 931; *Drummond v. City of Eau Claire*, 79 Wis. 97, 48 N. W. Rep. 244. The important question for determination is the measure of such damages. In *Crossett v. City of Janesville*, *supra*, the trial court charged the jury that the plaintiff was entitled to recover "for all the direct and proximate damages to her premises, caused by the grading in question," and "that the measure of the plaintiff's damages was the actual depreciation in the value of her lots by reason of the grading having been done at the time and in the manner it was done." The correctness of the charge, however, was not challenged upon such ground, but was assumed by this court. The same is true with respect to *Meinzer v. City of Racine*, *supra*, where the charge was substantially the same. In *Addy v. City of Janesville*, 70 Wis. 401, 35 N. W. Rep. 931, it was held, in effect, that, "where a city, by unlawfully raising a street above the established grade, causes surface water to flow or accumulate upon an abutting lot, it is liable to the lot owner for the injury occasioned thereby;" that, under a complaint alleging such unlawful raising of the street, it was competent to prove "the insufficiency of a culvert by which such water might have been conducted away" from the plaintiff's lots. It was there contended that the city was not liable for such consequential

damages from mere surface water by reason of such change of grade, and numerous cases in this court were cited in support of such contention. In answer to such contention, *Cole, C. J.*, speaking for the court, there said: "These cases are inapplicable to the present, for the obvious reason that here the common council had no authority to change the grade without taking the steps prescribed by the charter to give them power so to do." The trial court, in that case, charged the jury "that the city had shown no authority whatever for raising the grade, and if such raising of the grade, without sufficient culverts or gutters to carry off the waters as rapidly as they were carried off before, produced injury to the plaintiff, the raising was, as to her, unlawful; and if done by the city, or if the city ratified the raising of the grade after it was done, by paying for the work, the city was liable to her for all damages which naturally resulted from the raising of the grade, with its insufficient gutters or culverts to conduct the waters as rapidly as they flowed off before the grade was raised." An exception to this portion of the charge was there overruled. That case was cited approvingly by *Mr. Justice Orton* when the case at bar was here on the former appeal; and he there said, in effect, that as the grading was done without authority, and unlawfully, the city was "liable to the plaintiff for such damages as he had suffered, which were caused by it." 79 Wis. 102, 48 N. W. Rep. 244. Such are the adjudications of this court in respect to the measure of damages in cases where the regrade was done without authority of law. On the other hand, this court has, in effect, frequently held that where a change of grade in a street is made under authority of law, and with due care, the municipality is not liable for consequential injury to abutting lots, unless made so by statute or the constitution. *Smith v. City of Eau Claire*, 78 Wis. 457, 47 N. W. Rep. 830; *Wallich v. Manitowoc*, 57 Wis. 9, 14 N. W. Rep. 812; *Harrison v. Board*, 51 Wis. 662-665, 8 N. W. Rep. 731; *Tyson v. City of Milwaukee*, 50 Wis. 78, 5 N. W. Rep. 914; *French v. City of Milwaukee*, 49 Wis. 584, 6 N. W. Rep. 244; *Stadler v. City of Milwaukee*, 34 Wis. 98; *Stowell v. City of Milwaukee*, 31 Wis. 523; *Church v. City of Milwaukee*, *Id.* 512. In the case at bar the trial court, in charging the jury, apparently followed the rule of law laid down in the case last cited. The provision of the city charter upon which that case was based was to the effect that all damages, costs, and charges arising from a change in the grade of the streets therein should be paid by the city to the owner of any lot injured thereby; and it was "held that while any peculiar or special benefit conferred upon the plaintiff's lot, not common to other lots in the neighborhood, and not increasing its market value, could not be considered by the jury in fixing the damages, yet if such lot, in con-

sequence of the changed grade, was appreciated in value in common with the other property in that locality, the city was entitled to have such increase of value deducted, in the estimation of damages." The rule of law stated in that case and in *Stowell v. Milwaukee*, supra, as explained in *Tyson v. City of Milwaukee*, 50 Wis. 85-89, 5 N. W. Rep. 914, is only applicable where such regrade is under lawful authority; but has no application to a case like the one at bar, where the regrade is confessedly without any lawful authority. Hence, it was error for the trial court to follow that rule in the case at bar. It would be anomalous to hold that one may enter upon and injure the land of another, without any lawful authority, as a mere trespasser, and then defeat an action thereon on the ground that such unlawful acts were beneficial to the land or its owner. It is well settled that one who makes such wrongful entry upon land, and erects fixtures thereon, thereby loses title to the fixtures. *Huebschmann v. McHenry*, 29 Wis. 655; *Kimball v. Adams*, 52 Wis. 554, 9 N. W. Rep. 170. The plea of good faith by such trespasser is not even available in equity, as against the rightful and equitable owner of the land. *Houzik v. Delaglise*, 65 Wis. 501, 27 N. W. Rep. 171, and cases there cited. Such trespasser is, in all cases, liable to actual damages; and, although he may have benefited the land, still he would be liable, at least, for nominal damages. *Murphy v. City of Fond du Lac*, 23 Wis. 365; 3 Sedg. Dam. § 923. The measure of damages, in such case, is the amount of injury directly resulting from the unlawful acts committed. *Id.* In trespass quare clausum the plaintiff may be entitled to consequential damages. *Id.* § 927. But it is unnecessary to continue the discussion, since the rule sanctioned by this court in the cases of *Crossett v. City of Janesville* and *Addy v. City of Janesville*, cited, where such regrading was without authority of law, seems to be substantially correct. For the errors in the charge, referred to, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

MYGATT v. TARBELL.

(Supreme Court of Wisconsin. June 21, 1893.)

CONTRACT—WHAT CONSTITUTES—EVIDENCE—CONSIDERATION—QUESTION FOR JURY—ESTOPPEL.

1. A controversy arose between defendant and M., execution creditors, as to the legality and priority of a levy of M.'s execution on shares of stock. M.'s attorney proposed to defendant's in writing that the sheriff secure a proper levy on the stock, that neither levy have priority over the other, and that the proceeds of the sale be divided equally between their clients. Defendant's attorney afterwards handed M.'s an unsigned paper, which referred to the latter's proposition, and stated, in substance, that since the levy of M.'s execution defendant's has been levied on the stock; that this was deemed expedient in view of the fact

that service of the other execution was made out of the state; and that on behalf of defendant the attorneys consent that the proceeds of the sale on his execution shall be divided equally between him and M., the latter assigning to defendant so much of his judgment as the proceeds paid to him amount to. *Held* that, if the latter paper be considered binding, it was not an acceptance of M.'s proposition, since it added a condition that the latter assign his judgment pro tanto on receipt of his share of the proceeds of the proposed sale.

2. In an action by M.'s administrator to enforce an alleged agreement for an equal division of the proceeds of the sale of such stock on defendant's execution, the latter's attorney testified that the proposition of M.'s attorney was never accepted; that he submitted the unsigned paper to the latter, and told him if it met his views to let the witness know, and he would submit it to his client, and if he obtained his authority he would sign it as a definite proposition; and that his proposition was never accepted. M.'s attorney testified that his proposition was accepted orally, and that it was afterwards accepted in writing by the unsigned paper, the signing of which he waived. *Held*, that it was not error to submit to the jury the question as to whether or not there was a contract for the equal division of the proceeds of such sale.

3. In the absence of any evidence that M. or his attorney agreed to surrender some rights claimed under his levy, defendant's agreement, if made, was nudum pactum, even if such levy was valid, since the mere existence of a valid levy was no consideration for a promise by defendant to divide the proceeds of sale under his levy.

4. It appeared that M. claimed a valid levy until a sale about to be made under it by the sheriff, when the latter adjourned the sale to take counsel. Afterwards, in his written proposition, M.'s attorney suggested that a "proper levy" be secured of both executions, and he testified that at this time the question of the sufficiency of such levy was discussed by him and defendant's attorney; that later he contemplated suing out another execution, and probably would have done so had not other executions intervened. Defendant's attorney testified that he several times told M.'s attorney that such levy was invalid, and he understood that the latter so concluded; and that M.'s execution, which was afterwards returned nulla bona, was not returned at witness' request. It did not appear that the return of such execution was considered during the negotiations. *Held*, that it was not error to submit to the jury the question as to whether or not M. claimed a valid levy at the time the alleged agreement was made.

5. In such case, defendant testified that he told his attorney that if a proposition was made by M.'s attorney which the former thought was reasonable, "if he would submit it to me, I would state whether I would accept it or not." His attorney testified with regard to the unsigned letter that he told M.'s attorney that if it was satisfactory to the latter, witness would submit it to defendant, and if he got his authority he would sign it. *Held*, that the question as to whether or not defendant's attorney had authority to make the compromise agreement was for the jury.

6. In the absence of any evidence in such case that M. or his attorney placed any reliance on, or took any steps or changed his position in the least because of, defendant's failure to deny such agreement or his attorney's authority to make it, after he knew that M.'s attorney claimed the existence of such agreement, defendant is not estopped from denying the agreement or his attorney's authority to make it.

7. In such case the answer alleged an agreement between the parties fixing the value of the stock for the purpose of division of the

proceeds at five cents per share, and providing that if it sold for more defendant was to account to M. for 2½ cents a share only. There was evidence tending to prove such agreement but it was not shown that defendant's attorney had authority to make it. *Held*, that the admission of evidence tending to show that such stock was worth from three to five cents a share was not available error where the court withdrew from the jury the question as to the making of such contract because no authority to make it was shown.

Appeal from superior court, Milwaukee county; F. L. Gilson, Judge.

Action by A. A. Mygatt, as administrator of the estate of Henry M. Mygatt, deceased, against Gage E. Tarbell, on a contract. From a judgment for defendant, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by WINSLOW, J.:

Action on contract. May 4, 1888, defendant, Tarbell, obtained two judgments of \$9,000 and \$31,000, respectively, against one Burton, and on the same day execution was issued to the sheriff of Milwaukee county upon the smaller judgment. May 10, 1888, the plaintiff's intestate, Henry M. Mygatt, obtained a judgment against said Burton for over \$11,000, and issued execution thereon to the said sheriff. At the same time Mr. Maxon, Mygatt's attorney, informed the sheriff that Burton owned certain shares of stock in the Bessemer Consolidated Iron Company, a corporation of this state, and directed the sheriff to levy said junior execution thereon. The officers and books of this corporation were not in this state, but were in New York. The sheriff, in obedience to this direction, mailed a copy of the execution to one Coon, then secretary of the corporation, in New York, and Coon returned a certificate pursuant to Rev. St. § 2989, stating that at the time of the levy there were upon the books 3,581 shares of the stock of the corporation in the name of and owned by said Burton. The sheriff advertised these shares for sale under the Mygatt execution, such sale to take place on July 2, 1888. At the time the sale was to take place Mr. Flanders, attorney for defendant, Tarbell, appeared, and notified the sheriff that Tarbell would hold him liable in damages for not levying his (Tarbell's) execution on said stock, such execution being prior to Mygatt's, and also claiming that the levy under the Mygatt execution was invalid, because the secretary was out of the state when it was attempted to be made. The sheriff thereupon adjourned the sale in order to obtain advice as to the questions so raised. After such adjournment, Mr. Maxon and Mr. Flanders had several conversations with a view to an amicable arrangement by which the stock might be sold for the mutual benefit of their respective clients. Mr. Flanders requested that Mr. Maxon put his proposition in writing, whereupon, on August 10, 1888, Mr. Maxon sent Mr. Flanders the following

letter: "Gentlemen: In relation to the levy made by the sheriff of Milwaukee county upon the Bessemer Consolidated stock of John E. Burton in favor of H. M. Mygatt, I make the following proposition: That the sheriff secure a proper levy of the executions of Gage E. Tarbell and H. M. Mygatt upon this Bessemer Consolidated stock, and that neither levy have priority over the other, and that the proceeds from the sale of the levys so made be divided equally between your client and mine, and that, in case there are no bids other than that made by our clients, that we each bid in one-half (½) of the amount of stock levied upon, and that the stock be sold and bid in in such a way as to give neither party an advantage over the other. I make this proposition to you confidentially, and it is not to be made use of or filed, except for the purpose of carrying out this agreement, in case you accept this proposition." Mr. Maxon testifies that this proposition was accepted orally by Mr. Flanders, and Mr. Flanders testifies that he never accepted it. Further adjournments of the sheriff's sale were had by mutual consent. Mr. Maxon left the city of Milwaukee soon after August 10th, and did not return until about the 20th. He testifies to several interviews with Mr. Flanders before he left as to the best way to carry out the agreement, and as to whether his levy was sufficient, and he says he was unable to fully satisfy himself on this last point. It appears that one Gill became secretary of the Bessemer Company, but at what date does not appear. On the 16th of August Gill was in Milwaukee, and Flanders caused execution to be issued upon the \$31,000 judgment, and a levy to be made thereon by personal service upon Gill, who made the usual certificate as to Burton's shares, and stating that the levy was subject to the Mygatt levy. Upon Maxon's return, about August 20th, further negotiations were had between Maxon and Flanders, the purport of which is in dispute. Maxon claims that in these conversations Flanders recognized the former alleged agreement, and agreed that it should be carried out, and discussed the details and methods of so doing. On the other hand, Flanders denies this, and claims that the conversations were simply renewals of attempts to settle amicably, which came to nothing. In pursuance of these further talks, and on September 12, 1888, the following paper was handed by Flanders to Maxon, unsigned: "Dear Sir: Referring to your letter of August 10th in regard to the levy made by the sheriff of Milwaukee county upon the Bessemer Consolidated stock of John E. Burton, we would say that since that levy so made a levy has been made upon an execution in favor of G. E. Tarbell, by service upon the secretary of the Bessemer Consolidated Company within the state of Wisconsin of a copy of Mr. Tar-

bell's execution. We deem this expedient in view of the fact that service of your execution was made without the state of Wisconsin. Service of Mr. Tarbell's execution was made upon the secretary in this city while such secretary was here temporarily. On behalf of Mr. Tarbell, we consent that the proceeds of the sale made upon Mr. Tarbell's execution shall be divided equally between Mr. Tarbell and Mr. Mygatt, Mr. Mygatt assigning to Tarbell so much of his judgment as the proceeds paid to him amount to." Mr. Flanders testified that he then told Mr. Maxon that if such a proposition as that would meet his views, if he would let him know that it was satisfactory, he would submit it to Mr. Tarbell, and, if Tarbell gave him authority, he would make it, and sign it as a definite proposition. He further claims that Mr. Maxon never accepted it, and that he never heard from it again. On the other hand, Mr. Maxon testified that this unsigned letter was handed to him as a definite proposition of settlement, and as carrying out the former agreement, and that he at once accepted it when presented to him, and waived the necessity of any signature. On the 17th of September, 1888, Mr. Maxon directed the sheriff to return the execution on the Mygatt judgment nulla bona, which was done. Mr. Flanders testified that this execution was not returned at his request, nor in pursuance of any understanding between the parties. On the 23d of October the stock was sold under the Tarbell second execution for 76 cents a share to Gill, the secretary of the company, Tarbell being the only other bidder. Mr. Maxon, Mr. Tarbell, and Mr. Flanders were present at the sale, and some conversation took place between them just prior to the sale. The purport of this conversation is in dispute. Mr. Flanders and Mr. Tarbell testify that an agreement was then made by which Tarbell might take the risk of bidding above five cents a share on the stock, and that Maxon agreed that Mygatt would be satisfied to take 2½ cents per share, without regard to what the stock brought. Mr. Maxon, while admitting that the discussion involved a proposition of this kind, denies that he agreed to it, and says that he disclaimed authority, in the absence of his client, to make any such arrangement. The net proceeds of the sale were \$2,686.61. After the sale Mr. Maxon demanded of defendant \$1,300.78, being one-half the net proceeds of the sale, and tendered an assignment of a portion of his judgment to that amount, with provision that any amount afterwards realized on the judgment should first go to pay such assigned portion, and upon refusal brought this action for said half of the proceeds of the sale. The defendant, by answer, denied any agreement for compromise claimed by the plaintiff, but set up affirmatively the alleged agreement to accept 2½ cents per share of stock

sold, which agreement he has been and is ready and willing to carry out. Upon the trial the jury returned a verdict for defendant, and from judgment thereon plaintiff appeals.

Glenway Maxon and Miller, Noyes & Miller, for appellant. Quarles, Spence & Quarles, for respondent.

WINSLOW, J., (after stating the facts.) This case has been once before this court upon appeal from a judgment of nonsuit granted upon a former trial. 78 Wis. 351, 47 N. W. Rep. 618. It was there held that the nonsuit was improperly granted, and that the cause should have gone to the jury. As the plaintiff's evidence only was before the court upon that appeal, and the facts which that evidence legitimately tended to establish were taken as proven for the purposes of the appeal, much that was said there is inapplicable now, because upon the present trial there was a sharp conflict of evidence upon all the material issues. The plaintiff sues defendant for one-half of the amount realized from property seized upon an execution issued upon a judgment owned by defendant. Obviously he must show his right to money so realized by some binding contract made by defendant or by his authority.

It is first claimed by plaintiff that the uncontradicted evidence shows that a contract for an equal division of the proceeds of the sale of the Bessemer stock was made by the parties. We have stated the substance of the evidence quite fully, and it must be sufficient to say here that this contention is not supported by the evidence. The writings introduced in evidence do not show it, because, even if Mr. Flanders' unsigned letter be considered as binding, it does not amount to an acceptance of the plaintiff's written proposition by reason of the fact that it does not accept the proposition first made in terms, but proposes a material change, namely, the assignment to defendant of a part of plaintiff's judgment. That there was any oral acceptance of either proposition is flatly denied by the defendant's attorney who conducted the negotiations; therefore the question was properly for the jury. If there was any agreement it was an executory agreement to divide at some time in the future the proceeds of an execution sale. To rise above the level of a mere nudum pactum it must be based upon a consideration either beneficial to defendant or prejudicial to the plaintiff. The mere fact that plaintiff had secured a levy on the stock, even though it was valid, (prior to defendant's levy thereon,) is evidently no consideration. If he had such valid levy, he could enforce it by sale, or hold the sheriff liable for failure so to do. If there was any consideration for defendant's alleged agreement to divide the proceeds of sale on his execution it must be in

something that plaintiff did or refrained from doing under his alleged levy as a consideration for defendant's agreement to divide. He must have claimed some rights thereunder, and surrendered some of those claimed rights as part of the agreement. The levy alone, though legal, was no consideration to defendant for a promise to divide. The consideration, if any, was the promise to surrender rights either real or claimed under that levy. So, if the fact be that the levy was legal, still if plaintiff abandoned it, and returned his execution, because he concluded it was worthless, and not by virtue of an agreement with defendant to abandon it, and as a consideration for a promise to divide proceeds, it manifestly could not operate as a consideration. It was then a voluntary act purely. So it became necessary for plaintiff to show that he claimed a valid levy when he made the alleged agreement of division of proceeds, and that he surrendered his claims by virtue of that agreement, and as a consideration for defendant's promise. He must show both these facts. If at time of the alleged agreement plaintiff did not claim a valid levy, then there was no conflict of rights; there was nothing to compromise. An agreement of compromise implies necessarily adverse claims; but if plaintiff had no claim of levy he had no claim adverse to defendant; there was no controversy to settle, nothing for an agreement to act upon. A release of a levy which the owner admitted to be utterly void would be no consideration for a promise. Upon this branch of the case the circuit judge charged the jury—rightly, as we think—that they should inquire whether the plaintiff at the time of the alleged agreement to divide claimed a valid levy upon this stock, and, if he did, whether such compromise agreement was made, and whether plaintiff caused his execution to be returned relying on such compromise; and, if either of these propositions were found against plaintiff, it was fatal to plaintiff's case, unless an estoppel was found by virtue of certain transactions considered later in the charge. Plaintiff claims that the evidence is undisputed that he claimed a valid levy, and that hence it was error to submit this question to the jury. It is quite clear that plaintiff claimed a valid levy up to July 2, 1888, when the sheriff's sale was about to take place on the Mygatt execution; but after this time the question cannot be said to be entirely clear. In his letter of August 10th Mr. Maxon suggests that a proper levy be secured of both Tarbell's and Mygatt's executions. Mr. Maxon himself testifies that at this time the question of the sufficiency of the first levy was discussed between himself and Mr. Flanders, and that he (Maxon) was not able to fully satisfy himself upon the point. Also that about August 20th he contemplated suing out another execution, and levying thereun-

der, and apparently would have done so had there not been intervening executions on behalf of other creditors in the sheriff's hands. Mr. Flanders testifies that he told Mr. Maxon several times that in his opinion the levy was invalid, and according to his understanding he (Maxon) substantially came to that conclusion himself; also that the Mygatt execution was never returned at his instance or request, and that he did not know of it until after the sale of October 23d. Furthermore, it does not appear in any evidence in the case that the return of the execution was considered or discussed during the negotiations. We think, in this state of the evidence, there was no error in submitting the question to the jury.

The circuit judge also submitted to the jury the question whether Mr. Flanders had authority to make the alleged contract of compromise. It is claimed by defendant that the uncontradicted evidence shows such authority. There certainly was evidence from which it might properly have been found that Mr. Flanders had authority from his client, Tarbell, to make the agreement claimed; but there was also evidence to the contrary. Mr. Tarbell says that he told Mr. Flanders that if a proposition was made by Mr. Maxon which he (Flanders) thought was reasonable, "if he would submit it to me, I would state whether I would accept it or not." Mr. Flanders testified with regard to the unsigned letter that if it was satisfactory to Maxon he would then submit the proposition to Tarbell, and if he got his authority he would make and sign the proposition. We think the evidence called for the submission of the question to the jury. The general authority of an attorney under his retainer in the cause would certainly not authorize him to make an agreement to divide with another the proceeds of an execution sale, especially where, as here, the client resided in the same city with his attorney. Weeks, *Attys. at Law*, (2d Ed.) § 219. The plaintiff claims that defendant is estopped from denying that there was a valid agreement of compromise, or that Mr. Flanders had authority to make such agreement. This claim is founded on one or more conversations which occurred between Mr. Maxon and defendant, Tarbell, personally, at some time previous to the sale. Mr. Maxon claims that in these conversations Tarbell clearly understood that he (Maxon) understood and claimed that an agreement of compromise had been made between himself and Mr. Flanders, and that Mr. Tarbell did not dissent, but kept silent concerning Mr. Flanders' lack of authority to make a binding agreement, and that he is now estopped from denying the fact. An estoppel may undoubtedly arise from silence where one ought to speak, but the evidence is clearly insufficient to raise an estoppel here. In the first place, the time of these conversations is not proven. It was previous to the sale,

objection as being leading, and her evidence as to what he did to her was properly admitted. It is to be remembered that the prosecutrix was a child of tender years, not having quite reached the age of 10 years at the time of the trial.

2. We do not perceive any valid objection to any of the questions put to Dr. Philler. They were addressed to him as a medical expert, calling properly for matters of opinion, based on the examination he made of the girl, and were to some extent based, as they might properly be, upon hypothetical questions. After stating a variety of causes which might have produced the redness of the genitals, there was no objection to his stating that, if a male had done with her what she stated, he would be very apt to lay it to that, in the absence of other causes; that he did not find any other cause, she being neatly dressed, and clean in her person otherwise.

3. The evidence of Undersheriff Dwinell in respect to what the girl told him as to the treatment she had received, and what she told others, Mrs. Meininger, the girl Emma, and Miss Coates, was clearly competent for the purpose for which it was admitted, as explained by the circuit judge at the trial and in his charge to the jury, not to prove the substantive charge, but to show that she complained or reported what she claimed had occurred, and as in some degree a corroboration of her evidence at the trial. Whart. Crim. Law, §§ 565, 566. It is generally considered that there can be no conviction in cases such as this simply upon the unsupported and uncorroborated evidence of the prosecutrix, and such testimony is held admissible in corroboration, and in many cases it is all such evidence that the nature of the case admits of. The evidence of the undersheriff in respect to what took place when he went to the defendant's house to get the girl Clara, and when endeavoring to investigate the charge that had become current, was proper, though not particularly important, and that the defendant's wife was not a competent witness as to what took place on this occasion was not, we think, any reason for its exclusion. The defendant was not present, and there was no evidence to show that what his wife said or did was in any way inspired or directed by him.

4. Whether the court erred in not excluding from the consideration of the jury the evidence of the girl Emma, to the effect that the defendant came to the room in which she and the prosecutrix were sleeping, and got in bed with them, and there had sexual intercourse with her, is a question not free from difficulty. It is a general rule of law, recognized by numerous cases, that, upon the trial of the accused for one offense, it is improper to prove that he has been guilty of other offenses, and that upon a trial for rape it would be incompetent to prove that the accused had committed or attempt-

ed to commit a rape upon another woman; but upon principle it seems that upon trial for rape, or for an assault with intent to commit it, it would be competent to show that the defendant had previously made an unsuccessful attempt to commit the same offense with which he was charged. The evidence tends to show that previous to his last assault upon the prosecutrix, in March, he had made other like assaults during the winter months, and before Emma became his domestic servant, as well as after the occurrence in question; that he had behaved in a lewd and indecent manner to the girl Emma and the prosecutrix in the room where they slept, visiting it at late hours, evidently for improper purposes, and, it is claimed, with the intent which characterized his conduct towards the prosecutrix on subsequent occasions. He got into bed with them on the particular occasion. This was an indecent assault of itself, and of a very gross character, upon both. This conduct on this occasion was corroborative of the evidence of the prosecutrix in respect to other indecent or criminal assaults, such as are charged in the information, and would tend to sustain and render more credible her evidence of such other occurrences. The general subject is fully considered in the cases of *People v. O'Sullivan*, 104 N. Y. 483, 10 N. E. Rep. 880; *People v. Sharp*, 107 N. Y. 427, 14 N. E. Rep. 319; *Farris v. People*, 120 Ill. 521, 529, 21 N. E. Rep. 821. In *Com. v. Ferrigan*, 44 Pa. St. 386, Thompson, J., says: "The rule on this subject may, in substance, be stated to be that when facts and circumstances amount to proof of another crime than that charged, and there is ground to believe that the crime charged grew out of it, or was in any way caused by it, such facts and circumstances may be proved to show the *quo animo* of the accused." That the defendant went to the room in which Emma and the prosecutrix were sleeping, and got in bed with them, may fairly be considered to have been for the purpose of renewing his former attempts to gratify his brutal passions, and would have a material bearing in support of the testimony of the prosecutrix, both as to previous and subsequent assaults upon her, and would be admissible for that purpose; and all that took place as a part of the transaction at that time would be competent. The reasonable and true rule seems to be laid down in *Com. v. Merriam*, 14 Pick. 519, that "evidence should be excluded which tends only to the proof of collateral facts. It should be admitted if it has a natural tendency to establish the fact in controversy." It was argued in that case that the defendant was not to be put upon his trial for every act of his life, but it was answered by the court: "Be it so. If the evidence which was received has a natural tendency to corroborate other direct evidence in the case, it would seem to be clearly admissible." And in that case, after making

proof of one act of adultery by a witness whose evidence was attempted to be impeached, it was held that other instances of improper familiarity between the defendant and the same woman, not long before the act of adultery proved, might be given in evidence to corroborate him. A greater latitude of proof as to other like occurrences is allowed in cases of sexual crimes. Upon a prosecution for adultery, evidence of previous acts of improper familiarity, amounting to adultery, between the same persons, was held competent either in corroboration of witnesses for the prosecution, or to show the disposition of the parties to commit the crime. *Com. v. Thrasher*, 11 Gray, 450; *Thayer v. Thayer*, 101 Mass. 111; *Brooks v. Brooks*, 145 Mass. 574, 14 N. E. Rep. 777; *State v. Marvin*, 35 N. H. 22; *State v. Walters*, 45 Iowa, 389; *Com. v. Choate*, 105 Mass. 458; *State v. Stice*, (Iowa,) 55 N. W. Rep. 17. We do not suppose that evidence that the defendant had committed adultery, or been guilty of acts of improper familiarity with the girl Emma at another time or place, would be competent evidence on the trial of the present issue, but rest our ruling on the ground already stated, that the act of the defendant in going to the room where both Emma and the prosecutrix were sleeping, and getting in bed with them, was a grossly indecent assault on both; and the case in this respect is clearly distinguishable from the cases cited by counsel for the plaintiff in error. So far as proof is concerned that criminal intercourse had taken place between her and the defendant, that fact was fully established by the defense on the cross-examination of the prosecutrix. The defendant really made her his own witness on that point. No objection was made to the question to the girl Emma whether, on the particular occasion in question, the defendant had intercourse with her, nor to the answer she gave in the affirmative, until the close of all the evidence, and then only by the omnibus motion, which included a great many portions of the evidence which the defense desired the court to strike out. After the defense had allowed the witness Emma to answer this question without objection, and had taken the chances that she would contradict the evidence of the prosecutrix that the defendant had improper intercourse with her, they could not avoid the unfavorable result of the experiment by subsequently moving to strike out her testimony on this point. It was a matter of discretion with the trial court whether to strike out evidence thus received without objection. Besides, the proposition was not in proper form, as very many other points were coupled together with this in a single motion. *People v. Chacon*, 102 N. Y. 669, 6 N. E. Rep. 303; *Quin v. Lloyd*, 41 N. Y. 349; *Pontius v. People*, 82 N. Y. 339, 347. We are of the opinion that error cannot be assigned in respect to it, nor in relation to the motion, for

the court does not clearly appear to have made any ruling on it, and no exception is alleged on that account.

5. The objection that the court improperly admitted testimony of Ida Coates, to the effect that the defendant had come to her bed, and kissed her, and attempted to have sexual intercourse with her, is not sustained by the record. No such testimony appears in it. We do not think, in view of the evidence, that there was any impropriety in the remark of counsel for the state in summing up, nor that the state should have been confined to proof of one act of attempted sexual intercourse with the prosecutrix, between the periods mentioned in the information. Proof of other attempts was competent in corroboration of the prosecutrix as to the substantive charge.

6. The prosecutrix was under the age of consent, and was conclusively incapable of consenting to the offense charged. It was neither necessary to allege nor prove a want of consent. Any attempt to have carnal knowledge of a female under 10 years of age is, by force of the statute, necessarily against her consent and forcible; and there is no ground for saying that the statute under which the defendant was prosecuted is void for uncertainty. *Fizell v. State*, 25 Wis. 364; *State v. Erickson*, 45 Wis. 86.

7. It was proper for Mr. Whitehead, the president of the Wisconsin Humane Society, to testify to the circumstances under which the prosecutrix came under his charge, and was placed with the defendant, with a view of being adopted. Whether Mr. Whitehead might sit by her when she gave her testimony was a matter resting in the discretion of the court. Upon the whole record, we cannot say that the verdict is contrary to law and evidence. We find no error in the record of which the defendant can complain. The judgment of the circuit court is affirmed.

SCHILLINGER v. TOWN OF VERONA.

(Supreme Court of Wisconsin. June 21, 1893.)

BRIDGES—ACTION FOR INJURIES—NEW TRIAL—
DEFECTS IN SPECIAL VERDICT.

1. In an action for injuries received in attempting to cross a bridge, a question submitted to the jury, whether a hole in the bridge, at which plaintiff's horses became frightened, was an insufficiency, or a want of repair of the bridge, at the time of the accident, naturally calculated to frighten horses of ordinary gentleness, was answered in the negative. *Held* that, as there was involved, among other things, the question of what constitutes an insufficiency, and the jury may have thought there could be none unless the hole was so large and so connected with the traveled track that the horses were liable to step in or on it, and thereby become frightened, and as there were no findings as to its location and size, or as to how the horses were frightened thereby, the court was warranted in setting the verdict aside as defective.

2. So, too, the court was warranted in setting aside the verdict as defective on a finding

that at the time of the accident the team became more than momentarily unmanageable, there being no finding as to the distance the horses backed before coming in contact with a defect in the embankment at the end of the bridge, over which embankment, at a point further from the bridge, plaintiff was thrown, and the jury having been charged that, if the horses became unmanageable and remained beyond the control of plaintiff a length of time sufficient to regain control by ordinary care and skill on his part "before he was thrown out of the buggy," he could not recover.

Winslow, J., dissenting.

Appeal from circuit court, Dane county; R. G. Siebecker, Judge.

Action by Anton Schillinger against the town of Verona. Judgment for defendant on a special verdict. From an order setting aside the judgment and verdict and granting a new trial, defendant appeals. Affirmed.

The other facts fully appear in the following statement by CASSODAY, J.:

This action is to recover damages for personal injuries sustained by the plaintiff while attempting to drive over a bridge across Sugar river, in the defendant town, July 20, 1890. The complaint is in the ordinary form, and, among other things, alleges, in effect, that at the time there was a hole in the bridge, constituting an insufficiency or want of repair; and that the embankment constituting the approach to the north end of the bridge was too narrow, insufficient, and without railings or guards; and that his team became frightened at the hole, and backed off from such embankment, and caused the injury. The answer consisted of denials, and alleged contributory negligence. At the close of the trial the jury returned a special verdict to the effect that (1) the hole in the bridge was not an insufficiency or want of repair of the bridge at the time of the accident, naturally calculated to frighten horses of ordinary gentleness; (2) that the horses at the time in question were ordinarily gentle horses; (3) that the horses did become frightened at the hole in the bridge at the time in question; (4) that, if the hole was an insufficiency or want of repair naturally calculated to frighten horses of ordinary gentleness, then the defendant did not have actual notice thereof; (5) that the highway forming the approach to the north end of the bridge was in a condition of insufficiency or in want of repair; (6) but such insufficiency or want of repair was not the proximate cause of the accident and injury suffered by the plaintiff; (7) that the team, while in the plaintiff's charge at the time of the accident, did become unmanageable, (8) and more than momentarily unmanageable; (9) that the plaintiff, at the time of the accident, was not guilty of any want of ordinary care in driving and managing his team which directly contributed to produce the injury complained of; (10) that, if the plaintiff was entitled to recover, his damages were assessed at \$400. The court at first directed judgment to be entered on said special verdict in favor

of the defendant, and the same was entered accordingly May 23, 1892, and thereupon, and on motion of the plaintiff, at the same term, on the minutes of the judge, to vacate the judgment to set aside the verdict and to grant a new trial upon the exceptions to the special verdict, and upon the inconsistencies of the answers to the questions of the special verdict, and because the verdict was contrary to law and evidence, and the judgment inconsistent with the verdict; and upon hearing of said motion by the court it was "ordered and adjudged that the judgment for the defendant in said matter, entered May 23, 1892, be, and hereby is, vacated; that the verdict herein be, and hereby is, set aside, upon the ground that the special verdict in the case is inconsistent and defective; and that a new trial in the above-entitled action be, and hereby is, granted to the plaintiff on that ground." From that order the defendant brings this appeal.

Bashford, O'Connor & Polleys and Olin & Butler, for appellant. La Follette, Harper, Roe & Zimmerman, for respondent.

CASSODAY, J., (after stating the facts.) The highway at the place in question ran north and south across the Sugar river. The bridge over the river was 86 feet long, 16 feet wide, and 9½ feet above the water. The planks were 3 inches thick and 16 feet long, and the bridge was 14½ feet wide between the railings. The hole mentioned in the foregoing statement appears to have been formed by a large knot in the north end of the bridge having become loosened and knocked out, and then a sliver broken off from that plank, tapering from the place where the knot had been west until it came to a point; and which knothole appears to have been about 3 feet from the east railing, and the point mentioned appears to have reached to or nearly to the usual wheel track on the east side of the bridge. The witnesses who attempt to describe the hole seem to agree that it was the largest at the east end, where the knot had been, and that it gradually tapered to a point at the west end of it; but they differ considerably as to the size of the hole. The testimony as to the size of the hole seems to range from 2 to 4 inches wide, and from 6 to 24 inches long, and the verdict leaves the size of the hole otherwise undetermined. The approach up to the north end of the bridge was upon an embankment in the form of an inclined plane, built of stumps piled in and covered with dirt. The face of this embankment was very much narrower than the bridge. An architect and engineer who took the measurements, testified to the effect that where that embankment joined the bridge it was only 10 feet wide; and that it was 3½ feet from the east end of the plank to the embankment, and 2½ feet from the

west end of the plank to the embankment; that there was no railing along the east side of the embankment; that from the top of the embankment to the bottom on that side, perpendicularly, 1 foot from the bridge, it was 7 feet and 3 inches; that 3 feet from the bridge it was 7 and 5 inches; that 7 feet from the bridge it was 6 feet and 3 inches; that 10 feet from the bridge it was 5 feet and 4 inches; that 1 foot from the bridge the face of the embankment clear across was 5 inches lower than the surface of the bridge. Some of the witnesses give a somewhat different description of the embankment, and one, who seems to have measured it, said it was 12 feet wide close up to the bridge. The plaintiff testified, in effect, that on the afternoon of July 20, 1890, he, with his wife, got into a two-seated carriage or buggy, with springs under each end, but with only one seat in at the time, drawn by a span of horses, and drove south upon the highway in question, and up the embankment mentioned, and onto the bridge described, with the reins in both hands; that the horses went nicely until their heads were at or near the hole in the bridge mentioned, when they began to shy, and jumped to the left side as far as they could, and in the same moment, and as quick as they could, they went back; that as soon as they jumped he took the reins in his left hand, and told them to "get up," and reached with his right hand for the whip, but could not catch it,—that "it went like lightning;" that his wife screamed and hallooed; that as the horses went back the right hind wheel went off the plank first; that when that went down the other left hind wheel had to go down; that a little further, and then the buggy, horses, and everything, including himself and wife, went down the east side of the embankment described, when the plaintiff became unconscious. The horses thereupon appear to have started north with the carriage for about 12 rods, when they broke loose from it, and continued to run north until they were stopped. The man who stopped them took them back to the bridge, and he testified to the appearances at the bridge, to the effect that he found the plaintiff near the bridge; that he saw where the buggy had been dragged from the foot of the embankment to the place where it laid; that he saw the footprints of the horses on the edge of the embankment, about half way from the top to the bottom, and about 6 or 7 feet from the north end of the bridge; that he saw a few pieces of short boards and a broken whip at the foot of the embankment, about 6 feet north of the north end of the bridge; that he saw what appeared to be wheel marks on the top of the embankment; that such wheel marks left the bridge about 6 or 8 inches east of the west wheel track, and run in a semicircle or curve towards the east edge of the embankment; that such wheel marks or tracks appeared to have been

made by the two off wheels of the buggy, and were not more than 7 feet from the north end of the bridge; that he did not see any track or mark made by either of the near wheels; that there were two tracks there at that time, but they were apparently made by the two off wheels; that he saw no tracks to match, made by the near wheels. If this version of the occurrence is correct, then it is manifest that the near hind wheel must have gone over the embankment about the time the fore wheels left the bridge; certainly before the horses left the bridge. A witness on the part of the defendant testified to the effect that he saw the plaintiff from a distance when he drove onto the bridge; that when he got a little ways onto it his horses backed up and turned right square off, and went up the road; that it looked to him, from the distance, as though they backed perhaps to the edge of the embankment, got their hind feet off, and then turned and went up the road; that upon going to the bridge he saw a track where the buggy backed off the embankment; that the near front wheel had been cramped so hard that it had partly slid; that the buggy, and particularly the hind wheels, appeared to have gone down the embankment very nearly square; that the left fore wheel had been cramped,—had been partly sliding,—so that it shoved the dirt up, and made a very plain track; that the footprints of the horses were at the edge of the embankment, but that there were no tracks from there down in the mud; that he saw prints in the mud, as though something had fallen down the embankment, and packed down the mud, and that that was somewhere from 25 to 30 feet north of the north end of the bridge. If this version of the occurrence is correct, then it would seem that the buggy did not turn and go over the embankment until it reached a point 25 or 30 feet north of the north end of the bridge. Other witnesses give different versions as to the distance from the north end of the bridge to the place where the buggy apparently went over the embankment. The question is left wholly undetermined by the special verdict. So the distance from the north end of the bridge to the hole in the bridge mentioned is left undetermined by the special verdict. Several of the witnesses put it about 30 feet. Such are the general outlines of the evidence upon which the special verdict is based. The several findings of the jury constituting that verdict are, in effect, given in the foregoing statement. As there indicated, the trial court set aside that verdict, and granted a new trial on the ground that it was "inconsistent and defective."

The rule is firmly settled by repeated decisions that the granting of a new trial is very much in the discretion of the trial court, and that its order granting the same will not be reversed unless there clearly ap-

appears to have been an abuse of such discretion. *McLimans v. Lancaster City*, 57 Wis. 297, 15 N. W. Rep. 194; *Seaman v. Burnham*, 57 Wis. 568, 16 N. W. Rep. 38; *Evans v. Rugee*, 63 Wis. 31, 23 N. W. Rep. 24; *Smith v. Champagne*, 72 Wis. 480, 40 N. W. Rep. 398; *Schraer v. Stefan*, 80 Wis. 653, 50 N. W. Rep. 778. The only exception to this rule is where it affirmatively appears upon the record that such order was based upon a misapprehension of the law. *Smith v. Dragert*, 61 Wis. 223, 21 N. W. Rep. 46; *Mullen v. Reinig*, 68 Wis. 410, 32 N. W. Rep. 293; *Warner v. Michelstetter*, 77 Wis. 674, 47 N. W. Rep. 181. The question recurs whether such misapprehension of the law does affirmatively appear in this record. One of the grounds upon which the order was granted is that the findings of the jury are inconsistent. Counsel for the defendant claims that the court erroneously held that the first three findings were inconsistent. He contends that, although the plaintiff's horses were at the time ordinarily gentle, and did become frightened at the hole in the bridge, yet that such hole at the time might not have been an insufficiency or want of repair naturally calculated to frighten horses of ordinary gentleness; in other words, horses of ordinary gentleness may become frightened at an object not constituting an insufficiency or want of repair in the highway naturally calculated to frighten such horses. This may be conceded. *Olson v. City of Chippewa Falls*, 71 Wis. 558, 37 N. W. Rep. 575; *Railway Co. v. Taylor*, 104 Pa. St. 306; *Railway Co. v. Wynant*, 114 Ind. 525, 17 N. E. Rep. 118. But another ground upon which the order was granted is that the verdict was defective. The first question submitted to the jury reads: "Was the hole in the bridge an insufficiency, or a want of repair of the bridge, at the time of the accident, naturally calculated to frighten horses of ordinary gentleness?" To answer that question in the affirmative it became necessary for the jury to find, not only that the hole was an object naturally calculated to frighten horses of ordinary gentleness, but also that it was an insufficiency or a want of repair of the bridge; in other words, it comprised a mixed question of law and fact. Thus, in *Foshay v. Town of Glen Haven*, 25 Wis. 288, the trial court charged the jury as a matter of law "that an object existing within the limits of the highway, but leaving the traveled path unobstructed, so that the traveler is safe from collision with it, is not an insufficiency in the way, merely because it exposes the traveler's horse to become frightened at the sight of it, and the town in such case would not be liable;" but this court reversed the judgment by reason of such error, and held as a matter of law that "objects within the limits of a highway, naturally calculated to frighten horses of ordinary gentleness, may constitute such defects in the way as to render the town lia-

ble, even though so far removed from the traveled path as to avoid all danger of collision." *Bloor v. Town of Delafield*, 69 Wis. 273, 34 N. W. Rep. 115. This principle of law was nowhere given to the jury in charge, nor was it requested. The court read to the jury the statute giving damage "by reason of the insufficiency or want of repair of any bridge," etc., (section 1339,) and charged them "that this statute had given a remedy against towns where injury results by reason of such insufficiency or want of repair;" and then submitted to them the mixed question of law and fact quoted. The jury may have thought, as the trial judge did in *Foshay v. Town of Glen Haven*, supra, that there could be no insufficiency or want of repair in the bridge, within the meaning of the statute, unless the hole was so large and so connected with the traveled track that horses were liable to step in or upon it, and thereby to become frightened. It is entirely a matter of conjecture whether the horses did step in or upon the hole and become frightened therefrom, or whether they became frightened by seeing the water glimmer through the hole. These things might depend upon the size of the hole and the place where the horses were, with reference to it, when they began to shy and jump,—questions, as we have seen, left undetermined by the verdict. May not the trial judge, in making the order, have reached the conclusion that, in the absence of more specific instructions upon the principle of law mentioned, the jury wrongly determined the legal proposition embraced in the question? And if he did so conclude, was it not within the province of his discretion to set aside the verdict on that ground? Was not the trial court justified in holding that the question, as submitted, was misleading, and the answer to the same defective? We cannot say that it appears affirmatively upon the record, in the particulars mentioned, that the order setting aside the verdict was based upon a misapprehension of the law.

By the eighth and ninth findings the jury found, in effect, that at the time of the accident the team became more than momentarily unmanageable. Upon this question the court charged the jury that, "if * * * the horses became unmanageable and uncontrollable, and remained beyond the control of the plaintiff a length of time sufficient to regain control by ordinary care and skill on his part before he was thrown out of the buggy, then he cannot recover in this case." Under this instruction the conclusion of the jury was necessarily based upon the plaintiff's testimony as to the conduct of the team, the distance of the hole from the north end of the bridge, the nearness of the horses' heads to the hole when they first became frightened, the length of the carriage and team when taken together, the fact whether the carriage went over the embank-

ment within 7 feet of the end of the bridge, as indicated by portions of the evidence, or 25 or 30 feet north of the bridge, as indicated by other portions of the evidence, or at some intermediate point, as indicated by still other portions of the evidence; in other words, this particular finding is, in effect, a general verdict upon this branch of the case. The question recurs whether it affirmatively appears upon the record that this order setting aside such a finding as defective is necessarily based upon a misapprehension of the law applicable. Manifestly it was based very largely, if not wholly, upon the view which the trial judge took of such disputed and undetermined facts. Besides, the finding is not limited to the time when the carriage came in contact with the defective embankment. On the contrary, the portion of the charge quoted extended the question of such unmanageableness down to the time when the plaintiff "was thrown out of the buggy;" that is to say, when it went over the embankment. It is to be remembered that the jury answered the sixth question to the effect that the approach to the north end of the bridge was insufficient, or in want of repair. As indicated, it was much narrower than the bridge, and only 10 feet wide; that it was $3\frac{1}{2}$ feet from the east end of the plank to the embankment, and with no railing on that side; that 1 foot from the bridge the face of the embankment clear across was 5 inches lower than the surface of the bridge. Thus it appears that when the hind wheels of the carriage struck the embankment they at once came in contact with an admitted defect in the highway. If the carriage and horses together were 18 feet in length, and the horses were frightened by seeing the glimmer of the water through the hole, which, according to some of the witnesses, they might have done when their heads were 3 or 4 feet from it, then it is manifest that they only had to back 11 or 12 feet before the carriage came in contact with the defect. If their heads were right over the hole at the time they became frightened, then it would seem that they only had to back some 15 feet before the carriage came in contact with the defect. True, the carriage and horses, taken together, may not have been as long as mentioned; but, in any view of the evidence, it would seem that the horses could not have backed more than from 11 to 18 feet before the carriage came in contact with an admitted defect in the highway.

The question recurs whether the jury should have been limited to that period in determining whether the team became more than momentarily unmanageable, or whether that question was properly left unlimited, and by the charge of the court expressly extended to the time when the plaintiff was thrown out of the buggy. The rule seems to be pretty firmly established "that a horse is not to be considered uncontrollable that

merely shies or starts or is momentarily not controlled by his driver." *Houfe v. Town of Fulton*, 29 Wis. 308; *Titus v. Inhabitants of Northbridge*, 97 Mass. 258; *Ring v. City of Cohoes*, 77 N. Y. 87. So, in *Babson v. Inhabitants of Rockport*, 101 Mass. 93, it was held "that, if there was only a momentary loss of control, and the control would have been instantly regained if the plaintiff's carriage had not come in contact with the place where the way was defective, then the plaintiff could recover." To the same effect, *Stone v. Inhabitants of Hubbardston*, 100 Mass. 49; *Cushing v. Bedford*, 125 Mass. 528; *Wright v. Templeton*, 132 Mass. 49. This last case was somewhat similar to the case at bar, and it was "held that the defendant had no ground of exception to the submission to the jury of the question whether the plaintiff's loss of control over the horse was momentary only, with an instruction that, if the horse backed sixty feet or more, the plaintiff could not recover." *Olson v. City of Chippewa Falls*, 71 Wis. 558, 37 N. W. Rep. 575, is quite similar to the last case cited. In our judgment, the trial court was warranted in holding that the ninth question, as submitted, was defective. Certainly it does not affirmatively appear upon the record that the order setting it aside was based upon a misapprehension of the law. Of course, the manner of submitting that question had a controlling influence upon the jury in their answer to the seventh question submitted. The order of the circuit court is affirmed.

WINSLOW, J. I dissent herein because it seems to me that the special verdict is a consistent and complete verdict, which disposes of all the issues in the action. I shall not elaborate my views, but will simply say that after considerable examination and thought I find myself unable to perceive the defects in the verdict which the court finds to exist. To my mind, it tells a plain and perfectly consistent tale, all the facts of which are supported by sufficient evidence; and it seems to me that under the law laid down in *Jackson v. Town of Bellevue*, 30 Wis. 250, the defendant is entitled to judgment upon the verdict.

FARMERS' & MERCHANTS' BANK OF AINSWORTH v. UPHAM et al.

(Supreme Court of Nebraska. June 30, 1903.)
ACTION ON NOTE—FAILURE OF CONSIDERATION—PLEADINGS—INSTRUCTIONS.

1. In an action upon a promissory note, the defense was that the note was given for a flock of sheep, which were warranted to be sound, but which were diseased, by reason of which the consideration failed, and the warranty was broken. The court, at the request of the defendants, gave three instructions, consecutively, in which it is said "that a failure of consideration, breach of warranty, or fraud"

constitutes a valid defense, etc. *Held*, that the element of fraud was not in issue in the case, and the instructions were erroneous and prejudicial.

2. Instructions must be applicable to the issue made by the pleadings.

(Syllabus by the Court.)

Error to district court, Valley county; Harrison, Judge.

Action on a promissory note by the Farmers' & Merchants' Bank of Ainsworth against Clinton Upham and A. B. Skelton. Defendants had judgment, and plaintiff brings error. Reversed.

E. M. Coffin and Thomas Darnall, for plaintiff in error. El. J. Clements and C. A. Munn, for defendants in error.

MAXWELL, C. J. This is an action upon a promissory note for the sum of \$1,225, payable to the order of D. Collins. The note was duly indorsed and transferred to the plaintiff. The defendants' answer is as follows: "Come now the defendants, and, for answer to the petition of the plaintiff herein, admit that they made, executed, and delivered to Dennis Collins & Co. the notes described in plaintiff's petition, and that said notes are now past due and unpaid. (2) The defendants deny that the plaintiff is the owner of said notes, or ever has been, and allege that said notes are now, and ever have been, the property of Dennis Collins & Co., the payees of said notes, and that the plaintiff did not purchase said notes before they were due. (3) The defendants further allege that said notes were given for a flock of sheep purchased by the defendant Clinton Upham of Dennis Collins & Co., and that said Dennis Collins & Co., in making said sale, represented to the defendant Clinton Upham that they were well acquainted with the diseases of sheep, and that all of said sheep so purchased were entirely free from disease; and the defendant, being unacquainted with the diseases of sheep, and relying on said representations of Dennis Collins & Co., purchased said sheep. (4) Said sheep were not free from disease at the time Clinton Upham purchased the same, but were diseased with 'scab' and other diseases, the names of which defendants do not know, but that all of said diseases were contagious, and that all of said sheep died of said diseases, and that, therefore, the defendants never received any consideration whatever for said notes, and that said sheep were absolutely worthless, to defendants' damage \$2,500. (5) That defendant Upham spent, in time and money, in doctoring and caring for said sheep, the sum of \$500. (6) Wherefore, the defendants pray judgment that the plaintiff take nothing in this action, that the same may be dismissed, and for costs." The reply admits that the note was given for a flock of sheep, but denies all other allegations of the answer. On the trial of the cause the jury

returned a verdict of \$100 in favor of the defendants. This, however, was remitted, and the action dismissed.

The court, at the request of the defendants, instructed the jury as follows: "No. 5. You are instructed that a failure of consideration, breach of warranty, or fraud constitutes a valid defense to a suit on a promissory note, when brought by the original holder or payee thereof to the extent of the injury resulting from said failure of consideration, or to the extent of the damages arising from said breach of warranty, or growing out of said fraud. No. 6. A bona fide holder of collateral notes can recover only the amount of his interest therein, in an action brought by said holder, when there is a failure of consideration, breach of warranty, or fraud of the original holder or payee, which would avoid all of said notes, over and above the interest of said bona fide holder. No. 7. Where no defense is established, the holder of negotiable promissory notes as collateral security may sue the makers thereof, and recover a judgment for the full amount due on said collateral notes; and he will hold the amount recovered on said judgment, over and above the interest of said holder, as trustee for the party who deposited said notes as collateral security. But failure of consideration, breach of warranty, or fraud of the original payee is a good defense to the amount due on said notes, over and above the interest of said holder, even when the plaintiff is a bona fide holder." These instructions, given consecutively, make fraud a prominent cause of defense in the case, although it was not in issue. We cannot tell what influence such instructions would have on the jury. They cannot be said to be harmless. The instructions were calculated to lead the jury to believe that, in the view taken by the court, there might be fraud in the transaction. The instructions must be applicable to the issue made by the pleadings. The judgment is reversed, and the cause remanded for further proceedings. The other judges concur.

JONES NAT. BANK et al. v. PRICE et al.
(Supreme Court of Nebraska. June 29, 1893.)
STATUTE OF FRAUDS — AGREEMENTS RELATING TO
LAND — FORECLOSURE — RESALE.

A parol contract between a plaintiff and defendant provided that the plaintiff should enter his voluntary appearance to a suit then pending, to foreclose a mortgage on real estate owned by him, and waive the nine-months stay of sale of the premises, allowed him by law, in consideration of which defendant should bid in said premises at the sale under the foreclosure proceedings at the amount of the decree, interest, and costs, resell the same at private sale, and pay to plaintiff the amount realized in excess of the bid. *Held*, a valid contract, and not within the statute of frauds. (section 3, c. 32, Comp. St.)

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Seward county; Bates, Judge.

Suit by Allen and Louisa Price against the Jones National Bank, H. T. Jones, and M. A. Butler. Judgment for plaintiffs. Defendants bring error. Conditional order.

Ed. P. Smith, for plaintiffs in error. Geo. H. Terwilliger and R. P. Anderson, for defendants in error.

RAGAN, C. Allen and Louisa Price sued the Jones National Bank, H. T. Jones, its cashier, and M. A. Butler, in the district court of Seward county, and in their petition alleged that on the 18th day of September, 1886, the plaintiffs were the owners of certain real estate in the city of Seward, Neb., and occupied the premises as a residence. That they were at that time incumbered by a mortgage given by the plaintiffs to the defendant Butler to secure the payment of \$2,000, with interest at the rate of 10 per cent. from September 23, 1885, and due six months afterwards. That, although the note and mortgage were made payable to Butler, they were in fact given to secure the payment of money borrowed of or through the defendant the Jones National Bank. That the plaintiffs had paid the defendants interest on the loan at the rate of 15 per cent. That the defendants had represented to plaintiffs that the money due on the note and mortgage was due to the Jones National Bank, and that plaintiffs should have additional time for the payment of said note and mortgage, provided the interest thereon was promptly and fully paid. That on the 23d of September, 1886, Butler assigned the note and mortgage to one Samuel Grey, and on the 18th day of September, 1886, a petition was filed, in the name of said Grey, in the United States circuit court, in the city of Omaha, Neb., against the plaintiffs, for the purpose of obtaining a judgment against plaintiffs on said note and mortgage, and decree of foreclosure and sale of said mortgaged premises. That at that time interest on said mortgage had been fully paid. That subsequently to the filing of the said petition in the United States court the defendant Jones made a verbal agreement with the plaintiffs that if they would acknowledge service of summons, and waive their right to a stay of order of sale in the proceedings in the federal court, the plaintiffs should be held exempt from the payment of any fees whatsoever for the service of said summons; that no attorneys' fees should be taxed against the said plaintiffs, or paid out of the proceeds of the sale of the aforesaid property under said foreclosure suit; and that he (Jones) would buy in the said premises, at the sale thereof, for the actual amount necessary to satisfy the amounts due on said note and mortgage, and necessary costs of suit in said court; and that he (the said defendant Jones) would then sell

said premises at private sale, and pay the plaintiffs the excess of the proceeds received at such private sale over and above the amount of decree, interest, and costs, that might be rendered in said suit in said federal court. That, in pursuance of this agreement, plaintiffs acknowledged service of summons, and entered their voluntary appearance in said suit in the federal court, and agreed with the defendant Jones to waive their stay of the order of sale in said case. That on the 5th day of November 1886, a decree was rendered in the federal court, in said case, for the sum of \$2,050 and costs of suit, with a decree of foreclosure and order of sale. That the plaintiffs, in pursuance of their agreement with Jones, waived their stay of the order of sale, and on the 15th day of January, 1887, said premises were duly sold under the decree of the said federal court, and bid in by said defendant Jones at the sum of \$2,391.31, and, by officers of said court, said premises were duly conveyed to the said defendant Jones. That, out of the purchase price of said real estate, said Jones paid out an attorney's fee of \$205, taxed as part of the costs in said suit. That on the 4th day of May, 1887, Jones sold and conveyed the said premises to another party, and received for said premises the sum of \$2,700 in cash. That the rental value of the premises at the time plaintiffs waived their stay of order of sale under said decree was \$20 per month, and that at the time of the bringing of the suit in the federal court the said defendant the Jones National Bank and H. T. Jones were the true owners of the note and mortgage foreclosed in the name of said Grey, and that the assignment to said Grey was then intended to place the same under the jurisdiction of the federal court, and with intent to defraud the plaintiffs, and that the agreement made between the plaintiffs and the said Jones was not made in good faith on the part of defendants, but with intent to mislead and defraud the plaintiffs out of their right to the possession and use of said premises pending the stay of the order of sale. That there was due to the plaintiffs from the defendants the sum of \$513.69, and interest thereon from the 4th day of May, 1887. This sum, the plaintiffs alleged, was composed of the \$205 attorney's fee paid by Jones out of the proceeds of the sale of said land, contrary to his agreement with plaintiffs, and the further sum of \$308.69, the difference between the proceeds of the sale received by Jones, and the amount of the decree, interest, and costs, including the attorney's fee of the case in the federal court. The prayer was for judgment against the defendants for \$513.69, and 7 per cent. interest from the 4th day of May, 1887, and costs of suit. Judgment and verdict for the plaintiffs, and the defendants bring the case here for review.

The first error assigned is that the peti-

tion does not state a cause of action, and this error is predicated on the theory that the contract alleged in the petition is void under the statute of frauds. Section 3, c. 32, Comp. St., provides: "No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered, or declared, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." The question, then, is whether the contract set out in the petition is within this statute. In *Byers v. Locke*, 93 Cal. 493, 29 Pac. Rep. 119, it is said: "An agreement that the defendant should provide the necessary money to redeem the property of the plaintiff, which had been sold under a foreclosure, and that, for the purpose of enabling defendant to do so, plaintiff would convey the premises to the defendant, to be held by him until such time as they might be sold, is not an agreement for the sale of land, or any interest therein." In *Miller v. Kendig*, 55 Iowa, 174, 7 N. W. Rep. 500, it is said: "A parol agreement by the grantee of land that, in case he sells the land for more than the price paid, one-half the excess shall be paid to the grantor, does not create an interest in the real estate, and is not within the statute of frauds." In *Hess v. Fox*, 10 Wend. 437, it is said: "An agreement by the mortgagee to sell mortgaged premises, the equity of redemption in which is released by the mortgagor, and, after deducting the amount due, he is to pay the surplus of such sale to the mortgagor, is not void, as within the statute of frauds, and, after the sale of the premises for more than enough to satisfy the debt due to the mortgagee, the mortgagor may maintain assumpsit for the surplus." In *Price v. Sturgis*, 44 Cal. 591, it is said: "A verbal agreement, made by the grantee when he buys land, and receives a deed therefor, to pay the grantor a further sum of money, as a part of the price, out of the proceeds of the sale of the land, when he sells it, is valid, and the statute of frauds does not require it to be in writing. Such a contract is not for the conveyance of land, but for the payment of a certain sum of money upon the happening of a certain event." In *McQuat v. Cathcart*, 84 Ind. 567, it is said: "A contract whereby the mortgagee agrees that, in consideration that the mortgagor will permit the foreclosure, and pay the costs and attorneys' fees, he will bid in the land for the full amount of the debt, is not within the statute of frauds, and will be enforced." The contract upon which this action is based is not one for the sale of land, or for the creation of any interest therein. To enforce it would not be to create a trust or power over or concern-

ing lands, or relating thereto. This action is merely for the payment of the money agreed upon as a consideration for which plaintiffs entered their voluntary appearance, and waived their defense to the foreclosure suit, in the federal court, and surrendered their possession of the premises for nine months, by not asking a stay of sale for the time allowed them to redeem from decree. It is not every agreement relating to the sale of lands that is within the statute of frauds. Only such agreements are within the statute as are intended to create an interest in lands. In the case at bar the plaintiffs did not actually convey the land to the defendants, but it is alleged in the petition that the defendants were in fact the owners of the mortgage being foreclosed; that it was tainted with usury; and that, in consideration of the promises of the defendants, plaintiffs entered their appearance to the foreclosure suit, and consented that decree might be taken as prayed for. We do not see that this case is different in principle from those cited above. The petition states a cause of action, and the contract set out therein is not within the statute of frauds.

The second error alleged is that the court erred in permitting the evidence to go to the jury that the mortgage foreclosed in the federal court was tainted with usury; that neither Butler nor Grey was ever in fact the owner of the mortgage, but that the same was at all times owned by the Jones National Bank. The ground of the objection to this testimony is that it assailed the findings and decree of the federal court in the foreclosure suit. We do not so regard the effect of the testimony. No effort was made, either in the pleadings or evidence, by the plaintiffs below, to contest the jurisdiction of the federal court or to in any manner impeach the decree rendered by it. In fact, the bringing of this action by the plaintiffs is a ratification by them of everything done by that decree. It was competent for the parties to show that the original note and mortgage foreclosed in the federal court were tainted with usury; that they were in fact owned by the defendants, and not by Grey, the man in whose name the foreclosure suit was brought. These facts tended to corroborate the claim of the plaintiffs that the contract was made with them by the defendants as pleaded. This evidence tended to show a consideration and a reason for the making of the contract on the part of the defendants.

The third error assigned is that the plaintiff Mrs. Price was permitted to testify that her husband had told her of the agreement he had made with the defendant Jones. If this evidence was hearsay, it remains to be said that Mrs. Price was examined in chief by her counsel, and nothing was asked her in that examination as to what, if anything, her husband had told her as to the contract he had made with Jones. On her

cross-examination the counsel for plaintiffs in error asked her these questions: "Question. Harry [Jones] told you, as I understand, that he wanted his money back, and that was all he wanted, and you should have the balance? Answer. Yes, sir. Q. That is, the money he wanted back, and the interest? A. I believe so. Q. You was to have the balance? A. Yes, sir. Q. Mr. Price told you that same thing? A. It was talked over. Q. Did he tell you that same thing before that,—that all Harry wanted was to get their money back? A. That was what I understood all the time. Q. The overplus you were to have? A. Yes, sir." On re-direct examination of this witness, she was then asked: "Q. Your husband has told you about this agreement? A. He has told me. Yes, sir. Q. Mr. Price did and transacted all this business for you? A. Yes, sir; as my husband. Q. State to the jury what Mr. Price told you, if anything, as to the agreement between him and Harry Jones, as to you receiving any balance that might be remaining out of the money received from the sale of the property after his debt was paid. A. He told me the place was to go to sale, and to sell it, and all over and above the mortgage, that the place brought, would be ours." This is the substance of the testimony, to the introduction of which objection was made by the plaintiffs in error; and inasmuch as they called out this matter themselves, in their cross-examination of the witness, they are in no position to object to it now as incompetent. Furthermore, the evidence excepted to, under the circumstances, was not prejudicial to the plaintiffs in error, if hearsay.

The final contention of the plaintiffs in error is that the verdict is contrary to the evidence. The evidence satisfies us that the mortgage foreclosed in the federal court was at the time, in fact, owned by the defendants; that it was assigned to Grey, and foreclosed in his name, without his knowledge, and for the purpose of cutting off the defense of usury, with which the mortgage was tainted, and which defense the plaintiffs in error feared would be introduced if suit were brought in the state court; that the money paid into the federal court for the purchase of the land, except the costs of the case, was returned to plaintiffs in error. As to whether the contract set out in the petition was actually entered into between plaintiffs in error and defendants in error, the evidence is conflicting. It was a question fairly submitted to the jury. They have found in their verdict that such a contract was made, and the evidence supports that finding, and we cannot disturb it. The verdict, however, is too large, by \$203 and interest, the amount of the attorney's fee taxed by the federal court as part of the costs in the foreclosure case. Defendants in error have permission to file in this court, in twenty days, a remittitur of

\$285.86, as of date of the judgment in the district court, and thereupon the judgment of the district court will be affirmed. Should such remittitur not be filed, the judgment will be reversed, and the case remanded. Judgment accordingly. The other commissioners concur.

BROWN et al. v. FEAGINS.

(Supreme Court of Nebraska. June 29, 1893.)
FORCIBLE ENTRY AND DETAINER — WHEN LISS —
PARAMOUNT TITLE.

1. An action for the forcible detention of real property may be maintained by one whose complete possession thereof has been ended by the wrongful entry of another, even though such entry was made under claim of a paramount title.

2. A person who claims the paramount title to real property in the undisputed possession of another cannot, by surreptitiously obtaining possession thereof, place such former possessor at any disadvantage as to the assertion of his rights or the enforcement of his remedies in respect thereto.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Ferguson, Judge.

Action by Leonard B. Feagins against David and Frank Brown. Judgment for plaintiff. Defendants bring error. Affirmed.

O. A. Baldwin, for plaintiffs in error. Connell & Ives and John Q. Burgner, for defendant in error.

RYAN, C. This action was begun before a justice of the peace of Douglas county by Leonard B. Feagins against David and Frank Brown, the complaint reciting that on or about January 23, 1889, the said Browns, unlawfully, forcibly, and with strong hand, did enter, and thenceforward have held possession of, the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 31, township 15 N., range 10 E. of the sixth P. M., and that the said Feagins, at the time of said entry, and ever since, had the right of possession of the said premises. Service of notice to quit was also duly averred in said complaint. A trial of this action for the forcible entry and detention of the aforesaid real property resulted in a verdict and judgment in favor of Feagins, whereupon the defendants appealed to the district court of said county. A trial in that court resulted as before, and the Browns bring the case into this court for review upon petition in error.

The evidence presented the facts with but little dispute; certainly, none of serious importance. For some three years immediately preceding January 24, 1889, George Hill had claimed the ownership of the property in dispute, and, incident to such claim, had maintained about the said premises a fence of rather doubtful efficiency. During the pasturing season of the year 1888, Feagins, as Hill's tenant, used the said real property for grazing purposes, for which alone it was suitable, removing the cattle when the grass

became unfit for use. About Christmas of the year 1888, a gap was made in the inclosure by the falling of a portion of the fence. The posts and wires of which this portion had been constructed were afterwards covered by snow, so that any person so disposed could easily drive a team through the gap into the inclosure. The plaintiffs in error, having previously procured a quitclaim deed from the holder of a tax deed upon the said premises, drove into the inclosure, over the fallen portion of the fence above mentioned, on January 24, 1889, and with the help of two other persons, on the same day, erected a shanty, which said Browns at once occupied as a place of residence. Based upon this possession, reinforced by the claim that their quitclaim deed raised such question of title as could not be investigated in this form of action, the plaintiffs in error resist Feagin's contention for restoration to his former possession of the property above described.

This form of action involves merely the present right of possession of the property described in the complaint. This action may be maintained by any person who is entitled to possession, as against another, who has unlawfully and forcibly obtained possession, or whose possession, originally rightful and peaceable, is afterwards forcibly and unlawfully held. Section 1019, Code Civil Proc. Under this section this court has held that this action being a civil remedy to recover the possession of premises unlawfully, and with force, withheld from the plaintiff, it will be sufficient to charge the forcible detainer; that the party unlawfully in possession refuses to vacate the premises on lawful notice so to do. *Estabrook v. Hateroth*, 22 Neb. 281, 34 N. W. Rep. 634. In the case under consideration, lawful notice to quit possession was served upon both Browns, who refused to vacate the premises. Their right to retain possession is therefore to be considered solely with reference to the nature of their possession, as against the defendant in error. There is no ground for dispute that by reason of occupancy of the premises, and the continued inclosure thereof, Hill—and under him his tenant—had exclusive possession previous to January 24, 1889. In respect to this, property the assertion of such possession was all that, in the condition of the disputed property, it was capable of, and, as against all the world, the complete possession was held by Feagina. With full knowledge of all the facts in this matter, plaintiffs in error, at the time last mentioned, taking advantage of an accidental breach in the inclosure, entered and took possession, which, upon due notice, they refused to surrender to the party dispossessed. The defendant in error, upon such refusal, had the right to be reinstated in his possession, for whatever that possession may have been worth. If plaintiffs in error, out of possession, de-

sired to test the right of the defendant in error as to the disputed property, an action of ejectment offered the proper remedy. That form of action in which only the right of possession can be tested cannot be made available for such purpose. And, having obtained possession in the manner above indicated, the interlopers cannot oust the jurisdiction of a justice of the peace of the proper county to re-establish the interrupted rightful possession by the assertion of a superior title. Upon this theory the cause was tried in the district court, where, upon the facts, the verdict was in favor of the defendant in error. This verdict was right, and the judgment thereon is therefore affirmed. The other commissioners concur.

LAFLIN v. SVOBODA.

(Supreme Court of Nebraska. June 29, 1893.)

TRESPASSING ANIMALS—PASTURING—LIABILITY FOR DAMAGE—REMEDIES.

1. Under the herd law, (Comp. St. c. 2, art. 3.) a person having the custody of cattle for the purpose of depasturing the same, although without compensation from the general owner, is liable for damage done by them upon the cultivated lands of another.

2. In such case the person injured is not confined to the lien provided by statute, but may maintain an action for damages.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Johnson county; Appelget, Judge.

Action by F. B. Svoboda against L. H. Laflin. Judgment for plaintiff. Defendant brings error. Affirmed.

D. F. Osgood, for plaintiff in error. Chamberlain Bros. & Rood, for defendant in error.

IRVINE, C. The defendant in error brought this action against the plaintiff in error to recover damages for injury to crops growing on land of the defendant in error, committed by cattle alleged in the petition to be those of plaintiff in error, and cattle of which he had the possession. There was a verdict and judgment in favor of the defendant in error, the plaintiff below. The errors assigned relate to the giving of certain instructions by the court, and the refusal of instructions asked by the plaintiff in error. The instructions given by the court were based upon the theory that the plaintiff in error was liable for injuries committed, not only by his own cattle, but by cattle of others, under his custody. The question presented is the construction of the herd law, (chapter 2, art. 3, Comp. St.) By section 1 of this article it is provided "that the owners of cattle, horses, mules, swine, and sheep, in this state, shall hereafter be liable for all damage done by such stock upon the cultivated lands in this state, as herein provided by this act." It appears from the evidence that a portion, if not all, of the cattle which committed the trespass complained of, were

not owned by the plaintiff in error, but were permitted to be pastured upon his land without compensation to him. Under this state of facts the plaintiff in error contends that the rule of liability as between bailor and bailee applies, and that, the bailment of the cattle to the plaintiff in error being gratuitous, he would not, in any event, be liable except for gross negligence on his own part. In urging this point the plaintiff in error confuses the relations existing between bailor and bailee with those existing between the bailee and third persons, and the doctrine referred to has no application to this case.

It is also urged that the defendant in error, by surrendering possession of the cattle, and so waiving the lien created by section 2 of the herd law, lost his remedy. This is not true, because, by section 11 of the herd law, it is provided that nothing in that law contained shall be so construed as to prevent the person injured from maintaining an action for damages. *Keith v. Tilford*, 12 Neb. 271, 11 N. W. Rep. 315.

The most serious question in the case is whether the word "owner," in the statute, is to be construed by restricting the term to the general owner, or by extending it to persons in possession under some special title, and having the custody of the stock. It was held in *Delaney v. Erickson*, 10 Neb. 492, 6 N. W. Rep. 600, that, as to trespasses by cattle upon open, uncultivated lands, the common law of England is not applicable to Nebraska. But in *Keith v. Tilford*, supra, this case was explained, and restricted to uncultivated lands; and it was said that where growing or standing cultivated crops are injured the owner has his remedy, and that the first section of the herd law conferred no right in the people of the state, which they did not possess before its enactment. That section must therefore be deemed declaratory of the common law in regard to trespasses upon cultivated lands. Indeed, the common law is stated almost in the words of the herd law, except that it was not restricted to cultivated lands; and at common law the same double remedy existed, to wit, by distress or by action. 3 Bl. Comm. 211. Under the common law it was frequently held that an agister or depasturer is liable for trespasses committed by cattle in his possession, and in such case many authorities hold that the owner is not liable, especially in trespass. *Rossell v. Cotton*, 31 Pa. St. 525; *Tewksbury v. Bucklin*, 7 N. H. 518; *Kennett v. Durgin*, 59 N. H. 560; *Marsh v. Jones*, 21 Vt. 378; *Ward v. Brown*, 64 Ill. 307. In *Weymouth v. Gile*, 72 Me. 448, it was contended, as here, that there was no contract of agistment, but that the owners took the cattle from defendant's close at night, and returned them in the morning. Nevertheless, it was held that the depasturer was liable. In *Smith v. Jaques*, 6 Conn. 530, in *Barnum v. Vandusen*, 16 Conn. 200, and in *Sheridan v. Bean*, 8 Metc. (Mass.) 284, statutes very

similar to ours were construed, and the word "owner" held to include depasturers having the custody of the cattle.

The instructions given by the court were correct, and those asked by the plaintiff in error were properly refused. Judgment affirmed. The other commissioners concur.

BARNETT v. PRATT.

(Supreme Court of Nebraska. June 29, 1893.)

NOVATION — ACTION ON CONTRACT — PAROL EVIDENCE—STATUTE OF FRAUDS.

1. A. brought suit against B., alleging that C. was indebted to A. for wages; that B. purchased C.'s business, out of which the debt arose, and in part consideration agreed to pay C.'s debt to A.; that this agreement was omitted from an instrument in the form of a receipt, set out in the petition, and containing other terms of the transfer; and that the omission was to prevent a third person from learning of the promise. Held, that the petition stated a cause of action.

2. Such a promise, omitted from a written agreement, may be proved by parol, where the promisee was induced to execute the writing on the faith of the oral promise.

3. Such a promise is not within the statute of frauds.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Tibbets, Judge.

Action by Burton Barnett against Thomas H. Pratt. Judgment for defendant. Plaintiff brings error. Reversed.

Thos. C. Munger, for plaintiff in error.
J. A. Marshall and J. L. Caldwell, for defendant in error.

IRVINE, C. This action was begun by the plaintiff in error against the defendant in error in the district court of Lancaster county. The petition alleges, in substance, that the plaintiff had been in the employ of one William J. Pratt, as a laborer in his livery stable, and that about September 26, 1890, William J. Pratt was indebted to plaintiff, for wages, in the sum of \$125.93; that, about that date, William J. Pratt sold said livery stable to the defendant, who, in part consideration of said purchase, agreed with William J. Pratt that he would pay to the plaintiff said debt; that, at the time of the sale, there was executed by William J. Pratt an instrument, in writing, as follows: "Received from Thomas Pratt three hundred and fifty dollars, cash in hand, and said Pratt also agrees to pay C. L. Hooper one hundred and fifty dollars on note and a-c., also \$1,450.00 per mem. of mortgages now on file,—in all, making \$1,950.00,—for the following property, to wit: Fourteen (14) head of horses; 6 buggies; two carriages; two hacks; two sleighs; four single harnesses; 6 sets double harnesses; all whips & robes; one farm wagon; all hay now in barn; everything belonging to me now in livery barn 1624 O street, in city of Lin-

coln; also all leases and insurance that I hereby assign to said Pratt; also all hay in said barn. This being a receipt in full for all the above property. W. J. Pratt." The petition further alleges that at the time of the execution of the writing the defendant called William J. Pratt aside, and requested that no mention should be made in said writing about the payment by defendant of said amount to plaintiff, because one Hooper, who was present, and who furnished the defendant with the purchase money, was unwilling, and objected to such a bargain; and it was then and therefore agreed by and between said William J. Pratt and Thomas H. Pratt that this portion of the agreement should not be stated in this writing. The petition asked judgment against the defendant in the sum named. Upon the trial the plaintiff called William J. Pratt as a witness, whereupon the defendant objected to the introduction of any evidence to vary, change, or contradict the terms of the written contract pleaded, and also objected to the introduction of any evidence, for the reason that the petition did not state facts sufficient to constitute a cause of action. The plaintiff then offered to prove by the witness, substantially, the matters set out in the petition, with the additional offer to prove that witness agreed to sign the written instrument only upon condition that defendant should pay plaintiff. The objections were sustained, and a verdict directed for defendant.

By the case of *Shamp v. Meyer*, 20 Neb. 223, 29 N. W. Rep. 379, it is settled that where one makes a promise to another, for the benefit of a third person, such third person may maintain an action upon the promise, though the consideration does not move directly from him. That case is in line with the great weight of American authority to the effect that the person for whose benefit a promise is made may sue upon that promise, although not a party to the consideration. The purpose of the American rule seems to have been largely to avoid circuity of action. It may, probably, be assumed that in order to permit such third person to sue the contract must be one which might be enforced between the immediate parties thereto. In fact, many of the cases state the rule in these terms. Upon this theory the defendant contends that the plaintiff cannot maintain this action, because of the rule forbidding parol evidence to change, add to, or contradict the terms of a written agreement. We cannot regard the instrument referred to in the petition as a contract complete in itself. It purports only to be a receipt. It is signed only by W. J. Pratt, and not by the party assuming these obligations; and its whole effect is that of an informal memorandum, and not the expression of a complete contract. Further, it is settled by a considerable line of authority that where the execution of a writ-

ten agreement has been induced upon the faith of an oral stipulation made at the time, but omitted from the written agreement, though not by accident or mistake, parol evidence of the oral stipulation is admissible, although it may add to or contradict the terms of the written instrument. Among the cases establishing this principle are *Chapin v. Dobson*, 78 N. Y. 75; *Ferguson v. Rafferty*, 128 Pa. St. 337, 18 Atl. Rep. 484. The same doctrine, substantially, has been adopted by this court. *Norman v. Waite*, 30 Neb. 302, 46 N. W. Rep. 639. It will be observed that the allegations of the petition, and the evidence offered, brought the case strictly within this rule.

While the point is not urged in the briefs, it might be, with considerable force, argued that the promise sued on is within the statute of frauds, as being a promise to answer for the debt of another. The case of *Shamp v. Meyer*, already cited, does not settle this question, for in that case the promise was for the benefit of the debtor, and not the creditor. While a great many cases hold that such a promise cannot be sued upon by the creditor, for the reason that it is a promise to answer for the debt of another, and within the statute, authorities to the contrary are about equally numerous; and, except in a very few cases, it has always been held that a promise is not within the statute when made in consideration of the transfer of property or funds out of which the debt should equitably be paid, and that in such case the creditor may sue. Without determining whether this distinction is well founded in reason, it suffices to say that the construction of the statute of frauds is so largely a matter of precedent that the doctrine thus established should be followed. We think the judge erred in excluding the evidence, and the judgment is therefore reversed, and the case remanded. The other judges concur.

AMERICAN WATERWORKS CO. v. DOUGHERTY.

(Supreme Court of Nebraska. June 29, 1893.)

PERSONAL INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—QUESTIONS FOR JURY—DAMAGES—MENTAL SUFFERING.

1. Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different inferences as to these questions from the facts established.

2. In an action for personal injuries, mental suffering and anxiety caused by a physical injury is an element of damage, whether or not the injury was due to the willful act of the defendant.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Douglas county; Clarkson, Judge.

Action by Frank Dougherty against the American Waterworks Company. Judgment

for plaintiff. Defendant brings error. Affirmed.

John L. Webster, for plaintiff in error.
Isaac Adams, for defendant in error.

IRVINE, C. The defendant in error, Frank Dougherty, recovered judgment against the plaintiff in error in the sum of \$500, for injuries sustained by defendant in error by being thrown into a trench excavated by plaintiff in error in Sherman avenue, in the city of Omaha, and alleged to have been left without proper guards or precautions against accident. To reverse this judgment, the plaintiff in error brings these proceedings.

The plaintiff in error was operating a system of waterworks in the city of Omaha, and possessed by ordinance the right to occupy streets in that city with its mains, and to make openings and excavations in such streets for the purpose of laying and repairing such mains. A general ordinance of the city in relation to the laying and repairing of water, sewer, and gas pipes provided as follows: "Red lights shall be kept around all unfinished work at night, and fences or other suitable and sufficient barricades against accidents shall be placed around excavations at all times." On the day preceding the accident, the plaintiff in error had opened a trench on Sherman avenue, running lengthwise of the street, which was north and south, some 6 or 8 feet from the west curb. This trench was from 16 to 20 feet long, about 4 feet wide, and 7 feet deep. About 7 o'clock, and after it had grown dark, Dougherty started from a point on Sherman avenue, about a mile north of the excavation, driving two horses attached to a wagon. He was seated upon a board laid across the side boards of the wagon. He started from a saloon, and the evidence shows that he had been there some time, and had partaken of intoxicating beverages, but upon this point it is very doubtful whether the evidence would have been sufficient to have sustained a finding that he was intoxicated. He was accompanied by two men, driving one horse attached to a buggy. Dougherty drove down the west side of the street; the two men referred to, upon the east side. They were driving at a somewhat rapid rate; and remained so close together that they were enabled to converse as they drove along. When the excavation was reached, the two men in the buggy being a short distance ahead, Dougherty's horses both plunged into the excavation, and Dougherty was thrown either into the trench, or upon the ground at the side thereof, sustaining the injuries to recover for which the action was brought.

The principal error assigned is that the verdict is not supported by sufficient evidence, and it is argued upon this assignment, in the first place, that there is no evidence of negligence on the part of the wa-

terworks company causing the accident, and, secondly, that the evidence discloses contributory negligence on the part of Dougherty. The evidence in regard to the condition of the excavation is conflicting. That introduced on behalf of the company tends to show that when work ceased, about 6 o'clock, the earth removed from the excavation had been piled up along each side and across each end of the ditch, to a height varying from 1½ to 3 feet; that at each end there had been thrust into the loose earth a stick from 3 to 5 feet in length, and to the top of each stick was fastened a lantern, having a wire guard a short distance from the glass, and a jacket of red flannel drawn tightly over the guard. The evidence on behalf of Dougherty tends to show that, when the accident occurred, only one red light was visible, and that at the south end of the trench, and that there was no earth, or, if any, a very small quantity, across the north end. There is evidence to the effect that Dougherty's horses struck a lantern at the north end, shattering it, and that the fragments were found after the accident. But the two men in the buggy observed but one lantern, and this only when they were within about 25 feet of it. As to the existence of the embankment of earth across the north end of the trench, the evidence of the defendant's witnesses Vickery and Dr. Brown is conflicting, and both cannot be believed. The jury was justified in accepting the testimony offered on behalf of Dougherty, and it is in the light of that testimony that the case must be considered.

By the ordinance referred to, the company was required to provide fences or other suitable and sufficient barricades against accidents. The term "barricade" imports an obstruction; not merely a warning, but an actual impediment to travel. If the ordinance had only contemplated the throwing out of the earth necessary in making the excavation, it would be a useless piece of legislation, for that much of a barricade would necessarily be made. The general term "suitable and sufficient barricade" must also be construed with reference to the special term "fence," and these considerations lead us to conclude that the ordinance contemplates a barricade more marked than even the evidence of the water company shows to have been in existence about this trench. As to the lights erected, while the testimony of the superintendent of the water company is to the effect that he has seen such lights at the distance of a mile, the testimony of both Russell and Yubel, the men in the buggy, is that they saw but one light, and that at the south end. Yubel did not see it until he was within about 25 feet of it, while Russell does not seem to have noticed it until after the accident. The light of a common lantern passing through a piece of red flannel cannot be very brilliant, and whether or not it afforded a sufficient warning was

clearly a question for the jury. We think the jury was clearly justified in finding that the trench had been left without proper barricades or cautionary signals, and we think it was clearly justified in inferring that the negligence of the company in this regard caused the accident.

Much that has already been said applies to the question of contributory negligence. We cannot say that the jury was bound to find that Dougherty was intoxicated; that he was driving with undue speed; or that, in failing to observe the red light, and avoid the trench, he failed to use ordinary care. There is some general complaint of the instructions upon these subjects, but, when taken together, they state the law fairly, and no specific exceptions were taken.

It is assigned as error that the court erred in giving instruction No. 1 asked by Dougherty. This instruction is as follows: "The jury are instructed that the leaving of an excavation in the street without fencing or suitable and sufficient barricades against accident, contrary to the provisions of the city ordinance, is evidence of negligence. If you shall find that the earth thrown out from the trench on either side did not constitute a suitable and sufficient barricade against accidents, and that the accident occurred through want of a suitable and sufficient barricade, while the plaintiff was in the exercise of ordinary care, then you will find for the plaintiff, notwithstanding that you may find that the excavation was at the time guarded by red lights." The first objection urged to this instruction is that its first sentence omits the element of the necessity of proving that the want of a suitable and sufficient barricade contributed to the happening of the accident. The remainder of the instruction states this in clear terms, and is applicable to the evidence. It is also urged that the instruction is erroneous in not telling the jury what would be sufficient and suitable barricades. This point is covered by the second instruction given by the court on its own motion, where the jury is told that it is their duty to inquire whether the company did or did not use such precautions as a person, in the exercise of ordinary prudence, would have used to warn and protect persons traveling along the streets from the danger to which they might be exposed by reason of the trench. That instruction was at least as favorable to the company as the law would permit. The remaining objections to this instruction seem to rest upon the proposition that the court should have itself determined that the plaintiff was guilty of contributory negligence. This question has already been discussed.

The plaintiff in error also contends that the court erred in instructing the jury that they might consider mental suffering and anxiety in estimating the damages. This instruction was correct. Owing to the nature of things, there can be no precise scale for

weighing damages in such cases. Physical suffering caused by such injuries is in its nature inseparable from mental suffering and anxiety from the same cause. Whatever may be the rule as to the recovery of such damages where there has been no physical injury, where such physical injury has been sustained, mental suffering and anxiety are, as much as physical, an element for which the plaintiff should be compensated. Judgment affirmed. The other commissioners concur.

LEE et al. v. BRUEGMANN et al.

(Supreme Court of Nebraska. June 29, 1898.)

PRINCIPAL AND SURETY — RELEASE OF SURETY — EVIDENCE—APPEAL—REVIEWING ORDER ON MOTION TO STRIKE OUT EVIDENCE.

1. The extension of time of payment of a note to the principal by the payee, upon sufficient consideration, without the knowledge of the surety, releases the surety; and evidence clearly directed to proof of such facts, properly pleaded, is competent.

2. Where the admissibility of evidence is for the first time called in question by a motion to strike it out of the record, it is very questionable whether, under any circumstances, a review can be had of the ruling of the district court upon such motion.

3. A verdict will not be disturbed because unsupported by the evidence, unless it is clearly so.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; Field, Judge.

Action on a promissory note by Lee, Fried & Co. against Henry Bruegmenn and Jacob Rocke. Plaintiffs had judgment against defendant Bruegmenn alone, and they bring error. Affirmed.

Cornish & Tibbets, for plaintiffs in error.
J. O. Johnston, for defendants in error.

RYAN, C. This action was brought by the firm of Lee, Fried & Co. to recover judgment on a note made to said firm by Henry Bruegmenn and Jacob Rocke for \$300. As a verdict was returned against Bruegmenn, upon which judgment was rendered, to which he has made no objection, his answer need not be mentioned. Mr. Rocke answered that he signed said note only as surety for Bruegmenn, which fact was well known to plaintiffs at the time; that afterwards, without the knowledge or consent of said surety, Bruegmenn entered into an agreement with all his creditors to sell out the entire stock then owned by Bruegmenn, and that the same should be divided among Bruegmenn's creditors, upon which said Bruegmenn was to be discharged as to all liability on said note. The defendant Rocke further averred that said stock was accordingly so sold, and the proceeds, to the amount of \$500, were applied upon the indebtedness of Bruegmenn to the plaintiffs, and the time of payment of said note was extended, to the damage of said Rocke, wholly without his knowledge or

consent. Defendant Rocke further answered that, after said note had been signed by him as surety, plaintiffs entered into an agreement with the principal, Henry Bruegmenn, without Rocke's knowledge or consent, in consideration of the extension of the time of payment of all the indebtedness of Bruegmenn for five years, (a period much greater than that for which the note was originally to run,) that Bruegmenn would execute to plaintiffs for the indebtedness evidenced by said note, as well as other indebtedness, likewise due between the said parties, a mortgage upon his stock of goods, which was done as agreed, and said time of payment was so extended without said Rocke's knowledge or consent; and Rocke further alleged that a part of said agreement was that said note should be delivered to Bruegmenn, which plaintiffs wrongfully failed to do. The reply denied in detail the several affirmative matters which by answer had been alleged as sufficient to operate as a discharge of said Rocke as surety. Upon these issues, there was a verdict and judgment in favor of defendant Rocke. The petition in error and motion for a new trial present the same grounds for review in as nearly the same language as the nature of the two documents will permit.

The first assignment of error, that the verdict is contrary to law, must fail, for the defense pleaded by Mr. Rocke was, if sustained by the evidence, amply sufficient to discharge him from liability for Bruegmenn's debt.

It is claimed, next, that the verdict is contrary to the evidence, and there are addressed to us some cogent arguments to sustain this claim. After all, however, it was merely a question of a preponderance, with sufficient, either way, to sustain a verdict. It cannot therefore avail to insist upon this objection.

Another error is assigned, in the following language: "The court erred in admitting testimony or evidence of defendant Bruegmenn's arrangements with his creditors to sell his stock, and prorate the amount received among his creditors, the admission of which evidence was objected to by plaintiffs, and exceptions properly taken." Referring to the evidence of Bruegmenn and other witnesses, it is found that the testimony called in question was relevant to the issues presented by Rocke's answer, in which, as has already appeared, there was pleaded a good defense. This objection is therefore without merit. Aside from this, it is questionable whether exceptions were properly taken. For instance, as to questions asked Bruegmenn upon this head, it is found that the record shows only that plaintiffs objected as irrelevant and incompetent, following which was no ruling or exception. Apparently, about the time Mr. Bruegmenn's deposition was offered in evidence, the following action was had, as shown by the record: "Cornish: I move that the testimony in the deposition

of Mr. Bruegmenn contained in answers to questions 33 up to 35, inclusive, be stricken out, as irrelevant and immaterial; the testimony showing that the agreement to prorate was not carried out, it not appearing that there was any consideration for the agreement, and for the further reason that an agreement to sell out at once, and divide the money pro rata among all of one's creditors, is not an agreement to give time, but is a payment to all his creditors. (Motion overruled, and plaintiff excepted.)" Within these 47 interrogatories and answers sought to be stricken out in solido by an oral motion there was much evidence that should have been submitted to the jury, possibly some that should not. Under this motion, however, the court could not be required to select and strike out that which might be objectionable. A motion of this kind is of rather doubtful utility, at best, as to evidence which has been admitted without objection. To extend it as sought in this instance is out of the question.

The only other errors assigned are based upon the giving, or refusal to give, the several instructions set out in the record. These cannot be reviewed, for the reason that to the ruling upon no one of them was an exception taken. The judgment of the district court is affirmed. The other commissioners concur.

CADWALLADER v. McCLAY, Sheriff, et al.
(Supreme Court of Nebraska. June 29, 1893.)

JUDGMENT—TAKEN AFTER SETTLEMENT—VACATION—PROMISE OF INFANT—INJUNCTION.

1. A judgment will be set aside when it was taken after a settlement between the parties, and contrary to plaintiff's promise to dismiss the action, the defendant having relied upon the promise, and so suffered default.

2. The defendant was justified in relying upon such promise, although the plaintiff was an infant, he possessing apparently good judgment and discretion, and having been, by his father, who appeared in the action as his next friend, permitted to transact the business out of which the action rose.

3. Where none of the special proceedings provided by the Code is in such a case available, an action in equity will lie to enjoin against the enforcement of such a judgment, and to declare its cancellation.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Lancaster county; Hall, Judge.

Suit by Charles M. Cadwallader against Samuel McClay, sheriff, and others, for the purpose of vacating a judgment, and enjoining enforcement thereof. From a decree granting the relief, defendants appeal. Affirmed.

J. S. Bishop and Pound & Burr, for appellants. Reese & Gilkeson, for appellee.

IRVINE, C. Charles T. Weber, an infant, by his father, as next friend, recovered a judgment before the justice of the peace in Lancaster county for \$107, and costs. A

transcript of this judgment was filed in the office of the clerk of the district court, and, after certain proceedings in aid of execution, an execution was levied upon real property of Cadwallader, occupied by him and his family as a homestead. Before the sale this suit was begun by Cadwallader against the sheriff of Lancaster county and Weber, for the purpose of vacating the judgment, and enjoining the enforcement thereof. D. L. Love was permitted to intervene as assignee of Weber's judgment.

The plaintiff claimed, first, that the property levied upon was exempt from execution as a homestead. The defendants met this by showing that the judgment upon which the execution was issued was for wages owed by Cadwallader to Weber, and claimed that a homestead was not exempt from execution upon such a judgment. This question we need not determine, in view of the conclusions reached on the other branch of the case.

The plaintiff contended, in support of his application to have the judgment canceled, that, pending the action before the justice of the peace, and before judgment was rendered, he had a conference with Weber, in which their accounts were looked over, and a settlement reached, by which it was ascertained that Weber's account was overdrawn, and that a small balance was due from Weber to plaintiff; that thereupon Weber promised that the suit should be dismissed; that Cadwallader relied upon that promise, and did not attend at the time appointed for the hearing, when Weber, in fraud of his agreement, took judgment by default, and this fact was concealed from Cadwallader until too late to open up the judgment or appeal therefrom. The evidence upon this subject was conflicting, and the trial judge was justified in finding the facts for the plaintiff. There can be no doubt that a judgment taken contrary to an agreement of this character, relied upon by the defendant, would be vacated if taken in the district court, under section 602 of the Code. That section does not apply to justices of the peace, and the plaintiff is therefore entitled to proceed in equity to avoid such judgment. See *Black, Judgm.* § 373, and numerous cases there cited.

We do not think that the fact that Weber was an infant affects the case. His next friend was his father, and his father had emancipated him, as is clear from the fact that he had been permitted to engage in a contract with the plaintiff on his own behalf, and that his father undertook, as his next friend, to prosecute an action to recover his wages for him. He was apparently a young man approaching his majority, and accustomed to transacting his own business. Under these facts, we think Cadwallader was justified in relying upon Weber's representations and promises. An infant is responsible for frauds committed by him, as well as for torts. *Savage v. Foster*, 9 Mod. 35; 1 Story,

Eq. Jur. (12th Ed.) § 385. As was said in *Binsse v. Barker*, 13 N. J. Law, 263, a similar case: "The defendant has been injured by the want of good faith on the part of the plaintiff, and this court will not sustain a judgment under such circumstances." Love, as Weber's assignee, took only Weber's rights.

The briefs discuss a question as to whether the defendants were misled by a statement of the trial judge whereby they were induced to forbear putting upon the stand certain witnesses upon the question of fraud; but the record does not disclose any facts founding this argument, and the affidavit filed in this court cannot take the place of a transcript of the record or bill of exceptions. Affirmed. The other commissioners concur.

RABEN v. FIRST NAT. BANK OF AURORA.

(Supreme Court of Nebraska. June 29, 1893.)

ACTION ON NOTE—DEFENSE—EVIDENCE.

A., the owner of a note secured by mortgage, pledged the note to a bank to secure an indebtedness from A. to the bank. A senior mortgagee brought a foreclosure suit, in which A. appeared by his own attorney and filed a cross bill. A decree foreclosing both mortgages was rendered, and the land was sold to a stranger. Thereafter the bank bought the land from the purchaser, A.'s attorney in the foreclosure case negotiating the purchase, and receiving a bonus. Later the bank resold at a profit. *Held*, that A. could not recover from the bank the amount of the note out of such profits.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Hamilton county; Post, Judge.

Action by John Raben against the First National Bank of Aurora. Defendant had judgment, and plaintiff brings error. Affirmed.

Sedgwick & Power, for plaintiff in error. A. W. Agee and E. J. Hainer, for defendant in error.

IRVINE, C. The plaintiff in error, who was also plaintiff below, was the owner of a promissory note drawn to his order and executed by one Sparks for the sum of \$374.70. This note was secured by a mortgage upon land in Hamilton county upon which there was a prior mortgage to the New England Mortgage Security Company for \$400. Raben was indebted to the defendant bank, and pledged the Sparks note and mortgage to the bank as collateral security for his indebtedness. The New England Mortgage Security Company began suit in the United States circuit court to foreclose its mortgage, making Sparks a party defendant. Mr. Alfred W. Agee held a third mortgage upon the same land. He was an attorney at law, and in that capacity represented the bank in many matters. He had also for some time acted as the at-

torney of Raben under an annual retainer. Mr. Agee appeared in the foreclosure case, filed an answer and cross bill for Raben, and a decree of foreclosure was ultimately rendered establishing the mortgages in the order above stated, and directing a sale of the premises. A request for stay was filed, and a short time after the expiration of the stay the premises were sold by the master to one John Sutton for \$790, the proceeds not being quite sufficient to satisfy the costs and the New England Company's mortgage. Neither Agee, Raben, nor the bank seems to have known of the issuance of an order of sale, nor to have been aware of these proceedings until after the sale had been confirmed, and a master's deed made to Sutton. Agee then learned that the sale had been so made, and obtained an interview with Sutton, who was until that time an entire stranger to all the parties. Sutton offered to convey the property to Agee for \$200 more than the amount of his bid. Agee went to the bank for the purpose of borrowing \$1,000, with which to purchase the land. Upon making his object known, one Delevan Bates, a stockholder in the bank, and bookkeeper thereof, suggested that if the bank was to advance the money it might buy the land for itself. Agee then proposed to give the bank the benefit of his bargain provided the bank would pay him \$100. This proposition was accepted, and ultimately a deed was executed from Sutton to Bates, Sutton receiving \$990 and Agee \$100, the bank advancing the money. Some time afterwards the land was conveyed by Bates to one Larsen for \$1,500, the bank receiving the purchase money. Before Bates received his deed, and while negotiations were pending between Agee and Sutton, Raben and the bank effected a settlement of their accounts, Raben transferring certain property to the bank in satisfaction of all his indebtedness thereto. Raben claims that this settlement was made without any knowledge on his part of the pending negotiations between Sutton, Agee, and the bank, and there is no evidence to show the contrary. Raben brought this suit seeking to recover from the bank the amount of the Sparks note, with interest. There was a general finding and judgment for the defendant.

In addition to the foregoing facts, which are very clearly established, Raben claims that Agee was, in the foreclosure case, acting as the bank's solicitor, and that both Agee and the bank assured Raben that the bank would collect the Sparks note out of the security, and that Raben need pay no attention to the matter. The bank denies this. The clear preponderance of the evidence is that the bank undertook no obligations in the foreclosure case; that Agee's employment was on behalf of Raben alone, and that the note and mortgage were delivered

to him by the bank only to permit him to enforce Raben's rights. On the part of Raben, his testimony is that officers of the bank told him he need pay no attention to the sale; that they would attend the sale. His testimony goes no further than this. The officers of the bank, on the contrary, testify that they made no promises and assumed no duties whatsoever, but left the whole matter of protecting the mortgage to Raben himself. The findings of the trial judge are clearly sustained by the evidence. Upon this state of facts and these findings the only question is whether the bank could purchase the property for itself without accounting to Raben for the amount of the note out of the profits realized by it. It may be that, had the bank purchased the property at the foreclosure sale, it would be held to treat the property merely as collateral to the debt under the same terms that it had before held the mortgage; but that state of affairs does not exist. The bank was not bound to bid on the property at the sale. The property was sold to a stranger whose title to it was perfected, and the whole interest of both Raben and the bank had become completely divested before Agee's negotiations with Sutton took place. The question of the bank's power to invest its funds in real estate in this manner has no bearing upon this case. It does not appear that the purchase was made with any reference to the relations between the bank and Raben. On the contrary, it appears that the officers of the bank considered it as an entirely independent transaction, and were moved only by the consideration that it would be more profitable for them to buy the land themselves, paying Agee his bonus, than to lend Agee the money wherewith to make the purchase. We know of no principle of law holding even a trustee to accountability for profits realized by him through the purchase and sale of property once held by him in trust, where the trust had completely terminated, and the interest of the cestui que trust been divested by a prior sale to a stranger, without any collusion of the trustee.

The difficulty seems to have grown out of the conflicting relations between Agee and the parties. The rights existing between him and his client are not before us for determination. We do not wish to say that Mr. Agee's course was improper, but the fact that he not only was interested in the property himself, but also undertook to act for Raben in a manner where Raben's interests might not prove identical with those of the bank, with which he was also closely associated, presents a situation which is unfortunate at least. The case shows what extreme caution should be observed by an attorney in dealing in any manner with the property in which his clients are interested. Affirmed. The other commissioners concur.

PACIFIC TEL. CO. v. UNDERWOOD.

(Supreme Court of Nebraska. June 29, 1893.)
TELEGRAPH COMPANIES—ERROR IN MESSAGE—LIMITING LIABILITY.

1. The legal status of a telegraph company is practically that of a common carrier of intelligence for hire, and such company is bound to correctly and promptly transmit and deliver messages intrusted to it, and cannot by contract relieve itself, either in whole or in part, from liability for injury or loss resulting from its own negligence.

2. A telegraph company had printed on its message blanks: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." Held an attempt on the part of the telegraph company to limit its liability; that this clause, if regarded as a contract, was without consideration, unjust, unreasonable, and violative of section 12, c. 89a, Comp. St.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Lancaster county; A. W. Field, Judge.

Action by John I. Underwood against the Pacific Telegraph Company to recover damages for an error in transmitting a message. Plaintiff had judgment, and defendant brings error. Affirmed.

Marquett, Deweese & Hall, for plaintiff in error. Chas. E. Magoon, for defendant in error.

RAGAN, C. John Underwood sued the Pacific Telegraph Company in the district court of Lancaster county. The facts involved in the case are substantially: Underwood lived in Lincoln, Neb. He had some household goods in Richmond, Ind. He desired these shipped to Lincoln, and wrote to one Lawrence, at Richmond, asking the rate on goods. Lawrence delivered to a telegraph company at Richmond the following dispatch: "Richmond, Indiana, July 2, 1886. To John I. Underwood, Lincoln, Nebraska: Rate, seventy-six dollars per car; \$1.09 per one hundred local. L. L. Lawrence." This telegram, when delivered to Underwood, read: "Richmond, Indiana, July 2, 1886. To John I. Underwood, Lincoln, Neb.: Rate, twenty-six dollars per car; \$1.09 per hundred local. L. L. Lawrence." Underwood, relying upon the correctness of this telegram as delivered, ordered his goods shipped as a car lot, and on their arrival at Lincoln was obliged to pay \$76 freight. He brought this suit to recover the difference between the \$76 and \$26. The telegraph company defended on three grounds: (1) That the mistake in the telegram was made on another line; (2) that Underwood did not present his claim for damages to the telegraph company within 60 days after the date of the telegram; (3) that Underwood was not damaged by the mistake. There was a verdict and judgment for Underwood, and the telegraph company brings the case here for review.

The first error assigned is that the court erred in admitting in evidence the telegram as it originally started from Richmond, for the reason that it is a different one from that set out in the petition. On looking into the record, we find that Underwood claims that the telegraph company delivered to him a telegram which read "twenty-six dollars per car," but he avers that this telegram, as originally sent, read "seventy-six dollars per car," and that through the negligence of the telegraph company it was altered. The principal objection, however, is that Underwood, on the trial to the jury, put in evidence only the written part of the telegram, without putting in the printed matter on the blank. The printed matter alluded to was that usually found on all telegraph blanks, and contains, among other conditions and terms, this: "This company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." The telegraph company did not undertake that the printed conditions on the telegraph blank should be transmitted. These conditions were no part of the message sent. The evidence corresponded with the pleadings, was competent, and there was no error in its admission.

The second error alleged is the refusal of the court to give the jury this instruction: "If the jury find from the evidence that the telegraphic blank on which was written the message received by the plaintiff from the defendant contained a clause or provision to the effect that the company will not hold itself liable for errors or delay in transmission or delivery of unrepeatable messages in any case where the claim is not presented in writing within sixty days after the sending of the message, then, before the plaintiff can recover, he must show that he presented his claim to the defendant in writing within sixty days after receiving the message; and, if the jury find from the evidence that the plaintiff did not so present his claim in writing within sixty days after the sending of the telegram, then the defendant is not liable, and the plaintiff cannot recover, and your verdict should be for the defendant." There are four reasons why the refusal of the court to give this instruction was correct: (a) This suit is not based on a contract, but is grounded in tort. (b) A telegraph company is a common carrier of intelligence for hire, bound to promptly and correctly transmit and deliver all messages intrusted to it, and cannot by contract exempt itself from liability for its own negligence. (c) The clause printed on the telegraph blank, to the effect that the telegraph company would not be liable for damages in any case unless the claim was presented in writing in 60 days, was and is unreasonable, and wholly without consideration, if viewed as a contract between the telegraph company and the sender of the

message, and an attempt on the part of the telegraph company to enact for itself a statute of limitations. If it can make its liability for negligence depend on notice of claim being given in 60 days, it may make it 6 days. If liability can be made to depend upon the notice being in writing, it can limit it to pen and ink. The laws of this commonwealth are for the protection and government of corporations and individuals alike, and all citizens should transact their business with reference to these laws. The attempt, so often indulged in by insurance and telegraph companies, to prescribe for themselves a law, is not one that appeals to the judgment or commends itself to the conscience of this court. See, on this subject: *Tyler, Ullman & Co. v. W. U. Tel. Co.*, 60 Ill. 421; *W. U. Tel. Co. v. Crall*, (Kan.) 17 Pac. Rep. 309; *Gillis v. W. U. Tel. Co.*, (Vt.) 17 Atl. Rep. 736, and cases there cited; *Johnston v. W. U. Tel. Co.*, 33 Fed. Rep. 302; *W. U. Tel. Co. v. Longwill*, (N. M.) 21 Pac. Rep. 339. (d) The instruction asked was violative of the statutes of the state, (section 12, c. 89a, Comp. St.): "Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for nondelivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from the failure to perform any other duty required by law; and any such telegraph company shall not be exempt from any such liability by reason or any clause, condition, or agreement contained in its printed blanks."

The third contention of the plaintiff in error is that the mistake in the telegram was made by the Pacific Mutual Telegraph Company, and the jury erred in not so finding. Whether this was so was entirely a question of fact for the jury, and was properly submitted to them; and at the request of the plaintiff in error they were instructed on the subject as follows: "The jury are instructed that the defendant in this case is not liable for any errors or mistakes made on their connecting telegraph lines, and if the jury find from the evidence that the error or mistake complained of in the telegram was made on other lines before it came onto the line of the defendant, and you find that the message was transmitted by the defendant from the point where the message came to the defendant to its place of destination in the same form that it was received, then the defendant has not been guilty of negligence, is not liable, and you should find for the defendant." The jury said by their verdict that the defense was not made out. They were clothed by law with the duty of weighing the evidence, and determining, and we cannot say they came to a wrong conclusion.

Finally, it is insisted that Underwood suffer-

ed no damage by reason of the mistake made in the dispatch. On looking into the record we find that the evidence is that Underwood's goods weighed about 2,000 pounds. At \$1.09 per 100, local, the freight would have been \$21.80. The testimony further shows that he would not have shipped them as a car load had he known that the rate was \$76 instead of \$26. It would thus appear that in any event Underwood was damaged \$54.20. There is no error in the judgment of the district court, and the same is affirmed. The other commissioners concur.

STRATTON v. OMAHA & R. V. RY. CO. (Supreme Court of Nebraska. June 30, 1893.)

EJECTMENT—TITLE TO SUPPORT.

Where one in possession of land under an executory contract for the purchase of the same conveys to a railroad company a strip of said land for its right of way, and afterwards, by mesne assignments of the interest of the respective holders of said executory contract, the right to a deed thereunder vests in one who takes such an assignment, and a deed thereunder, with full knowledge of the conveyance of said right of way, and of the operation of a railroad line thereon for almost 10 years, with full acquiescence of all parties concerned, it was properly adjudged by the district court that ejectment would not lie, in favor of the holder of such deed, against said railroad company, for the possession of said right of way strip.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Saunders county; Post, Judge.

Ejectment by Frank M. Stratton against the Omaha & Republican Valley Railway Company. Defendant had judgment, and plaintiff brings error. Affirmed.

J. R. & H. Gilkeson, for plaintiff in error. J. M. Thurston and W. R. Kelly, for defendant in error.

RYAN, C. This was an action of ejectment, brought in the district court of Saunders county, Neb., for the possession of a strip 200 feet in width along the west side of the north half of the southeast quarter of section 3, township 14, range 7 east of the sixth P. M. This strip has been occupied for right of way, depot grounds, and other railroad uses, by the defendant, since October, 1876. The 80-acre tract, of which said strip was a part, was patented by the general government to the Union Pacific Railroad Company March 6, 1875, though the patentee, under an act of congress, was entitled to such patent long before its date, and anterior to any transaction hereinafter narrated. As the above strip was part of the northwest quarter of said southeast quarter, the history of said 40-acre tract need alone receive our attention. On the 30th day of July, 1873, the Union Pacific Railroad Company contracted, in writing, with George H. Stocking, to convey to him, in consideration of prompt payment of the

purchase price, the 40-acre tract last described, reserving, however, "a strip of land 400 feet wide to be used by the party of the first part [the Union Pacific Railroad Company] for right of way or other railroad purposes, in case the line of the road was heretofore, or shall be, laid over the premises." On the 24th day of October, 1876, the said George H. Stocking—his wife, Emma C., joining him—conveyed the right of way in dispute to the defendant in this action by a right of way deed, which was filed for record October 25, 1876. Defendant soon afterwards built its line of railroad upon said right of way, and has ever since continued to use and occupy the same for railroad purposes. On January 19, 1878, Stocking assigned all his interest in said executory contract to one Perky, by whom a like assignment thereof was made to one Knapp. Afterwards, on June 20, 1878, Knapp assigned, in like manner, an undivided half interest in said contract to plaintiff, which on March 29, 1879, was followed by an assignment, between the same parties, of the other undivided half. Each holder of said executory contract retained possession of the tract therein described, except that defendant retained and used the strip referred to for right of way purposes until September 26, 1883; and even then, and thenceforward, defendant's possession has continued as before. On the date last mentioned the Union Pacific Railroad Company executed to plaintiff a conveyance of the north half of the southeast quarter of the section above described, pursuant to the terms of two contracts therein described,—one of which is that above referred to,—the said conveyance reciting that it is "in pursuance and fulfillment of which said contracts this conveyance is made and executed." This conveyance contained the following language, following the description of the subject-matter thereof: "Reserving, however, to the said Union Pacific Railway Company, all that portion of the land hereby conveyed, if any such there be, which lies within lines drawn parallel with, and one hundred feet on each side distant from, the center line of its road, as now constructed, and any greater width, when necessary, permanently; to include all its cuts, embankments, and ditches, and other works necessary to secure and protect its main line."

Plaintiff claims that he ought to recover from the defendant the right of way strip conveyed by Stocking and wife, notwithstanding such conveyance and the above-quoted language, for the alleged reason that the deed of Stocking was but a quitclaim deed of a strip of which the Union Pacific Railway Company, at the time, held the legal title; that by such quitclaim deed the grantee was only vested with such interest in the property as was at the time held

by the grantor, which was less than the legal title, which never passed until vested in plaintiff; and that plaintiff, by virtue of said legal title, should have had a judgment of ouster against defendant in this ejectment suit. This claim has sufficient plausibility to deserve consideration. At the time Stocking made a conveyance of the right of way to the defendant, the Union Pacific Railway Company was holding the legal title to the 40-acre tract as trustee for the use of Stocking, and compellable to convey to him upon his making payments as agreed. Each assignee under Stocking took only the interest which his immediate assignor had in said tract. Meantime, the defendant was holding continuous possession under and by virtue of its deed from Stocking. There can be no question that the original entry of the defendant upon the right of way was lawful, and so continued, at least, while Stocking held the contract in question. We are at a loss to conjecture just when it is assumed that such possession became wrongful. It seems, however, to be contended by the plaintiff that, at the date of the deed of the Union Pacific Railway Company to plaintiff, such possession, as against plaintiff, became illegal. In this view we cannot concur. It might be that the covenants in the deed of the Union Pacific Railway Company were already broken when made, but that does not affect the merits, as between the parties to this controversy. If, upon due legal proceedings, it shall be established that there has been a breach of the Union Pacific Railroad Company's warranties to plaintiff, such breach might be satisfied in damages, in a proper action between those parties, as covenantor and covenantee. The plaintiff in this action, however, who has taken the legal title with full knowledge of the possession held by the defendant for almost 10 years under a deed from Stocking, through whom plaintiff claims by mere assignment of his interest, is not in a position to maintain ejectment against the defendant. There are between the parties equities which cannot properly be ignored, as must be done if plaintiff is adjudged entitled to maintain this action. The following language of Cobb, J., in *Railway Co. v. Redick*, 16 Neb. 313, 20 N. W. Rep. 309, applies to the facts under consideration: "Whatever the rights the plaintiff may have against the present plaintiff in error, growing out of this right of way question, and whether he is estopped, in pais, to assert any or all of them, it seems clear to me that he is not entitled to a judgment that would enable him to sever a line of commerce, which, by his assent, if not through his actual agency, in part, was constructed over this same property, and has enjoyed free passage over it for at least seven years."

The judgment of the district court is affirmed. The other commissioners concur.

CLARKE BANKING CO. v. WRIGHT.

(Supreme Court of Nebraska. June 30, 1893.)

ATTACHMENT—AMENDING AFFIDAVIT FOR.

An affidavit for the issuance of an attachment may be amended, by leave of the court, even after a motion to quash the proceedings is filed because of that particular defect.

(Syllabus by the Court.)

Error to district court, Buffalo county; Hamer, Judge.

Action in attachment by the Clarke Banking Company against Isaac K. Wright. From a judgment denying a motion to amend the affidavit on which the writ of attachment issued, and dissolving the writ, plaintiff brings error. Reversed.

J. M. Easterling and Sinclair & Brown, for plaintiff in error. Gid E. Newman, for defendant in error.

MAXWELL, C. J. On the 1st day of April, 1891, the plaintiff commenced an action in the district court of Buffalo county, against the defendant, to recover money alleged to be loaned to the defendant by the plaintiff. On the same day the plaintiff, by J. M. Easterling, filed an affidavit for an order of attachment in said cause, as follows:

"State of Nebraska, Buffalo County—ss.: In the district court of Buffalo county, Nebraska. The Clarke Banking Co. v. Isaac K. Wright. J. M. Easterling, being first duly sworn, upon his oath deposes and says that he is the duly-authorized attorney for the Clarke Banking Co., a corporation duly organized under the laws of the state of Nebraska, and doing business in Buffalo county, Nebraska, with office and place of business at Saritoria, in said county and state; that plaintiff has commenced an action against Isaac K. Wright, in the district court of Buffalo county, to recover the sum of \$250.00, with 10% interest from March 4, 1891, now due and payable to the plaintiff from defendant, for money loaned the defendant at his special instance and request. Affiant further says that plaintiff's claim is just, and that plaintiff ought, as he believes, to recover thereon the sum of \$250.00, and that the defendant is a nonresident of the state of Nebraska, as he verily believes. J. M. Easterling.

"Subscribed in my presence, and sworn to before me, this 1st day of April, 1891. Will G. Nye, Clk. Dist. Ct., Buffalo Co., Neb. [District clerk's seal.]"

On the filing of said affidavit an order of attachment was issued, and certain property of the defendant attached. Afterwards the defendant appeared, and filed the following motion: "Now comes the defendant, by his attorney, Gid E. Newman, and, making a special appearance, objects to the jurisdiction of the court over the subject-matter of this suit, for the reasons: (1) That the affidavit filed herein preliminary to the issuing

of the attachment is insufficient in law, because it states that the defendant is a non-resident, upon information, as he believes, and not in positive terms." On the 13th day of June, 1891, and while the motion to dissolve the attachment was pending, the plaintiff made application to the court for leave to amend the affidavit for attachment, as follows: "Now comes the plaintiff, and asks leave of the court to amend the affidavit of attachment in the above-entitled cause so that said affidavit may positively state that said defendant is a nonresident of this state." The application to amend was overruled, and the attachment discharged, and that is the error complained of. In this we think the court erred.

In *Struthers v. McDowell*, 5 Neb. 491, this court held that "an affidavit for the issuance of an attachment may be amended, by leave of the court, even after a motion to quash the proceedings is filed because of that particular defect." In delivering the opinion of the court, Chief Justice Lake says, (pages 493, 494): "Under our statute of amendments, great latitude is given to the court in permitting even material defects to be remedied, especially where they were occasioned by mistakes, or are the result of oversight, and it can be seen that, by so doing, substantial justice will be done; and this rule is not limited to pleading, merely, but is applicable to all proceedings in civil actions. *Irwin v. Bank*, 6 Ohio St. 81; *Campbell v. Whetstone*, 4 Ill. 361; *Langworthy v. Waters*, 11 Iowa, 432; *O'Dea v. Washington Co.*, 3 Neb. 118." The decision in that case conforms to the spirit of the Code, and is right, and will be adhered to. The court, therefore, should have permitted the amendment to be made. The judgment is reversed, and the cause remanded for further proceedings. The other judges concur.

WALTHERS v. KNUTZEN.

(Supreme Court of Nebraska. June 30, 1893.)

REPLEVIN—EVIDENCE.

In an action of replevin the proof failed to show any right of the defendant to the possession of the goods. The judgment was therefore set aside, and a new trial granted.

(Syllabus by the Court.)

Error to district court, Buffalo county; Hamer, Judge.

Action in replevin by Joseph Walthers against Walter Knutzen. Defendant had judgment, and plaintiff brings error. Reversed.

R. A. Moore, for plaintiff in error. Oalkins & Pratt, for defendant in error.

MAXWELL, C. J. This is an action of replevin, brought by the plaintiff against the defendant, to recover possession of "1 radiator, (72 tubes;) 2 radiators, (24 tubes;) 1 radiator, (20 tubes;) 5 feet soil pipe; 3 pk.

53-inch tees; 22 2½-inch tees; 38 2-inch tees; 12 1½-inch tees; 4-inch quarter bends, 2 4x2 yds., 1 2x2 yds.; 2 2-inch hubs; 14 1¼-inch tees; 10 1-inch tees; 8 ¾-inch tees; 11 1-inch tees; 15 ¾-inch tees; 3 4-inch ells; 4 2½-inch ells; 2 3-inch ells; 2 2-inch ells; 11 1½-inch ells; 4 1¼-inch ells; 12 1½-inch ells; 4 1-inch ells; 4 ¾-inch ells; 6 2-inch bends; 25 1½-inch ells; 2 1-inch ells; 4 ¾-inch ells; 1 8x4 bushings; 2 2x2½-inch bushings; 1 2½-inch plug; 19 2-inch lock nuts; 4 1½-inch lock nuts; 1 2½-inch flange union; 1 1¼-inch union; 2 1-inch unions; 23 pins; 1 inch ceiling plate; 1 5-inch floor plate; 3 1¼-inch floor plates; 2 2-inch floor plates; 11 1¼-inch pipe hangers; 3 1½-inch pipe hangers; 3 2-inch pipe hangers; 4 1½-inch pipe hooks; 2 3-inch nipples; 3 1½-inch nipples; 2 2½-inch nipples; 8 2-inch nipples; 9 1-inch nipples; 8 ¾-inch nipples; 1 job lot of couplings; 1 6-inch ventilator cap; 2 12x12 slop sinks; radiator tops; 1 11x11 soot door; 1 lot of scrap pipe; 448 pounds of mineral wool; 3 2-inch ells; 4 1½-inch ells; 6 1¼-inch ells; 2 1-inch ells; 2 ¾-inch ells; 4 1½-inch ells; 3 1½-inch ells, (cast); 3 1½-inch ells, (malleable); 9 2-inch lock nuts; 5 1½-inch lock nuts; 3 1¼-inch lock nuts; 1 1¼-inch union; 1 1½-inch T; 1 1¼-inch T; 4 2-inch R. & L. couplings; 7 1¼-inch R. & L. couplings; 4 1-inch R. & L. couplings; 6 ¾-inch couplings; 4 2-inch reducer; 4 bath wastes; 20 1-inch grate valves; 2 ¾-inch grate valves; 1 sewer and gas trap; 2 ¾-inch cut-offs; 2 1-inch handle; 1 1¼-inch T handle; 80 lbs. scrap lead; 70 lbs. lead tacks; 533 lbs. lead pipe; 250 lbs. sheet lead; 123 lbs. 2-inch lead pipe; 54½ ft. 4-inch black pipe; 40½ ft. 3-inch pipe; 29 ft. 2-inch galvanized pipe; 15 ft. 1½-inch galvanized pipe; 41 ft. 1¼-inch pipe, (gal.); 24 ft. 1-inch pipe, (gal.); 62 ft. 2-inch black pipe; 31 ft. 1½-inch black pipe; 37 ft. 1-inch black pipe; 15 ft. ¾-inch black pipe; 225 joists soil pipe; 29 ¾-inch bends; 5 ½-inch traps; 2 tees,—of the value of \$250.00."

The answer is a general denial. On the trial of the cause the jury returned a verdict for the defendant, and found the value of the property to be \$250, and the damages \$1, and judgment was rendered on the verdict. The testimony tends to show that in the year 1887 the defendant had a contract for the erection of certain buildings pertaining to the industrial school near Kearney; that the plaintiff was a subcontractor under him to perform certain plumbing required in the building; that the contract price for this plumbing was between \$5,000 and \$8,000; that the plaintiff gave a bond for the faithful performance of the work, duly signed by a number of sureties; that the plaintiff was unable to purchase plumbing material on credit, and the defendant guaranteed the payment of the same, and deducted the amount paid for such material as each payment was made. It also appears that the state made payment of 80 per cent.

of the amount due the contractor every two weeks, and the contractor seems to have paid the subcontractors at the same time.

There was a provision in the plaintiff's contract that the contractor, for certain causes, might declare the contract at an end, and thereupon the plaintiff's contract should cease and determine. Under this provision the defendant, in June, 1887, declared the plaintiff's contract annulled, and thereafter refused to permit the plaintiff to perform his contract. The material in controversy, the plaintiff claims, was in the building when the defendant took possession, and that it belonged to the plaintiff, and he was entitled to the immediate possession of the same. The testimony shows that after the defendant excluded the plaintiff from the building in question, and prevented him from performing his contract, he presented a bill to the plaintiff and his bondsmen, wherein he claimed that he had paid out for the plaintiff, for material for said building, the sum of \$3,415, and that included the property in controversy, and that he had brought suit on the bond to recover the balance due for said material. This is nowhere denied. This being so, it is difficult to understand why the defendant also claims the right to the possession of the goods that, according to his own showing, were the property of the plaintiff, and he and his sureties were liable for. It is claimed that the defendant had a lien upon the goods until they were fully paid for, and that, therefore, he was entitled to the possession under the lien; but the proof fails to show such lien, or any arrangement that can be construed in that light. In no view of the case, therefore, can the judgment be sustained. The judgment is therefore reversed, and the cause remanded for further proceedings. The other judges concur.

WISTEDT v. BECKMAN et al.

(Supreme Court of Nebraska. June 30, 1893.)

APPEAL—REVIEW—TRANSCRIPT—PETITION IN ERROR.

1. To give the supreme court jurisdiction to review a case on appeal, the transcript of the proceedings must be filed in this court within six months after the rendition of the decree sought to be appealed from.

2. A judgment cannot be reviewed on error by the supreme court unless a petition in error is filed in this court therefor.

(Syllabus by the Court.)

Commissioners' decision. Appeal from district court, Burt county; Irvine, Judge.

Action by Andrew M. Wistedt against Andrew Beckman and others for an accounting. Judgment, from which plaintiff appeals. Affirmed.

Sears & Thomas, for appellant. H. H. Bowes, for appellees.

RAGAN, C. This is an appeal from the district court of Burt county. The appellant sued the appellees for an accounting, claiming due him from them \$800. The appellees answered, admitting \$6 due appellant. The court found due the appellant \$78.13. This decree was rendered March 31, 1891. The transcript and the evidence for appeal were filed with the clerk of this court December 18, 1891, or more than six months after the rendition of the decree. No petition in error has ever been filed in this court. We are precluded, then, from examining the evidence in the bill of exceptions, and trying this case, either on appeal or error. The pleadings support the judgment. The findings and decree of the district court are affirmed.

RYAN, C., concurs. **IRVINE, C.,** having presided in the court below, took no part in the decision here.

HOUCK, Constable, v. HEINZMAN.

(Supreme Court of Nebraska. June 30, 1893.)
MORTGAGES—FRAUD—EVIDENCE—QUESTION OF
LAW—PERISHABLE PROPERTY.

1. Where the facts relied upon to render a mortgage fraudulent as to creditors appear upon the face thereof or are undisputed, the question of fraud is one of law for the court. In all other cases it is a question of fact for the consideration of the jury.

2. A mortgage will not be declared fraudulent as to creditors on the sole ground that among a large number of separate chattels included therein is a small amount of perishable property, which it is impossible to preserve until the maturity of the mortgage debt, although such fact may be considered as evidence of fraud. The question of good faith in such case is one of fact, and not of law.

(Syllabus by the Court.)

Error to district court, Douglas county; Davis, Judge.

Action by Elizabeth Heinzman against Dorsey B. Houck. Judgment, from which defendant brings error. Affirmed.

Will H. Thompson and Chas. Offutt, for plaintiff in error. Donovan & Evans, for defendant in error.

POST, J. This was an action of replevin in the district court of Douglas county, in which the defendant in error, plaintiff below, claimed possession of the property in dispute, to wit, two horses, two wagons, and two sets of harness, through a mortgage from her son William Heinzman; while the defendant below claimed as constable by virtue of an order of attachment in an action in which the Omaha Packing Company was plaintiff, and the said William Heinzman was defendant.

1. The first error assigned is the receiving in evidence of the mortgage through which the plaintiff below claimed, without sufficient evidence of its execution by the alleged mort-

gagor. The plaintiff first introduced in evidence a note payable to her order for \$1,250, bearing date of April 18, 1890, due two years after date, and bearing interest at 7 per cent., purporting to have been signed by William Heinzman. After having testified that the note aforesaid was given for money advanced by her to her son, she was asked: "Question. State if you asked him for any other security. Answer. I asked him for a mortgage. Q. Did you get it? A. Not just then. I got it afterwards. Q. You got a mortgage? A. Yes, sir." Peter O'Mallery, county clerk, the proper foundation having been laid, testified: "Question. You may examine that book, and see if you can find a mortgage there from William Heinzman to Elizabeth Heinzman. Answer. Yes, sir. Q. Are they numbered in the order in which they are filed? A. Yes, sir. Q. What number is that? A. Number 8 of July, 1890." The mortgage introduced in evidence bears date of July 1, 1890, and purports to have been executed by William Heinzman to Elizabeth Heinzman, to secure a note of the former payable to the latter for \$1,250, dated April 18, 1890, due two years after date, and bearing interest at 7 per cent. It appears to have been acknowledged before a notary public on the day of its execution, and filed in the office of the county clerk on the same day. The property described in the mortgage aforesaid evidently includes the horses, wagons, and harness in controversy. The evidence clearly points to William Heinzman as the mortgagor, and we think proves *prima facie* that it was executed by him.

2. But the chief reliance of the plaintiff in error is upon the proposition that the mortgage is, by its terms and the character of the property thereby conveyed, fraudulent and void as to creditors of the said William Heinzman. The following is the description of property contained in the mortgage: "One bay horse, about 12 years old, weight about 1,000 lbs.; one sorrel mare, about 6 years old, weight about 1,000 lbs.; one meat delivery spring wagon, with red running gear and blue box; one butcher's delivery wagon, with red bed and yellow or straw-colored gear; one side-bar buckboard buggy, Drummond make; one set single harness, heavy; one set single harness, light; also all of the stock and fixtures in the butcher shop situated at number 714 North 16th St., Omaha, consisting of meats, poultry, and ice box, meat blocks, saws, cleavers, meat racks, counters, scales, butchers' knives, meat rocker, and block; also all of the book accounts of said butcher shop." It should be observed that the mortgage contains no provision for the sale of any part of the property therein described by the mortgagor; hence the rule announced in *Tallon v. Ellison*, 3 Neb. 75, has no application. It is suggested, however, that a mortgage of perishable property, like meats,

poultry, and butchers' stock, which it is obviously impossible to preserve until maturity of the debt secured, implies a power of sale, and is therefore presumptively fraudulent. The sound rule is believed to be that such fact does not render the mortgage void per se, although it may be considered by the jury as evidence of fraud; the question of fraud or good faith being one of fact, and not of law. See *Herm. Chat. Mortg.* § 106; *Jones, Chat. Mortg.* § 363; *Shurtleff v. Willard*, 19 Pick. 202; *Hedman v. Anderson*, 6 Neb. 392; *Davis v. Scott*, 22 Neb. 154, 34 N. W. Rep. 353; *Barkow v. Sanger*, 47 Wis. 500, 3 N. W. Rep. 16; section 20, c. 32, Comp. St. There is no evidence in the record upon which to base a finding of the amount of perishable property in stock at the time of the execution of the mortgage, on the 1st day of July, or the amount thereof, if any, disposed of by the mortgagor subsequent to the date last named, and before the property was seized by the plaintiff in error, two days later, to satisfy the order of attachment. Nor is it pretended that such sales, if any, were made with the knowledge or consent of the plaintiff. It is clear, therefore, that the authorities cited are in point, and that the mortgage will not be presumed fraudulent by reason of the character of the property conveyed thereby.

3. The mortgage was, however, presumptively fraudulent as to creditors, for the reason that there was no change of possession of the property mortgaged. But that question was submitted to the jury by instructions which fairly state the law, and which are here copied at length:

"In this action the plaintiff has taken, by writ of replevin, the property described in the petition, claiming to be entitled to its possession as mortgagee, under a mortgage executed by William Heinzman, previously the owner of the property. The property in question was in the possession of defendant as a constable, by virtue of a writ of attachment executed against the property of William Heinzman. The issues made by the pleadings raise the question for you to determine as to the validity of the plaintiff's mortgage. You are instructed (1) that William Heinzman had a right to secure plaintiff any valid and subsisting indebtedness owing by him to plaintiff, and, for that purpose, to execute to her a mortgage on his property, if made in good faith, without any intention to defraud a creditor. (Defendant excepts.) (2) The evidence in this case shows that, after the giving of the mortgage to plaintiff, no change in the possession of the property took place, and the law is that the mortgage is to be conclusively presumed to be fraudulent, and shall be considered as void, unless the plaintiff shows on her part that the mortgage was made in good faith, and without any intent to defraud creditors; and the burden of showing such good faith and absence of

fraud is on the plaintiff. (Defendant excepts.) (3) Every mortgage made with the intent to hinder, delay, or prevent creditors from the collection of their debts is fraudulent and void as to such creditors, and if the plaintiff either participated in such intent, or knew of such intent on the part of William Heinzman at the time of taking the mortgage, or if she had notice of such facts as would put a person of ordinary prudence and care on such inquiry as would have led to knowledge of such fraudulent intent on the part of the mortgagor, the mortgage would be void as to her. (Defendant excepts.) In determining the question of whether plaintiff has shown an absence of such notice or knowledge on her part, you are to consider the relations of the parties, the surrounding circumstances, the manner of the transaction, and any other fact shown by the evidence. (4) Transactions between relatives, whereby property is transferred from one to another, when it is shown that the person parting with the property is in embarrassed circumstances, are to be closely scrutinized, and the good faith of such transaction must be clearly established. (5) If, under these instructions, you find that the plaintiff has, by a preponderance of the testimony, shown her good faith, as defined herein, in the taking of the mortgage, your verdict will be for the plaintiff. If plaintiff has failed satisfactorily to show such good faith on her part, your verdict will be for the defendant. (Defendant excepts.)"

4. Finally, it is urged that the verdict is not sustained by sufficient evidence of good faith on the part of the plaintiff below to overcome the presumption of fraud arising from the continued possession of the mortgaged property by her son. That the note of \$1,250 was executed by the latter for money advanced by the plaintiff is clear from her testimony, and is not seriously controverted. It is true, as stated in the brief of plaintiff in error, that she rested her case after showing merely the advancement of the consideration named in the note and mortgage; but from her cross-examination it appears that it was understood when the money was advanced that she should be secured by mortgage, and that she had asked for it at different times prior to its execution. She was also asked: "Question. You wanted to get security? Answer. Yes, sir. Q. That is, you wanted to get your claim before your son's other creditors got theirs? A. I did not know about his other creditors. I wanted to be secured for the amount of money I gave him. If it had only been \$200 or \$300, I would not be so particular. Q. When you went to the lawyer's office, you knew the Omaha Packing Company was suing him? A. No, sir; I did not." The foregoing is substantially all the evidence upon the question, and is, we think, quite sufficient to sustain the finding of good faith. It is apparent that the district court did not err in denying the

motion for a new trial, and that the judgment should be affirmed. The other judges concur.

FIRST NAT. BANK OF WYMORE v. MILLER.

(Supreme Court of Nebraska. June 30, 1893.)

CHECKS—PRESENTMENT FOR PAYMENT—REASONABLE TIME—DAMAGES—CUSTOM OF BANKERS.

1. On Saturday, the 31st day of May, 1890, about the close of banking hours, one M. indorsed in blank, and deposited to his credit in a bank of Wymore, Neb., certain checks drawn to his order by one B. on a bank in Courtland, Neb. Wymore and Courtland are 27 miles distant from one another, but connected by telegraph, telephone, and railroad lines; and a mail left Wymore at 6 P. M. daily, arriving at Courtland at 9 P. M. the same day. The Wymore bank made no inquiry of the Courtland bank as to whether the checks were good, nor did it at any time advise the Courtland bank that it held the checks, but on the day of their receipt mailed said checks to a bank in St. Joseph, Mo., which bank sent them by mail to a bank in Omaha, Neb., and this latter bank sent them by mail to the bank in Courtland, at which they arrived on June 5th, and were then protested for nonpayment. *Held*, that the Wymore bank did not present the checks for payment to the Courtland bank in a reasonable time, and that the indorser, Miller, was thereby discharged.

2. An ordinary check is not designed for circulation, but for immediate presentment, and, to charge an indorser, must be presented with all due dispatch and diligence consistent with the transaction of other commercial business.

3. Greater diligence is required in presenting ordinary checks for payment than in presenting bills of exchange. Whether an ordinary check has been presented for payment by the indorsee thereof in such a reasonable time as to hold the indorser must be determined from the facts and circumstances of each particular case.

4. No custom or usage among bankers as to the manner of presenting ordinary checks for payment will relieve them from the legal duty of presenting such checks for payment within a reasonable time.

5. In a suit by an indorsee against the indorser of an ordinary check, where the defense is that the check was not presented for payment within a reasonable time, inquiry as to whether the indorser was damaged by reason of the failure to present the check for payment is immaterial.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Gage county; Appelget, Judge.

Action by Abraham L. Miller against the First National Bank of Wymore to compel payment of a balance. Judgment for plaintiff. Defendant brings error. Affirmed.

A. D. McCandless and Marquett, Deweese & Hall, for plaintiff in error. Griggs, Rinaker & Bibb and T. F. Burke, for defendant in error.

RAGAN, C. On Saturday, the 31st day of May, 1890, about 4 o'clock in the afternoon, Abraham L. Miller indorsed in blank, and deposited to his credit in the First National Bank of Wymore, two checks, drawn by A. W. Beahm to Miller's order, on the State Bank of Courtland, Neb. These checks ag-

gregated \$3,429.25. The town of Courtland is 27 miles distant from Wymore, the two being connected by telephone, telegraph, and railroad lines, and two daily mails. The mails for Courtland closed at Wymore, at that time, at 6 and 8 o'clock, respectively, in the afternoon of each day. The first mail would reach Courtland at 9 o'clock P. M. of the same day, and the second at 10 o'clock the next day. The plaintiff in error made no inquiry of the Courtland bank as to whether the Beahm checks were good, nor did it notify the Courtland bank that it held such checks. On the same day that the checks were received by it the plaintiff in error sent them by mail to a bank in St. Joseph, Mo., for collection. That bank forwarded them by mail to the Omaha National Bank, at Omaha, Neb., for collection, and the latter sent them by mail to the State Bank of Courtland, on which they were drawn. This bank received them on Thursday, the 5th day of June. Beahm being insolvent, they were protested for nonpayment. At the close of business on Saturday, the 31st of May, Beahm had to his credit in the State Bank of Courtland \$3,533.76. On the morning of Monday, the 2d day of June, at the commencement of business, Beahm had to his credit in the State Bank of Courtland the sum of \$3,533.76, and during the day he deposited \$3,200 more to his credit in the same bank. Against this sum the cashier of the Courtland bank had agreed to accept checks of Beahm amounting to \$3,800. On the morning of Tuesday, June 3d, Beahm had to his credit in the Courtland bank \$2,132.85. On the morning of Wednesday, June 4th, he had to his credit a balance in the Courtland bank of \$1,621.35, and during the day deposited \$500 more. During this day, June 4th, he drew against his deposits in the Courtland bank, so that on Thursday morning, June 5th, he had left to his credit in the Courtland bank the sum of \$310.15. After Miller had deposited in plaintiff in error the two Beahm checks, he drew against them checks amounting to \$2,472.29, which plaintiff in error paid, leaving to his credit a balance of \$956.96. The bank having refused to pay him this, he brought this suit to recover it. The plaintiff in error filed an answer and counterclaim, in and by which it alleged the deposit by Miller in its bank of the Beahm checks; that it forwarded said checks in a reasonable time to the State Bank of Courtland, on which they were drawn, but that the checks were worthless, and payment was refused, for the reason that Beahm had no funds in the Courtland bank with which to pay the same, and that the checks were duly protested; and that on the day the checks were deposited it had paid checks of Miller amounting to \$2,482.28, and that subsequently it had collected from the said Beahm \$800, and put the same to the credit of Miller, leaving Miller owing the plaintiff in

error \$1,687.84, for which sum, with interest and protest fees, it prayed judgment against Miller. The case was tried to the court, a jury being waived. The court found for the defendant in error, Miller, and rendered judgment against the plaintiff in error for the sum of \$956.96, the difference between the Beahm checks and the total of the checks which Miller had drawn on the bank after their deposit, and which the bank had paid. The bank brings the case here for review, the error alleged being that the findings and judgment of the court below were contrary to the law and evidence.

After a careful and patient examination of this record, we have no doubt that the Beahm checks were received by the plaintiff in error as cash, and that they were not received by the plaintiff in error for collection for Miller. This proposition is abundantly supported by the facts and the evidence throughout the entire case. These checks were payable to Miller's order, and by him indorsed and delivered to the plaintiff in error, which gave Miller credit for the amount of them, and allowed him to check against them. After these checks were deposited in plaintiff in error by Miller, the relation subsisting between the bank and Miller was,—First, that of depositor and depositee; and, second, that of indorser and indorsee. The plaintiff in error contends, conceding that the checks were not presented for payment within a reasonable time, that Miller was not prejudiced by the delay. We do not assent to this as a conclusion of fact. The evidence is, had plaintiff in error, on the date it received the checks, advised the Courtland bank of the fact, that bank would have paid checks in full. At the opening of business on Monday, June 2d, Beahm had on deposit in the Courtland bank \$3,533.76, and during the day he deposited \$3,200 more. Against this there was a check of \$3,800 that the bank had agreed to accept, which would leave on deposit at the Courtland bank at the close of business on Monday, June 2d, to Beahm's credit, \$2,933.76. Had the checks reached Courtland on Tuesday, June 3d, there were \$1,186.35 of Beahm's money on deposit there that date. Had they reached the Courtland bank on Wednesday, June 4th, there were in the Courtland bank, to Beahm's credit, \$2,125.35. We do not see from this evidence how plaintiff in error can claim that the delay in presenting these checks worked no injury to Miller. But in a suit like this, between the indorsee and indorser of an ordinary check, is it a material inquiry whether the delay of the indorsee in presenting the check damaged the indorser? Tied. Com. Paper, § 442, after stating that the drawer of a check would not be discharged by the failure to present it for payment within a reasonable time, unless the drawer was prejudiced thereby, continues: "The rule is different with regard to indorsers. They are discharged whether they have suf-

fered any damage or not from the failure to make due presentment and give the notice of dishonor within a reasonable time." In *Coal Co. v. Bowman*, 69 Iowa, 150, 28 N. W. Rep. 493, that court say, after deciding that the plaintiff had held the check in question an unreasonable time before presenting it, and that it could not recover against indorsers: "The fact that the drawer had no funds in the hands of the drawee when the check was drawn, makes no difference." In *Gough v. Staats*, 13 Wend. 549, the supreme court of New York say: "If there has not been due diligence in presenting the check for payment, the indorser is discharged, although he has not been prejudiced by the delay." We think these cases state the rule correctly, and that the question as to whether the indorser was damaged by the delay in the presenting of the Beahm checks for payment was wholly immaterial.

The question, then, is whether plaintiff in error was guilty of such negligence or laches in the presentment of these checks for payment to the bank on which they were drawn as to release the indorser Miller. The authorities all say that, in order to hold an indorser of a check, it must be presented by the indorsee in a reasonable time, and as to what is a reasonable time depends upon the facts and circumstances of each particular case. Now, it appears from the evidence in this record that the plaintiff in error was guilty of negligence at the time it received the Beahm checks in not inquiring of the Courtland bank as to whether they would be paid on presentation. If further appears that Courtland is only 27 miles distant from Wymore, plaintiff in error's place of business; that the checks could have been mailed by the plaintiff in error to the Courtland bank the same day they were received, and they would have reached the Courtland bank, at the furthest, on Monday, at 10 o'clock in the forenoon. The plaintiff in error could have mailed the checks on Monday, and they would have reached the Courtland bank on Tuesday, at 10 A. M. Instead of this, the plaintiff in error chose to mail these checks to St. Joseph, Mo., and they go around by way of Omaha, and then back to Courtland. It is also in evidence in this record, from the mouths of experienced bankers, that due diligence in the presentment of these Beahm checks to the Courtland bank required that the plaintiff in error should send them by the first mail to the Courtland bank; and the evidence does not establish the contention of the plaintiff in error that these checks were presented for collection to the Courtland bank under any custom of bankers; and, if it did, we do not think that bankers, by any custom, can evade their legal duties. We think, therefore, that the plaintiff in error did not use such diligence in the presentment of these Beahm checks for payment as to

hold the indorser, Miller, thereon. In *Smith v. Janes*, 20 Wend. 102, the supreme court of New York, say: "The holder of a check can recover against the indorser only when he has used due diligence in presenting it for payment." "(2) Where the parties all reside in the same place the check should be presented on the day it is received, or on the following day; and, when payable in a different place from that in which it is negotiated, it should be forwarded by mail on the same or the next succeeding day for presentment." See, also, *Holmes v. Roe*, 62 Mich. 199, 28 N. W. Rep. 864. In *Bank v. Broderick*, 10 Wend. 304, the supreme court of New York say: "A check on a bank for the payment of money, to charge an indorser, must be presented with all due dispatch and diligence consistent with the transaction of other commercial concerns, and it was accordingly held, where a check was received in Schenectady on the 14th of January, drawn on a bank in Albany, a distance of sixteen miles from the former place, and between which places there is a daily mail, and not presented until the 6th of February, that laches were imputable to the holder, and that the indorser was discharged." "(2) Although it is said that checks are like inland bills of exchange, and are to be governed by the same principles, greater diligence is required in presenting them than in presenting bills of exchange." This case was affirmed by the court for the correction of errors in 13 Wend. 133. See, to the same effect, *Coal Co. v. Bowman*, 69 Iowa, 150, 28 N. W. Rep. 496. We do not mean to lay down any rule by which the indorsee of a check must present the same for payment in any given time in order to hold the indorser. What we do decide, however, is, in this case, that the Beahm checks were not presented by the plaintiff in error within a reasonable time. In this case, Tuesday, June 3d, would have been a reasonable time within which to present these checks. It must be borne in mind that ordinary checks are not designed for circulation, but for immediate presentment. Tied. Com. Paper, § 443, and cases there cited. The judgment of the district court is therefore in all things affirmed. The other commissioners concur.

DIMICK v. GRAND ISLAND BANKING CO.

(Supreme Court of Nebraska. June 30, 1893.)
LAND CONTRACTS—MORTGAGE—FORECLOSURE—PETITION—PROCEEDINGS AT LAW.

1. In 1881 one N. purchased from the U. P. R. Co. a certain tract of land on credit. This land was sold to various persons prior to 1887. In that year, the contracts being the property of one S., he mortgaged the same for a large amount to one D. He also conveyed the same to the G. I. Bank, and soon afterwards assigned the contracts to the bank. D. began an action to foreclose a mortgage in his favor, and made the bank a party. After the

answer of the bank was filed, the bank, at D.'s request, paid \$212 to the U. P. R. Co., then due on the land contracts. No claim was made for this in the foreclosure proceedings. In an action by the devisee of D. to have the bank deliver up the contracts, and quiet the plaintiff's title in the land, *held*, that the bank was entitled to \$212, and interest thereon, and a decree of foreclosure to that effect was right.

2. The provision of the Code that the plaintiff shall state in his petition whether any proceedings have been had at law for the recovery of the debt, or any part thereof, applies alone to formal mortgages, and not to mortgages or liens arising out of the equities between the parties.

(Syllabus by the Court.)

Appeal from district court, Hamilton county; Bates, Judge.

Action to quiet title by Sarah A. Dimick against the Grand Island Banking Company and the Union Pacific Railway Company. Judgment for the banking company, from which plaintiff appeals. Affirmed.

E. J. Hainer and E. L. King, for appellant.
O. A. Abbott, for appellee.

MAXWELL, C. J. This is an action to quiet title to real estate. On the trial of the cause in the court below, judgment was rendered in favor of the banking company, from which the plaintiff appeals. The facts are correctly stated in the appellant's brief, and the statement will be taken from that: "The pleadings show that on February 11, 1881, the Union Pacific Railway Company sold to Christian Needham the N. ½ N. W. ¼ section 19, township 13, range 5, in Hamilton county, Neb., on its usual terms,—one-tenth cash, balance on ten yearly deferred payments,—and as evidence of the sale, and its terms, made and delivered to the purchaser its sale contracts, numbers 46,868, 46,869 in the form usually employed by it. These contracts were assigned by Needham to one Putnam, and by Putnam to John W. Smith, mentioned in the pleadings. On August 27, 1885, Smith and wife mortgaged these lands, with other tracts, to Chauncey S. Dimick, for a large amount. The mortgage was immediately and properly recorded. Thereafter, on October 6, 1885, Smith and wife conveyed the same premises, by quitclaim deed, to the defendant banking company, which deed was also duly recorded. Three days later,—October 9, 1885,—Smith and wife assigned and delivered said Union Pacific Railway contracts of sale to the banking company. This assignment was approved by the railway company on October 14, 1885, and the bank has ever since retained possession of the contracts." It is admitted in its answer that the banking company had actual knowledge of the Dimick mortgage, and that its rights under the deed and assignment were subsequent to the Dimick mortgage. After the maturity of his mortgage, Dimick commenced foreclosure in the Hamilton county district court, making the banking company defendant. This cause was removed to the federal court, and was

consolidated with other foreclosure cases affecting the same property. Under date of November 23, 1886, all the parties to these consolidated cases, including Dimick and the banking company, entered into a stipulation declaring the amounts due each, fixing their respective priorities and rights, and for a foreclosure of their several liens. On this stipulation, decree was rendered in the federal court on April 11, 1887. A copy of this stipulation, and also of the decree rendered thereunder, is attached to plaintiff's petition, and was introduced in evidence. Paragraph 2 of the stipulation declares the amount due Chauncey S. Dimick on his mortgage to be \$3,771.45, with 10 per cent. interest from November 8, 1886. Paragraph 3 provides that Chauncey S. Dimick has a first and best lien on the land above described, and being the property in dispute in this action, and that he has subsequent liens on other tracts described in the stipulation. Paragraph 10 is in the following language: "That any surplus that may arise after the satisfaction of the liens above stated, with the costs, shall be paid into court, to await its further order in the premises, and that the Grand Island Banking Company shall have the right to redeem all and any of several said tracts or parcels of land from this decree, or from any sale thereunder, at any time prior to the confirmation of such sale, upon payment of the amounts hereinbefore declared to be a lien thereon, with its pro rata share of the costs; said costs to be apportioned proportionally to the amount of the liens on the several tracts hereinbefore described." The decree follows the stipulation. It declares that the Grand Island Banking Company is the present owner of the equity of redemption in and to all the lands mentioned, and contains the usual provision of such decrees, among them being that the Grand Island Banking Company is forever barred and foreclosed of all equity of redemption and claim in and to the premises. The banking company did not, in that case, set up or claim anything for the \$212. Under this decree, sale was had on June 6, 1889, and the land in question sold to Chauncey S. Dimick, mortgagee, for \$800. On June 10, 1889, this sale was confirmed by the court, and on the same date deed was made thereunder to Chauncey S. Dimick, by the special master in chancery making the sale. Pending these proceedings, on November 30, 1886, being seven days after the date of the stipulation to which reference has been made, but more than four months before the date of the decree, and more than two years and a half before the sale and confirmation, the bank paid on these contracts to the Union Pacific Railway Company \$212, being delinquent payments, and interest due thereon. Immediately after receiving his deed from the master in chancery, Chauncey S. Dimick entered into possession of the premises, and some time thereafter

died, leaving a will whereby he devised to his widow, the plaintiff, the land in question. She made the remaining payments to the railway company, and, when the last payment became due, tendered the sum, and demanded the deed. The railway company insisted upon a surrender of the contracts before making a deed, and the bank refused to deliver the contracts except upon payment of the \$212 paid by it on the contracts, insisting that while the assignments of the contracts, upon their face, were absolute, yet it took them as security for a large sum of money due it from Smith at the time the assignments were made, and it made such payments at the request of plaintiff's testator; that it did this to protect its security, and that the payment was necessary to protect the interest of Chauncey S. Dimick, as well as of the bank; that the claim of the railway company was prior to the claim either of Chauncey S. Dimick or the bank; and that by making the payment the bank became subrogated to the claim of the railway company, and has a lien on the contracts and on the land for its repayment. The railway company was not a party to the foreclosure proceedings, and the bank did not set up its payment, nor any claim based thereon, by way of supplemental pleadings or otherwise, but suffered a decree to be taken, the sale to be had, confirmation taken, and deed issued, without taking any steps whatever to protect or recover the payment so made by it. In its answer the bank makes no reference whatever to the deed made by Smith and wife. It offers no explanation of the deed having been made or recorded. Neither does the bank make any averment or showing, either by pleading or proof, that anything remained due it from Smith, nor does the answer allege any breach of the alleged implied contract to repay the \$212 paid by it on the contracts, nor yet does it allege that no proceedings have been had at law to recover the amount due. This suit was brought by plaintiff, as devisee of Chauncey S. Dimick, to compel the bank to surrender the contract, and the railway company to make deed to her for the lands in question. The railway company, by their answer and stipulation filed in the case, offer to make a deed to the party adjudged by the court to be entitled thereto. The district court adjudged that the bank had a lien on the contracts to the land in question for said sum of \$212, with interest, and gave a decree of foreclosure for the same.

It will be observed that payments were made by the bank at the request of Dimick, the mortgagee. Unless such payments had been made by some one, the contracts would have been subject to forfeiture, and, if forfeited, the entire security of the mortgagee would have been lost. The payment of this money was an independent transaction, and, so far as appears, entirely disconnected with the mortgage in that case. The bank held

the contracts, which were duly assigned to it as security, and were also security in favor of Dimick. He became the purchaser under the decree of foreclosure. The \$212 in question was one of the payments for the land. The plaintiff, as devisee of Dimick, seeks to have the lien of the bank canceled without making payment of the same. It is a fundamental rule of equity that he who seeks equity must do equity, and that rule applies in this case. In order to divest the lien of the bank on the premises, the plaintiff must pay the amount due thereon.

2. Objection is made that the defendant's answer does not allege that no proceedings have been had at law for the recovery of the debt, or any part thereof. This provision of our statute is intended for formal mortgages, and not for liens arising out of the equities between the parties. Thus, at common law, the mortgagee, after default, could maintain ejectment to recover the possession, an action on the note, and to foreclose the mortgage, all at the same time. The hardship and expense to the mortgagor were very burdensome, and not infrequently stripped him of all his property. To avoid these the statute in question was passed. But ejectment cannot be had in favor of the mortgagee in any case, nor on an equitable lien to recover the possession. Neither can an action at law, as a rule, be maintained, to enforce the claim, which usually can be enforced only in equity. There is no error in the record, and the judgment is affirmed. The other judges concur.

REED BROS. CO. v. R. T. DAVIS MILLING CO.

(Supreme Court of Nebraska. June 30, 1893.)

ACTION ON ACCOUNT—EVIDENCE.

In an action on an account, for flour sold and delivered, a number of defenses were set up, which the proof failed to sustain; and, the jury having found for the plaintiff, *held*, that the judgment was right, and no error in the record.

(Syllabus by the Court.)

Error to district court, Cass county; Chapman, Judge.

Action by the R. T. Davis Milling Company against the Reed Bros. Company. Judgment for plaintiff. Defendant brings error. Affirmed.

H. D. Travis, for plaintiff in error. A. N. Sullivan and Gregory, Day & Day, for defendant in error.

MAXWELL, C. J. This is an action upon an account, for flour sold and delivered, to recover the sum of \$261, with interest from September 1, 1890. To the petition the defendant below filed an answer as follows: "Comes now the defendant herein, and for answer to plaintiff's petition admits that the plaintiff is a corporation duly organized un-

der the laws of the state of Missouri; admits that the defendant is a corporation organized under the laws of the state of Nebraska, and doing a general merchandise business at Weeping Water, Neb. (2) Defendant admits that on or about the 1st day of September, 1890, the defendant purchased of and from the plaintiff a bill of goods, to wit, flour; that the said flour was sold to defendant by plaintiff, the price of which was \$633.40. But at the time of said sale, and before the same was consummated, the plaintiff, by its agent, stated and represented and warranted to the defendant that the aforesaid flour was first-class, and equal to the brand of flour which defendant was selling at that time, and which said brand of flour was first-class. That defendant, relying on the aforesaid statements and representation so made by plaintiff, purchased the aforesaid flour, and agreed to pay the sum of \$633.40 therefor in case flour was as represented, and, by reason of the aforesaid warranty of plaintiff, defendant was induced to accept said flour, and place it upon the market, and to retail the same to its customers. (3) That the aforesaid representations made by plaintiff as to the quality of the said flour purchased was not true, but that said flour was of an inferior grade or quality, and of entirely different quality from that which defendant agreed to purchase from plaintiff, and of but little value, and which plaintiff agreed to furnish defendant, and that said flour purchased from plaintiff was wholly unfit for use. (4) That it notified plaintiff that said flour was not flour as plaintiff represented it to be, and returned the same to plaintiff, whereupon the plaintiff represented to defendant that it had changed said flour for a better quality, and returned it to defendant; but defendant represents the fact to be that plaintiff did not change all of said flour, whereupon defendant returned said flour to plaintiff. (5) That at the time of the purchase of said flour from plaintiff it had a large and valuable trade in flour, and had the confidence of all its customers in that line of trade, but that by reason of the bad quality of the flour purchased from the plaintiff, and believing the representations of plaintiff to be true, and having sold some of said flour, he recommended it to be as good quality as the brand of flour which they had been selling heretofore, defendants lost their retail flour trade, to the very great damage of defendants, in the sum of \$500. (6) Defendant further represents that plaintiff is indebted to the defendant in the sum of \$43.60, money paid out for use and benefit of plaintiff by defendant in connection with the transaction aforesaid. (7) Defendant denies each and every allegation in plaintiff's petition contained, not herein specifically admitted. Wherefore, by reason of the breach of warranty of plaintiff of the flour aforesaid, and the misrepresentation and fraud of plaintiff, the defendant has been damaged

in the amount of \$500, and plaintiff is indebted to the defendant for money paid out for plaintiff in the sum of \$43.00. Defendant therefore prays judgment for \$543.00, and the costs of this suit." The reply need not be noticed. On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of \$231, upon which judgment was rendered.

No objection to the instructions is made in the plaintiff in error's brief. It is true the rule as to the measure of damages, as contended for, is stated. Whether the rule contended for is correct or not, we need not determine, as it is not alleged that the jury disregarded the instructions given by the court.

2 It is contended that one Underwood, an agent of the defendant in error, was permitted to testify as to the quality of the flour sold, without showing any qualification in that line. The proof clearly shows that Underwood was engaged in selling flour in the different markets of Nebraska, and knew what flour was worth at Weeping Water. It is apparent that there is no real defense to the action, and that the judgment is right. It is therefore affirmed. The other judges concur.

PHENIX INS. CO. OF BROOKLYN v. DUNGAN.

(Supreme Court of Nebraska. June 30, 1893.)

INSURANCE POLICY—CONDITIONS—PAYMENT OF PREMIUM.

A policy of insurance provided that, upon the failure of the insured to pay the premium note therein described in full, at maturity, such policy should cease to be in force, and continue null and void while said note remained unpaid. Said note not having been paid at maturity, the insurance company accepted as a credit thereon an amount of money largely in excess of the premium earned, and left the note with its local agent for collection. Subsequently, and before the premium so paid had been earned, and before the note had been paid in full, the property insured was destroyed by fire. *Held*, that the policy was voidable only at the election of the insurance company, and that, by receiving and retaining the part payment after default, and retaining the note for collection, it waived the right to insist upon a forfeiture thereof.

(Syllabus by the Court.)

Error to district court, Kearney county; Gaslin, Judge.

Action by W. O. Dungan against the Phoenix Insurance Company of Brooklyn, N. Y. Judgment for plaintiff. Defendant brings error. Affirmed.

Godfrey & Godfrey, for plaintiff in error. St. Clair & McPheely, for defendant in error.

POST, J. This was an action in the district court of Kearney county upon a policy of insurance, resulting in a verdict and judgment for the defendant in error, plaintiff below. The policy bears date of July 25, 1887, and expires July 25, 1892. The considera-

tion therefor is the note of the defendant in error for \$190, bearing date of July 25, 1887, and maturing July 1, 1888. The loss occurred on the 29th day of September, 1889. Proof of loss appears to have been made in due form, and within the time specified in the policy. In the court below, the plaintiff in error filed an answer which, after admitting the issuing of the policy sued on, and the loss as charged, alleges "that said plaintiff at the same time made, executed, and delivered his one certain promissory note, in writing, in amount \$190, due on the 1st day of July, 1888. A copy of said note is hereto attached, marked 'Exhibit B,' and made a part thereof; that on the 29th day of September, 1889, said note, so given by plaintiff, although long past due, remained wholly unpaid, and still so remains unpaid, except an indorsement, October 8, 1887, of \$27, also a credit by loss \$75, occurring prior to maturity of said note, although indorsed on said note, 12/3/88. Defendant avers that, since maturity of said note, no extension has been granted thereon, nor has said note been held for the purpose of collection, neither has there been any effort made to so collect, but the same has been held since maturity for naught, and defendant has been at all times since said maturity, and now is, willing to return said note, and now tenders the same to plaintiff. Defendant, for further answer, denies each and every allegation in plaintiff's petition not herein specially admitted." The following is a copy of the note referred to: "\$190.00. On the first day of July, 1888, for value received, I promise to pay to the Phoenix Insurance Company of Brooklyn, N. Y., (at their office in Chicago, Ill.) or order, one hundred ninety dollars, in payment of premium on policy No. 0,255,242 of said company, with 10 per cent. interest from maturity until paid. If this note is not paid at maturity, said policy shall then cease and determine and be null and void, and so remain until the same shall be fully paid and received by said company. In case of loss under said policy, this note shall immediately become due and payable, and shall be deducted from the amount of said loss. If this note be paid at maturity, all interest shall be waived. It is understood and agreed that this note is not negotiable. Dated, at Minden, Neb., this 25th day of July, 1887. W. O. Dungan." Upon the back of the note above described appear the following indorsements: "Received, on the within-described premium note, the sum of \$27.00. R. P. Date, September 30, 1887. \$27.20. R. P. Oct. 8, '87. Pd., by loss, \$75.00. 12/3/88. O. H. Williams." It appears from the undisputed proofs that the credit of \$75 was made on the 3d day of December, 1888, and represents the amount due the defendant in error at that time by the terms of a tornado policy previously issued to him by the plaintiff in error. It is not contended

that the note in question was surrendered to the defendant in error upon default of payment at maturity thereof, or that any notice was given of the forfeiture of the policy, or any overt act indicating an election by the insurance company to cancel the same. On the other hand, it appears that said note remained in the hands of the collection agents of the company at Minden until after the loss. The defendant in error testified in his own behalf as follows: "I stepped into the office of Godfrey & Godfrey to see about this matter. I had that day sold a piece of land, and I knew I could pay this note when I got the money on the land. I had never seen this agent. I met George Godfrey as I went in, and he introduced me to the agent. The agent said to me, 'I would like it if you would secure that note, if you can't pay it right away.' I told him that I could pay it some time in October; that I could have the money some time from the 1st to the 15th; and that, if I failed to get the money, then I would secure the note. He said that would be all right, and he would leave the note with Godfrey & Godfrey, and I could come to their office, and pay it or secure it." The agent referred to above was Mr. Williams, the adjuster of the defendant company, whose authority to waive the conditions of the policy by extending the time of payment as claimed is not denied. The defendant in error further testified that, after the maturity of the note, and before the loss occurred, payment thereof was demanded several times by the local agents of the company. Mr. Godfrey, the local agent, testifies that he was present at the conversation between the defendant in error and the adjuster, Williams, and that the latter remarked that he would leave the note with witness, and see if defendant would pay it, but that no agreement was made for an extension of payment. He also denies that he demanded payment after the maturity of the note. Williams, the adjuster, testifies that he was present at the time in question, and indorsed the credit of \$75 upon the note; but that he informed defendant in error that such payment would not be considered as a waiver of any condition of a policy, which would "stand suspended until the balance of the note was paid." In the policy above described is found the following condition: "In case the assured fails to pay the premium note or order at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order remains unpaid after its maturity." That the plaintiff in error might have declared the policy forfeited for nonpayment of the note will not be denied. Nor is it necessary to determine whether the plaintiff in error, in order to avail itself of the provision for a forfeiture of the policy, was required to indicate its intention by an overt act, such as notice to the insured or return of the note. The policy

was, by its conditions, voidable at the election of the insurer; but the evidence establishes to our satisfaction an extension of the time of payment, and which must be construed as a waiver of the strict conditions of the policy. The evidence is at most conflicting, and we are not at liberty to say that the jury were not warranted in finding for the defendant in error upon the disputed questions. Although contradicted by the more numerous witnesses of the plaintiff in error, he is strongly corroborated by the admitted facts of the case. The credit of \$75, December 3, 1888, together with previous payments, greatly exceeded the premium earned at that time, and it is not probable that the defendant in error would have advanced such a sum knowing his policy was not in force, and that, to use the language of the adjuster, it would continue to "stand suspended." While the plaintiff in error, by its answer, offers to surrender the note, there has been no offer to return the amount paid thereon in excess of the premium earned at the time of the default. It was entitled to demand payment in full of the note at maturity, but having, after default, received and appropriated the money paid thereon, a sum in excess of the premium earned at the date of the loss, it will not now be permitted to interpose the strict conditions of the policy as a defense. Such is the rule repeatedly recognized by this court. See *Insurance Co. v. Lansing*, 15 Neb. 494, 20 N. W. Rep. 22; *Schoneman v. Insurance Co.*, 16 Neb. 404, 20 N. W. Rep. 284; *Insurance Co. v. Scheldle*, 18 Neb. 495, 25 N. W. Rep. 620. The judgment of the district court is right, and should be affirmed. The other judges concur.

RATHMANN v. PEYCKE et al.

(Supreme Court of Nebraska. June 30, 1893.)

EQUITABLE RELIEF—FRAUD—RESCISSIION.

Held that, as between the plaintiff and Peycke, the proof failed to show fraud, and that, as the plaintiff had refused the offer to redeem the cheese company stock by paying the amount for which it was taken as security, with interest thereon, the judgment would be affirmed.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Wakeley, Judge.

Action by Christian Rathmann against Edmund Peycke and Rudolph Dorn. Judgment for defendants. Plaintiff appeals. Affirmed.

Chas. B. Keller, for appellant. Charles Ogden, for appellees.

MAXWELL, C. J. This action was brought in the district court of Douglas county on the 10th day of March, 1886, to require Peycke—"First, to surrender up certain school leases left by Dorn with his wife for Christian Rathmann, and which were gotten possession of by Edmund Peycke, and retained by him; second, to require

Edmund Peycke to account for, and to repay to the said appellant, certain moneys obtained from Rathmann by fraud and false representations; third, to cancel certain notes obtained from Rathmann through fraud, and on account of the failure of the consideration thereon; and, fourth, to cancel a certain contract entered into on the 2d day of January, 1885, assigning certain stock in the Blair Cheese Company from Rathmann to Peycke, and to require the said Peycke to account for the value of said stock, in the mean time enjoining the transfer of said shares by said Peycke." While the action was pending the plaintiff filed a supplemental petition, setting forth that Peycke had borrowed large sums of money upon the shares of stock in the Blair Cheese Company assigned to him by the plaintiff, by reason of which the stock had become worthless, and praying for an accounting. On the trial of the cause the court granted the plaintiff leave to redeem the Blair Cheese Company stock by paying the amount, with interest, for which it was given as security. This offer the plaintiff declined, whereupon the court found the issues in favor of the defendants, and dismissed the action. The plaintiff appeals.

It appears from the record that for some time prior to March, 1886, one Rudolph Dorn held prominent positions in at least two companies in the state, and was receiving salaries, the aggregate of which seems to have exceeded \$400 per month. Dorn seems to have stood well as a business man, and the business relations between him and the plaintiff were of the most friendly character. The same is true of the business relations between the plaintiff and Peycke. Dorn suggested to both the plaintiff and Peycke that money could be made by leasing school lands in Keith county from the state. The result was that the plaintiff gave his note to Dorn for \$1,280, and procured the notes of two or more of his brothers, each for a like amount, in favor of Dorn. These notes Dorn and Peycke indorsed, and Dorn obtained the money thereon. Peycke and three or four persons in Omaha were also induced to give their notes to Dorn for \$1,280 each. The proof in regard to the amount of school land leased is quite meager. That some land was leased there is no doubt, but the quantity is left in doubt. It seems to be conceded, however, that the scheme was practically a failure, and that the contributors to the fund received but little for their investments. In the mean time the plaintiff's note, and those of his brothers, which he had indorsed, and which had also been indorsed by Dorn and Peycke, had become due at a bank, and were paid by Peycke. Thereupon the plaintiff gave him security upon his cheese company stock, and it is claimed that Peycke used unfair means to supplant the plaintiff in said company, and instate himself there-

in. There is testimony in the record tending to show that Dorn was dishonest, and deceived both the plaintiff, Peycke, and a number of others, and inveigled them into the school-land scheme, by reason of which he obtained possession of a large amount of money without any effort on his part to procure school lands, and that soon afterwards he absconded from the state. The proof fails to show that Peycke acted in bad faith with the plaintiff or others, but he seems, like the plaintiff, to have placed full reliance in Dorn. The charge of fraud against Peycke, therefore, is not sustained. The plaintiff was offered the right to redeem the cheese company stock upon the payment of the amount for which it was taken as security, and refused to accept the same. That was the proper relief, under the proof in the case. There is no error in the record, and the judgment is affirmed. The other judges concur.

In re DOBSON.

(Supreme Court of Nebraska. June 30, 1893.)
CASES IN CRIMINAL CASES—IMPRISONMENT FOR COSTS.

1. When a person is convicted of a criminal offense, it is the duty of the court in which the conviction was had to render judgment against the prisoner for the costs of prosecution, and the court may make it a part of the sentence that the party be imprisoned in jail until the costs are paid, or secured to be paid, or he is otherwise legally discharged. Crim. Code, §§ 500, 501.

2. A defendant in a criminal case, confined in jail for the nonpayment of the costs assessed against him, and who is unable to pay the same, is not entitled to be discharged from further imprisonment for such costs, under section 528 of the Criminal Code, where it appears he has not been imprisoned at least one day for each three dollars of the costs.

(Syllabus by the Court.)

Original proceedings in habeas corpus, on the petition of Robert Dobson, for release from custody on a conviction of assault and battery. Heard on demurrer to the petition. Demurrer sustained.

A. Hardy, for petitioner. Geo. H. Hastings, Atty. Gen., for respondent.

NORVAL, J. This is an application for a writ of habeas corpus. On the 24th day of February, 1893, the petitioner, Robert Dobson, was convicted in the district court of Gage county of an assault and battery, and on the 27th day of the same month he was sentenced by the court to pay a fine of \$50, and the costs of prosecution, and that he be committed to the county jail until said fine and costs are fully paid. In compliance with said judgment he was committed to the jail of said county, where he is still confined. Subsequently, petitioner paid the fine imposed upon him, but no part of the costs of prosecution. It also appears that he is possessed of no estate, either personal or real,

wherewith to meet this demand. But one point is presented for decision, and that is whether the imprisonment of the petitioner because of his nonpayment of the costs adjudged against him in the criminal case is illegal.

The statutory provisions bearing upon the question are sections 500, 501, and 528 of the Criminal Code, which are as follows: "Sec. 500. In all cases wherein courts or magistrates have now, or may hereafter have, the power to punish offenses, either in whole or in part, by requiring the offender to pay a fine or costs, or both, the said courts or magistrates may make it a part of the sentence that the party stand committed, and be imprisoned in the jail of the proper county, until the same be paid, or secured to be paid, or the defendant is otherwise discharged according to law. Sec. 501. In every case of conviction of any person for felony or misdemeanor, it shall be the duty of the court or magistrate to render judgment for the costs of prosecution against the person convicted." "Sec. 528. Whenever it shall be made satisfactorily to appear to the district court, or to the probate judge of the proper county, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution for any criminal offense hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of said court or judge to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs: provided, that nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he or she may be sentenced to be imprisoned, as part of his or her punishment, nor until the convict shall have been imprisoned at least one day for every three dollars of the amount adjudged against him." An examination of the foregoing sections satisfies us that the proposition contended for by the counsel for the petitioner is not tenable. Where a person is convicted of a crime, section 501 makes it the imperative duty of the court in which the conviction is had to render judgment against the prisoner for the costs of prosecution, and the next preceding section confers authority upon such court to include in the sentence that the party be committed to the county jail until such costs are paid, or security is given for their payment, or he is otherwise legally discharged. Under section 528, a defendant in a criminal case, confined in jail for the nonpayment of the costs assessed against him, who is unable to pay the same, upon proper showing to the district court or the county judge, may be discharged from further imprisonment for such costs, provided all legal means for their collection have been employed without success, and he has been confined at least one day for each three dol-

lars of the costs. The petitioner is not entitled to be released on the ground of his poverty, since it does not appear that he has been in custody for the length of time specified in section 528. We have examined and considered the two cases cited by the petitioner's counsel. In *Estep v. Lacy*, 35 Iowa, 419, it was decided that a general pardon issued by the governor does not operate to release a judgment rendered for the costs of prosecution. To the same effect is *State v. Mooney*, 74 N. C. 98. These decisions cannot be regarded as in conflict with the views stated by us. The demurrer to the petition is sustained, and writ denied. Judgment accordingly. The other judges concur.

STATE ex rel. SUMMERS, Acting Attorney General, v. URIDIL et al.
(Supreme Court of Nebraska. June 29, 1893.)

INCORPORATION OF VILLAGE—VALIDITY—QUO WARRANTO—WHEN LIES.

1. An order incorporating a village is void, when it is obtained from the county board by means of a paper purporting to be a petition signed by a majority of the taxable inhabitants of the territory sought to be incorporated, but the signatures attached to which were not by the signers thereto appended, but were given for some other purpose, and fraudulently there-to attached.

2. Quo warranto is the proper remedy to oust persons who are exercising the powers of corporate officers, when the corporation has no legal existence.

(Syllabus by the Court.)

Commissioners' decision.

Original action in quo warranto, in the name of the state, at the relation of W. S. Summers, acting attorney general, against V. J. Uridil and others, to try the validity of the incorporation of the village of Able, and defendants' title to the office of trustees of said village. Judgment for plaintiff.

W. S. Summers, Deputy and Acting Atty. Gen., Frick & Dolezal, and S. H. Steele, for relator.

IRVINE, C. This is an information in the nature of quo warranto, alleging that the respondents, conspiring to usurp the franchise and power to license the traffic in intoxicating liquors, and enjoy its revenue, in a place in Butler county known as "Able," procured upon a piece of paper the signatures of certain persons, and thereafter made a writing in the form of a petition, praying for the incorporation, as a village, of said place of Able, and fraudulently attached said signatures to said writing, making the same falsely to appear as a petition, in due form, by a majority of the taxable inhabitants of said Able, for incorporation as a village: that they presented that paper to the board of supervisors of Butler county, and that certain of the respondents appeared before said board, and falsely swore that said place of Able contained more than 200, and less

than 1,500, inhabitants, whereas, in fact, said place contained, in all, not more than 70 inhabitants. The information further alleges that by such means the respondents fraudulently procured the county board to make an order pretending to incorporate said place of Able as a village, and appointing the respondents as a board of trustees of said village, and that the respondents have, ever since said proceedings, unlawfully and fraudulently usurped and exercised the franchise and corporate powers and duties of a village. The prayer is for a writ of quo warranto and judgment of ouster against said defendants, and for costs. No answer has been filed, and the allegations of the information must be taken as confessed.

It is clear, under these facts, that the territory designated as "Able" was not entitled to incorporation as a village; that no proper petition was filed before the board of supervisors, and that, on the contrary, a grave fraud was practiced upon the board to procure the order of incorporation, whereby the board was induced to act upon a forged petition, which conferred no jurisdiction upon the board. Under the common law, quo warranto would not lie in such a case. *King v. Saunders*, 3 East, 119. And there are decisions in the United States to the same effect. Section 704 of the Code of Civil Procedure provides, however, that an information may be filed against any person unlawfully holding or exercising any public office or franchise, or when any persons act as a corporation without being authorized by law. Under very similar statutes it has been held in several states, and we think rightly, that, in such proceedings against the persons unlawfully exercising the powers of an office, the legal existence of that office may be determined. *People v. Carpenter*, 24 N. Y. 80; *State v. Parker*, 25 Minn. 215; *Scrafford v. Gladwin Co.*, 41 Mich. 647, 2 N. W. Rep. 904; *State v. O'Sullivan*, 59 Mo. 50. Indeed, it would seem that to institute proceedings against the village itself would be to recognize its existence as a corporation, and that if the incorporation is void the only proceedings must be against the persons undertaking to exercise its franchises. There will be a judgment of ouster, and for costs against the respondents. Judgment accordingly. The other commissioners concur.

GERMAN INS. CO. OF FREEPORT et al. v. EDDY. QUEENS INS. CO. OF LIVERPOOL v. SAME. GERMAN FIRE INS. CO. OF PEORIA v. SAME.

(Supreme Court of Nebraska. June 30, 1893.)

COSTS — ALLOWANCE OF ATTORNEYS' FEES IN INSURANCE CASES — WHERE APPLICATION TO BE MADE.

1. Upon the rendition of a judgment in favor of the plaintiff in an action on a fire insurance policy issued since the taking effect of the valued policy act of 1889, where the in-

sured building has been wholly destroyed, the court rendering the judgment is, under said act, authorized to allow a reasonable attorney's fee in favor of the plaintiff, and against the insurer, to be taxed as costs in the case. Such allowance can be made only upon proof as to what constitutes a reasonable fee.

2. The question of the allowance of an attorney's fee, in such a case, cannot be raised, in the first instance, in the supreme court; but the plaintiff must first demand such fee in his petition, and present the question to the trial court, and, if disallowed, the decision may be reviewed in the appellate court.

(Syllabus by the Court.)

Action by Ambrose Eddy against the German Insurance Company of Freeport, Ill. Same plaintiff against the German Fire Insurance Company of Peoria, Ill. Same against the Queens Insurance Company of Liverpool, England. A judgment for plaintiff in each case was affirmed on appeal, (54 N. W. Rep. 856,) and plaintiff now moves for the allowance of attorneys' fees. Motion denied.

Abbott, Selleck & Lane, for the motion. Adams & Scott, opposed.

NORVAL, J. The defendant in error, Ambrose Eddy, brought three actions in the district court, each on a fire insurance policy issued, respectively, by the German Fire Insurance Company of Peoria, the Queens Insurance Company, and the German Insurance Company of Freeport. The cases were tried as one, and judgment was rendered for the plaintiff. The companies prosecuted error to this court, and the judgment of the trial court was affirmed. It was held that the insured building was "wholly destroyed," within the meaning of that term, as used in the valued policy law of 1889. 54 N. W. Rep. 856. Subsequently, the defendant in error filed a motion in this court to allow a reasonable attorney's fee for services of counsel, rendered in both courts. Section 3 of the said act of 1889 (section 43, c. 43, Comp. St. 1891) provides that "the court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as a part of the costs." Under the foregoing provision the trial court, upon the rendition of the judgment against the insurance companies upon the policies in suit, was authorized to allow a reasonable attorney's fee in favor of the plaintiff, and against the companies, to be taxed and collected with other costs in the case. Proofs should have been adduced before the trial court as to what sum would constitute a reasonable fee. No proof was offered upon that question in the court below, so far as the record before us discloses. Whether the question of the allowance of a sum for attorneys' fees, in such cases, should be submitted at the same time the cause is tried upon its merits, and to the same trial or trials of fact, it is unnecessary now to determine. Although the plaintiff, in his petition, prayed for the allowance of a reason-

ble attorney's fee, yet the record fails to show that the question was ever called to the attention of the district court. Had that been done, and a ruling adverse to the plaintiff below been made, then we could have reviewed the decision; but, as already stated, the matter of attorney's fee was not submitted to the court below, but the question is now raised for the first time, after the affirmation of the case on the merits. The jurisdiction of the supreme court to review, reverse, or correct the proceedings of a district court is appellate, merely. The question of the allowance of an attorney's fee cannot be raised, in the first instance, in this court. The motion, therefore, must be overruled. Judgment accordingly. The other judges concur.

PHENIX INS. CO. OF BROOKLYN v. REAMS.

(Supreme Court of Nebraska. June 30, 1893.)

APPEAL—REVIEW WITHOUT ARGUMENT.

Where no briefs are filed by either party in a case brought into this court on error the court will examine the pleadings and evidence, and, if the judgment conforms thereto, the judgment will be affirmed. Particular errors in a record must be pointed out in a brief of the party complaining.

(Syllabus by the Court.)

Error to district court, Franklin county; Morris, Judge.

Action on a policy of insurance by one Reams against the Phenix Insurance Company of Brooklyn. Plaintiff had judgment, and defendant brings error. Affirmed.

A. F. Moore, for plaintiff in error. E. A. Fletcher, for defendant in error.

MAXWELL, C. J. This is an action upon a policy of insurance against loss or damage to live stock by lightning, to recover the value of a mule which it is alleged was killed by lightning. The insurance company makes three defenses to the action: First, that the action was not brought within six months, as required by the terms of the policy; second, that the defendant in error has never furnished proofs of loss at the Chicago office of the company; and, third, that the mule alleged to have been killed was but three months old, and was not covered by the policy. There is a reply which need not be noticed. On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of \$60, with interest at 7 per cent. from the time the mule is alleged to have been killed, —\$74.91 in all,—upon which judgment was rendered. No briefs were filed by either party, nor are any alleged errors pointed out, except in the assignments of error in the petition. Such being the case, we will examine the pleadings and evidence, and, if the judgment is in conformity therewith, it will be affirmed. Particular errors in a rec-

ord must be pointed out in the briefs of the party complaining. An examination of the record in this case fails to disclose any material error, and the judgment is affirmed. The other judges concur.

STATE ex rel. CARTER v. TRUSTEES OF VILLAGE OF ELWOOD.

(Supreme Court of Nebraska. June 30, 1893.)

INTOXICATING LIQUORS—LICENSE—APPEAL FROM VILLAGE BOARD—STAY OF PROCEEDINGS.

1. An appeal by a remonstrant from an order of a village board, under the provisions of section 4, c. 50, Comp. St., in order to have the effect of a stay, and prevent the issuing of license to the applicant, must be taken immediately, and perfected as soon as a transcript can, with reasonable diligence, be procured and filed in the district court. *Lydick v. Korner*, 12 N. W. Rep. 838, 13 Neb. 10.

2. License was allowed on the 9th day of May. The remonstrant immediately gave notice of an appeal, knowing that the district court for the county would convene, pursuant to adjournment, on the 18th day of the same month, and that the next session thereof would be in September following. A transcript was demanded for the first time on the 19th, after the final adjournment of the district court, and filed on the 20th. It appears that a transcript could, with reasonable diligence, have been procured and filed within 24 hours from the time the license was allowed. *Hrbt.* that the appeal was not taken in time to have the effect of a stay, and a peremptory mandamus should not be allowed, to compel the village board to revoke and cancel a license issued on the 18th, after the final adjournment of the district court.

(Syllabus by the Court.)

Original application in the name of the state, at the relation of T. J. Carter, for mandamus to the trustees of the village of Elwood. Writ denied.

T. J. Carter and A. M. White, for relator. W. S. Morlan, for respondents.

POST, J. This is a mandamus proceeding instituted in this court to compel the board of trustees of the village of Elwood, Gosper county, to revoke and cancel a liquor license issued to one Gill pending an appeal from the order allowing the same to the district court of said county. The cause is, by written stipulation, submitted to us upon the petition and answer, in addition to certain admissions not appearing from the pleadings, which will be noticed hereafter. The facts disclosed by the pleadings are substantially as follows: On the 12th day of April, 1893, John Y. Gill filed with the clerk of the village board his petition for a license to sell liquors for the ensuing year in conformity with the provisions of the statutes and ordinances of said village. Notice having been given of such application, and that it would be heard on the 1st day of May following, the relator and others presented a written remonstrance and objection to the granting of a license to the petitioner. Subsequently, the petition was amended by the signing of additional names thereto, and the remon-

strance renewed. It is not necessary to critically examine the remonstrance, in this connection. It is enough to say that it is sufficient in form and substance to entitle the signers thereof to a hearing before the village board, and to prosecute an appeal to the district court. From the allegations of the answer, which are admitted to be true, it appears that the hearing before the village board was, at the request of the remonstrants, adjourned, first to the 5th, and afterwards to the 9th, day of May. On the last-named day there was a hearing of the application and remonstrance, which resulted in finding for the petitioner, and an order for the issuing to him of a license as prayed. Notice was immediately given by the remonstrants of their intention to appeal to the district court for said county, whereupon the board refused to issue the license until such appeal could be heard and determined. It appears, also, that at the time of the hearing before the board it was known to the remonstrants and their attorneys that the district court for said county would, pursuant to adjournment, convene on the 18th day of May following, and that the next term thereafter would be held in September, 1893. That at the adjourned session held on the 18th there was ample time and opportunity for the hearing of said appeal, and that a transcript of the proceedings could, with reasonable diligence, have been procured and filed with the clerk of the district court within 24 hours from the time the license was allowed, but that the remonstrants did not demand a transcript until the 19th day of May, and that the same was not filed in the district court until the day following, and after the adjournment thereof to the next regular term, in September; that on the evening of the 18th, and after the final adjournment of the district court, the village board being convened in lawful session, the petitioner, Gill, appeared before the respondents at such meeting, and showed to their satisfaction that no transcript had been demanded or filed, or other steps taken to perfect an appeal from the order above mentioned, and demanded that a license be issued to him in accordance with such order, and, acting in the belief that the failure to perfect their appeal in time for hearing at the adjourned term of the district court was intended by the remonstrants to prevent action thereon until the September term, they decided to issue the license notwithstanding the notice of appeal, which they accordingly did, as alleged in the petition. It appears from the written admission accompanying the pleadings that on the 19th, when the relator demanded a transcript, the village clerk did not demand his fees therefor in advance; that he was also county clerk and clerk of the district court, and was in the habit of performing official services for the relator, when requested, on the credit of the latter, and to render bills therefor at

his pleasure. If it were a material question in the case, we should feel constrained to hold that the clerk had waived his right to demand the fee for the transcript in advance, and that the relator has not been prejudiced by his failure to tender the fee therefor; but, since the writ must be denied on other grounds, we have no occasion to further discuss that question.

The writer was at first disposed to regard *State v. Bays*, 31 Neb. 514, 48 N. W. Rep. 270, as decisive of this case, but, upon a careful examination thereof, concurs with the other members of the court in holding that the question now at issue was not involved therein. The essence of the decision in that case is found in the concluding sentence of the opinion, on page 516, 31 Neb., and page 271, 48 N. W. Rep., viz: "The remonstrants, therefore, must be heard; and, if an appeal is duly taken to the district court, such appeal must be disposed of before the license can issue." Was the appeal in this case "duly taken," within the meaning of the statute, as above interpreted? We think not. It may be that upon the filing of the transcript, on the 20th, the district court acquired jurisdiction to entertain the appeal; but such appeal was not taken within the time contemplated by the statute, so as to operate as a stay, and thus prevent the issuing of the license. It was held in *Lydick v. Korner*, 13 Neb. 10, 12 N. W. Rep. 838, that the appeal must be taken immediately; that is, as soon as the transcript can be procured and filed in the district court. In *State v. Bonsfield*, 24 Neb. 520, 39 N. W. Rep. 427, it was said by Reese, C. J.: "It was evidently the purpose of the legislature that no delay should result from the appeal, except such as was caused by the time intervening before the next session of the district court, and that the appeal should be decided without any unnecessary delay." We do not doubt the honesty and perfect good faith of the appellants in this case, but to hold that their appeal, 10 days after the order complained of, was taken immediately, would not only be a forced construction of the statute, but would be using the process of the court to defeat the action of the tribunal to which the law has intrusted a discretion over the subject, and which, so far as this record discloses, acted in good faith, and strictly within its jurisdiction. It follows that the action should be dismissed, and the writ denied. The other judges concur.

In re WALSH.

(Supreme Court of Nebraska. June 30, 1893.)
CRIMINAL LAW—SEPARATE SENTENCE—FORGERY—
INFORMATION.

1. Where a person has been convicted at the same term of court of several distinct offenses, each punishable by imprisonment in the penitentiary, whether charged in separate informations or in separate counts of the same

information, the court may impose a separate sentence for each offense of which the prisoner has been found guilty.

2. In such case the judgment should not fix the day in which each successive term of imprisonment should begin, but should simply direct that each successive term should commence at the expiration of the one imposed by the previous sentence.

3. If the same offense is charged in different counts of an information, and there is a conviction on each count, but a single sentence should be pronounced upon all the counts for the one entire offense.

4. An information which charges the forgery of an instrument and the fraudulently uttering of the same instrument by the same person charges but one crime, and in case of conviction but one penalty can be inflicted.

5. To an information containing two counts, one charging the petitioner with the forgery of a certain bank check, and the other with the uttering of the same instrument, a general plea of guilty was entered. Thereupon the court sentenced him upon the first count to imprisonment in the penitentiary for the period of one year from the 9th day of May, 1892, and upon the other count a like imprisonment was imposed for the term of one year from May 9, 1893. By good conduct the petitioner saved two months of his first sentence, and, having served out the term under such sentence, he applied for his release on habeas corpus. *Held*, that the second sentence was illegal and void, and that he was entitled to be discharged from further imprisonment.

(Syllabus by the Court.)

Original proceedings in habeas corpus on the petition of Fred Walsh for release from custody on a conviction for forgery. Petitioner discharged.

Walter A. Leese, for petitioner. Geo. H. Hastings, Atty. Gen., for respondent.

NORVAL, J. At the May term, 1892, of the district court of Douglas county the county attorney filed in said court an information against the petitioner, Fred Walsh, which contained two counts, the first of which charges that the petitioner, on the 12th day of April, 1892, in the county of Douglas, unlawfully and feloniously did falsely make, forge, and counterfeit a certain bank check calling for the sum of \$45.60, with intent to defraud. A copy of the instrument is set out in the information. The second count charges the petitioner with feloniously uttering and publishing as true and genuine the said false, forged, and counterfeit bank check described and set out in the first count, he at the time knowing the same to be false, forged, and counterfeited. Subsequently, at the same term, the petitioner was arraigned on the information, and he entered a general plea of guilty. He was therefore sentenced by the court upon the first count to confinement in the penitentiary at hard labor for the period of one year from and after the 9th day of May, 1892, and upon the second count a like imprisonment was imposed for the term of one year from May 9, 1893. By good conduct the petitioner has saved two months of his first sentence, and, having served out the term under the first sentence, he, on

the 10th day of March, 1893, presented to this court his petition for discharge on habeas corpus, on the ground that the second sentence is illegal and void. At the hearing the writ was allowed.

The contention of counsel for the petitioner is that the power to inflict cumulative sentences does not exist, unless expressly conferred by statute, and, as there is no legislative enactment in this state authorizing cumulative sentences, such sentences in felony cases are illegal. The following authorities are cited to sustain the doctrine: *People v. Liscomb*, 60 N. Y. 559; *Miller v. Allen*, 11 Ind. 389; *Kennedy v. Howard*, 74 Ind. 87; *Prince v. State*, 44 Tex. 481; *James v. Ward*, 2 Metc. (Ky.) 271; *Lamphere's Case*, 61 Mich. 105, 27 N. W. Rep. 882; *Bloom's Case*, (Mich.) 19 N. W. Rep. 200. But, in our opinion, the great weight of authority is in favor of the proposition that upon connection of several offenses charged in separate indictments, or in separate counts of the same indictment, the court has power to impose cumulative sentences. See *Whart. Crim. Pl. & Pr.* § 910; *Bish. Crim. Law*, § 953; *Kite v. Com.*, 11 Metc. (Mass.) 581; *Mims v. State*, 26 Minn. 498, 5 N. W. Rep. 374; *State v. Smith*, 5 Day, 175; *Petition of McCormick*, 24 Wis. 492; *In re Fry*, 3 Mackey, 135; *Ex parte Hibbs*, 26 Fed. Rep. 421; *State v. Robinson*, 40 La. Ann. 730, 5 South. Rep. 20; *Parker v. People*, (Colo. Sup.) 21 Pac. Rep. 1120; *Mills v. Com.*, 13 Pa. St. 631; *Brown v. Com.*, 4 Rawle, 259; *Russell v. Com.*, 7 Serg. & R. 489; *Williams v. State*, 18 Ohio St. 46; *Eldredge v. State*, 37 Ohio St. 191; *Bohn v. People*, 73 Ill. 488; *Stack v. People*, 80 Ill. 32; *Johnson v. People*, 83 Ill. 431; *Fitzpatrick v. People*, 98 Ill. 269. The leading case sustaining the position that cumulative sentences are void is *People v. Liscomb*, 60 N. Y. 559, cited by counsel for the petitioner, and the doctrine there enunciated has been frequently criticized by law writers and jurists, and the courts generally have refused to follow it as a precedent. Although there is no statutory provision in this state which authorizes a court to sentence a person convicted of a crime to imprisonment for a term to commence at the expiration of another term specified in a previous sentence, yet, inasmuch as the statute does not in terms require sentences of imprisonment to commence in praesenti, we are persuaded that the power necessarily exists to make the term of imprisonment imposed by a sentence commence at the expiration of another, else where a person is convicted at the same term of court for several distinct offenses charged in the same or in different informations or indictments the court could pronounce a sentence of imprisonment upon one conviction only, and judgments in the other convictions would have to be postponed until the expiration of the sentence in the other case. We are unwilling to

adopt the construction contended for by the petitioner's counsel. The supreme court of Ohio, in *Williams v. State*, supra, in passing upon a similar question, say: "To hold that where there are two convictions and judgments of imprisonment at the same term both must commence immediately, and be executed concurrently, would clearly be to nullify one of them. To postpone the judgment in one case until the termination of the sentence in the other would, if allowable, be attended with obvious inconveniences and expense, without any correspondent benefit to the convict. There is nothing in the statute requiring this, and it is not to be construed so as to defeat or impede the execution of its own provisions as to the punishment of crimes. We think both upon principle and the weight of authority that we are required to hold that it is not error, upon a conviction in a criminal case, to make one term of imprisonment commence when another terminates." This court has held that, where a person has been convicted of several distinct misdemeanors, it is proper for the court to impose a separate sentence upon each offense of which the defendant is found guilty, (*Burrell v. State*, 25 Neb. 581, 41 N. W. Rep. 899,) and we know of no reason why the same rule should not apply in convictions for felonies. Where a cumulative sentence is imposed in case a person is convicted of several distinct offenses, the judgment should not fix the day on which each successive term of imprisonment should commence, but should direct that each successive term should begin at the expiration of the previous one, (*Johnson v. People*, 83 Ill. 431;) and this for the obvious reason that the prior term of imprisonment may be shortened by the good behavior of the defendant, by executive clemency, or by a reversal of the judgment; in which event the succeeding sentence would then take effect. In case it provided that the term of imprisonment should commence at the termination of the previous one. It will be observed that the second sentence in the case we are considering did not so provide, but specified that the term of imprisonment should begin on May 9, 1893. By the good conduct of the petitioner his first term of imprisonment was, under the statute, cut down to 10 months, so that his first term had ended and his second term had not commenced when the writ of habeas corpus was granted in this case, or when the prisoner was ordered discharged on the writ issued herein.

There is another reason why the imprisonment of the petitioner was illegal. The information, although it contains two counts, charges but a single offense, yet the accused has been sentenced to two separate terms of imprisonment,—one term for falsely making a bank check, and another term for fraudulently uttering the same instrument. From the information itself it ap-

pears that the check described in the second count as having been fraudulently uttered by the petitioner was the same instrument as that described in the first count as having been forged by him. Both acts were parts of the same transaction, and constituted but one crime, and the court had no power to impose separate sentences upon each count. Whart. Crim. Law, 141, states the rule thus: "Where a statute makes two or more distinct acts, connected with the same transaction, indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled that they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table, and inducing others to bet upon it, may also constitute a distinct offense. For either, unconnected with the other, an indictment will lie; yet when both are perpetrated by the same person at the same time they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted." The above doctrine is abundantly sustained by the authorities. *Johnston v. Com.*, 85 Pa. St. 54; *Ex parte Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556; *Woodford v. State*, 1 Ohio St. 427; *Hinkle v. Com.*, 4 Dana, 518; *Com. v. Eaton*, 15 Pick. 273; *Devere v. State*, 5 Ohio Cir. Ct. R. 509; *State v. Eggesht*, 41 Iowa, 574. In the last case the supreme court of Iowa decided that where a person at the same term, and as part of the same transaction, passed four forged checks, he was guilty of but one offense, and that there could not be a separate conviction for: uttering each instrument. See *State v. Hennessey*, 23 Ohio St. 330; *State v. Benham*, 7 Conn. 414. The precise question we are considering was passed upon in the case of *Devere v. State*, supra. That was a prosecution for forgery before the court of common pleas, the indictment containing two counts, one charging the defendant with the forgery of a promissory note, and the other with the uttering of the same instrument. A verdict of guilty was rendered on both counts, and she was sentenced by the court to confinement in the penitentiary for five years under the first count and a like term under the second count; the last term to commence at the expiration of the first. She prosecuted error to the circuit court, where it was held, under a statute relating to forgery, almost like our own, that the falsely making and the fraudulent uttering of the same instrument by the same person constitutes a single offense, and subjects the guilty party to but one penalty. *Bentley, J.*, in delivering the opinion of the court, says: "Upon a careful consideration of the authorities, our conclusion is that it satisfactorily appears from the record that in falsely making and fraudulently uttering the instrument

set out in the indictment the accused committed but one offense; that the 'making' and 'uttering' of the same instrument by the same party were, in contemplation of law, connected and consecutive parts of but one transaction, and became and were so merged as to render the accused guilty of the crime of forgery, but not of having committed a double crime under the statute. It results that this double sentence, imposed as before stated, was without authority of law, and the judgment pronouncing such sentence must be reversed, and the cause remanded to the court of common pleas for judgment and sentence upon the verdict of the jury as for a single offense, pursuant to law." There can be no doubt of the soundness of the doctrine stated in the foregoing quotation. Where the different counts in an information charge the same offense, in case of a conviction on each count the rule is to render a single sentence upon all the counts for the one entire offense. It follows from these views that the imprisonment of the prisoner was unlawful, and that he should be discharged.

Writ allowed. The other judges concur.

STATE ex rel. GARNEAU v. MOORE, State Auditor.

(Supreme Court of Nebraska. July 14, 1893.)

STATE OFFICERS—CLAIMS AGAINST STATE—DUTIES OF AUDITOR—VOUCHERS.

1. Under the provisions of section 9, art. 9, of the constitution, all claims upon the state treasury are to be examined and adjusted by the auditor, and approved by the secretary of state, before any warrant for the same shall be drawn. This applies to all appropriations, specific as well as general.

2. The original vouchers approved by the commissioner general are to be presented to the auditor, so that he may see that the claim is one for which an appropriation has been made.

(Syllabus by the Court.)

Original application in the name of the state, at the relation of Joseph Garneau, for mandamus to Eugene Moore, state auditor. Application denied.

A. J. Sawyer, for relator. Geo. H. Hastings, Atty. Gen., for respondent.

MAXWELL, C. J. This is an application for a mandamus to compel the auditor to draw his warrant on the state treasury of Nebraska for the sum of \$5,000, from the funds appropriated in said act, and now in the state treasury, and deliver the same to the relator. The defendant has filed an answer, in which he admits many of the allegations of the petition, but denies that the relator has devoted his entire time and attention to the duties of his office, and denies that the expenditures mentioned in the petition were all necessary, just, and proper, and denies that the estimate for said \$5,000 was accompanied by proper vouchers. The

petition is accompanied by a copy of the act of the legislature approved April 8, 1893, and by a large number of vouchers and estimates covering moneys heretofore drawn, and submitted by the relator to the auditor. Among the estimates and vouchers filed, we find charges for hotel bills, and other like charges, and most of the estimates are not accompanied by vouchers of the parties rendering the services or furnishing the materials.

Section 9, art. 9, of the constitution, provides that the legislature shall provide, by law, that all claims upon the treasury shall be examined and adjusted by the auditor, and approved by the secretary of state, before any warrant for the amount allowed shall be drawn: provided, that the party aggrieved by the decision of the auditor and secretary of state may appeal to the district court. The construction of this provision of the constitution was before this court in *State v. Babcock*, 22 Neb. 38, 33 N. W. Rep. 711. In that case the legislature had passed an act to provide for paying of the expenses incurred in the prosecution of Olive for murder. The court held that the constitution requires that all claims upon the state treasury must be examined and adjusted by the auditor, and his action approved by the secretary of state, before any warrant can be drawn therefor, and this provision applies to all claims, whether claimed by virtue of a specific appropriation or not. In *State v. Moore*, 54 N. W. Rep. 866, this court held that the original vouchers must be presented to the auditor, for him to act upon. This seems important, in order that the auditor may determine that the claim is one for which the legislature has provided an appropriation. If it is not, it is his duty to refuse to draw a warrant. The auditor draws every warrant at his peril, and, if he draws a warrant without authority of law, he and his sureties are liable for the same. This would seem to be important in this case. A number of claims are presented to the auditor that are clearly for expenses. The relator is paid a salary of \$2,000 per year. He is also entitled to his traveling expenses. In estimating traveling expenses, however, they would be simply compensation for going from his home to Chicago, and from Chicago to his home. If, in the mean time, he desires to return home, and from thence to Chicago, he must do so at his own expense. The return is for his own convenience, and must be at his own expense. The original vouchers must, in all cases, be sent to the auditor. The commissioner should approve the same before sending them. The auditor will then have the evidence of the debt before him, and will know whether it is such a claim as the legislature has provided an appropriation for. If it is, it is his duty to draw a warrant. If it is not, then he should refuse. He is not to draw a warrant upon mere estimates, and as the appli-

cation, in this case, is to draw upon mere estimates, the writ of mandamus must be refused. It may be said that this will occasion inconvenience, by causing delay in the payment of claims; but not necessarily so. Lincoln is but 16 hours from Chicago, and claims sent one day can be returned not later than the third day, so that there will be no great delay. In any event, the constitutional provision applies to all claims, including the claims in question, and the construction heretofore placed upon the provision must be adhered to. The writ is denied. Judgment accordingly. The other judges concur.

NORVAL, J., concurs. POST, J., dissents.¹

IOWA SAV. BANK v. DUNNING et al.
(Supreme Court of Nebraska. June 29, 1893.)
CHATTEL MORTGAGES—DESCRIPTION OF PROPERTY
—NOTICE—QUESTION FOR JURY.

1. A description of property covered by a chattel mortgage, which will not enable third persons, aided by inquiries which the mortgage itself suggests, to identify the mortgaged property, is not constructive notice to good-faith purchasers thereof for a valuable consideration.

2. Whether the description of property in a chattel mortgage, and the other inquiries which the mortgage itself suggests are sufficient to enable third persons to identify the mortgaged property is a question of fact for the jury.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Saunders county; Post, Judge.

Action in replevin by the Iowa Savings Bank against Dunning & Hartson. Defendants had judgment, and plaintiff brings error. Affirmed.

Jay Bros. and Simpson & Sornborger, for plaintiff in error. Geo. I. Wright, for defendants in error.

RAGAN, C. This is a suit brought by the Iowa Savings Bank against Dunning & Hartson to the district court of Saunders county for "possession of one hundred and seventy-eight two and three year old steers, marked with an inverted 'V' cut in the ear." The bank claims these steers by virtue of two chattel mortgages made by one Jackson to one Wheeler, and by the latter assigned, together with the evidences of debt which they were given to secure, to the bank. There was a verdict and judgment for Dunning & Hartson, and the bank brings the case here, and assigns for error that the verdict is not supported by the evidence, and that the court erred in certain instructions given to the jury.

As to whether the verdict is supported by the evidence, it appears in September, 1889, Wheeler sold two lots of cattle to Jackson, and to secure a part of the purchase money took from him notes and the mortgages

above mentioned on the cattle sold. The cattle were described in the mortgages as follows: "(a) Ninety head two and three year old steers in spring of 1889 marked $\diamond$ (diamond) hole in right ear; branded O on right hip. (b) Ninety-eight head three year old steers marked $\diamond$ (diamond) hole in the left ear; also branded O on right hip." The mortgages were duly recorded in Stanton county, one on the 20th day of March, and the other on the 30th day of April, 1889. It is not pretended that any of the cattle replevied in this suit were branded with the letter O. The cattle sold by Wheeler to Jackson were not thus branded, but the evidence shows that Jackson promised at the time of their purchase that he would so brand them. There was evidence on the part of the bank that the steers sold by Wheeler to Jackson were at the time marked with a diamond-shaped hole in the ear; and there was evidence at the trial to the effect that the ears of some of the cattle replevied still had this diamond-shaped mark, though partly obliterated by a cut made in the ear; and some of the witnesses for the bank identified some of the cattle replevied as the same cattle covered by the mortgages. On the other hand, there was evidence for Dunning & Hartson that they bought the cattle in controversy out of a herd of some 600 from a man named Abrams, in whose possession they were; that the purchase was in good faith, for a valuable consideration, without any knowledge, either actual or constructive, of the existence of the mortgages, and without knowledge or notice of any fact or circumstance to put them on inquiry as to the mortgages; that the cattle in suit were none of them marked with a diamond-shaped hole in the ear, none of them branded with the letter C, and all distinctly marked by a "swallowfork" in the ear; and that they were not the cattle sold by Wheeler to Jackson. Abrams, the vendor of the defendants, was a witness, and testified that all of the cattle replevied were cattle he sold to the defendants, and that he purchased some of these cattle from the Sioux City stockyards, some from a cattle dealer named Hall, in Minnesota, and some of them from Jackson, and that none of the cattle bought by him of Jackson or of the other parties, or sold by him to Dunning & Hartson, had any diamond or other mark in their ears, but that all his herd, some 600, except 175 big cattle, were marked by a "swallowfork" in the ear. Dunning, who bought the cattle, swears all the cattle bought by him of Abrams were "swallowforked," and "not a critter in the bunch" that had a diamond hole in its ear, or any indication of there ever having been one.

There were some 16 witnesses in the case, and all of equal credibility, so far as we know. The important question in the case was whether the cattle replevied were the

¹ For dissenting opinion, see 56 N. W. Rep. 154.

ones covered by the mortgages,—a question of identity. The bank claimed, and made a vigorous effort to show, they were. The defendants as vigorously protested they were not. There is sufficient evidence in the record to sustain a finding either way. This is a case that demonstrates the wisdom of our fathers in providing a jury for the determining of disputed questions of fact. The men of that tribunal heard all these witnesses, had the opportunity to observe them and their conduct while on the stand, and after several and careful readings of all the evidence we certainly cannot say that the verdict was wrong.

The instructions given by the trial court, and excepted to by the bank, are as follows: (1) "If you find that the steers found in defendants' pasture are the steers mortgaged to Wheeler in Pender, as already explained, you will proceed to consider the other questions submitted to you. If you do not so find, or if the preponderance is with the defendants, or if the testimony is evenly balanced upon that question, you will return a verdict for the defendants, and need not, in that case, consider the other questions submitted." (2) "The mortgages introduced in evidence are both in due form of law, and were filed in due form, and are sufficient to entitle plaintiff to the possession of the steers in controversy, as against said Jackson. It does not follow, however, that plaintiff is entitled to the possession of said steers, as against the defendants, Dunning & Hartson, even should you find that they are the identical steers sold by Wheeler to said Jackson." (3) "If you find that the description in the mortgage is sufficient to put the defendants on inquiry, and put them in the way of learning the truth about plaintiff's mortgage, you will have to find for the plaintiff. If you do not so find, and if you further find that defendants are purchasers in good faith, as explained hereafter, you will find for the defendants." (4) "If you find that the description of the steers in the mortgage is not sufficient to put a purchaser upon his guard, and to leave him to a knowledge of the rights of the plaintiff, as already explained, and that the defendants bought and paid for the said steers in good faith, without any knowledge or information that they had been mortgaged to Wheeler, then you are charged that they would acquire a complete title to said steers, and should recover in this action." These instructions were applicable to the evidence, and stated the law correctly.

The authorities cited by learned counsel for plaintiffs in error are not to the point. The cattle in question were not obtained from Wheeler by fraud. If the cattle replevied were the ones covered by the mortgages, the question still remained whether the defendants were innocent purchasers of them. The contention of the plaintiffs in error is that, conceding the cattle replev-

ied to be the same cattle covered by the mortgages, any further inquiry was immaterial. This is not the law as applied to the facts of this case. The cattle were described in the mortgages: "Steers marked

◇ (diamond) hole in the left ear; also branded C on the right hip." It was conceded the cattle covered by the mortgages were not branded at all. There were two defenses made on the trial,—one that the cattle replevied were not the cattle mortgaged; and the other that, if they were, defendants were innocent purchasers for valuable consideration, without actual or constructive notice of the mortgage; that when they purchased, they were in possession of no fact or circumstance which, aided by all the indices afforded by the mortgages, were sufficient to put them on inquiry, or enable them to identify the cattle as the ones covered by these mortgages. The defendants introduced much evidence, as above stated, in support of both their defenses. The charge of the trial judge, which included the instructions complained of, was not only correct, but a model statement of the law applicable to all the phases of the case. The logical result of counsel's proposition is that no description of the subject-matter of a chattel mortgage is necessary; that is to say, no one can acquire title to a mortgaged chattel as against the mortgagee thereof, no matter under what circumstances he may purchase the chattel, or what its description may be in the mortgage. The description of the cattle in these mortgages was not only not constructive notice to a purchaser of the cattle that they were covered by these mortgages, but evidence that the cattle purchased were not the ones mortgaged. The description of the property covered by a chattel mortgage which will not enable third persons, aided by inquiries which the mortgage itself affords, to identify the mortgaged property, is not constructive notice to a good-faith purchaser thereof for a valuable consideration. *Smith v. McLean*, 24 Iowa, 322; *Rowley v. Bartholemew*, 37 Iowa, 374. There is no error in the judgment of the district court either in the instructions or in the admission of testimony, and the same is in all things affirmed. The other commissioners concur.

SHULTS v. STATE.

(Supreme Court of Nebraska. June 30, 1893.)
HOMICIDE—INSANITY AS A DEFENSE—COMPETENCY OF NONEXPERT WITNESS.

1. Only such intimate acquaintances of a person accused of crime as have seen him almost daily for several months preceding the date upon which the alleged crime occurred are competent, as nonexpert witnesses, to testify as to the sanity or insanity of the accused.

2. Such testimony, however, must be strictly limited to such sanity or insanity, and confined to those occasions upon which the witness testifies to having observed the conduct and ap-

pearance of the individual whose sanity is the subject of inquiry.

3. The rule permitting a nonexpert witness to testify as to the sanity or insanity of a party whose legal accountability is the sole matter in issue does not allow such witness to testify that, at a certain date, such party knew the difference between the right and wrong of an act at that time committed by him.

(Syllabus by the Court.)

Commissioners' decision. Error to district court, Hall county; Harrison, Judge.

Cuyler Shults was convicted of murder in the first degree, and brings error. Reversed.

W. A. Prince and W. H. Thompson, for plaintiff in error. Geo. H. Hastings, Atty. Gen., and Chas. G. Ryan, for the State.

RYAN, C. Cuyler Shults was convicted in the district court of Hall county, Neb., of the murder of J. P. Farr, charged to have been committed in said county on the 28th day of August, 1891. There was no question that said Farr came to his death, at the time and place charged, from the effect of a gunshot wound inflicted upon him by said Shults. The defense was insanity, of which there was much evidence. It was shown that the accused was wounded in the right side of the head, by a fragment of a shell, on the 6th of April, 1862, at the battle of Shiloh; that since his discharge from the federal army the accused has become gradually morose,—at times almost savage towards the members of his family; that he has become, year by year, quarrelsome at times, and distrustful of his family and friends; that he frequently was cruel towards his cattle and horses; that, when crossed by either man or beast, he became much irritated, and on such occasions threatened to take the life of the animal or man by whom his displeasure was excited; that he sought solitude, and talked much to himself; that a medical examination showed that his left side was partially paralyzed; that his sleep was fitful; that, owing to a continuous pain in the region of the above-mentioned wound, the accused habitually slept with his hands locked across his head; that he seized frequently the bedclothes in his teeth, and bit and tried to tear them, at the same time gritting his teeth, and on one or two occasions it was testified that he foamed at the mouth. There was evidence that the night before the commission of the homicide the accused was agitated beyond reason by an act of Farr, which accused considered as an outrage towards himself and his family; that in speaking of it he shed tears on that day, and on the same day as, and just previous to, the killing of Farr, saying at each time mentioned that he had to kill Farr. Other evidence in the same direction was given, and there was also evidence of epilepsy of accused's mother. The wife of the accused testified that accused said that, by the use of intoxicating liquors, the pain which continuously existed in his

head was deadened; and she further testified, as of her own observation, that such use enabled him to sleep when otherwise he could not. There was medical expert testimony that periodic insanity of a sub-acute character was indicated by the symptoms of the prisoner. The state insisted that the above conduct of the accused was owing to a violent temper, often aggravated by intoxication, but that no insanity existed. As the sole contention in this case was as to the sanity and ability of the accused to discriminate between right and wrong on the 28th day of August, 1891, we shall limit our observations to that, and incidental inquiries, giving the testimony of the witnesses on rebuttal at considerable length. (To a proper understanding of this evidence, it is proper to explain that the accused, for some years previous to the homicide, resided between eight and nine miles, in a southerly direction, from Grand Island.)

James McKnight testified that he had known the accused about four years. Lived within about a mile and a half of the place of residence of the accused. Was middling well acquainted with him. Saw him pretty often, but could not say just how often. Sometimes, once or twice a week. Sometimes, would not see him for a month, perhaps. Saw him quite frequently during the summer previous to that in which the evidence was given, and saw him and talked with him on the 27th of August, 1891. That during the time witness saw the accused he talked with him about as frequently as one neighbor would with another, but never had any business transactions with him. Had seen him drink in Grand Island, and once saw him under the influence of liquor when he was coming home from Grand Island, which was August 27, 1891. Following this testimony, the witness was asked: "Question. I will now repeat the question. You may state, Mr. McKnight, from your knowledge of Cuyler Shults,—gained by your acquaintance with him, as you have stated,—whether, in your opinion, he was sane or insane on the 28th day of August, 1891?" Answer. I would say he was as sane as any man, as far as I could see." On further examination this witness testified that he had never noticed any peculiar acts of insanity about the accused.

John Schwim testified that he resided at Doniphan, Neb., where he had lived for about six years. Had met the accused in Mr. Wolbach's store, where witness was book-keeper, about seven years before the date of the trial. Since that, would sometimes see him every week, and sometimes once a month. During the preceding spring, on account of accused's sickness, he had not seen him during a period of two or three months. Witness further testified that his occupation was that of cashier of the bank of Doniphan; that for the last three or four years the accused had owed the bank

some money, and the bank had generally some collection notes against the accused, who was accustomed to visit the bank perhaps once a month. Sometimes there would be a lapse of two or three months. Witness testified that he had seen the accused about a week or two before the 28th of August, 1891. Accused was then at the bank, talking with witness. His condition was about as usual ever since witness had known him. Witness testified that he had passed the house of accused a couple of times. Talked with him about fishing,—a general conversation. This was in July or August, 1891. The habits of the accused were irregular. Witness had never seen the accused take a drink, and, in relation to being under the influence of intoxicating liquor, seemed always to be the same; that is, witness could not distinguish it, if he was under the influence of liquor. Upon this preliminary examination the following question was propounded to the witness: "Question. Now, from what he appeared to you on the 28th day of August, and from what you have known of him during all the time during the last seven years, in your judgment or opinion, was the man sane or insane on the 28th day of August, 1891?" Objection duly made, overruled, and exception taken. The court remarked: "I think he may answer now. It is pretty close, though." Whereupon witness answered: "Answer. I cannot form an idea if he had been sane or insane. Mr. Shults was eccentric. I cannot draw the line between insanity and eccentricity. I am no expert. Q. What does his eccentricity consist of, Mr. Schwim? A. Well, first, he had a mania for lying. Q. What else, if anything? A. And telling stories in general. Q. What else? A. Oh he had— I don't think he ever liked work very much. He wanted to go fishing and hunting. It was one of his passions. Q. That was one of his eccentricities, was it? A. Well, it was more of a passion, I should think. And lying I should class as an eccentricity. A man may have a passion for lying, the same as he may have for stealing, or kleptomania. I don't know as there is any man that has the habit of lying when it don't do any good. Q. From your knowledge of this man during these seven years, and the many times you have met him and talked with him, with all of his eccentricities, taking them together, what, in your opinion, was the man's ability to judge between right and wrong in this particular crime, committed on the 28th of August, 1891?" Due objection was made, overruled, and exception taken. Witness answered: "A. I think when— Of course, I don't know what state his mind was in at that time—the day he committed the crime; but, from the appearance he gave me the last few times, I think he could distinguish between right and wrong."

Mr. Henry Denman testified, on rebuttal,

that he lived 11 miles southwest of Grand Island at the time of testifying, where he had lived over 22 years. Had known Cuyler Shults between 12 and 15 years, and during the time of his acquaintance with Shults had seen him two or three times a week,—sometimes, might be a month, probably not more than once or twice a month, and again witness might not see him for two months. During the time of his acquaintance with the accused, witness had held the office of sheriff and jailer of the county for two years. Had seen the accused in the jail perhaps three or four times during those two years, which were 1882 and 1883. Since the last date above given, witness had lived on his farm, in the neighborhood of 2½ miles from the residence of the accused, during which time he had seen him every two or three days. Often saw him on the road, and sometimes in the village of Doniphan; sometimes in the city of Grand Island. Sometimes he would see him once a week, and sometimes it might be two or three weeks. When witness saw the accused in Doniphan, he would be doing considerable talking, and drank considerable liquor. Had met the accused a great many times in Grand Island, and the accused seemed, and was, under the influence of liquor. When in this condition he was more boisterous than when sober,—was talkative and violent. When under the influence of liquor, Mr. Shults' eyes seemed to be very glary,—had a devilish appearance,—devilish disposition seemed to have possession of him. When sober the witness could observe no incoherence in the speech of the accused, but, when drunk, the accused's tongue would be thick and numb, and he could scarcely talk. Witness testified that he did not see the accused very often during the summer of 1891. Probably met him half a dozen times in the fore part of the season.—June and July,—on the road from accused's place to Doniphan. Witness testified that he was at the home of the accused between the 25th day of July and the 15th of August, 1891, between 9 and 10 o'clock in the evening. After witness had been there 10 or 15 minutes, accused came from the river, where he had been attending to his fishhooks. Witness conversed with him. Accused did not act any differently from any time when witness had met him when he was sober. Premised with this testimony, the following questions and answers appear in the record: "Question. Now, Mr. Denman, from your knowledge of him, as you have stated, was he, in your opinion, sane or insane in August, 1891?" Upon the suggestion of the court that the question be confined to the acquaintance of the witness with the accused, the question was put in the following form: "Question. Mr. Denman, from this knowledge and acquaintance with the defendant, was he, during the time you have known him, sane or insane, in your opinion? (Due objections were made, overruled, and excep-

tions taken.) Answer. My opinion is he was sane. Q. From your knowledge and acquaintance with him during the time you speak of, did he, in your opinion, know the difference between right and wrong? A. Yes, sir. Q. From your knowledge of him during the time you have known him, could he, in your opinion, distinguish the difference between right and wrong in the particular act charged in this information, namely, the killing of J. P. Farr on the 28th of August, 1891? Due objections were made to this proposed evidence, which were overruled, to which the defendant excepted. Witness answered: "Yes, sir."

John W. Denman testified to an acquaintance with the accused, and opportunities of observing his conduct much to the same effect as detailed in the evidence of the last witness. He said that he saw the accused on the 27th day of August, 1891, going to Grand Island, about 11 o'clock in the forenoon, when he had some talk with the accused, who told him about his trouble with Mr. Farr. That he saw the accused the same day about sunset. That at the last-named time the accused was under the influence of liquor. Saw him the next day after the homicide, when the accused said to him, "Good-bye;" that accused never expected to see witness again. That witness remarked to him that he expected he (Shults) would get into the "jug" over to Grand Island. No further conversation was had at that time. That, during the witness' acquaintance with the accused, he lived within about three miles of him. After this preliminary testimony, witness was asked the following question: "Question. Now, from your knowledge and acquaintance of this man for the number of years that you have known him, state, Mr. Denman, what was your opinion of this man, in regard to his ability to judge between right and wrong of this particular act, committed on the 28th of August, 1891." After the overruling of objection and taking of exception, witness answered: "Answer. Well, I should judge he was able to judge between right and wrong."

John Gallagher testified that, at the time of giving his testimony, witness lived $7\frac{1}{2}$ miles south of Grand Island, where he had lived for about a year. Previous to that time he had lived 1 mile north of Doniphan and a mile east, for four years. Prior to that time he had lived 6 miles east of Doniphan, or, rather, 5 miles east of Doniphan, and 1 mile south. He detailed about the same means of observation, and the same intimacy of acquaintance, as has been stated by the two witnesses whose evidence immediately precedes that of this witness. Witness further stated he had always considered the conversation of the accused just as rational as his own. Never saw him take a drink of liquor in his life. Every time witness met the accused coming from towards Grand Island, accused seemed to be intoxicated. At such

times he talked just as any other man would when the worse for liquor. Sometimes he would be drunk, almost, and lying in the bottom of the wagon, letting his horses proceed homeward without any restraint at all. Had seen the accused under the influence of liquor in Grand Island. Noticed no difference in him when intoxicated, in appearance, from the appearance of other men when intoxicated. Sometimes, under such circumstances, he was profane and abusive. Sometimes, whether intoxicated or not, he was angry and excited. One time, in 1889, while surveying, noticed such conduct of accused when he was sober. The defendant then accused witness of bringing Mr. Shaw—"the damn big Scotchman," as he called him—out to cheat him out of his land; warned witness not to come near him, or witness might look out for the hatchet which was in the hands of the accused. At that time the accused ground his teeth, and looked like an angry man. The expression in his eyes was one which witness had noticed many times when accused was excited. He had a flashing eye. When talking, the accused would put the corner of his handkerchief or necktie into his mouth. On such occasions he would talk rational, however. Never heard him give any reason for this conduct. Witness saw accused in August, 1891, when accused was brought before the commissioners of insanity. Met him on the way to Grand Island. At that time, had conversation with him, and accused talked as he always did. Said he had been over before the said commissioners, but said the commissioners could not keep the accused long, because he just told them that if he was insane they would have to take care of him, and if he was not insane they would have to turn him out, and let him go. Accused told witness, at that time, that it was a damn good scheme for to get rid of him. The defendant accused Mr. Yonker of having instituted the proceedings before the commissioners of insanity. Yonker is his son-in-law. At that time, accused told witness that Yonker could not stay on his place. Subsequently to that time, and before the homicide, witness had met the accused, and talked with him for probably an hour or an hour and a half. Could see no difference in his talk or conduct, from what it ordinarily was. This last conversation witness fixed as on the 28th of August, 1891. It was just a general conversation in regard to the weather, the old trouble of cutting a fence. Accused said if they would rebuild it, and deprive his family of going to school, and provision to live on, he would cut the fence down; said they could not ride over him any longer, or, if they did, he would shoot them. Did not say who he referred to. Witness was then asked the following question: "Question. Mr. Gallagher, from your acquaintance with him, as you have detailed, you may state whether or not, in your opinion, he was sane or insane dur-

ing the time you have known him." To this there was proper objection, which was overruled, and exception taken. The witness answered, "I always thought he was a sane man."

Zenas H. Denman testified to facts showing about the same means of observation and acquaintance with the accused as has been stated in the testimony of the three last-named witnesses. The witness further stated that the last time he saw the accused was about five or six weeks prior to the homicide; that is, the last time he had a talk with him. He was then asked this question: "Question. Mr. Denman, from your acquaintance with him, as you have detailed, did he, in your opinion, know the difference between right and wrong, as to the killing of J. P. Farr, on August 28, 1891?" He answered: "Answer. From the last talk I had with him,—I think it was about six weeks prior to the shooting,—I should say he would know right from wrong."

Dr. Sutherland testified as to the indications of certain phenomena respecting the accused, which had been detailed by the other witnesses.

John Allen testified that he was clerk of the district court of Hall county, and ex officio clerk of the board of commissioners of insanity. That defendant Shults was before the board, on the charge of insanity, on July 22 or 23, 1891. That he attended the inquisition held as to the alleged insanity of defendant Shults. That witness talked with accused about his condition, and that accused said, if he was insane, then he always had been; claimed that his family was plotting against him; that he had had trouble with Yonker; also with his own son, John; that accused's wife was very deceitful,—when any person was around the house, she was pleasant and nice to him, but as soon as they were gone she abused and aggravated him; that he wanted to subpoena twenty-five witnesses from Grand Island, and the neighborhood where he lived, to prove that he was not insane. This was about 8 o'clock in the evening; that the commission did not want to put the county to a great deal of expense, and commenced and concluded to hold the examination that evening. It was held in the county superintendent's office. Mr. Shults handled his own case, and made the witnesses own up to nearly everything he had told the commissioners. That the commissioners turned Mr. Shults over to the sheriff until next morning at 10 o'clock. The accused talked a great deal, repeated the assertions he had made as to his family, and commenced to tell war stories, among other things. Did not see the accused, after that time, before the 28th of August. Had known Cuyler Shults for 10 years, during which time witness had seen him, on an average, probably, of about once in two months, in Grand Island. Sometimes the accused came in to have witness

make out his pension papers, affidavits, etc. Sometimes witness saw him on the street. Accused talked a good deal. Was generally under the influence of liquor,—sometimes a good deal under the influence of liquor. Was full of talk. Made rather rough remarks and jokes. Did not particularly notice his eyes. Had noticed him when he was angry, when he would be a little more talkative than usual; talked rather loud, and in rather a disconnected manner. Witness did not have a great deal of talk with him when he was intoxicated. Would get through with him as soon as possible. Merely required him to answer questions to get his papers in proper shape and signed. Talked with him on the streets, probably three or four times a year. Witness was then asked: "Question. Now, from your acquaintance with him, as you have detailed, was he, in your opinion, sane or insane, during the time you knew him?" After the overruling of an objection and exception taken thereto, witness answered: "Answer. Sane, but not very well balanced." He was then asked: "Q. Mr. Allen, from your acquaintance with him, as you have testified, did he, in your opinion, know the difference between right and wrong on the 28th of August, 1891, when he killed J. P. Farr?" Upon proper objection being overruled, and exception taken, the witness answered: "A. I think he did. He seemed to know the penalty of the crime he had committed."

Mr. Glanville, another member of the board of commissioners of insanity, testified substantially as above in respect to the proceedings had on July 22 or 23, 1891. He was not asked his opinion as to the sanity or insanity of the accused, or his ability to discriminate between right and wrong.

George Grantham testified that he lived $3\frac{1}{4}$ miles south of Doniphan. Had known the accused for 20 years. First knew him in Butler county, Neb., where he lived in the same house with witness. Might have been four or five months. During that time he appeared all right. In speaking, his manner was very quick. Spoke quicker than some people do. Did not drink much then, as he has lately, because he was poor at that time. Would get mad very quick. After he left Butler county, witness next saw him at Doniphan, Neb., about 12 years before the date of the trial, when he was living on a farm on the Platte river. Witness and the accused had had a little trouble in Butler county, and the accused wanted to make it up with the witness every time they met, and especially when the accused had had liquor. At such times the accused terribly wanted to get into conversation with witness, and make it up, and said that, if witness would come down home with him, accused's wife would make witness some candy. He was somewhat intoxicated at the time. While at Doniphan, witness had seen accused around the corner of a building, drinking

out of a bottle, once or twice. After accused came to Hall county, Neb., witness saw him once in two or three weeks or once a month, just as it happened. Had seen accused after accused had said his wife would make witness some candy. Sometimes he was sober, and sometimes he was not. Witness had never seen accused excited or angry since he had been in Hall county. Witness had seen accused some time before the killing of J. P. Farr, but could not say how long previous to that date. Could not say in what year. Witness was then asked this question: "Question. Now, Mr. Grantham, from your acquaintance from the time you first met him in Butler county, was he, in your opinion, sane or insane, during the time you have known him up to the 28th of August, 1891?" Objection was duly made to this question, which was overruled, and exception taken. Witness then answered: "Answer. Well, sir, I should say he was a sane man, sir." Witness was then asked this question: "Q. From what you know of him from the time you first knew him in Butler county up to the 28th day of August, 1891, did he, in your opinion, know the difference between right and wrong, as to the killing of J. P. Farr, on August 28, 1891?" After the overruling of due objection to this question, to which exception was taken, the following answer was made by the witness: "A. I should judge he did know right from wrong."

It will scarcely escape observation that all the preliminary inquiries made were introductory to two questions: First. Whether the accused was sane or insane,—in some instances, on the day of the homicide; in others, during the acquaintance of the witness with the accused. Second. Whether, on the day of the homicide, the accused could judge between right and wrong, in respect thereto. This evidence was in no instance given by an expert, hence the following quoted language is applicable thereto. In *Schlencker v. State*, infra, occurs the following language: "The defense of insanity being interposed, and several witnesses having testified to strange conduct on the part of the prisoner shortly before, and on the day of, the homicide, a number of witnesses—not experts, however—were examined by the state as to his conduct and appearance in their presence on sundry occasions both before, and shortly after, the shooting occurred. The opinions of these witnesses as to prisoner's mental condition, based upon what they had personally observed, and then detailed to the jury, were admitted in evidence, under the objection that they were incompetent evidence. That none but medical experts shall be permitted to give to the jury their opinions, based upon the testimony of other witnesses on the question of insanity, is, we believe, universally held. In this case, however, the witnesses were the neighbors and acquaintances of the prisoner, who knew him well; and their opin-

ions were formed from seeing and observing him, for several months, almost daily. Opinions formed under these circumstances, although not those of medical men, are nevertheless entitled to respectful consideration by courts and juries, and we have seen no satisfactory reason for holding them to be incompetent evidence." In *Polin v. State*, 14 Neb., on page 546, 16 N. W. Rep. 898, is found the following language: "Nonexpert testimony on the question of the prisoner's alleged insanity was admissible. The witnesses had known the prisoner for years; were more or less intimately acquainted with his habits and practices, and formed their opinions from facts within their knowledge. Their testimony was clearly within the rule announced in the case of *Schlencker v. State*, 9 Neb. 241," 1 N. W. Rep. 857. In *Burgo v. State*, 26 Neb., on page 643, 42 N. W. Rep. 701, this court said: "It is probable that there is no better proof of the sanity or insanity of a person than the testimony of those who are intimately acquainted with him, and have observed his conduct for months and years." The inquiry as to sanity or insanity is as to a fact, "and the expressed opinion of one who has had adequate opportunities to observe his conduct and appearance is but the statement of a fact; not, indeed, a fact established by direct and positive proof, because, in most if not in all cases, it is impossible to determine with absolute certainty the precise mental condition of another, yet, being founded upon actual observation, and being consistent with common experience, and the ordinary manifestations of the condition of the mind, it is knowledge, so far as the human intellect can acquire knowledge upon such subjects." *Insurance Co. v. Lathrop*, 111 U. S. 620, 4 Sup. Ct. Rep. 538. To testify as above indicated, it should be affirmatively shown that the nonexpert witness has had sufficient acquaintance and means of observation to testify as to sanity or insanity, as to any other physical fact. In support of the ruling of the court in excluding the opinion of Campbell, a witness of the class now under consideration, counsel for the defendant in error, in their brief, use the following apposite language: "The doctrine is well settled, in accordance with the current of authority, that the witness who is not a medical expert may, in certain cases, where the question of insanity is raised, and the state of mind of a person is the subject of investigation, state his opinion; but to warrant this being done, and such opinion being received in evidence, it must first be shown that the acquaintance of the witness with the party whose sanity is questioned is of an intimate character, and his associations with him of sufficient duration to justify him in forming a correct judgment as to the intellectual status of the person whose sanity is under investigation." This rule properly excluded the testimony of Campbell, and with the same effect should

have been interposed against the evidence of some of the witnesses on rebuttal,—notably, that of George Grantham. The evidence should, to qualify a nonexpert witness to testify as to a condition of sanity or insanity, show an acquaintance with that condition, which in the instance last cited, at least, was not sufficiently done. Not only so, but evidence of such condition must be confined to periods when there was sufficient opportunities for observation. It will readily be seen that some of these witnesses showed a disconnected acquaintance with the prisoner, extending through several years, yet they testify as to the condition of the accused, apparently in no way limited by, or having relation to, the periods covered by such observation. This could hardly be considered evidence pertinent to the existence of a fact, established, though it was, by observation. It may have been an inference by the witness, deduced from the presumed continuance of the condition which the witness had observed, but that is not within the rule, or the reason of the rule, which permits the use of this class of evidence.

There is, however, a more radical objection to the testimony given by the witnesses in rebuttal than has been yet made, though it lies in the general course of former observations. After having shown opportunities for observation of the accused from twice a week to once in two or three months,—in one instance, at least, being no nearer than six weeks to the date of the homicide,—witnesses were asked whether, in their opinion, the accused knew the difference between right and wrong on August 28, 1891, as to the killing of J. P. Farr. The evidence of these witnesses as to the sane or insane condition of the prisoner was tolerable only because they testified as to the existence of sanity or insanity as a fact. What deduction was to be drawn from that fact was solely a question for the consideration of, and determination by, the jury. The contest was not as to the fact of the homicide, but was as to the legal responsibility of the accused for its commission. The court properly instructed the jury that if the accused, at the time, by reason of insanity, had not the capacity to distinguish between right and wrong, he could not be held accountable. This capacity was the sole question for the jury to determine. To allow the witnesses to testify that in their opinion the accused, when he committed the homicide, was sane, and, further, that he knew the difference between right and wrong, as to his killing of J. P. Farr, at the time of the commission of the homicide, was to allow of as incompetent evidence as to have permitted the same witnesses to testify whether or not, in their opinion, the accused was guilty as charged. If the testimony really given was accepted by the jury, and acted upon, as true, only a verdict of guilty could logically result. The reason for the rule allowing nonexpert witnesses to tes-

tify as to sanity or insanity, as a physical fact, has been fully set out, that it may be obvious that in this there is no violation of the general rule which forbids witnesses, not experts, testifying as to a mere opinion. In some courts even this class of evidence has been rejected, because assumed to be but one kind of an opinion. By the great majority of courts, however, it is allowed, because it is not open to that objection. This rule, however, furnishes no excuse for permitting nonexpert witnesses giving what without doubt is a mere opinion, and that, too, upon the one vital question in the case,—the legal accountability of the prisoner for a homicide admittedly committed by him. The judgment of the district court is reversed.

IRVINE, C., concurs. RAGAN, C., as counsel, having advised parties interested in respect thereto, took no part in the consideration or decision of the above case.

STATE ex rel. CRAWFORD v. NORRIS, Judge.

(Supreme Court of Nebraska. June 29, 1893.)

WHO ARE CITIZENS—CONSTITUTIONAL LAW—NATURALIZATION—ELECTION CONTESTS—NOMINATION OF CANDIDATE—ERRORS IN BALLOTS.

1. The act of congress approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes," is not in conflict with article 1, § 8, of the constitution of the United States, which provides that congress shall have power "to establish a uniform rule of naturalization."

2. By the provisions of said act, all Indians born within the territorial limits of the United States, to whom allotments of land in severalty have been made under the provisions of said law, or other law or treaty, and all Indians, born as aforesaid, who have voluntarily taken up their residence in the United States, separate and apart from any tribe of Indians therein, and adopted the habits of civilized life, are made citizens of the United States, and such Indians residing in this state are citizens thereof.

3. The actual issuance or receipt by an Indian of a patent for lands allotted to him under the act is not necessary to constitute him a citizen of the United States. When he has accepted the land allotted, taken possession thereof, and otherwise complied with the law, he becomes entitled to his patent, and his citizenship attaches.

4. An objection that the "convention," "primary meeting," "committee," or "electors" nominating a candidate for a public office had not legal authority to make such nomination must be made before the election, and in the manner provided by section 136, c. 26, of the Compiled Statutes; and if not so made the legal authority of such "convention," etc., to make such nomination—the certificate thereof being in an apparent conformity with the provisions of the election law—will, in the absence of fraud, be conclusively presumed.

5. By the provisions of section 141, c. 26, of the Compiled Statutes, a candidate may make objections to the ballots as printed by the county clerk, and invoke the power of the courts to correct any error or omission in the name or description of his competitor; but, if

such candidate neglects to make such objection until after the election, he cannot then object to the result because of any error in the political designation of his competitor on said ballots, without a showing of fraud, and that the error, by deceiving the electors, prevented a full and fair expression of the voters' will.

6. Such a construction of an election law as would result in the disfranchisement of large bodies of voters because of an error of some public officer should not be adopted, where the language of the statute is susceptible of any other.

7. Innocent irregularities of election officers, which are free of fraud, and have not prevented a free and fair expression of the popular choice, will not vitiate the result of an election, unless the legislature has expressly so declared.

(Syllabus by the Court.)

Commissioners' decision.

Original action in quo warranto, in the name of the state, at the relation of J. C. Crawford, against W. F. Norris, to try title to the office of judge of the eighth judicial district of Nebraska. Judgment for defendant.

Geo. H. Hastings, Atty. Gen., M. McLaughlin, Barnes & Eames, W. E. Gantt, and W. F. Bryant, for relator. Barnes & Tyler, C. C. McNish, Uriah Bruner, and Jay & Beck, for respondent.

RAGAN, C. This is an action of quo warranto, brought by the relator, J. C. Crawford, against W. F. Norris, the present judge of the eighth judicial district. The material allegations of the information are that at the general election held on the 3d day of November, 1891, in the eighth judicial district of the state of Nebraska, the whole number of votes cast for judge of the district court, as canvassed and returned by the board of canvassers, was 7,408, of which the defendant is alleged to have received 3,775 and the relator 3,693, and that upon the canvass of said votes said defendant had an apparent majority of 82 votes, and was thereupon declared duly elected to said office, and received a certificate of election to the same. That the county clerks of the counties of Cuming, Cedar, and Stanton caused the name of the defendant to be printed on the sample and official ballots as follows: "W. F. Norris, Independent and Republican,"—without authority, and in direct violation of the law, as the said Norris had not been nominated by any convention or primary meeting representing a political party which at the last election before such convention cast 1 per centum of the vote polled in said judicial district. That at the last election held prior to said nomination there was no candidate voted for, for any office in said judicial district, representing the political party and designated on the ballots as "Independent." That 500 ballots were cast in said counties at the November election, 1891, for the said defendant, on which ballots he was designated as candi-

date for the "Independent" party, which said 500 votes are part of the total of 3,775 votes cast and canvassed for the said defendant. That at the time of the holding of the convention aforesaid there was no party in said judicial district by the name of "Independent," and the printing of the defendant's name on the ticket, representing him as "Independent," was calculated to, and did, deceive a large number of voters. That the county clerk of Thurston county caused the name of the defendant to be designated on the sample and official ballots as candidate for judge of said district as follows: "W. F. Norris, Republican and Independent,"—without the said defendant having been nominated by any convention representing any political party known or designated as "Republican Independent." That 293 of such ballots were cast in said Thurston county for the said defendant, and were canvassed and counted as a part of the said 3,775 votes alleged to have been received by said defendant. That the printing of the defendant's name on the ballots as aforesaid was calculated to deceive the voters, by making it appear that the defendant was the candidate and nominee of the "Republican Independent" party, when in fact he was not. That the county clerk of Dakota county caused the name of the defendant to be printed on the sample and official ballots as follows: "W. F. Norris, People's Independent and Republican,"—notwithstanding there was no certificate on file in the office of said clerk certifying that said Norris had been nominated by any convention representing a political party by the name of "People's Independent." That the printing of the defendant's name on the ballots as aforesaid was calculated to, and did, deceive the voters in said county, by representing that he was the candidate of the "People's Independent" party, when in fact he was not, and that 200 such votes were cast, counted, and canvassed for said defendant in said county, as a part of said 3,775 votes alleged to have been received by said defendant. That at said election there were cast in Omaha precinct and Black Bird precinct, in Thurston county, 127 illegal votes, and that in Perry precinct and in Winnebago precinct, in said Thurston county, there were cast 206 illegal votes. That said illegal votes so cast in said four precincts were cast by persons, members of the Omaha and Winnebago tribes of Indians, who were then under the charge of, and in the care, custody, and control of, an Indian agent, and that none of said Indians who voted at said election in said four precincts were citizens of the United States or this state, and were not qualified electors, on the 3d day of November, 1891. That said Omaha and Black Bird precincts, in said Thurston county, are a part and parcel of the Omaha Indian reservation, and that the polling places where the said Omaha Indians voted were located

on said reservation. That said Perry and Winnebago precincts are a part and parcel of the Winnebago reservation, and that the polling places where said Winnebago Indians voted were located on said Winnebago Indian reservation.

The answer of the defendant, so far as we notice it, alleges: The defendant denied that the persons named in the relator's information as Indians were at the time of the election members of the Omaha and Winnebago tribes of Indians, and averred the fact to be that there were then no such tribes of Indians, and that their tribal relations had been dissolved, and that all of said persons so named in said information as Indians, and who voted in said Perry, Winnebago, Omaha, and Black Bird precincts, in said Thurston county, were on the 3d day of November, 1891, citizens of the United States, and qualified voters of the state of Nebraska. That all of said Indians were born within the territorial limits of the United States, and on the 3d day of November, 1891, were male persons more than 21 years of age, and before said election each and every of said persons had severed his tribal relations, and had adopted the habits of civilized life, and lived separate and apart from any tribe of Indians; and each of said Indians, before such election, had applied for and had received his allotment of land in severalty, in accordance with an act of congress approved February 8, 1887, commonly known and called the "Dawes Bill." That said defendant was duly nominated for district judge of the eighth judicial district of the state of Nebraska by the Republican judicial convention of said district as candidate for district judge at the election to be held November 3, 1891. That he was also nominated by the Independent judicial convention of said district, held at Wakefield, Neb., as candidate for judge of said district at said election. That certificates of each of said nominations, in due form of law, were duly filed in the office of the clerks of the several counties composing said judicial district at the proper time before the election. That the clerks of the several counties embraced in said judicial district caused the official and sample ballots for said election to be printed and published in due form, and at the proper time, before the holding of said election. That said clerks, without fraud, and to the best of their knowledge and information, placed the name of this defendant on said official and sample ballots as a candidate for office of district judge for both of said parties by which he was nominated. That said "Independent judicial convention," and the persons who composed the same, were the same persons, and was the same party, that in the year 1890, under the name and style of "People's Independent Party," cast, in said state of Nebraska, some 68,000 votes, and, in said eighth judicial district, more than

1 per centum of the votes polled therein at the general election in said year. That all of these facts were well known to the said relator at the time, and long before, the said election, held November 3, 1891, yet the said relator made no objection to the said certificates of nomination, or said official or sample ballots, but acquiesced in all of said proceedings, with full knowledge thereof, and is now estopped to question the regularity or good faith of said proceedings. Defendant further averred that he received a large majority of the legal votes cast in said district for the office of district judge at the November election, 1891; that said election was lawfully and fairly conducted; that no voter in said district was deceived by anything which occurred in relation thereto, either before or at the holding of said election; that he lawfully and rightfully received the certificate of election, and in due time entered upon his duties as judge.

We then have the following issues: (a) Whether the Indians of Omaha and Black Bird precincts, in Thurston county, who voted, were electors. (b) Whether the Indians of Winnebago and Perry precincts, in said Thurston county, who voted, were electors. (c) If these Indians were voters, should the ballots cast by them be rejected because the polling places at which they were cast were on lands in said Thurston county known as the "Omaha and Winnebago Indian Reservations?" (d) Shall the ballots cast for the defendant, on which he was designated, "W. F. Norris, Republican Independent," be counted. (e) Shall the ballots cast for the defendant, on which he was designated, "W. F. Norris, Republican. W. F. Norris, Independent," be counted? (f) Shall the ballots cast for the defendant, on which he was designated, "W. F. Norris, Republican. W. F. Norris, People's Independent,"—be counted?

This cause was sent to a referee to take the evidence and report his findings of fact. He has done so, faithfully and carefully; but, as both parties to this proceeding have filed exceptions to the referee's report, we have been compelled to read the entire testimony, and shall construe it without reference to the report of the referee, while cheerfully acknowledging the assistance the report has afforded us.

(a) Were the Indians of Omaha and Black Bird precincts, in Thurston county, electors? The record shows that the Indians who voted at the election in Omaha and Black Bird precincts in November, 1891, were male persons over 21 years of age, all born within the territorial limits of the United States and territories, and were born members of the Omaha tribe or nation of Indians; that each of said persons so voting had, before said election, taken his land in severalty; had taken possession thereof, and received his patent therefor, in accordance with the

terms of the act of congress approved February 8, 1887. Article 7, § 1, of the constitution of this state, provides that all male persons of the age of 21 years, or upwards, who have resided in the state six months, and who are citizens of the United States, shall be electors. Section 6 of the act of congress approved February 8, 1887, provides: "And every Indian born within the territorial limits of the United States, to whom allotments [of land] shall have been made under the provisions of this act, or under any law or treaty, * * * is hereby declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizen." In *State v. Frazier*, 28 Neb. 438, 44 N. W. Rep. 471, it is said, in substance, that in order to establish an Indian's right to citizenship, and hence to vote at an election in this state, it must be proven that such Indian was born within the territorial limits of the United States, and that an allotment of land had in fact been made to such Indian by the government of the United States, in pursuance of the act of congress above mentioned, or some other law or treaty. The Indians, then, of Omaha and Black Bird precincts, who voted at the election of November 3, 1891, were electors, within the meaning of the constitution of the state, and the act of congress quoted above.

(b) Were the Indians of Winnebago and Perry precincts, in Thurston county, voters? The evidence in this record shows that the Indians who voted at the election held November 3, 1891, in Winnebago and Perry precincts, were at the time of said election male persons over 21 years of age; that they were born within the territorial limits of the United States, and were born members of the Winnebago tribe of Indians; that each and every one of said Indians who voted had, before the election, selected and applied for his allotment of land in severalty under the terms of said act of congress; that each of the Indians so voting had taken possession of his land; that the special agent appointed by the government for the allotting of lands to Indians had allotted to each of said Indians, so voting, his land in severalty, had issued certificates to said Indians for such allotments, and transmitted the schedules of said allotments to the secretary of the interior, for his approval, but that at the date of the election the selections of land in severalty, made by the Indians, and the allotment thereof made by the government, had not been formally approved, nor the patent issued therefor. The evidence further shows that these Indians had voluntarily taken up their residences separate and apart from their tribes; that they had adopted the habits of civilized life; that they had severed their tribal relations.

Now, it is contended by the relator that these Winnebago Indians, although born within the territorial limits of the United

States, and although they had selected their lands in severalty in compliance with the provisions of said act of congress, taken possession of said lands, and such selections had been approved by the agent of the United States appointed to make the allotments, the certificates of allotments had been issued to the beneficiaries, and such allotments certified to the secretary of the interior, yet because, at the date of the election, that officer had not formally approved of the allotments made, and the allottees had not actually received their patents for the lands allotted, they were therefore not entitled to vote. We do not so construe the act. By section 6 thereof it is provided: "And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act," etc.; and section 3 of said act provides that the United States shall make the allotments through a special agent appointed by the president for the purpose, and, when such allotments are made, certify the fact to the secretary of the interior, and, upon his approval of the allotments made by the government, patents shall issue therefor. The part to be taken by the Indian in this proceeding is much like that taken by a man "taking up a homestead." He selects the land he wishes, and the local authorities of the government confirm or reject his selection. Now, these Winnebago Indians selected each his allotment of land in severalty, under the terms of the act of congress, and took possession of said lands. The special agent of the government made the allotments, issued the certificates therefor, reported his action to the secretary of the interior, and recommended that patents should issue for the lands so allotted. These Indians had done all required of them by law to entitle them to the lands, and to the right of citizenship. It is undoubted that if they possessed the qualifications required by the act, as to birth, etc., and complied on their part with the other requirements of the law, the secretary of the interior has no discretion in the matter, but must approve the allotments made, and the patents must issue therefor. The presumption is that the special agent made no allotments to any one not entitled thereto, and we will presume that all Indians holding the certificates of allotment under the act are entitled to their patents, and therefore citizens, and entitled to vote. An Indian to whom an allotment has been made under this act, and who possesses the other qualifications required by the constitution and laws of this state, is *prima facie* a voter. But the evidence in this record shows, as before stated, that at the election held November 3, 1891, these Winnebago Indians who voted at such election had severed their tribal relations, voluntarily taken up their residence separate and apart from their tribes, and had adopted the habits of civilized life; and this

brought them within the last clause of section 6 of the aforesaid act of congress.

The learned counsel for relator very truly say "that the government of the United States is one of the enumerated powers, the national constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess," and then proceed to argue that the act of congress known as the "Dawes Bill" is unconstitutional. The claim is that it violates section 8, art. 1, of the constitution of the United States, which provides that congress shall have power "to establish a uniform rule of naturalization;" that the rule prescribed by the law is not uniform. The argument is very able and very interesting, but we do not think that the act in question is in conflict with the constitution of the United States. Section 19, art. 6, of the constitution of this state, provides: "All laws relating to courts shall be general, and have uniform operation." In the examination of a law passed by the legislature, which was alleged to be in conflict with the above clause, the supreme court of this state, in *State v. Berka*, 20 Neb. 375, 30 N. W. Rep. 267, said: The constitutional provision last above quoted "is not violated by an enactment of a law limiting the number of justices of the peace in cities of the first class to three, to be elected in districts to be created by the board of county commissioners of the counties in which such cities are situated." "A law which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, is not objectionable as wanting uniformity of operation." The rule as thus announced was adhered to by this court in *County of Lancaster v. Trimble*, 33 Neb. 121, 49 N. W. Rep. 938.

An analysis of the "Dawes Bill" discloses that it prescribes a rule of naturalization only for Indians born within the territorial limits of the United States, and for such of those (1) to whom lands have been allotted in severalty; and (2) such as have voluntarily taken up their residence in the United States, separate and apart from any tribe of Indians therein, and adopted the habits of civilized life.

(c) Are the votes cast by these Indians to be rejected because the polling places at which they were cast were located on their reservations? Relator insists that neither the state of Nebraska nor the county of Thurston had any jurisdiction over these reservations; that the establishing of election precincts, and holding elections thereon, were illegal, and the votes cast thereat should be thrown out. In *Painter v. Ives*, 4 Neb. 128, it was said by Chief Justice Lake: "It would seem clear that, at the date of the state's admission into the Union, every portion of the territory within the prescribed bounda-

ries thereof, the Indian reservations inclusive, became subject to its laws." We think this is correct. The county of Thurston, in which these reservations lie, is one of the duly-organized political subdivisions of the state. The county authorities were invested by law with the duty of establishing voting places therein, and of holding elections. The fact that one or more of the places of voting happened to be on an Indian reservation in the county should not disfranchise the voters. That the title to these reservations is in the United States, and the lands are occupied by the Indians, sometimes denominated "wards of the nation," does not give the United States exclusive jurisdiction of the territory. The jurisdiction of the nation over the Indian, in his tribal relation, is supreme and exclusive; but when an Indian becomes a citizen of the United States, within the provisions of the acts of congress, he becomes subject to the laws of the state of which he is a resident, and entitled to the benefits of the laws of such state. The state also has jurisdiction over all the territory within its boundaries, for the government and protection of its citizens and their property, and the enforcement of its laws.

(d) Shall the ballots cast for the defendant, on which he was designated, "W. F. Norris, Republican Independent," be counted? (e) Shall the ballots cast for the defendant, on which he was designated, "W. F. Norris, Republican. W. F. Norris, Independent," be counted? (f) Shall the ballots cast for the defendant, on which he was designated, "W. F. Norris, Republican. W. F. Norris, People's Independent," be counted? We answer that all of said ballots were rightfully counted for the defendant, and for the following reasons:

The record shows that the defendant was duly nominated by the Republican convention as its candidate for the office of judge for the eighth judicial district; that he was also nominated by the Independent convention held at Wakefield; that certificates of these nominations, in due form, were filed in the office of the county clerk for each of the counties composing said district for the length of time required by law before the election. It was the duty of the county clerks, in preparing the official ballots, to place the defendant's name thereon as a candidate for each of the parties by which he was nominated. The clerks prepared the ballots without suggestions from either party to this proceeding, and did so without fraud, and with the most honest of intentions. The evidence also shows that there was no party by the name of "Independent" which polled in said district 1 per centum of the votes cast therein at the election of 1890, but the evidence does show, if that is material, that the "People's Independent" party and the "Independent" party were one and the same. This court will also take judicial notice of the fact that the Repub-

lican party and the People's Independent party, at the general election of 1890, each cast more than 1 per centum of the votes polled.

The defendant was entitled to have his name appear on the ballots as candidate of each party nominating him. *Fisher v. Dudley*, (Md.) 22 Atl. Rep. 2; *Wigmore's Australian Ballot Sys.* 190; *Behrensmeyer v. Kretz*, (Ill. Sup.) 26 N. E. Rep. 704; *State v. Pierce*, 35 Wis. 93; *State v. Stein*, 35 Neb. 848, 53 N. W. Rep. 999. And all such ballots should be counted, unless it appears the candidate was voted for more than once by the same elector. By section 136, c. 26, Comp. St., it is provided that all certificates of nomination, which are in apparent conformity with the provisions of the election law, shall be deemed valid unless objection is made thereto in three days after their being filed; and section 141 of the same act provides that whenever it shall be made to appear by affidavit that an error or omission has occurred in the name or description of a candidate nominated for office, or in the printing of the sample or official ballots, the county judge, or any judge of the district court at chambers, may, upon application of any voter, require the clerk to correct the error complained of, or show cause why it should not be corrected.

Now, the certificates of the nomination of the defendant apparently conformed with the law, and the record before us does not disclose that the relator, or any other elector, made any objection to such certificates. When these certificates were filed it was the duty of the county clerks, in preparing the sample and official ballots, to designate the candidate on the same according to the certificates of nomination. It is conceded the clerks prepared the ballots without suggestion from either party; that there was no fraud practiced or intended. This record does not show—nor is the attempt made—that any elector was deceived by anything on the ballots, and the ballots show plainly that there were but two candidates for judge,—the relator and the defendant; and, for aught that appears, every man voted for the candidate of his choice. Neither does the record show that the relator, or any one else, made any objection to the party designation—that is, the description—of the defendant, as printed on the ballots before the election; and yet he asks us to disfranchise a thousand voters of the state because of an error, if it was an error, in the political description of the defendant. The relator and defendant had a right to be voted for for an office, and have the votes counted, even if the clerk had left off the ballot, entirely, the names of the political parties of which they were members, and by which they were nominated.

The statute requiring that the ballot shall contain the name of the party or principle which the candidate represents is directory,

and is intended as a help and a guide to the voter, and it should be complied with; and the law denounces severe penalties against an officer who should unlawfully or fraudulently violate it. Yet, as the voter has nothing to do with the preparation of the ballot, he cannot be deprived of the right to have his vote counted for the candidate of his choice because the ballot omits the candidate's correct political affiliation. *Smith v. Harris*, (Colo. Sup.) 32 Pac. Rep. 616; *Montgomery v. O'Dell*, (Sup.) 22 N. Y. Supp. 412; *State v. Saxon*, (Fla.) 12 South. Rep. 218; *Miller v. Pennoyer*, (Or.) 31 Pac. Rep. 830; *State v. Barber*, (Wyo.) 32 Pac. Rep. 14; *State v. Van Camp*, (Neb.) 54 N. W. Rep. 113. "Innocent irregularities of election officers, which are free of fraud, and have not prevented the free and fair expression of the popular choice, will not vitiate the result of an election, unless the legislature has so expressly declared." *Bowers v. Smith*, (Mo. Sup.) 17 S. W. Rep. 701. If the relator was dissatisfied with the political or other description of the defendant on the ballots as printed, he should have proceeded, under section 141 of the election law, to have had the ballots corrected. Not having done this, his objection to these ballots at this time comes too late. *Bowers v. Smith*, (Mo. Sup.) 17 S. W. Rep. 761; *Id.*, 20 S. W. Rep. 101; *Allen v. Glynn*, (Colo. Sup.) 29 Pac. Rep. 670. In the last case the supreme court of Colorado, through Chief Justice Hayt, say: "By other sections [of the Australian ballot law] it is provided that the name of every candidate whose name has been properly certified shall be on one and the same ballot; that the sample ballots shall be in the county clerk's possession seven days before the election, subject to public inspection, and official ballots four days before election. It is also provided for the posting of sample ballots, etc. An examination of these sections will show that the legislature has made ample provision for the correction of ballots prior to the election, and it would seem to be the duty of the candidate to make such objection in reasonable time. It is believed that it would not be in the interests of a fair expression of the will of the people to allow a candidate to lie by, and not point out such objections as he may have to the form of the ballot, until after the election has been held. If this be true, contestors should have spoken before the election. The fundamental object of all election laws is the freedom and purity of the ballot. It is to be observed that the voter has no control whatever over the publication of the names of candidates, or the form of the ballots. If, for some defect in these particulars, the ballot must be rejected, the door would be open to fraud. To defeat the will of the people, it would only be necessary to have the county clerk furnish the electors, or some of them, with tickets slightly variant from those prescribed by

law. It would seem to be the purpose of this section to give the opposing candidate ample opportunity to see that his opponent's name was not upon an unauthorized ticket, or under a device to the use of which he was not entitled. We do not think that those decisions which have been cited, holding that all provisions of the statutes are mandatory, and that ballots should be rejected that are not in all particulars in conformity to the requirements of the act, are entitled to much weight, in view of the provisions of this act. In order to make such decisions controlling, it should appear that the provisions for objection and amendment are equally as liberal in those states as under our statutes. It may be said that all of such laws are mandatory, in the same sense that they place a duty upon those who come within their terms. But it does not follow that an election should be invalidated because of every departure on the part of the public officers from the terms of the act. We do not feel at liberty to place a narrow construction upon this act. To overthrow the expressed will of a large number of voters for no fault of theirs, as we are asked to do, would be to defeat the purpose of all election laws, which is to obtain a full and fair expression of the wishes of the voters." The application of the relator is denied, and the suit dismissed, at his costs, including fees of the referee herein, taxed at \$100. Judgment accordingly. The other commissioners concur.

IN RE BOARD OF PURCHASE AND SUPPLIES FOR STATE INSTITUTIONS.

(Supreme Court of Nebraska. June 30, 1893.)

STATUTES—REPEAL BY IMPLICATION—DUTIES OF STATE BOARDS.

The title of the act of February 15, 1877, "To regulate the purchase of supplies for the public institutions and executive offices of the state," is not broad enough to include or repeal by implication the provision of the act of February 13, 1877, for the auditing by the board of public lands and buildings of accounts for money disbursed for the support of the public institutions of the state. Norval, J., dissenting, on the ground that the court had no jurisdiction to determine the question.

(Syllabus by the Court.)

Submission of questions to the supreme court by the board of public lands and buildings.

MAXWELL, C. J. The board of public lands and buildings has submitted to this court certain questions relating to a seeming conflict in the statute relating to their duties and those of the board of purchase and supplies. After referring to and setting out portions of the statutes in question, they submit the following: "(1) What bills, if any, do the board of purchase and supplies examine and approve? (2) What bills, if any, do the board of public lands and

buildings examine and approve, under the existing laws of this state? (3) Does the act of 1877, (Laws 1877, p. 189,) creating a board of purchase and supplies, supersede the act of 1877, (Laws 1877, p. 188,) establishing a board of public lands and buildings, and defining their duties, in so far as the latter act provides that the board of public lands and buildings shall examine and approve the account of the various state institutions therein mentioned?"

Section 19, art. 5, of the constitution provides: "The commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general shall form a board, which shall have general supervision and control of all the buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes; and shall perform such duties, and be subject to such rules and regulations, as may be prescribed by law." In 1877 the legislature passed an act creating the board of public lands and buildings. The powers of the board, as declared in that act, are as follows: "Section 1. That the board created by section 19 of article 5 of the constitution of the state of Nebraska, consisting of the commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general of the state, shall hereafter be known in law as 'The Board of Public Lands and Buildings of the State of Nebraska,' and shall have general supervision and control of all the public lands, lots, and grounds, and all institutions, buildings, and the grounds thereto, now owned or that may hereafter be acquired by the state, including the saline lands, together with all salt springs, the penitentiary lands, internal improvement lands and lots, as well as the state capitol building and grounds, the state penitentiary and grounds, the state hospital for the insane and grounds, the asylum for the deaf and dumb and grounds, the asylum for the blind and grounds, and all other lands, lots, grounds, and buildings now belonging to or hereafter acquired by the state: provided, however, that all lands, lots, grounds, and buildings, or institutions set aside for and devoted to educational purposes, be and hereby are excepted from the provisions of this act. Sec. 2. The board of public lands and buildings shall have the power to make general direction, according to law, for the sale, leasing, or other disposition of the lands, lots, and grounds belonging to the state as aforesaid, and shall give warrant by their proceedings as such board, to the commissioner of public lands and buildings for his action in the sale or leasing of such lands, lots and grounds, and shall require of the said commissioner a full and detailed report of all such sales, leases, and the funds thereby acquired as hereinafter directed. Sec. 3. The board shall have general custody and charge of all buildings

and institutions and the grounds thereto coming under the provisions of this act, and shall be responsible for the proper keeping and repair of the same, and shall require from the commissioner of public lands and buildings who shall be direct custodian of such institutions and buildings and grounds, a report at least once in every three months, as to the condition of the same: provided, that no additions shall be made to any public buildings without special appropriation of the legislature. Sec. 4. The said board shall have power, under the restrictions of this act, to direct the general management of all the said institutions and be responsible for the proper disbursement of the funds appropriated for their maintenance, and shall have reviewing power over the acts of the officers of such institutions, and shall, on the part of the state, at regular meetings as hereinafter directed, audit all accounts of such officers including the accounts of the commissioner of public lands and buildings, except his salary. Sec. 5. At the regular meeting of the board it shall be their duty to examine the accounts of the public officers contemplated in this act, and to determine whether the same are entitled to be paid out of the moneys appropriated for the purpose of maintaining the institutions for which they are charged, and, if correct, shall approve the same, which approval shall be signed by the president and countersigned by the secretary under date of such action, and if the accounts be incorrect, exorbitant, or not entitled to payment from such appropriations, the same shall be disapproved and returned to the claimant, such board keeping a record of the same. Sec. 6. When the accounts above mentioned have been filed with the board and shall have been audited and approved by them, the auditor of public accounts is hereby authorized and directed, upon the presentation to him of such accounts so authenticated, to issue his warrant on the treasurer against the proper fund or appropriation for the amount therein stated, to the claimant or his assignee. And no accounts coming under the provisions of this act shall be entitled to payment until they have been so approved by the said board. Sec. 7. It shall be the duty of the board to take cognizance of all charges or complaints made against the said public officers, and at a regular meeting to give an impartial hearing to such charges, and the defense against them, if any, and report the charges, evidence, and their conclusions in the matter, to the governor, within six days after the determination of such investigation. Sec. 8. The said board shall meet at least once in each month, on the first Monday thereof, for the transaction of business; the commissioner of public lands and buildings shall be ex officio president of the board, and shall preside at all meetings and execute all other duties prescribed for

him in this act, and shall sign all papers and instruments or documents that shall be approved, made or directed by the board. Sec. 9. The secretary of state shall be ex officio secretary of the board, and shall keep a careful record of all the proceedings of the board in a substantial and well-bound book to be kept for that purpose, and which shall be known as the 'Record of the Proceedings of the Board of Public Lands and Buildings of the State of Nebraska,' and the said secretary shall countersign all papers, instruments or documents approved, made, or directed by the board. Sec. 10. It shall be necessary for at least three members of said board to be present at any meeting for the transaction of business, and in absence of the president, or secretary, the place shall be filled by election, pro tempore, provided, that no meeting for business shall be held without the presence of one or the other of them. Sec. 11. The president shall have the power to call the board together in special meeting, if in his judgment the public good requires the same to be done for any purpose contemplated in this act; and such call shall be by written notice, stating the purpose of meeting, which notice shall be delivered to each member of the board."

This act was passed and took effect February 13, 1877. Two days thereafter the legislature passed "An act to regulate the purchase of supplies for the public institutions and the executive department of the state." The act is as follows: "Section 1. That all purchases and contracts for supplies for any of the departments and public institutions of the state, where the public exigencies do not require the immediate delivery of the articles, shall be by advertising a sufficient time previously for proposals for supplying the same. Sec. 2. At least one month previous to the first day of January, April, July and October, respectively in each year, a board consisting of the governor, commissioner of public lands and buildings, secretary of state, treasurer, and attorney general shall meet with the warden of the state prison, and the superintendent of each of the asylums or other institutions furnished by the state, and determine the supplies that may be necessary for three months, except such articles as may be perishable and cannot be kept. Said board shall designate clearly the quantity and quality of the articles, and shall then advertise for ten days in some newspaper published at the capital, having general circulation in the state, before the first day of January, April, July and October respectively, for proposals for furnishing said articles and for each institution separately, to be delivered at the institution within ten days after the first day of the month aforesaid: provided, that the board may permit the delivery of the goods monthly, if in their judgment it be deemed best. And the bids which propose to furnish the supplies for either institution at the lowest

rate, shall be received for such institution: provided, further, that no proposal shall be considered by said board unless the same is accompanied by a bond with such security as the board shall determine, with condition to furnish said articles as proposed in said bid. Sec. 3. All supplies for such institutions not purchased as provided in this act, shall be purchased in such manner as shall be directed by said board by written instruction. Sec. 4. The head of each of the executive departments respectively shall advertise for proposals for supplying the departments in accordance with the provisions of this act. Sec. 5. All vouchers for supplies having been examined and approved by said board or the head of the department, as the case may be, shall be approved by the secretary of state, and thereupon the auditor of state shall draw his warrant upon the treasurer for the amount."

It will be observed that the title of the act is not to create a board to purchase supplies, but to regulate the purchase. This is to be done by public advertisement for 10 days before the 1st days of January, April, July, and October in each year. The board is required to designate clearly the quantity and quality of the articles desired; that is, that the different articles shall be specified and described in such manner that all bidders will know just what is intended. In many respects the same rules apply as in the letting of contracts for supplies for a county. In *State v. York Co.*, 13 Neb. 65, 12 N. W. Rep. 817, in speaking of advertisements for supplies it is said: "These propositions should distinctly specify the kind and quality desired, and, if possible, the commissioners should provide samples as a basis on which to make the bids, so that all be made on the same basis. The object of the law is to invite competition and prevent favoritism and fraud." That language is quoted with approval in *State v. Saline Co.*, 19 Neb. 253, 27 N. W. Rep. 122, and is applicable in the case at bar. The utmost publicity possible should be given of the proposed purchase, so that competition may be invited. It is not intended that any goods shall be purchased at private sale, except in case of emergency, and which will not arise once in a thousand times. The fifth section provides that all vouchers for supplies, having been examined and approved by the board or the head of the department, as the case may be, shall be approved by the secretary of state; that is, the board may examine the vouchers, and approve the same, but it is not essential that it should do so. It is sufficient if the head of the particular department certify to their correctness. Now, do these provisions supersede the provisions of the act creating the board of public lands and buildings, in which it is made the duty of that board to examine the accounts of the public officers, and which makes the board responsible for the proper disbursements of the

funds, etc.? It will be seen from the title that it does not purport to supersede the act which took effect February 13, 1877. That remains in full force, but the act of the 15th of the same month regulates the mode of purchase of supplies. There is no conflict between the acts, and both may stand. It is unnecessary, in this connection, to refer to the rule that, to justify a repeal by implication, there must be such a repugnancy between the acts that both cannot stand; therefore the latter act will supersede the former. That rule, however, is not applicable here. The board of purchase and supplies need not approve the vouchers for supplies, but the board of public lands and buildings must do so before a warrant can be drawn in favor of the persons holding such vouchers; and the act of February 15th does not supersede that of February 13, 1877.

POST, J., concurs.

NORVAL, J., (dissenting.) I dissent from the decision of my associates on the ground that this court has no jurisdiction to pronounce the same. The constitution divides the powers of the state government into three distinct departments,—the legislative, executive, and judicial,—and defines the powers and duties of each. Section 2, art. 6, of the state constitution, reads as follows: "Sec. 2. The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum or to pronounce a decision. It shall have original jurisdiction in cases relating to revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." It is to the quoted section alone that we must look for the jurisdiction of the supreme court. There is no other provision of the constitution relating to the subject. In *Miller v. Wheeler*, 33 Neb. 765, 51 N. W. Rep. 137, it was held that the legislature has no power to increase the original jurisdiction of this court conferred by the constitution. That was an action brought in this court under the statute, to contest the office of district judge. The present chief justice, in delivering the opinion of the court, says: "A more careful examination of the statute and the constitution, however, convinces the writer that the original jurisdiction of the supreme court is confined to the cases specified in the constitution, and that under another name no additional jurisdiction can be conferred. This is a court the primary object of which is to review cases tried in the district courts. It is an appellate tribunal, and is given original jurisdiction in a few limited cases, most of which are extraordinary remedies for the purpose of preventing a failure of justice." It is plain that the section of the constitution to which reference has been made con-

fers no jurisdiction upon the supreme court to answer queries submitted either by the legislature or the officers of the executive department of the state government, and no such duty is imposed upon the court of last resort by any other provision of the constitution or by legislative enactment. It is the duty of the court, in a litigated case, where the question arises, to construe a statute or determine whether a law is constitutional or not; but it is proper to do so only in the determination of a real controversy between individuals in a proper action brought for that purpose. Courts should refrain from construing a statute or passing upon its constitutionality in advance of actual litigation, for the obvious reason that the parties who may be interested are not before the court, and the decision would not be binding upon them. Here, upon an ex parte proceeding, without the assistance of either a brief or oral argument, we are asked to pass upon important questions. To undertake to answer such questions we must act both as court and counsel.

But seven of the states of the Union contain constitutional provisions making it the duty of the supreme court to act as the legal advisers of the executive and legislative departments of the state government. The constitution of Colorado declares that "the supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of the court." Const. Colo. art. 6, § 3. The legislature of that state submitted to the supreme court whether a bill proposing to increase the fees of district attorneys, then pending before the legislature, would apply to the district attorneys then in office. The court, in *Re Constitutionality of Senate Bill No. 65*, 12 Colo. 466, 21 Pac. Rep. 478, decided that the constitutional provision of that state above quoted applies solely to cases involving questions of public right, and that such questions should only be thus presented or considered. It was held that the question submitted in that case was not one requiring in advance the opinion of the court, and it declined to answer the same. Chief Justice Helm in the opinion says: "It is a principle declared by our constitution, (section 25, art. 2,) and of universal recognition, that no person shall be deprived of life, liberty, or property without due process of law, unless the party to be affected has his day in court. Yet a careless construction and application of this constitutional provision might lead to the ex parte adjudication of private rights by means of legislative or executive questions, without giving the party interested a day or voice in court. When this tribunal exercises its original jurisdiction by entertaining any of the other proceedings specified in the constitution, process

must issue, the parties to be affected must have notice, and they must be given an opportunity to appear and be heard both in person and by counsel, so that, even though the primary and principal purpose of the proceedings be to adjudicate a matter public juris, yet there is a compliance with the fundamental requirement relating to due process of law. This consideration greatly reinforces the proposition that it could not have been the purpose of those who framed the amendment to permit such ex parte adjudication in legislative questions. We have no hesitancy in reaffirming what we have already declared, that parties must still adjudicate in the ordinary and regular course of judicial proceedings." See *In re Senate Resolutions on Irrigation*, 9 Colo. 621, 21 Pac. Rep. 470; *In re Construction of Constitution*, (S. D.) 54 N. W. Rep. 650; *Opinion of the Justices*, (Mass.) 21 N. E. Rep. 439; *Id.*, 24 N. E. Rep. 1086; *Id.*, 49 Mo. 216. In Nebraska, the attorney general, and not the supreme court, is the legal adviser of the executive and legislative departments. We are aware that this court has in some instances assumed to answer questions submitted by the other branches of the state government, although but twice since the writer has been a member of the court, and then I with much reluctance assented. This court is now burdened with business. The number of suits annually brought to this court had so increased that the last legislature created a supreme court commission to assist in the disposal of the numerous cases on the docket, and it seems to me, in justice to litigants who have actions pending, it is time for the court to call a halt, and entertain jurisdiction solely in cases where the same is conferred by the constitution. The courts of last resort of most of the states decline to take jurisdiction in a proceeding like this, and a different practice prevails almost alone in the few states having a constitutional provision similar to that of the state of Colorado. Entertaining this view upon the subject of jurisdiction, it would be improper for us to at this time express an opinion upon the questions propounded by the board of public lands and buildings, although we would willingly do so were the matters before us in a legal manner.

YORKE v. YORKE.*

(Supreme Court of North Dakota. May 31, 1893.)

DIVORCE—VACATING DECREE—CITATION TO SHOW CAUSE—SERVICE ON ATTORNEY—AFFIDAVIT FOR PUBLICATION—APPEARANCE—EFFECT OF VACATING DECREE.

1. When a decree of court has been obtained, and an application to set the same aside is subsequently made in the same case, service of the citation to show cause why the

* Rehearing denied July 24, 1893.

decree should not be set aside is properly made upon the attorney of record who procured the decree.

2. An affidavit for publication of summons, which entirely fails to show that any diligence was used to find the defendant in this state, and fails to state positively the residence of such defendant, or that any diligence has been used to ascertain such residence, is fatally defective, and a publication of summons based upon such affidavit confers no jurisdiction of the person of defendant.

3. When a party who has not been properly served with process appears in a case, and asks to have a decree against him set aside for the reason that the court had no jurisdiction of his person, and for the further reason that such decree was procured by fraud and deceit, and was without evidence to support it, such appearance is general, and is a waiver of all defects in the service of process.

4. But such general appearance will not validate a decree otherwise invalid by reason of fraud and deceit practiced in its procurement.

5. Courts of general jurisdiction have the inherent power, independent of any statutory provisions,—and in divorce cases no less than in other cases,—to set aside and annul any judgment or decree procured by the fraud and deceit of the successful party, practiced upon the complaining party to the action, and the court.

6. When a decree is thus annulled for fraud in its procurement, it is not proper for the court to go further, and dismiss the action with costs. The case should be retained, and defendant granted a reasonable time within which to plead to the complaint.

(Syllabus by the Court.)

Appeal from district court, Cass county; William B. McConnell, Judge.

Action by Louis A. Yorke against Emma M. Yorke, for a divorce. Plaintiff had a decree, and from an order vacating the same, and dismissing the complaint, plaintiff appeals. Modified and affirmed.

• M. A. Hildreth, for appellant. L. A. Rose, for respondent.

BARTHOLOMEW, C. J. This case comes to this court on an appeal from an order entered by the district court of Cass county on the 23d day of November, 1892, which vacated and set aside a decree of divorce granted by said court in said action on the 15th day of September, 1891, and dismissed the complaint in said action, with costs. On September 9, 1892, on the petition of Emma M. Yorke, the defendant and the respondent herein, an order was issued by the judge of said court, citing Louis A. Yorke, the plaintiff and appellant herein, to show cause why such decree should not be vacated. This order was served on M. A. Hildreth, Esq., who had acted as the attorney for plaintiff in procuring such decree. At the final hearing under such citation, the order was entered from which the appeal is taken. The petition upon which the order was granted is exceedingly voluminous. We state such of the ultimate facts, as alleged in the petition, as we deem necessary for a proper understanding of our rulings: Some time in 1889, appellant instituted an action for divorce against respondent in

the district court of Stutsman county, charging her with desertion. To this action there was an appearance and answer filed, and, the case being thus at issue, the attorney for appellant wrote to the attorney for respondent, who resided in Philadelphia, saying: "Will advise you of further proceedings in the case when the same are taken." That neither respondent nor her counsel ever received any notice of any further proceedings in said case. That on June 20, 1890, by order of said court, other counsel were substituted as attorneys for appellant in said case, and on the same day such substituted counsel procured an order dismissing said action without prejudice; and immediately thereafter this action was brought, in Cass county, charging respondent with desertion and adultery. That subsequently an order for publication of summons was procured in said case, and that the affidavit upon which such order was obtained was false, and known by appellant and his attorney to be false when made, in that it was stated therein that respondent's residence was at Philadelphia, Pa., when it was well known to them that her residence, in summer, was at Sea Girt, N. J., and, in winter, at Bryn Mawr, in Montgomery county, Pa., and that she had no residence whatever at said city of Philadelphia; that the summons in this case was published in a weekly newspaper at Fargo, in said Cass county, but that no copies of the summons and complaint were ever mailed to her, at her place of residence, as the statute requires, but the same, if mailed at all, were sent to said city of Philadelphia, and that all this was done for the purpose of preventing respondent from gaining any knowledge of the pendency of this action. The answer filed by the respondent in the case brought in Stutsman county is made a part of the petition in this case. In that answer, respondent specifically charged appellant with deserting her and with long-continued adulterous intercourse with one Lena de Zychlinski, and denied that he was a resident of this state. Respondent denies all desertion and all adultery on her part. She had no knowledge of the pendency of this action until after the decree was rendered, and until after October 22, 1891. That she then read in a newspaper published in New York city the announcement of the divorce of Louis A. Yorke from Emma M. Yorke, and his subsequent marriage to the Countess de Zychlinski. The evidence is also reviewed in the petition, and the claim made that it was insufficient to support the decree, and that it was false. The relief asked by the petitioner is as follows: "The defendant, Emma M. Yorke, therefore respectfully asks the court, upon the further consideration of the record, proceedings, and evidence in said cause, to open and set aside said judgment, and annul said decree therein, and if said court cannot summarily open and set aside and annul said

judgment and decree upon the irregularities, imperfections, and insufficiency of said proceedings, that it will allow said defendant to come and defend the said action." The trial court, in making the order appealed from, also made some preliminary findings of fact, one of which, being a matter of which that court was bound to take notice, becomes important here. The fact that the action had once been brought in Stutsman county, and, after issue joined, had been dismissed by plaintiff without the knowledge of defendant, was in no manner brought to the attention of the trial court until respondent's petition was filed.

The attorney for the appellant, M. A. Hildreth, Esq., appeared specially to oppose the motion to set aside the decree, and claimed that the court had acquired no jurisdiction of appellant in the matter because the motion papers were served upon the attorney, instead of the party. He filed his affidavit, setting forth that service might have been made upon the party in the state, and that the relation of attorney and client no longer existed between himself and Louis A. Yorke. This point is practically ruled against appellant in *Beach v. Beach*, 6 Dak. 371, 43 N. W. Rep. 701. We indorse what is there said, and need not repeat it here. We may add, however, that, granting that the relation, powers, and duties of an attorney cease upon entry of final judgment, yet it is upon the ground that the judgment and decree, as entered in this case, were not final, that the application of respondent was made. This application was not by original action in the same or another court, but by motion in the very case in which the decree was entered. While the court could entertain a motion affecting the decree, it cannot, in any proper sense, be said that the decree was final. See, also, *Miller v. Miller*, 37 How. Pr. 1; *Merriam v. Gordon*, 17 Neb. 325, 22 N. W. Rep. 563. The notice to show cause was properly served upon the attorney of record in the case.

It was alleged in the notice that the affidavit upon which the order of publication of summons was based was insufficient in form, as not showing what, if any, diligence had been used to find the defendant in this state. Under the authority of *Beach v. Beach*, supra, that would be true. Indeed, we think the affidavit in this case much more vulnerable than in that. It not only entirely fails to show that any diligence whatever had been exercised to find defendant in this state, but fails to give any satisfactory information as to defendant's residence. It was made by the attorney, and states, on information and belief, that defendant's residence is at Philadelphia, Pa.; and the sources of information are stated to be statements made by plaintiff to the attorney, and the fact that certain papers which the attorney had never seen were sworn to by her in that city. This latter circumstance could have no probative

force in the mind of a lawyer, and we are at a loss to understand why the plaintiff himself did not make the affidavit, instead of making statements to his attorney. He verified the complaint on the same day, before a notary public, in the same county, and presumably at the same place. True, these affidavits may properly be made by an attorney, but when the truth of the matter stated rests upon the unsworn statement of the client, and the client is present, good faith to the court requires that some reason be given why the client does not make the affidavit. We think the affidavit was insufficient in this case, and that the court was without jurisdiction of the defendant at the time the decree was granted.

But, when the respondent came into court with her motion to set aside the decree, she made no special appearance, nor did she attack the decree on the ground of want of jurisdiction only, but also upon the further grounds of fraud and deceit practiced upon herself and upon the court, and the insufficiency of the evidence to support the decree. The petition asked that the entire proceedings be set aside, or, if that could not be done, that she be allowed to come in and defend. This was a voluntary and unqualified submission to the jurisdiction of the court, generally, and, although made after judgment, was a waiver of all defects in the process. *Elliott v. Lawhead*, 43 Ohio St. 171, 1 N. E. Rep. 577; *Leake v. Gallogly*, (Neb.) 52 N. W. Rep. 824; *Grantier v. Rosecrance*, 27 Wis. 488; *Anderson v. Coburn*, Id. 558; *Insurance Co. v. Swineford*, 28 Wis. 257; *Carpentier v. Minturn*, 65 Barb. 293; *McBane v. People*, 50 Ill. 503; *Curtis v. Jackson*, 23 Minn. 268; *Frear v. Heichert*, 34 Minn. 96, 24 N. W. Rep. 319. But what was the effect of this general appearance, made subsequent to the entry of the decree? In *Anderson v. Coburn*, supra, it was held that, as to the immediate parties to the action, such appearance validated a judgment that was theretofore absolutely void for want of jurisdiction. Such was also the holding in *Grantier v. Rosecrance*, supra, and in *Alderson v. White*, 32 Wis. 308; *Burdette v. Corgan*, 26 Kan. 102; *Fee v. Iron Co.*, 13 Ohio St. 563; and *Curtis v. Jackson*, 23 Minn. 268. But this last case was expressly overruled, as to that point, in *Godfrey v. Valentine*, 39 Minn. 336, 40 N. W. Rep. 163. It may not be imperatively necessary for us to pass upon the point, but we cannot forbear saying that we think the case in 39 Minn. 336, 40 N. W. Rep. 163, rests upon much the better foundation in principle. We can well understand that where a defendant against whom judgment has passed, but who was in no manner served with process, comes into court, and asks to have that judgment set aside by reason of such want of service, and also for other alleged irregularities connected therewith, by asking the court to investigate such other irregularities he submits

himself to the jurisdiction of the court, and can no longer be heard to say that the court has no jurisdiction of his person. We can understand, also, that if, upon investigation, the court finds that such irregularities do not exist, and refuses to set aside the judgment, the defendant is forever bound by such rulings, unless reversed in a higher court. But we do not understand upon what principle it is held that the mention of such other irregularities in connection with the want of jurisdiction should forever preclude any investigations into the existence of such irregularities. A defendant who has not been served with process may have the judgment against him set aside for that cause. If plaintiff desires to proceed further he must then bring the defendant into court by proper service, and, when so in court, defendant may demur to the complaint, or defend, as he sees proper. But if, when he asks to have the judgment set aside, he goes one step further, and says to the court: "Notwithstanding the fact that I was never served with process, yet I now aver that plaintiff states no cause of action against me in his complaint, and I ask to have the judgment set aside for that reason also," by what legal necessity or propriety can it be said that he thereby shuts his own mouth, forecloses the question, and forever makes the complaint good, as against himself. We doubt if such a result should follow a voluntary appearance under such circumstances. But, however the law may be as touching mere irregularities, we are confident that no subsequent voluntary appearance can cure or condone fraud, such as appears upon the record before us. A court record, based upon a legal fraud, may demand obedience while it stands, but it is idle to talk of the sanctity of such a record. Whatsoever is tainted with fraud—a court record no less than a contract—must fall before the clear evidence of the fraud by which it was established. This principle can never be departed from without making the law the instrument for the perpetration of injustice, oppression, and crime. This is familiar law. But see *Black, Judgm. § 321*, and cases cited.

It is contended, however, that decrees in actions for divorce form a clear exception to the general rule; that, in this class of cases, reasons of public policy, the interests of the state, as well as the irreparable wrong that may be done to innocent third parties in cases of remarriage, alike demand that divorce decrees should not be subject to attack in this manner. It is freely conceded that courts have sometimes so held. Perhaps the strongest case in the books is *Parish v. Parish*, 9 Ohio St. 534. That case did not arise on motion to vacate, but under the old practice of bill in equity filed at a subsequent term. There was a demurrer to the bill, and the court said: "For the honor of human nature, it is to be hoped that the facts alleged in the petition in re-

gard to the procurement of the decree are not true in fact, though, for the purpose of the demurrer, they are to be taken as admitted. Indeed, if a case could be supposed in which a decree a vinculo, by a court having jurisdiction over person and subject-matter, could be vacated at a subsequent term by reason of its fraudulent procurement, it would seem that such a case is presented in the bill under consideration." But after a not very thorough review of the authorities the court concludes: "We therefore feel compelled, though reluctantly, to hold that sound public policy, in this class of cases, forbids us from setting aside a decree of divorce a vinculo, though obtained by fraud and false testimony, on an original bill at a subsequent term." See, also, *McJunkin v. McJunkin*, 3 Ind. 30; *O'Connell v. O'Connell*, 10 Neb. 390, 6 N. W. Rep. 467; *Lewis v. Lewis*, 15 Kan. 184; *Greene v. Greene*, 2 Gray, 361. An examination of these cases will disclose that in almost every instance the decision was more or less influenced by sympathy of the judges for innocent third persons, who, on the strength of the decree, had intermarried with the divorced party, and for the helpless issue of such marriage. They were unwilling "to expunge a sentence of divorce with a stroke of the pen, bastardize after-begotten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act which was operative at the time." Fortunately for us, as this record stands, our sympathies are not thus wrought upon; and, as a purely legal question, the overwhelming weight of authority is the other way. *Holmes v. Holmes*, 63 Me. 420; *Adams v. Adams*, 51 N. H. 388; *Edson v. Edson*, 108 Mass. 590; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Rush v. Rush*, Id. 649; *Olmstead v. Olmstead*, 41 Minn. 297, 43 N. W. Rep. 67; *Allen v. Maclellan*, 12 Pa. St. 328; *Mansfield v. Mansfield*, 26 Mo. 163; *Johnson v. Coleman*, 23 Wis. 452. These cases establish beyond dispute the principle that—not less in divorce cases than in any other class of cases—courts of general jurisdiction possess, ex necessitate, the power to emancipate themselves from the effects of a deceit practiced upon them, and to expunge from their records that which has been spread thereon only through fraud and deception. In no case "shall fraud be skillful enough to impose a sham upon a court of justice, to the injury of innocent parties, without any adequate remedy or reparation therefor."

When we apply these principles to the case before us, there is not the least doubt that the action of the court in setting aside the decree was entirely correct; and in so declaring we do not intend to hold that the fact that the trial court found the appellant to be a resident of this state upon insufficient or false testimony would constitute legal fraud. Nor do we hold that the fact, if

such it be, that the original decree was based entirely upon false or perjured evidence could be urged as a ground for annulling that decree. If the truth or falsity of the testimony upon which a judgment is based could be opened to subsequent inquiry, there would be no end of litigation. That matter must be regulated by the conscience of the witness, and the bar of the criminal court. 2 Blsh. Mar. & Div. § 1571, and cases cited. But the fraud in this case is of a more palpable character. The plaintiff brought his action in Stutsman county. Process was properly served. Defendant appeared by her attorney, and filed an answer in the case. If the allegations in that answer were true, they formed an insuperable barrier to any decree in plaintiff's favor. With the case thus at issue, plaintiff's attorney stated, in writing, to the attorney for defendant, that he should have notice of any further proceedings in the case. While defendant was thus lulled into security, plaintiff permitted his attorney, in direct defiance of the above understanding, and without any notice whatever to defendant or her attorney, to procure an order substituting another attorney in his stead, and permitted such substituted attorney to procure an order dismissing said action, and on the same day commenced an action in another jurisdiction,—i. e. in another judicial district,—using, it would seem, special precautions to prevent defendant from obtaining any actual notice of its pendency. This conduct, under the circumstances, was a gross fraud upon defendant's rights. In all the subsequent proceedings that led up to the decree, the court was in no manner informed of any of the prior proceedings in the case in Stutsman county. It cannot be doubted that, had the court received any knowledge of such facts, no further step would have been permitted in the case until the promise made by the former counsel was fully redeemed. Nor can it be doubted that plaintiff well knew that to be a fact. The suppression of those facts was a willful fraud upon the court. *Borden v. Fitch*, 8 Amer. Dec. 230; *Vischer v. Vischer*, 12 Barb. 640. By means of the frauds thus practiced the respondent, presumably an innocent woman, was branded as an adulteress by the solemn records of a court. That record cannot stand.

It is proper, as a matter of practice, to say that this application is not made under section 4939, Comp. Laws, giving relief in certain cases of mistake, inadvertence, etc. That section is not applicable to this case. Nor is it made under section 4900. That section gives a defendant served by publication only, and having no actual knowledge of the pendency of the action, the absolute right, on good cause shown, to come in, within the specified time, and defend the action, but divorce cases are expressly excepted from its operation. This application is en-

tertained under that underlying and indestructible right to attack a judgment that is rendered without jurisdiction, or obtained through fraud upon the injured party and the court. But while the action of the court, in setting aside the decree, was proper, we think the court went a step too far, in dismissing the complaint and entering judgment for costs. After all the record that was based upon the fraud was stricken out, there yet remained a complaint to which defendant had entered a voluntary appearance. Justice to all parties requires that the searching light of truth be turned upon this case. The district court of Cass county is directed to so modify the order appealed from as to set aside the decree of divorce, and allow the defendant 30 days from the entry of such modified order in which to plead to the complaint, if she so elect; respondent to recover costs in this court. Modified and affirmed. All concur.

CORLISS, J. I refrain from expressing any opinion whether the appearance validates the decree, so far as jurisdiction was concerned, or whether it conferred jurisdiction only from the date of the appearance.

HUDSON et al. v. ARCHER et al.
(Supreme Court of South Dakota. July 29, 1893.)

ACTION FOR BREACH OF CONTRACT—PLEADINGS—
DEMURRER—PARTIES.

1. The statement of the grounds of demurrer under section 4910, Comp. Laws, in the language defining what are valid grounds of demurrer in section 4909, is sufficient, except that when the first ground is relied upon the demurrer must specify whether the want of jurisdiction is as to the person or subject-matter, and, where the fourth ground is relied upon, the party must specify whether the defect is of parties plaintiff or defendant.

2. Under the last clause of section 4872, Comp. Laws, parties with whom a written contract is entered into may maintain an action in their own name for a breach of the same, though such parties are acting as agents or trustees of other persons; and it is not necessary that the persons beneficially interested in such contract be joined as parties plaintiff in the action.

3. In an action for breach of contract, stipulations introduced into the same as provisos in favor of the defendants need not be negatived by the plaintiffs in their complaint. Such stipulations, to be taken advantage of, must be pleaded by the defendants.

4. When the plaintiffs in their complaint set out a contract, allege full performance of the conditions of the same on their part, and a breach thereof by the defendants, they are entitled to recover nominal damages at least, and a demurrer to such complaint is not well taken.

5. An erroneous claim for damages, or an improper demand for relief, does not render the complaint demurrable.

(Syllabus by the Court.)

Appeal from circuit court, Yankton county; D. Haney, Judge.

Action by Everett E. Hudson, Newton Ed-

munds, and George R. Scougal against W. S. Archer and George A. Archer for a breach of contract. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

R. B. Tripp, for appellants. French & Orvis, for respondents.

CORSON, J. This appeal is from an order sustaining a demurrer to the complaint. The material parts of the complaint are as follows: "(1) The plaintiffs above named, as trustees for the following named persons, to wit, * * * complaining of the above-named defendants, allege: (2) That on the 18th day of June, 1887, the defendants made and executed an agreement in writing with the plaintiffs, whereby they, the said defendants, agreed to erect at Yankton, Dakota, an oil mill of dimensions not less than the following: * * * That they, the defendants, would operate said mill, and maintain therein at least the amount of machinery above mentioned for the period of five years from said date, provided that said defendants shall not be held to operate said mill during any time when, for causes not under their control, said mill cannot be operated without loss to them, they using at the time due economy and all proper skill. And the said defendants further agree that they would not during said period of five years sell or transfer said mill, or machinery therein, unless the parties receiving such transfer or conveyance bound themselves to the satisfaction of the plaintiffs to observe and fulfill the terms of said agreement. (3) That the plaintiffs, in consideration of the defendants doing, keeping, and performing the above stipulations on their part, promised and agreed that they would pay or cause to be paid to the said defendants the sum of \$1,500, as follows: \$500 on the arrival at said Yankton of the machinery above named, and \$1,000 when the said mill was completed according to the terms of said agreement, and the machinery set up therein, and the mill made fully ready to be put in operation for the manufacture of linseed oil. That the said plaintiffs performed all the conditions of said agreement on their part, and paid to said defendants the sum of \$1,500, and that the consideration of the payment of said sum was the faithful performance of said contract by the defendants on their part. (4) That the plaintiffs further allege that the persons above named paid the full sum of \$1,500, and paid the same to said defendants, through the plaintiffs as their trustees; and that said agreement was made for and on behalf of said trustees, who were the plaintiffs herein, and for and on behalf of the aforesaid persons, for whose benefit this action is brought, and that the sums so paid and contributed by each of said persons were received by said defendants as the consideration for the full per-

formance upon their part of all of the terms and consideration of said agreement to be kept and performed by said defendants. (5) That the plaintiffs further allege that the defendants failed to comply with the terms of said contract on their part, and committed breaches thereof in the following particulars: The said defendants, on or about the 7th day of June, 1889, sold and transferred said mill, machinery, and business to the Yankton Linseed Oil Company without the consent or satisfaction of said plaintiffs, and without any agreement on the part of said company to observe or fulfill the terms of said contract between the plaintiffs and the defendants; and that thereafter, on the 1st day of October, 1889, in violation of the terms of said contract, the oil mill and machinery ceased to be operated or maintained, and the said business has not been conducted by said defendants, or otherwise, since that date. (6) That the plaintiffs further allege that during the greater part of the time from the 18th day of June, 1887, to the 1st day of October, 1889, the said oil mill was not operated at all, and that at the date last mentioned the operation of said mill was, and ever since has been, entirely abandoned as aforesaid, and the said defendants and said Yankton Linseed Oil Company have, in violation of the terms of said contract, never intended since that date to operate said mill, and do not now intend to operate, manage, or continue the same. That by reason of the premises the consideration for the payment of said sum of \$1,500 has failed, and the plaintiffs are entitled to recover the same of the defendants, with interest from the date last mentioned. That no part of said sum has been paid. Wherefore the plaintiffs demand judgment against the defendants for the sum of \$1,500, with interest thereon from the commencement of this action, and for such other and further relief as shall be just and proper, and for costs and disbursements herein." To this complaint the respondents interposed a demurrer on the following grounds: (1) That there is a defect of parties plaintiff; (2) that the plaintiffs have no legal capacity to sue; and (3) that the complaint does not state facts sufficient to constitute a cause of action.

The appellant makes the objection to the consideration of the first ground of demurrer that, while the ground of the demurrer is stated in the language of the statute, (section 4909, Comp. Laws,) it is insufficient under the requirements of section 4910, which provides: "The demurrer shall distinctly specify the grounds of objection to the complaint." The provisions of our Code upon the subject of demurrers are similar to those of most of the Code states, and are the same as those contained in the original Code of the state of New York, whence our practice act was mainly taken. In that state, at an early day, the construction to

be given to this clause of section 4910 of our Code, above quoted, came up for consideration before the supreme court of that state in *Getty v. Railroad Co.*, 8 How. Pr. 177, and in a well-considered opinion that court held that the clause of section 4910 quoted means simply that the demurrer must distinctly specify one or more of the grounds for which a demurrer would lie, as provided in section 4909. The court says: "Six grounds of demurrer are specified in the Code. It is enough to authorize a demurrer that any one of these objections appears upon the face of the complaint. But the demurrer must not be general. It must specify distinctly upon which of the several grounds of objection which justify this pleading the party relies. No legislative requirement goes beyond this. If the ground of objection, as stated in the demurrer, is, in substance, any one of those specified in the 144th section, I suppose it is good as a pleading. In some instances, two distinct grounds of demurrer are embraced in one of the subdivisions of the section mentioned. Thus the defendant is authorized to demur when it appears 'that the court has no jurisdiction of the person of the defendant or of the subject of the action.' In a demurrer for want of jurisdiction it would undoubtedly be necessary for the defendant to state whether the alleged want of jurisdiction related to the 'person of the defendant,' or 'the subject of the action.' So, when the defendant demurs on the ground that it appears on the face of the complaint that there is a defect of parties plaintiff or defendant, he should state whether it is a defect of parties plaintiff or parues defendant upon which he relies. But in respect to the other grounds of demurrer I do not understand that anything more is required than to state the objections in the very words of the statute." The doctrine laid down in that case was followed in that state until 1877, when the law relating to demurrers was changed by statute. *Hulbert v. Young*, 13 How. Pr. 413; *Dayton v. Connah*, 18 How. Pr. 326; *Bliss*, Code Pl. § 416; *Maxw. Code Pl.* p. 381. Judge Maxwell, after giving the form of a demurrer, stating the grounds of a demurrer in the language of our section 4909, says in a note: "In some of the code states greater particularity is required in the special assignments. The above form is sufficient in most of the code states." *Id.* The only case called to our attention distinctly holding a contrary view is *Baker v. Hawkins*, 29 Wis. 576, in which the supreme court of that state held that, when the ground of demurrer was that there is "a defect of parties," the demurrer must specifically point out in some suitable manner who are the proper parties; but we are not inclined to follow this decision, as such specifications would, in our view, partake too much of the nature of an argument or brief of counsel. What would constitute a sufficient specifica-

tion would be vague and uncertain, and depend upon the views of different courts. Each section has its appropriate office. Section 4909 defines what are valid grounds of demurrer, and section 4910 requires the party demurring to distinctly specify upon which of the grounds he intends to rely. To specify which ground of demurrer is relied upon by the party demurring is sufficient, except that when the first ground is relied on the demurrer must specify whether the want of jurisdiction is as to the person or subject-matter; and when the fourth is relied on the parties must specify whether the defect is in parties plaintiff or defendant. Assuming, therefore, that the demurrer is sufficiently specific in form, the question of the right of the plaintiffs to bring the action is presented.

Respondents contend, in support of their demurrer, that the plaintiffs brought this action for the benefit of some 80 persons, not named as plaintiffs in the complaint, and therefore it appears that the plaintiffs, as such, have no right to maintain the action; but we cannot agree with the counsel in this view. The agreement being alleged to be in writing, and executed by the defendants to the plaintiffs, we are of the opinion that the plaintiffs, though bringing the action for the benefit of the persons who contributed the \$1,500 fund, come within the last clause of section 4872, *Comp. Laws*, which provides that "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." Mr. Pomeroy, in his work on Remedial Rights, says: "It is fully established by numerous decisions that when a contract is entered into expressly with an agent, the promise being made directly to him, although it is known that he is acting for a principal, and even although the principal and his beneficial interests in the agreement are fully disclosed and stipulated for in the very instrument itself, the agent in such case is described in the language of the statute, and may maintain an action on the contract in his own name, without joining the person thus beneficially interested." *Pom. Rem. & Rem. Rights*, § 175; *Considerant v. Brisbane*, 22 N. Y. 389; *Scantlin v. Allison*, 12 Kan. 85; *Noe v. Christie*, 51 N. Y. 270; *Hubbell v. Medbury*, 53 N. Y. 98; *Landwerlen v. Wheeler*, 106 Ind. 528, 5 N. E. Rep. 888. We have examined the cases cited by respondents' counsel upon this question, but, in our opinion, they do not apply to cases of express or written contracts. The case of *Ruckman v. Pitcher*, 20 N. Y. 9, well illustrates the doctrine of that class of cases. In that case a certain sum was deposited by the plaintiff on an illegal wager, a part of which belonged to himself, and the balance to other parties, for whom he acted as agent in making the deposit. The plaintiff brought an action to recover back the

whole sum so illegally bet or deposited, on the implied contract of such holder to refund the money, the wager being illegal; but the court held that he could only recover the amount of his own money advanced, and not that deposited as agent for others. But the court said his right to recover rested upon an implied contract only, as there was no express agreement to repay the money, and added: "An agent may in many cases sue upon an express contract made with himself by name." In the case at bar the agreement is alleged to be an express written agreement. If the plaintiffs had failed to pay the \$1,500 they agreed to pay, the defendants could have recovered it from the trustees in an action under the contract; but they could not have sued the persons who contributed the fund, as, so far as shown by the complaint, the defendants had no contract with them. *Landwerlen v. Wheeler*, 106 Ind. 526, 5 N. E. Rep. 888.

The second ground of demurrer is not tenable, as no incapacity of the plaintiffs, or either of them, appears on the face of the complaint. *Pom. Rem. & Rem. Rights*, § 208; *Maxw. Code Pl. p. 371*; *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. Rep. 269; *Campbell v. Campbell*, 121 Ind. 178, 23 N. E. Rep. 81.

Respondents further insist that the demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action was properly sustained for the reason that there is no allegation in the complaint that the mill could have been kept in operation without loss to the defendants. The appellants' counsel contend that this was a matter of defense, and that they were not required to allege the same in the complaint. We think the appellants are right in their contention. This clause in the contract is introduced as a proviso, and not an exception, and is, we think, a condition subsequent, and not a condition precedent. *Bliss, Code Pl. §§ 200, 202*; *Harris v. White*, 81 N. Y. 532; *La Point v. Cady*, 2 Pin. 515. Again, it was a matter peculiarly within the knowledge of the defendants. If they were unable to operate the mill without loss, that was a matter of defense, and should be presented to the court by answer.

The respondents further contend that the demurrer was properly sustained upon the ground that the complaint was drawn upon the theory that the plaintiffs had the right to recover back the entire consideration of \$1,500 paid the defendants towards the erection of the mill, and that the plaintiffs cannot maintain such an action under the contract; but we cannot agree with counsel for the respondents in this contention. The plaintiffs, in their complaint, set out a contract between the parties, allege full performance of the terms of the same on their part, and aver a breach thereof by the defendants. The demurrer admitting the facts alleged the plaintiffs are entitled to nominal

damages at least, and this is sufficient on demurrer. 1 *Suth. Dam. p. 759*. An erroneous claim for damages, or an improper demand for relief, does not render the complaint demurrable. *Maxw. Code Pl. p. 9*; *Bliss, Code Pl. § 417*.

The counsel for the respondents further contend that no damages are claimed in the complaint, but only the consideration paid, and therefore no facts are stated showing that even nominal damages may be recovered; but we cannot agree with counsel in this contention. The plaintiffs demand judgment for \$1,500, and whether that is denominated the consideration paid under the terms of the contract or denominated damages is, we think, not material, under our system of pleading. As we have seen, an erroneous claim for damages or demand for relief is not a ground of demurrer. If the rule by which the damages are to be estimated as stated in the complaint is incorrect or insufficient, the defect cannot be reached by a demurrer so long as the complaint states facts entitling the plaintiffs to recover any damages in the action. The amount that the plaintiffs may recover or the measure of damages must be determined on the trial under the pleadings and the evidence. *Sunny Side Land & Imp. Co. v. Willamette Bridge Ry. Co.*, (Or.) 26 Pac. Rep. 835; *Telegraph Co. v. Hopkins*, 49 Ind. 223; *Cowley v. Davidson*, 10 Minn. 392, (Gil. 314); *Leland v. Tousey*, 6 Hill, 328; *Trammell v. Chambers Co.*, (Ala.) 9 South. Rep. 815; *Bryant v. Barton*, (Neb.) 49 N. W. Rep. 331; *George v. Edney*, (Neb.) 54 N. W. Rep. 986. As the complaint, in our opinion, states facts sufficient to entitle the plaintiffs to maintain the action, it follows that the demurrer was erroneously sustained thereto. Whether the demurrer was well taken being the only question before the court on this appeal, we express no opinion as to the proper measure of damages upon the facts stated in the complaint. The order and judgment of the circuit court are therefore reversed, and the cause remanded, with directions to that court to overrule the demurrer.

BEM et al. v. BEM et al.

(Supreme Court of South Dakota. July 29, 1893.)

DEPOSITION—TIME OF TAKING—NOTICE—WAIVER OF DEFECT IN—APPEAL—RECORD—GIFT FROM HUSBAND TO WIFE—PRESUMPTIONS—EVIDENCE.

1. When refusal to suppress a deposition is assigned as error, the record must show the existence of the facts upon which the motion was based. It cannot be assumed that the facts existed because they were stated in the notice as the grounds upon which the motion would be made.

2. Under section 5289, Comp. Laws, in relation to taking depositions, providing that "the notice shall be served so as to allow the adverse party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sundays and the day of serv-

ice." the adverse party is entitled to an extra day for preparation beyond the time required to reach the place where the deposition is to be taken.

3. Where, however, the notice is short, in not allowing the one day for preparation, and both parties appear, and the notifying party then and there offers to postpone the examination, so as to afford the adverse party the day for preparation, failure to accept such offer without any explanation or reason therefor, and participating in the examination without further objection, answers any presumption of prejudice to the adverse party, and error without prejudice is no ground for reversal.

4. Errors assigned upon the ruling of the trial court upon objections to interrogations and answers referred to in the assignment by number only cannot be considered on an abstract in which the questions and answers, with their numbers, are not preserved, but are condensed and presented in narrative form, so that this court is unable to locate the particular matter objected to.

5. The abstract is the record upon which a case is heard in this court, and whatever matters it is necessary for this court to know and consider must be presented by the abstract. *Noyes v. Lane*, (S. D.) 48 N. W. Rep. 322.

6. Where a husband takes notes, securities, or real estate in the name of his wife, that fact, alone and unexplained, raises the presumption that he intended the same as a gift or provision for her, but such presumption may be overcome by evidence which shows a motive or design on the part of the husband inconsistent with such presumed intent, and that such property was so placed in his wife's name for purposes of convenience and advantage to himself.

7. Upon an examination of the evidence in this case, this court concludes that the money, notes, and securities described in the plaintiff's complaint were put into the wife's name by the husband for purposes of advantage and convenience to himself, and not with the intention or for the purpose of making a gift to or settlement upon her, and that the same belong to and should be distributed as a part of the estate of the deceased husband.

8. This court further concludes that as to the real estate described in said complaint the evidence is not positively inconsistent with, and does not overcome, the presumption that in procuring the same to be deeded to his wife the husband intended it as a provision for her.

(Syllabus by the Court.)

Appeal from circuit court, Hutchinson county; E. G. Smith, Judge.

Action by Lottie Bem, Frank J. Bem, and Arthur A. Bem against Emilie Bem, impleaded with — Bem, and Fred Helser, administrator of the estate of Frank Bem, deceased. Plaintiffs had judgment, and defendants appeal. Reversed.

G. P. Harben and N. J. Cramer, for appellant. R. B. Tripp, for respondents.

KELLAM, J. Respondents, who were plaintiffs below, are the children of Frank Bem, deceased, by a first wife. Appellant Emilie Bem is the second wife and is the widow of said Frank Bem, deceased. — Bem is their infant child. The general purpose of the action was to have certain property, real and personal, standing in the name of and claimed by appellant as her own, adjudged and declared to be of the estate of said Bem, deceased, and subject to be dis-

tributed as such. Fred Helser, as administrator, refusing to bring the action, it was brought by respondents, as already stated, and the administrator was made a defendant. Upon the issues made by defendant's answer the case was referred to a referee to try all the issues therein, and report findings of fact and conclusions of law. Upon the report of the referee, which was favorable to plaintiffs, judgment was rendered by the court in accordance with the prayer of the complaint. Motion for new trial having been overruled, the defendants appeal.

The theory of the plaintiffs was that the deceased, Frank Bem, at the time of his marriage with the defendant Emilie was possessed of some means; that Emilie had nothing, and that all the property in question was the product and growth of his judicious management of the said means of the deceased; that in the transaction of his business, which was largely that of loaning money, he had, for purposes hereafter referred to, taken notes and securities in his wife's name, and had for similar reasons taken deeds of real estate, which he bought and paid for with his own money, in the name of his wife, without any intention in fact of making her the real owner of either the real or personal property, and without that effect in law. The theory of the defendant was that by and in pursuance of an antenuptial agreement Frank Bem, in consideration of her marriage to him, gave to defendant the bulk of the property then owned by him, and afterwards acted as her agent in its management, and that the property referred to in plaintiffs' complaint was her own separate property, so made over to her in consideration of the marriage. During the progress of the trial before the referee, which the abstract shows was commenced June 30, 1891, upon motion of plaintiffs and upon affidavits, the referee granted a continuance for several days. This is assigned and claimed as error, though not argued. The statute expressly gives the referee the same power as to adjournments as a trial court has. Section 5, c. 100, Laws 1891. The affidavit upon which the adjournment was allowed is not presented to us, and we cannot assume that the referee's discretion was improperly exercised.

As the chief question in the case is the sufficiency of the evidence to support the findings of the referee, or any findings which would justify the judgment rendered by the court, it is in order first to examine the objections interposed to certain items of evidence, with the view of ascertaining what was properly before the referee, and what ought to be considered by this court in determining the questions presented. Upon the hearing before the referee defendant moved to suppress the deposition of Lottie Sexta, upon the grounds: First, that the name of the officer taking the same was not indorsed upon the envelope in which the same was inclosed; second, because the same was

opened by the clerk without order of the court, and without the presence of either of the parties or their attorneys; third, because the notice given was to take the deposition upon the same day and hour at which the taking of another deposition was noticed, at a place many miles distant from the place where the first was to be taken. The motion was overruled, and error is assigned on such ruling. No record is presented upon which we can examine this question. The motion itself is printed in the abstract, but nothing more. What the notices show as to the time and place we have no legitimate means of knowing, nor does the record show how the deposition was returned, or under what circumstances it was opened. We cannot assume that the facts existed as intimated in the motion; but, in the absence of a showing of facts which would prove the ruling of the referee to be wrong, it must be presumed to be correct. Defendant also moved to suppress the deposition of J. N. True for the reason that by the notice under which it was taken sufficient time was not given to get to the place where it was to be taken by the usually traveled route, with one day for preparation, as provided by section 5289, Comp. Laws. The section referred to says in respect to the notice: "The notice shall be served so as to allow the adverse party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sundays and the day of service," etc. We think the record shows sufficient facts as to the time required to get to the place where the deposition was to be taken, with another day for preparation, to entitle the defendant to more time than the notice allowed; and, if the record showed no more than that the defendant appeared and objected to the taking of the deposition because the day for preparation was thus denied him, we should find difficulty in avoiding appellant's objection. Our statute, above quoted, is different from that of Wisconsin, Illinois, and Indiana, where it has been held that, although the notice allows less time than the law contemplates, still, if the noticed party is actually present, and participates in the examination, the error is not prejudicial. This is so held on the ground that under the statutes of those states the only object of the notice was to give the adverse party time and opportunity to be present, and the fact that he is present and cross-examines the witness proves that the object of the statute has been accomplished. But our statute contemplates a further purpose and effect of the notice. It not only designs to give the adverse party time to reach the place of examination, but to give him an extra day for preparation. In this case the abstract shows that when defendant objected on account of the shortness of the time given by the notice, the plaintiffs offered to postpone the examination so as to give defendant the time claimed. Failure

to avail himself of this offer, without explanation, we think answers any presumption of prejudice to defendant, and error without prejudice is no ground for reversal.

The deposition of Frank Bem on the part of plaintiffs was objected to by defendants on the ground that he "was an heir of deceased, Frank Bem, and not competent to testify under the statutes." This objection was overruled, and such ruling is assigned as error. The assignment, however, is not considered or referred to in appellant's argument, and might, therefore, be treated as abandoned. A further reason for passing it without examination is that it nowhere appears that the witness was or is an heir of the deceased, Frank Bem. We cannot assume that Frank Bem whose deposition was taken and so objected to was the same person as Frank J. Bem, one of the plaintiffs. Being differently named,—one as Frank J. Bem and the other as Frank Bem,—the presumption is a fair one that they are different persons.

Defendants then "objected to questions 6, 9, 10," etc., but appellant does not print the deposition, nor any part of it. In respondents' abstract it is said "Frank J. Bem, a witness on the part of the plaintiffs, testified as follows: 'I am one of the plaintiffs,'" etc. Whether or not this is the testimony covered by the deposition we do not know. We can only say, as we said above in relation to Lottie Sexta's deposition, we cannot assume the existence of the grounds upon which error is assigned. They must affirmatively appear in the record. The motion to suppress being overruled, and the deposition being offered in evidence, the defendants interposed the same objections to the questions and answers of the witness and to said deposition as were interposed by their counsel when the same was taken, and the referee ruled thereon as follows: "The referee overruled the objection to question 3½ of said deposition, to which ruling the defendants excepted." Then follows the statement in the same form that the referee overruled the objection to questions 4, 7, 11, and 12. It does not appear what were the grounds of the objection as to either question, and the deposition itself, as it appears in the abstract, is in narrative form; no questions or answers are preserved. We can thus neither locate the matter objected to nor know the grounds of objection. Under these circumstances, we are unable to consider or examine the assignment.

The abstract in this case was evidently prepared under the erroneous notion that the court would examine the original papers and from them supply omissions and defects in the printed abstract; but the theory of our rules is that, except in cases of dispute, the abstract is the record upon which the case is heard in this court, and that whatever matters it is necessary for the court to know and consider will be pre-

sented by the abstract. *Noyes v. Lane*, (S. D.) 48 N. W. Rep. 322.

This brings us to the general question of the force and effect of the evidence. Does it show Emilie Bem to be the owner, either under the antenuptial agreement or as the donee of an executed gift from her husband, Frank Bem, after their marriage, or does it make her a trustee only, with a resulting trust in favor of her husband, and since his decease, of his estate? The property in question was found in the name and in the possession of defendant Emilie, and, in the absence of any evidence as to how she came by it, or how she was holding it, it was presumptively hers. It first devolved upon the plaintiffs to show such facts or circumstances attending the transfer to or the possession by her as would explain and account for her possession and apparent ownership upon some other theory than that she was the real and absolute owner of the same. *Lowery v. Erskine*, 113 N. Y. 52, 20 N. E. Rep. 588. This was attempted by showing that at the time of the marriage of Frank Bem, deceased, to the defendant Emilie, and for some years prior thereto, he had been in the business of loaning money for himself and others; that he had become possessed of some property; that Emilie, the wife, had nothing; that after the marriage he continued the same business, and conducted it in the same manner, except that some time thereafter he began to take notes and securities in the name of his wife, Emilie, but personally conducted all such business transactions, taking, holding, controlling, and collecting the notes, and using and reinvesting the moneys so collected in the same manner and to the same extent as though he were the sole and undisputed owner. The direct evidence tending to sustain Emilie's claim of this personal property is that, prior to her marriage with the deceased, and in consideration thereof, the said deceased agreed to, and afterwards did, transfer to her nearly all of the property which he then owned, and that it was agreed between them that he should afterwards act as her agent in the management of such property. The evidence designed to impeach or discredit this claim that the property was transferred to her in consideration and at the time of the marriage is that no change occurred in its possession, management, or apparent ownership at the time of, or immediately subsequent to, such marriage. It remained in the possession and under the exclusive personal control of the deceased. He transacted all the business of loaning and collecting, keeping the bank accounts in his own name, giving his personal checks on account of loans so made. That during the first six months after the marriage very few loans were taken in the wife's name, but in April, 1886, as testified to by witness True, not only from conversations with the

deceased, but from "circumstances that occurred at the time," there was considerable complaint in the county about excessive rates on chattel loans, and considerable talk of prosecutions for usury. That thereafter the loans were generally taken in the name of the wife, the husband charging and collecting a commission for procuring the loans. That he at that time took from her a power of attorney "to negotiate for me and in my name loans of money upon such security, real and personal or chattel, in the territory of Dakota, as he may deem proper, and upon such legal rates as he may please, not less than ten per cent. in advance, exclusive of all charges and commissions accruing to him for his services and expenses in such loans, and which said charges, expenses, and commissions said attorney in fact is to collect in his own name from the borrower in each case; and I am to be released from all liability thereon." Then follows a general authorization to use any such funds or property in buying, selling, or exchanging as he may please, and upon such terms as he may choose, concluding as follows: "The power herein contained being coupled with an interest in and contractual rights in favor of said Frank Bem, it is hereby expressly understood and agreed that said power cannot be revoked or annulled by said Emilie Bem, or by any act directed by her, during the lifetime of said Frank Bem." That, besides this business of loaning, the deceased derived considerable income from making final proofs for settlers, drawing legal instruments and conveyances, and by making real estate loans on commission for loaning companies. In the absence of other facts, the mere taking of an ordinary power of attorney from his wife to handle this money and collect these notes would be more consistent with the theory that he regarded the property as hers than otherwise; but the terms of this instrument are unusual. Their object and care seem to be, not so much to create and confirm Bem's authority as an agent as to destroy and negative Mrs. Bem's authority as a principal, and to forbid her any chance to ever assert the same. If Bem's design was, as claimed by respondents, to put this property in his wife's name, only so that he might occupy the position of a third party or factor between borrower and lender, he probably would have adopted just that plan for such purpose.

In her argument, appellant contends that much of the evidence of True with reference to the statements of Bem as to the reasons for making this power of attorney, and what it was intended to accomplish, was incompetent and inadmissible; but, as already pointed out, there is no record presenting this question. It may be remarked, however, that the statements and declarations of Bem, as testified to by True, to which appellants object, are not declarations made

by him concerning transactions which had previously taken place, but in immediate contemplation of one then just about to occur, and in which he was the moving party. The vital question here is, with what intention did Bem, who was the acknowledged prior owner, put and keep this property in his wife's name? If we knew what he had in mind in taking this power of attorney with its unusual provisions, we should have a clue to his understanding of his relation to this property, and what he intended should finally be done with it. Up to this time very few notes had been taken in her name. Afterwards it was common. It is a fair inference that the reason was connected with the power of attorney, and what Bem understood it would accomplish. We are inclined to think, though it is not necessary to decide, that the evidence was in general competent as a part of the *res gestae*.

Appellant contends against this conclusion, and in her printed argument states that even after the date of this power of attorney, and down to the time of Bem's death, he took a large number of notes in his own name, providing for illegal interest, and refers to "Exhibit 10," a book said to have been kept by Bem, but none of the contents or entries of this book are presented in the record, and we do not know what they are or what they prove. We, of course, can only consider the evidence which the record presents. But in the testimony in this case, plainly unobjectionable, and inferences legitimately deducible therefrom, we find enough to satisfactorily support the finding of the referee "that the said Frank Bem at the time of his death was the owner of all notes, mortgages, evidences of indebtedness, or other choses in action that had been taken in the name of the defendant Emilie Bem as payee, mortgagee, or obligee, subsequent to her said marriage, and which had not been paid at the time of the decease of the said Frank Bem." We think the effect of this evidence is also to rebut the presumption that the taking of these notes and securities in his wife's name was intended as a provision for or settlement upon her, for it satisfactorily accounts for the fact upon a theory inconsistent with such design. Besides, it appears that these notes and the real estate in question constitute nearly the entire earnings and accumulations of the deceased; that he left three children by his former wife unprovided for if he intended to make Emilie Bem the absolute owner of all this property. In such case, to presume, without any facts showing a reason therefor, that a husband and father intended to settle his entire estate upon the wife to the exclusion of, and without provision for, his children, would be against paternal instincts, unnatural, and therefore unreasonable. The presumption is one of fact, and must give way before circumstances showing it to be clearly unrea-

sonable and improbable. *Adlard v. Adlard*, 65 Ill. 212; *Perry, Trusts*, §§ 146, 147.

With reference to the real estate, we start out with the same presumption as in the case of the personal property. If a man purchase real estate, and take the title in the name of a stranger, the presumption is that he intends some benefit to himself, and a resulting trust in his favor arises; but if he take the conveyance in the name of his wife or child, the presumption of a resulting trust is rebutted, and the contrary presumption arises,—that the purchase and conveyance were intended to be an advancement to or provision for such wife or child. *Pom. Eq. Jur.* § 1039; *Story, Eq. Jur.* § 1204 et seq.; *Perry, Trusts*, § 143. Respondents do not question the existence of this presumption, but contend that the same evidence which overcomes such presumption with reference to the personal property overcomes it with reference to the real estate; but, in our judgment, some of the evidence which justifies the finding of the referee as to the personal property does not apply to the disposition of the real estate. The object of this inquiry is to ascertain Bem's purpose and intention in putting this property, whether personal or real, in his wife's name. The law presumes it was intended as a gift or provision, but the presumption is not conclusive, and to the extent that a good reason is shown for his desire and plan to make it appear to be his wife's, while it should really remain his, the force of such presumption is weakened.

We think it is not difficult to find reasons disclosed by the evidence for conducting the business of making loans and taking notes in his wife's name instead of his own. The evidence not only suggests, but tends to prove, that he adopted and relied on this plan as a means of making commissions for negotiating loans, instead of directly taking illegal interest, and incurring the consequences. These reasons would not suggest the taking of real estate in his wife's name. The advantage to Bem in his wife's apparent ownership of the money he was loaning and the notes he was taking is clear, but no such advantage would seem to result from making his wife the ostensible owner of the real estate. If Bem had been embarrassed by debts, or had anticipated any other trouble, which he might think could be avoided by allowing the title to this real estate to go to and be held by his wife, evidence of such facts would be entitled to consideration in determining his intention with reference to such real estate, just as such facts are considered in relation to the money and notes; but such facts and circumstances must be such as satisfactorily explain why the title was taken in the wife's name, and the whole evidence must be inconsistent with the presumption that a gift or provision was intended. 1 *Perry, Trusts*, § 146.

Again, while the evidence is full and con-

vinding as to Bem's relation to the personal property, the money and notes he was loaning and taking, it is very meager as to the real estate. The notes were taken in her name, but they were never delivered to or controlled by her. They were held, managed, and controlled by Bem precisely as though his own. By an irrevocable power of attorney, prepared under his direction, she relinquished to him all dominion over this kind of property, and formally and completely abdicated every right in relation to it, which is ordinarily an incident of ownership; but it is noticeable that this plenary power of control and disposition does not, in terms, at all events, extend to real estate, but specifically mentions the personal property as its subject. It is true the power of attorney was executed prior to the acquisition of this, and possibly any, real estate, and it may be that mention of real estate was omitted because he did not then contemplate acquiring any; but we cannot assume this, and thus enlarge the effect of this instrument as a piece of evidence. We remember nothing in the evidence showing that Bem said or did anything in connection with this real estate inconsistent with the presumption that he intended it as a gift to his wife.

The presumption of Bem's intention, upon the admitted facts, is as good as positive evidence in the same direction, and must prevail until overcome. The evidence to countervail the presumption must be "equally satisfactory and explicit with the proof required to establish a resulting trust. The circumstances relied on must be convincing, and leave no reasonable doubt as to the intention of the party." Read v. Huff, 40 N. J. Eq. 229. In Earnest's Appeal, 106 Pa. St. 310, it is said that to establish a resulting trust in favor of the husband, who has purchased real estate and caused it to be deeded to his wife, "the evidence must be clear, explicit, and unequivocal. The rule is so well established that a citation of authorities in extenso seems unnecessary."

For reasons which we have explained more at length probably than was necessary, we conclude that the evidence presented to us by the record is sufficient to sustain the findings of the referee and the judgment of the court as to the personal property, the notes, and the evidences of indebtedness; but much of the evidence which persuades us to this conclusion is, in our judgment, peculiarly and only applicable to the personal property, and does not necessarily or naturally lead to the same result with reference to the real estate. The evidence, as a whole, is insufficient to overcome the presumption that in causing this real estate to be deeded to his wife Frank Bem intended it as a gift to and provision for her, and in such case the presumption revails. The judgment is reversed, and the case is remanded to the circuit court, with

directions to cause to be entered judgment in accordance with these conclusions. All the judges concurring.

WILCOX v. SMITH et al.

(Supreme Court of South Dakota. July 26, 1893.)

DISSOLUTION OF ATTACHMENT.

1. Under section 5011, Comp. Laws, a defendant may unite in the same motion, as grounds for the discharge of an attachment, that the affidavit upon which the attachment was issued is insufficient in either form or substance, and that it is untrue in fact.

2. When, upon such motion, the defendant duly traverses all the statements of the plaintiff's affidavit upon which the attachment was issued, it is incumbent upon the plaintiff to support such statements by further evidence. Failing to do this, the attachment is properly discharged.

(Syllabus by the Court.)

Appeal from circuit court, Sully county, H. G. Fuller, Judge.

Action in attachment by Seth Wilcox against Milton M. Smith and Maggie Smith. From an order dissolving the attachment, plaintiff appeals. Affirmed.

Albert Gunderson, for appellant.

KELLAM, J. An attachment was issued in this action upon an affidavit of plaintiff, alleging the indebtedness of defendants; that the same was incurred "for money obtained under false pretenses, and that said defendants are about to assign, dispose of, and secrete their property, with the intent to defraud their creditors; and that plaintiff has demanded of defendants security for said debt, but defendants have refused to secure the same." Defendants moved to discharge the attachment on two grounds: (1) Upon the insufficiency of the affidavit, in its statement of the indebtedness, and of the false pretenses under and by which the indebtedness is charged to have accrued; and (2) that the affidavit was untrue in point of fact. This motion to discharge was supported by the affidavit of one of the defendants, specifically and separately denying the several statements of the procuring affidavit. Upon the hearing of defendants' motion to discharge, the plaintiff moved to strike out the first ground of the motion for the reason that it was "in the nature of a demurrer, and is inconsistent with the second paragraph of said motion, and that by pleading the second ground the defendants waive the irregularity complained of in the first." This motion being overruled, plaintiff moved that defendants be required to elect upon which of the two grounds stated they would rely, which motion was also denied, to both of which rulings plaintiff excepted. The court then, considering the case upon the affidavits already referred to, —no others being presented by either side,—discharged the attachment, to which the

plaintiff excepted, and from such order appeals. The errors assigned are as indicated by the three exceptions noted.

Section 5011, Comp. Laws, provides that "in all cases the defendant * * * may move to discharge the attachment." This is the only statutory provision authorizing a defendant to move for such discharge. It is general, and suggests no restriction as to what grounds may be urged or united on such motion. It was evidently intended to afford speedy relief to a defendant whose property is wrongfully attached. It would be shorn of much of its efficiency in this respect if a defendant were compelled to proceed solely upon one ground, to the exclusion of others. If he believed the statements of the affidavit were on their face insufficient to justify the attachment, he ought not to be compelled to forego that ground because he also desired to traverse and contest the truthfulness of the allegations that were made, or intended to be made, as a cause for issuing the attachment. Either is a good ground for discharge. They are not inconsistent, because both may be true, and we perceive no justification, either in the law or in reason, for requiring a defendant to elect, in such case, upon which one of such two grounds he will rely, and to abandon the other. It is true, as argued by appellant, that an objection to the sufficiency of the statements of the attachment affidavit is in the nature of a demurrer. So is the objection to the introduction of evidence under a complaint because of the insufficiency of its statements in the nature of a demurrer. But a defendant is never refused the advantage of such objection because he also denies the truthfulness of the statements of the complaint. In a case very similar to this the South Carolina court says: "The sufficiency of the affidavit must be determined, in the first instance, by inspection. If considered sufficient to sustain the attachment, *prima facie*, the affidavits read at the hearing for the motion, and those in behalf of the plaintiff in reply, must be considered; and if the allegations, as stated in the original affidavit, be not sustained, the motion must be granted; otherwise it must be refused." *Kerchner v. McCormac*, 25 S. C. 461. Appellant cites no authority sustaining such a construction of the attachment law as he claims, and we are not aware of any.

Appellant further contends that the attachment should have been sustained on the merits. But when the defendant presented his affidavit, denying specifically each fact stated in plaintiff's affidavit as a ground for the attachment, the burden of proof rested on the plaintiff. *Wyman v. Wilmarth*, (S. D.) 46 N. W. Rep. 190, and cases cited. It then became incumbent on him to sustain the allegations of his attachment affidavit with other proof. Failing in this, there was no error in discharging the attach-

ment. The judgment of the circuit court is affirmed; costs to be taxed in accordance with stipulation on file. All the judges concurring.

COLONIAL & U. S. MORTG. CO., Limited, v. BRADLEY et ux.

(Supreme Court of South Dakota. Aug. 2, 1893.)

APPEAL—RECORD—SURETYSHIP—LIABILITY OF MARRIED WOMAN.

1. By the provisions of sections 5103, 4756, Comp. Laws, the findings of the court constitute a part of the judgment roll, and are properly before this court on an appeal from the judgment.

2. By section 2590, Comp. Laws, which provides that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, a married woman is authorized to execute a promissory note with her husband, and she is liable thereon though the note is given for the individual debt of the husband.

(Syllabus by the Court.)

Appeal from circuit court, Beadle county; A. W. Campbell, Judge.

Action on a promissory note by the Colonial & United States Mortgage Company, Limited, against George Bradley and Eva D. Bradley. Plaintiff had judgment against defendant George Bradley alone, and from the judgment dismissing the complaint as to defendant Eva D. Bradley it appeals. Reversed.

Alva E. Taylor and John L. Pyle, for appellant. Kirke W. Wheeler, for respondents.

CORSON, J. This was an action to recover the amount of a promissory note executed by the defendants. Judgment was rendered against the defendant George Bradley, but the complaint was dismissed as to the defendant Eva D. Bradley. From the judgment dismissing the action as to Eva D. Bradley the plaintiff appeals.

The action was tried by the court, who found the following facts: "First. That at the time of making the note and contracting the indebtedness hereinafter mentioned the defendants, George Bradley and Eva D. Bradley, were husband and wife. Second. That the defendants, on the 1st day of March, 1884, at Huron, territory of Dakota, made their promissory note in writing, dated on that day, and thereby promised to pay John Bellerby or order, the sum of * * *, with interest at the rate of 6½ per cent. per annum, payable December 1st in each year, evidenced by coupon notes attached to the said principal note. Third. That said note and coupons were duly assigned for a valuable consideration by said John Bellerby to the plaintiff prior to the maturity of said notes, and that plaintiff is a corporation duly authorized to take such assignment. Fourth. (Finds the amount due.) Fifth. That the indebtedness for which said notes

and coupons were given was the individual debt of the defendant George Bradley, and did and does not relate to the separate property of Eva D. Bradley, the wife of the said George Bradley." Conclusions of law: "First. I find that George Bradley is indebted to plaintiff on said notes and coupons in the sum of four hundred thirty-nine dollars. Second. I find that no cause of action exists against the defendant Eva D. Bradley."

Before proceeding to discuss the main question, it will be necessary to dispose of a preliminary question, raised by the learned counsel for respondent. He contends that, as there is no bill of exceptions in the case, the findings are not properly before this court for review. In taking this position we think the counsel has overlooked the provisions of our statute. The appeal from the judgment brings up for review the judgment roll, and the findings constitute a part of this roll. Section 5103, Comp. Laws, provides that the judgment roll, in cases where there is an answer, shall consist of: (2) " * * * The summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict," etc. And section 4756 provides that "the word 'verdict' includes not only the verdict of a jury, but also the findings upon the facts of a judge or of a referee appointed to determine the issues in a case." It will thus be seen that the findings of the court are properly a part of the judgment roll, and properly before this court.

Upon the findings and judgment only one question is presented for our consideration, and that is, did the court err in dismissing the complaint as to the wife, Eva D. Bradley, upon the facts as found by the court? The theory upon which the court rendered judgment in favor of the wife evidently was that, as a feme covert, she could not legally bind herself by signing a promissory note with her husband, when the indebtedness did not concern her separate estate, and when it was not found that she had any separate property. The decision of the question presented involves the construction of the statute of this state conferring upon married women authority to make contracts binding upon them. Section 2590, Comp. Laws, reads as follows: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." It will be observed that the language of this section is broad and comprehensive, and includes the authority to enter into any engagement or transaction with any person which an unmarried woman might enter into, limited only by the provision that the

contract must be "respecting property," and the limitation as to contracts between husband and wife. The learned counsel for the respondents contends that, the authority of a married woman to enter into contracts being limited to contracts "respecting property," this limitation should be construed to mean her separate property; but to so construe the limitation would require us to interpolate into the section terms that are not found in the section, which this court would not be authorized to do. It must be presumed that if the legislature intended to so limit the authority of married women to contract, it would have inserted such qualifying words into the section. Again, the counsel contends that when it does not affirmatively appear that a married woman has separate property, her common-law disability to contract is not removed; but we think this position is untenable. The language of the section does not, in our opinion, admit of such a construction. The construction contended for would also require us to insert qualifying words not found in the section. Construing this section in connection with the other sections of the chapter in which it is found, especially section 2594, we are of the opinion that it was the intention of the legislature to give to married women full authority to enter into any and all contracts respecting property, and to remove their common-law disability as to their power to contract obligations binding upon them, and that their authority to enter into a contract is not dependent upon the existence or nonexistence of separate property. This seems to be the view taken by the supreme court of California of the section of their Code identically the same as the one we are considering. *Goard v. Moulton*, 67 Cal. 536, 8 Pac. Rep. 63. In that case the court says: "In this state a married woman may enter into any engagement or transaction respecting property which she might if unmarried. A promissory note is an engagement respecting property which a married woman may make, though it can be enforced only as against her separate property." The supreme court of North Dakota has also reached a similar conclusion in construing the same section of the Compiled Laws we are now considering. *Mortgage Co. v. Stevens*, 55 N. W. Rep. 578. We may add that the section of our statutes as above construed by us is in harmony with recent legislation of several of the states upon the subject of the power of married women to enter into contracts. New York, in 1884, passed a law conferring upon married women full authority to make any and all contracts that they could make if unmarried, except certain special contracts with their husbands. *Bank v. Sniffen*, (Sup.) 7 N. Y. Supp. 520. Vermont has followed New York, and removed all the common-law disabilities of married women to make contracts, (*Reed v. Newcomb*, 59 Vt. 630, 10 Atl. Rep.

593;) and Massachusetts has followed in the same line, (*Major v. Holmes*, 124 Mass. 108; *Binney v. Bank*, 150 Mass. 574, 23 N. E. Rep. 380.) The construction, therefore, given by us to our statute, conforms to the prevailing spirit of the age, and to the law as found in the statutes of states recognized as among the most conservative in the character of their legislation. Our conclusion is that *Eva Bradley*, the defendant, in executing the note in controversy with her husband, entered into a contract that she was fully authorized to make, and is liable upon the same. The judgment of the circuit court in favor of the defendant *Eva Bradley* is reversed, and the cause remanded, with directions to the said court to modify its second conclusion of law to make it conform to this opinion, and to enter judgment in favor of the plaintiff and against said defendant *Eva Bradley*.

W. W. KIMBALL CO. v. KIRBY.

(Supreme Court of South Dakota. Aug. 2, 1893.)

CHATTEL MORTGAGES—REGISTRATION—"AUTHENTICATED COPY"—SUBSEQUENT PURCHASERS—EXECUTION LEVY—PRIORITY OF LIENS.

1. In section 4379, Comp. Laws, providing that "a mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith for value, unless the original, or an authenticated copy thereof, be filed," etc., it seems the words "in good faith for value" apply only to subsequent purchasers and incumbrancers, and not to creditors.

2. The "authenticated copy" of a chattel mortgage, authorized by said section to be filed, is the authenticated copy provided for in section 4382, and made necessary by the fact that the original is filed in some other county, where a part of the property covered by the mortgage is situated.

3. When a creditor, within the meaning of said section, obtains a judgment and levies an execution upon the property covered by an unfiled chattel mortgage, he acquires a lien thereon superior to that of the holder of the mortgage.

(Syllabus by the Court.)

Appeal from circuit court, Minnehaha county; F. R. Aikens, Judge.

Action in replevin by the W. W. Kimball Company against Joe Kirby to recover possession of a piano. Defendant had judgment, from which and an order denying a new trial plaintiff appeals. Affirmed.

Wynn & Nock, for appellant. A. C. Boylan and Joe Kirby, for respondent.

KELLAM, J. The appellant was the holder, as assignee, of a written instrument in the form of a chattel mortgage. It was signed by the party described as mortgagor in the presence of one person only, who attested the same as a witness. A copy was filed in the office of the register of deeds of the proper county. Subsequently the property described in such instrument was

levied upon by respondent under an execution against the maker, and at the sale the respondent became the purchaser, and took possession of the same. The appellant, after demand and refusal, brought an action to recover possession, claiming under this instrument as a chattel mortgage. Upon the trial the plaintiff offered in evidence a copy of the instrument, and proof, both by the official certificate and the oral evidence of the register of deeds, that the same was filed in his office. This evidence was at first received, together with testimony tending to show actual notice to respondent of such instrument, but afterwards, on motion, all was stricken out, and a verdict directed for defendant. This appeal is from a judgment entered upon such verdict and an order refusing a new trial.

The first error assigned is in ruling out the copy of the instrument, which for convenience in this case we shall call a "chattel mortgage," without intending to intimate any opinion as to its legal character or effect. Section 4379, Comp. Laws, provides that "a mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated." It is not claimed in this case that the original was ever filed, but that a "true copy" was filed. We understand that the "authenticated copy" referred to in said section, and which may be filed instead of the original in certain cases, is the authenticated copy provided for in section 4382, and made necessary by the fact that the original is already on file in some other county, where a part of the property covered by the mortgage is situated. We do not think the statute authorizes or contemplates the filing of a copy when the property is all situated in one county. The mortgage, not having been filed, was void "as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith for value." The respondent was either himself a creditor of the mortgagor, or succeeded to the rights of a creditor. The record is not explicit as to this. Upon the trial testimony was offered, but rejected, tending to show knowledge of this mortgage on the part of respondent prior to the execution sale.

Upon this ruling the second error is assigned, so that it becomes necessary to inquire whether, under our statute, the expression "good faith for value" applies to a creditor, or only to "subsequent purchasers and incumbrancers." A comparison of the above section of our statute with the corresponding section of the New York statute reveals this difference: In the New York stat-

ute the words "as against" are repeated before "subsequent purchasers" and incumbrancers, reading, "void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagors in good faith." The New York courts hold that the saving qualification of "good faith" applies only to subsequent purchasers and mortgagors, but that as to creditors, with or without notice, an unfiled chattel mortgage is void. *Trust Co. v. Hendrickson*, 25 Barb. 484; *Stevens v. Railroad Co.*, 31 Barb. 590. The New Jersey statute is like that of New York in repeating the words "as against" before "subsequent purchasers," etc., and in that state the words "in good faith" are held, as in New York, to apply only to subsequent purchasers and mortgagors, and not to creditors. *Williamson v. Railroad Co.*, 29 N. J. Eq. 311-336; *Sayre v. Hewes*, 32 N. J. Eq. 652. In Ohio an early statute (1846) was like those of New York and New Jersey, already noticed, and was construed in the same manner. *Wilson v. Leslie*, 20 Ohio, 161. Subsequently section 4150 of the Revision of 1890, which declares an unfiled chattel mortgage "void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith," was held subject to the same construction, and consequently that "the rule applicable to a mortgagee in good faith is not applicable to a general creditor." The Texas statute is similar to that of New York, and repeats the words "as against" before "purchasers," etc. In construing it the court says a plain distinction was intended to be made between creditors of the mortgagor and subsequent purchasers or mortgagees of the property. *Brothers v. Mundell*, 60 Tex. 246; *Frelberg v. Magale*, (Tex. Sup.) 7 S. W. Rep. 684. The same is true both of the text and the judicial construction of the Nebraska statute. *Earle v. Burch*, 21 Neb. 702, 33 N. W. Rep. 254. On the other hand, in Iowa, in a statute declaring that "no sale or mortgage of personal property where the vendor or mortgagor retains actual possession thereof is valid against existing creditors or subsequent purchasers, without notice unless," etc., the words "without notice" are held to apply both to existing creditors and to "subsequent purchasers." *McGavran v. Haupt*, 9 Iowa, 83; *Allen v. McCalla*, 25 Iowa, 464. In Minnesota, under a statute like that of New York, the court said in *McCarthy v. Grace*, 23 Minn. 185: "Whether a creditor can be affected by actual notice of the existence of a mortgage without the filing thereof is a question not raised, and therefore not considered, in this case." From what the same court said in a later case, (*Dyer v. Thorstad*, 35 Minn. 534, 29 N. W. Rep. 345,) we conclude that it would hold that the expression "in good faith" applied to creditors, as well as to subsequent purchasers and mortgagors.

Without pursuing the inquiry further, there seems to us to be reason for discriminating as to the effect of notice between a creditor of the mortgagor, who becomes such after the giving of the mortgage, and while it remains unfiled, and perhaps, too, an antecedent creditor and a subsequent purchaser or mortgagee. In the case of the former the credit is generally given to the mortgagor on the strength of no particular piece of property, while in the latter case particular property is offered as the basis of credit, and, if accepted with knowledge that it is subject to a prior mortgage, such subsequent purchaser or incumbrancer is not wronged, for he knew what he was to get. The creditor, however, may, and presumably does, become such on the strength of all the visible property of the mortgagor, and a subsequent notice to him of a prior unrecorded mortgage upon the very property perhaps which induced the credit would afford him neither help nor protection. It is probably true that in a plain case like that the law would, without statutory suggestion, postpone the claim of the mortgagee to that of the creditor, upon equitable principles, and to prevent fraud; but we think the statute was intended to announce, not a principle for the decision of cases in equity, but a direct and simple rule that all unfiled chattel mortgages should be void as against the creditors of the mortgagor, and should be void as against such subsequent purchasers and incumbrancers of the property as became such in good faith for value. While, ordinarily, little importance can be attached to punctuation in the construction of a law, it is noticeable that in this section, (4379,) there is a comma after the expression "creditors of the mortgagor," but none between "subsequent purchasers and incumbrancers of the property" and "in good faith for value." In other words, the section, as punctuated, makes two distinct and separate classes, to wit, "creditors of the mortgagor" and "subsequent purchasers and incumbrancers of the property in good faith for value," and against both of these classes an unfiled chattel mortgage is declared to be void. It is unnecessary to discuss or determine in this case whether the term "creditors" in said section should be held to mean creditors generally, or only those who became such after the execution of the mortgage. It certainly includes the latter. There is nothing in the abstract showing when this creditor became such. No point is made by appellant that the evidence was insufficient to show him a creditor, within the meaning of the statute, and so in position, in that respect, to claim protection against this unfiled mortgage. The judgment is presumed to be in all respects right. We could not, upon this record, assume that he was a prior creditor, even if that would, without question, defeat his claim, for that would be to presume against

the correctness of the judgment, instead of in favor of it. The mortgage, then, being void as against this creditor, when he obtained his judgment, and levied his execution upon the property described in it, he acquired a lien upon and interest in the property superior to that of the mortgagee, and, as against him and those succeeding to his rights, the mortgagee was not entitled to the possession of the mortgaged property. The trial court so ruled, and the judgment is affirmed. All the judges concur.

YOUNG v. BOARD OF EDUCATION OF INDEPENDENT SCHOOL DIST. NO. 47 OF DASSEL.

(Supreme Court of Minnesota. Aug. 3, 1893.)

SCHOOL DISTRICTS—ULTRA VIRES CONTRACT.

Where the officers of a school district, without lawful authority, borrow and expend money for the completion of a schoolhouse, no liability attaches to the district therefor, notwithstanding the benefit received from such expenditure. No estoppel or ratification can be inferred from its retention or enjoyment of the improvement in such case, for it has no opportunity to reject it.

(Syllabus by the Court.)

Appeal from district court, Meeker county; Powers, Judge.

Action by Austin H. Young, receiver of the estate of Stevens & Co., against the board of education of independent school district No. 47, Dassel, Meeker county. Plaintiff had judgment, and from an order denying a new trial defendant appeals. Reversed.

E. P. Peterson, (Spooner & Taylor, of counsel,) for appellant. Daniel Fish, for respondent.

VAN DERBURGH, J. The plaintiff recovered a verdict, under the direction of the court, for \$205 and interest for money advanced by Stevens & Co., of whose insolvent estate the plaintiff is receiver. The evidence in the case tended to show that the defendant had expended the proceeds of bonds lawfully issued in the erection of a schoolhouse for the district, but the money derived from the bonds was insufficient to complete the building, and thereupon the treasurer of the district, one Peterson, arranged with Stevens & Co., who were bankers, for additional funds to complete the same, and drew checks upon them to the amount of \$205, which were honored and paid, though the district had no funds, and the money was expended in paying for labor and material furnished for the building, under the direction of the treasurer and other officers of the board. It does not appear that the board, as such, ever authorized the loan in question or the expenditure of the money in the manner stated, but the money was secured and expended, as may be inferred, by individual members or officers of

the board, upon the belief that their action in the premises would be approved by the defendant and the district. A school-district order was subsequently issued to Stevens & Co. for the amount, but whether at a lawful meeting of the board is left in doubt by the evidence.

The question, then, is whether the mere fact that the money was received and expended by the officers of the district in improving its property, though without lawful authority, raises a liability against the corporation for money had and received, or is sufficient to create an estoppel against the district to deny its liability therefor. But it cannot be said that the district has either received or expended the money, or that it was bound by the acts of its officers, and no estoppel or ratification can be inferred from the fact that it retains and enjoys the benefit of the expenditure, because it is inseparable from its property, and the case is unlike an unauthorized purchase of chattels, which could be restored. It has no option to reject the improvement in this instance. *Shaw v. Church*, 44 Minn. 25, 46 N. W. Rep. 146. It would be a very unsafe rule to establish to hold that school officers might borrow money at their pleasure, and bind the district because the same is expended by them in improving the property of the district. The case is to be distinguished from *Borough of Henderson v. County of Sibley*, 28 Minn. 515, 11 N. W. Rep. 91. There the money claimed had been deposited in the county treasury, and was used and expended by the county in the erection of a courthouse, which it had authority to build. It was expended for a lawful purpose by the proper authorities, and the county could not deny that it had, or had used for its benefit, plaintiff's money, received without consideration, and was bound to refund.

Order reversed, and new trial granted.

VAN NORMAN v. BARBEAU et al.

(Supreme Court of Minnesota. Aug. 3, 1893.)

PATENTS FOR INVENTIONS—ASSIGNMENT OF RIGHTS—CONSIDERATION—PRINCIPAL AND SURETY—FAILURE OF ONE SURETY TO SIGN.

1. In order to sustain the defense of want of consideration in a contract for the sale of a patent right it is not enough that its practical utility be limited, or that the patented article cannot be manufactured and sold at a profit, if it be capable of use.

2. Where one of several sureties named in a bond neglects or refuses to sign the same, if all the others sign it with the principal obligor, and the same is unconditionally delivered to the obligee in their presence, and without objection on their part, they will be deemed to have waived the omission to procure the signature of the remaining surety.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Canty, Judge.

Action on a contract by Minnie E. Van Norman against Charles F. Barbeau and

others. Defendants had judgment, and from an order denying a new trial, plaintiff appeals. Reversed.

Babcock & Garrigues, for appellant. Penney, Jamison & Hayne, for respondents.

VANDERBURGH, J. The plaintiff and Luther C. Farmer and J. H. White, owners of letters patent for improvements in weighing scales, on the 9th day of March, 1891, entered into a certain license contract with the defendant Charles F. Barbeau, described in the complaint, in and by which he was granted the exclusive right to manufacture and sell the scales therein described, and all the improvements owned or controlled by the parties of the first part, and in consideration of which he agreed to pay certain royalties upon the number of machines mentioned during the life of the patent, and thereby agreed to pay a royalty of \$1 each on at least 3,000 scales to be manufactured during the first year after the execution of the contract; and for the purpose of securing the performance of the agreement to pay such royalty for the first year Barbeau and the other defendants in this action executed their bond, also described in the complaint, and running to the plaintiff and Farmer and White, the parties of the first part in the contract first described. It appears that Farmer and White have adjusted their claim under the contract and bond with the defendants, and that the interest of the plaintiff in the royalty secured by the bond is one-fourth thereof, which this action is brought to recover.

The defenses set up in the answer are: First, (a defense in favor of all the defendants,) that the contract and bond are without consideration, on the ground that the patent and alleged improvements in question are of no utility, and that the scales manufactured thereunder were and are practically useless; and, second, in respect to the liability of the sureties in the bond, that one Joseph Barbeau, who was named therein as surety, and who as it was agreed and understood between the plaintiff and remaining sureties should sign the same, did not execute it or become a party thereto.

1. The rule applicable to a defense of want of consideration in a contract for a license to manufacture and sell articles under a patent right is thus stated in *Wilson v. Hentges*, 26 Minn. 290, 3 N. W. Rep. 338: "If the patent be valid, the right to sell the article is exclusive, and is, in law, a valuable right, although it may not, in fact, be a profitable one; and, as one may pay or agree to pay what he pleases for such a right, the grant of it to him is a valid consideration for his promise to pay for it. When, therefore, it is sought to impeach a contract as without consideration, on the ground that the consideration was the grant of a right to sell a patented article, and that

the article is useless, it must be shown that it is useless in the sense that will avoid the patent." And it is not enough that its practical utility be very limited, or that it will be of little or no profit to the inventor. "The law does not look to the degree of utility. It simply requires that it should be capable of use, and that the use be such as sound morals and policy do not discountenance or prohibit." The fact that the patented article may or may not be salable at a profit is not to be considered in determining the question of the utility or validity of the patent for the purposes intended by the patentee, and within the rule laid down in *Wilson v. Hentges*, supra, the question of the popularity of the invention or the measure of the pecuniary profit which may be derived from the manufacture and sale thereof is not material in determining the question involved in this case. *Lester v. Palmer*, 4 Allen, 145. It did not conclusively appear from the evidence that the patented invention was impracticable or useless; that is to say, that it might not be applied to some beneficial purposes. There was evidence tending to show that the scale would be of practical use for light weighing, and would work accurately for such purposes. The court, however, instructed the jury, among other things, upon this branch of the case, that they must "consider whether the machine can be sold for what it costs to make it, whether people will buy it and use it," and also "what practical use can be made of it in manufacturing machines for a profit." This was error, and presumptively prejudicial to the plaintiff.

2. On behalf of the sureties, the answer alleges that at the time of the execution of the bond referred to it was agreed by and between the principal and sureties therein and by and between the defendants and the obligees in the bond that one Joseph Barbeau should also sign the same as surety, and that the other sureties should not be liable thereon, nor should the same be delivered, unless he also signed the same as surety. His name was in fact inserted in the bond as one of the sureties, but he did not at any time execute the same. The evidence in behalf of the defendants tends to show that the sureties understood that Joseph Barbeau was also to sign as surety, and that, as between themselves, they executed the same on that condition; also that the bond was delivered to Farmer, one of the obligees therein, at the time of the execution thereof, and that all the defendants were then present. The evidence also tends to prove that the conversation among them in respect to Joseph Barbeau becoming surety with them was in the presence of the obligees, Farmer and Van Norman. But the latter both testify, in substance, that they were not cognizant of any such understanding or condition, and that nothing of that kind was said to them or in their presence,

and that the bond was executed in their presence by all the defendants, and delivered to them unconditionally. If this is true, and the defendants delivered the bond to the obligees without insisting upon its execution by Joseph Barbeau as a condition of its becoming operative in the hands of the obligees, or any notice to them to that effect, then it took effect immediately upon its delivery, and such delivery may be deemed a waiver of any such condition. It is clear that the sureties might waive the execution of the bond by Barbeau, and in that case it would not be material that his name was included in the instrument with the other parties thereto; hence, under the state of the evidence, it was error for the court to charge the jury that if it was agreed between Charles F. Barbeau and the sureties that Joseph Barbeau should sign it, and that they should not be liable unless he signed it, the plaintiff was bound by such agreement whether she knew of it or not, for the reason that his name was also included in the bond. There must, therefore, be a new trial, and the order denying it is accordingly reversed.

HAEG et al. v. HAEG et al.

(Supreme Court of Minnesota. April 24, 1893.)

DEED—DELIVERY—WHAT CONSTITUTES—EXECUTION AND ACKNOWLEDGMENT.

1. Where a deed is duly executed and delivered to a third party in the lifetime of the grantor, to be delivered after his death to the grantee named therein, it will be *held* a good delivery on the happening of the contingency, and to relate back so as to divest the title of the grantor by relation from the first delivery.

2. Evidence considered, and *held* sufficient to justify a finding by the trial court that the deed in controversy was delivered to a third person in the lifetime of the grantor, to be delivered to the defendant on or immediately before the decease of such grantor. *Held*, also, that the evidence justified the conclusion of the trial court that the deed in question was duly executed and acknowledged by the wife of the deceased grantor, with knowledge of its contents and his purpose in making it, and its final delivery acquiesced in by her.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Hooker, Judge.

Action by Susie Haeg and others against Fred Haeg and others to set aside certain conveyances made to defendants. There was judgment for defendants, and, from an order denying a new trial, plaintiffs appeal. Affirmed.

George S. Grimes and E. A. Campbell, for appellants. Shaw & Cray, for respondents.

VANDEBURGH, J. The plaintiffs and defendants are the widow and children of Charles Haeg, deceased, late of Hennepin county, and his sole heirs at law. The deceased and the plaintiff Albertina Louisa Haeg, his wife, in his lifetime, and on the

17th day of July, 1889, executed certain deeds of conveyance of his real property, in separate parcels, to his several children, parties to this action, intending thereby to make a division thereof among them. Among these deeds was one running to the defendant Fred Haeg as grantee of the 40-acre tract in controversy here. These deeds he intended to have delivered to the several beneficiaries just before or immediately after his decease, which subsequently occurred, on 3d day of February, 1891. The deeds were not in fact actually delivered to the grantees until after his decease, and on this ground, and the further ground also insisted on by the plaintiffs, that they were not in his lifetime delivered to or placed in the custody of a third party, in trust to deliver to the grantees at the appointed time, they claim that they never took effect as conveyances, and they therefore ask to have the same set aside and annulled.

We will first inquire whether the record discloses evidence tending to show that the deeds were placed in the control, custody, or possession of a third party, with instructions to deliver them to the grantees named, in pursuance of his declared purpose, and sufficient to support a finding of such delivery to him. We observe that no objection is made to the form or sufficiency of the findings of the trial court, and no claim is made by the plaintiffs' counsel in their brief that the delivery to such party was in escrow, nor any point made that the second or final delivery to the defendant was dependent on the performance of any condition. As just suggested, we are to consider simply, on this branch of the case, under the issues made and the briefs of counsel, the sufficiency of the evidence to justify a finding in defendants' favor on the point suggested. We are not to consider whether the case made in defendants' favor is strong or weak, for if there is evidence, as we think there is, reasonably tending to show such delivery, this court will not reverse the trial court upon the question. *O'Kelly v. O'Kelly*, 8 Metc. (Mass.) 439. If the deed was duly executed, and was delivered to such third party (in this case one Edward B. King) in the lifetime of the grantor, to be delivered after his death to the grantee, it was a good delivery upon the happening of the contingency, and related back, so as to divest the title of the grantor, by relation from the first delivery. *O'Kelly v. O'Kelly*, supra; *Foster v. Mansfield*, 3 Metc. (Mass.) 412. It appears that the deceased grantor in this case had definitely determined upon the division of his property among his children, as provided by the deeds in question, as early as the year 1889, and it was so understood between him and his wife and other members of his family; and he accordingly employed an attorney to prepare the deeds, and, as the court finds, they were duly executed and acknowl-

edged by himself and wife on the 17th day of July, 1889, and he then and there made an arrangement with King, who was an old acquaintance, to see that they were delivered to the grantees immediately before his death, or as soon thereafter as possible. And it further appears that, on the same day, he and King, who was present at his request, went together to Minneapolis with the deeds, and deposited them, inclosed in a separate envelope, in a box in the safety vault of the Minnesota Loan & Trust Company, rented by deceased, and that King then and there agreed to deliver the deeds as requested by the deceased; and subsequently, while on his deathbed, the latter again urged him not to forget the obligation. Soon after the decease of the grantor, King went, in company with the plaintiff widow, to the vault of the Minnesota Loan & Trust Company, and took out the deeds, and proceeded to deliver them, as previously agreed, to the grantees, including this defendant. It is very clear that the arrangement was understood beforehand by all the parties, and that the box in which the deeds were deposited for safe-keeping was to be accessible to King to enable him to carry out his agreement with the deceased, and make final delivery to the grantees. For the purpose of his trust the deeds must, under the findings of the court, be regarded as placed in his custody, and the record is sufficient to support the finding of a delivery for such purpose. It shows very clearly that such was the intention of the grantors in the deeds, and it would be a very narrow and technical construction to adopt, in order to defeat these deeds, to hold that, because the deeds were deposited in the manner stated in the safety vault, the final delivery was void for want of a previous delivery to King; and, as said by the court in *Foster v. Mansfield*, it is not necessary to consider what would have been the effect if the grantor had recovered from his sickness, and finally taken back his deed. He did not change his mind, and his conduct shows that his purpose and intention were unalterably and finally fixed and settled when he executed the deed and made the final arrangement with King. In respect to the claim made, that the deeds were executed by the wife of the deceased under a mistake of her legal rights or the nature of the transaction, it is enough to say that the evidence abundantly sustains the finding of the trial court that she was fully informed of the grantor's purpose in making the deeds, and knew what property was included therein, and that she executed the same freely and voluntarily, and was present and assisted in the delivery to the grantees, and fully acquiesced in the mode adopted by her husband for the division of his estate. The decision of the trial court is in accordance with the justice and equity of the case, and must

stand. As these findings are controlling, we deem it unnecessary to notice other points made in the case. Order affirmed.

MULLIN v. NORTHERN MILL CO.

(Supreme Court of Minnesota. April 24, 1893.)
INJURY TO EMPLOYE—NEGLIGENCE—QUESTION FOR JURY.

Where a mechanic, whose general duty it was to assist in making repairs in a sawmill, was directed to replace a chain, which had fallen from its place on a wheel, and which was operated in connection with a dangerous machine, claimed not to have been properly covered or guarded, and in which he was injured while engaged in working near it, *held*, upon the evidence in the case, that the questions of defendant's negligence, considered as the proximate cause of the accident, and of plaintiff's contributory negligence, were for the jury. *Held*, also, that the evidence was sufficient to sustain a finding that he was properly engaged, as a servant of the defendant, in the course of his employment when the accident occurred.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

Action by Frank Mullin against the Northern Mill Company to recover for personal injuries sustained while at work in defendant's sawmill. From an order refusing to direct a verdict for defendant, it appeals. Affirmed.

Kitchel, Cohen & Shaw, for appellant.
Christensen & Tuttle, for respondent.

VANDEBURGH, J. This action is brought to recover damages for a personal injury suffered by the plaintiff while at work in defendant's sawmill. The plaintiff was at the time attempting to replace a chain used to draw logs up through a "siding machine" upon a "sprocket wheel," by means of which the chain was operated. This wheel was about 20 inches in diameter, and was furnished with strong teeth, which caught the links of the chain successively, and thus pulled the logs through the machine. The machine was used to cut off the bark from the logs preparatory to sawing, and was composed of two revolving adjustable discs, with projecting knives, between which the logs passed. Slides or ways were constructed, along which the logs passed beyond the wheel. The wheel was situated about 4½ feet in the rear of the machine. There was a sheet-iron cover upon the upper side of the frame, upon which the discs were supported and operated, with a semicircular opening, 18 inches in diameter, through which the logs passed on the slide or ways. On each side of the slide next the machine there had been placed blocks or skids, called "guides," because they were intended to keep the logs in place on the slide as they emerged from the machine. They were about eight inches high, eight inches wide at the bottom, and were leveled

off on the inside, so as to adapt their shape to their use as "guides" for the logs. To make the apron fit over the guides, slots or openings were cut therein, so that when they were removed the hole in the apron was that much enlarged in size, and the risk of accident and injury from the revolving knives correspondingly increased. If the chain ran off the wheel mentioned, it would cease to move until replaced. The accident to plaintiff occurred in October, 1890, and he was at the time working as a blacksmith in the mill, where he had been so engaged since April preceding. The mill was operated both day and night. It was towards evening when the accident occurred, and the mill was lighted up for the night. Just prior to the accident the chain ran off the wheel, and rested on the shaft by the side thereof, and the operator of the machine called on the plaintiff to fix the chain on. All the material points raised by the appellant are necessarily involved in its request to the court to direct a verdict upon the evidence in its favor, which was refused. Included in these are the questions chiefly discussed by the counsel for the appellant in his brief,—that of the defendant's negligence and plaintiff's contributory negligence; the assumption of the risk by him, and whether his interference was entirely beyond and outside the duties of his employment, so that the defendant owed him no duty in the premises.

1. The first and most serious question in the case is that of defendant's negligence as related to the injury in question. While plaintiff was engaged in attempting to replace the chain upon the wheel, occupying a position between the machine and the wheel, his foot slipped into the open space left in the cover in the condition it was then in, and was caught and destroyed by the knives. It is evident that the machine, when in motion, was quite dangerous to anything coming within the range of the knives, and it was proper that it should be covered for the protection of employees working around it, as they might frequently be required to do; but an imperfect protection might be more dangerous (because misleading) than no covering at all. *Craver v. Christian*, 38 Minn. 413, 31 N. W. Rep. 457. The plaintiff testifies: "I went there to get that chain on. I was called up to fix the chain. I took an iron bar, and pried the chain over. I stood as close to the wheel as I could. I tried to pry the chain over, and the chain slipped out, and away I went. I was out by the wheel. I was standing in this way, [indicating.] My foot went in sidewise." The "slide" was 16 to 18 inches from the wall of the mill, and the plaintiff's testimony tended to show that the position he occupied while attempting to raise the chain upon the wheel was the proper one. The situation of the premises, the character of

the machine, and its condition, and the manner in which it was operated, the likelihood of accidents, and the danger which might reasonably be expected to be incurred in and about the same, taken together, make the case one, we think, proper for the consideration and practical determination of the jury. As practical men of affairs, they were in a better position than this court can be to judge of the effect of the absence of the guides, which plaintiff's evidence tended to prove had been removed before the accident. The person operating the machine and directly in charge of it must be presumed to know whether they were present in place or not, and since, in such matter, he represented the master, no further notice of the defect or increased danger was required.

2. There is still less doubt as to the propriety of the submission to the jury of the questions of plaintiff's contributory negligence, or the assumption of the risks by him. He was called on to act promptly while the mill was running and operatives waiting. He says he supposed the machine had been stopped since the chain was off, and the logs were not coming through. The mere turn of a lever would stop it, without affecting other machinery. What he did, and what position he occupied, and whether he knew the condition of the machine, or ought to have known the danger, whether under all the circumstances his conduct was negligent, were matters for the jury. There were many things to be considered, and how a reasonably prudent man should proceed in such an emergency could best be determined by them.

3. The court was asked to rule that the plaintiff was a mere volunteer in doing the work in which he was engaged when he was injured, and we are to determine whether the court erred in submitting the question to the jury. We think there is evidence in the case reasonably tending to show that the work was not beyond the scope of his employment, or, in any event, that he was acting at the time under the direction of defendant's authorized agent. At the time of the accident neither the millwright nor foreman was in the mill. The mill was running and lighted for the night, and there were 40 workmen. And the evidence tends to prove that in a case like this, when a machine got out of repair, it was the duty of the man in charge to see that it was put in repair. The foreman, who was not present at that time, testified: "Whenever anything broke of that kind the man that ran the machine or the millwright fixed it. If the millwright was not there, when I was not there, the machine would lie still until I came, if he could not do it himself, or get some assistance to do it." Plaintiff had been previously required to assist in repairing the chain, and in this

case he responded in good faith to the call of the operative to put it in place. Under such circumstances, to prevent a suspension of work in the mill we are unable to see why the practical common-sense rule should not apply which would authorize the operative of the machine to call for assistance upon any one of the employees whose business it was to assist in making repairs.

Judgment affirmed.

MOGAN et al. v. CARTER et al., (HARMON, Intervener.)

(Supreme Court of Minnesota. July 13, 1893.)

INVALID FORECLOSURE—CURATIVE ACT.

Russell v. Lumber Co., 48 N. W. Rep. 3, 45 Minn. 376, followed, to the effect that Laws 1883, c. 112, applies to a foreclosure of a mortgage under the power of sale, in which the notice of sale is not published the requisite length of time before the sale.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Pond, Judge.

Action by Patrick Mogan and others against Michael A. Harmon, impleaded with others, to determine the adverse title of defendants to certain improved real property in possession of plaintiffs. Defendant Harmon alone appeared and answered. The action was tried without a jury before the court, who found as facts that on June 1, 1874, one Mayo, the owner of the premises in question, made a mortgage thereof to E. W. Cutler. October 5th, following, Cutler assigned the mortgage to one Hungerford as collateral security. November 1, 1881, Hungerford re-assigned the same to Stanford Newell, the executor of Cutler, then deceased, which assignment was recorded December 12, 1881. November 25, 1881, Newell, as executor, began the foreclosure of the mortgage by advertisement, without referring in his notice of sale to the two assignments, and on January 7, 1882, made sale of the premises to plaintiffs' grantors, who, with plaintiffs, have since been in actual possession thereof, claiming title. That in 1889 an execution was issued upon a judgment against Mayo, and thereafter sale of the said premises made thereunder to the grantors of defendant Harmon, whose claim of title was based thereon, and on the alleged defect in the notice of foreclosure sale, and the publication thereof. That no action to question the validity of the mortgage sale was instituted prior to the present suit. Judgment was ordered for plaintiffs. Defendant Harmon appeals from the judgment. Affirmed.

W. A. Lancaster, for appellant. R. B. Forrest and Boardman & Boutelle, for respondents.

GILFILLAN, C. J. Assuming that the foreclosure of the mortgage by Newell was invalid, it was so by reason of the defect in

the notice or publication thereof,—that it was not published for a sufficient period after he had a right to foreclose under the power by the record of the assignment of the mortgage to him. The case, therefore, is similar to Russell v. Lumber Co., 45 Minn. 376, 48 N. W. Rep. 3, and comes within the provisions of Laws 1883, c. 112, which, as said in that case, was designed for just such and similar cases. Either Mayo, the mortgagor, or the judgment creditors in the judgment against him, under which the defendants claim, could have brought suit to set aside the invalid sale at any time after that act passed, and before five years from the date of the sale expired, and by failure to do so they lost their right to have the sale declared invalid. Upon the lapse of that time it became unassailable.

Judgment affirmed.

APPLEBY v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota. July 14, 1893.)

STREET-RAILWAY COMPANIES—EJECTION OF PASSENGER.

The plaintiff, a passenger on defendant's street-car line, paid his fare, and received a transfer check which entitled him to continue his journey by the "next" connecting car on another line of the same company. He took the next car on the connecting line, and the conductor took up his transfer check. Without notice to the plaintiff, this car was taken off, after going a short distance. The conductor having disappeared, the plaintiff was informed by the driver of that car that he should take the next passing car. He did so, but was put off by the conductor of that car because he had no transfer check, and refused to pay fare again. Held, that plaintiff showed, prima facie, a right to recover for the conduct of the defendant's agents, leading to and including the expulsion.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Egan, Judge.

Action by Ernest V. Appleby against the St Paul City Railway Company. Defendant had judgment by direction, and plaintiff appeals. Reversed.

Cyrus J. Thompson and Thompson, Gates & Thompson, for appellant. McCafferty & Noyes, for respondent.

DICKINSON, J. This action is for the recovery of damages for the forcible expulsion of the plaintiff from a street car of the defendant on its Selby avenue cable line. At the trial the court dismissed the action when the plaintiff rested his case. We shall only have to consider whether the evidence showed that the expulsion of the plaintiff from the car, in connection with the circumstances preceding it, was wrongful, so that the case should have gone to the jury.

Attention will be directed to what may conveniently be called two lines of street railway, connecting on Selby avenue at a cross street called Milton street. The west-

erly of these lines is operated by electric power; the easterly or cable line, by a cable. The tracks of the two lines are continuous, but the cars of each line stop at Milton street; the passengers changing cars at that point, which may be considered as the eastern end of the electric line, and the western end of the cable line. The cable line extends from Milton street, east, along Selby avenue and other streets, to Broadway. The "power house," so called, where is the machinery by which the cable line is operated, is some seven or eight blocks east of Milton street. Here, also, cars are housed and repaired. Passengers going east on the electric line pay their fare to the conductor on that line. This entitles them to transfer checks, as evidence of such payment, and upon transfer to the cable cars such checks entitle the passengers to continue their passage over the cable line to its eastern end, at Broadway. Passengers are required, at the transfer point, to take "the next car departing on the connecting line upon which it [the transfer check] is to be used." The plaintiff boarded an electric car, going east, his destination being a point on the cable line east of the power house. He paid his fare, and received a transfer check. When the car arrived at the transfer place at Milton street, a cable car was there, just about to start, going east. The plaintiff, with other passengers, got on it, and it forthwith proceeded eastward. The conductor took up the transfer checks. At the power house the car stopped, and was taken off the line, and run into the building; for what reason or purpose, does not appear. It does not appear that this was a usual proceeding, or that the passengers were in any manner notified that the car was not to go over the line to its end. Indeed, the only inference which can be drawn from the circumstances, as presented by the evidence, is that the plaintiff was justified in assuming that the car was to go over the line in the usual manner. His testimony is that he had no intimation to the contrary. When the plaintiff saw that the car was being taken off at the power house, the conductor had gone; and, upon inquiry addressed to the driver of the car, the latter told him he would have to take the next car, which was just then approaching from the west on the same line. The plaintiff did so. The conductor on that car demanded fare from the plaintiff, although the latter explained the fact that his transfer ticket had been taken up by the conductor of the car that had just been taken off at the power house. The plaintiff refusing to pay again, he was then forcibly put off.

The facts thus stated presented a case which would have justified a verdict for the plaintiff. He had paid the proper fare, and was entitled to ride on the cable line,

to its end. It is to be kept in mind that the action is not against the conductor, for the expulsion, nor does the right of action rest upon the bare fact of the expulsion. The cause of action set forth in the complaint covers the whole transaction above stated; and the inquiry is whether, upon the whole case, the defendant appears to have neglected or violated its duty towards the plaintiff, to his injury. If it be said that, since the plaintiff could present no proper evidence of his right to ride, it was the duty of the conductor to put him off, it may be answered that the defendant, and not the plaintiff, may well be deemed at fault for that condition of things. That is one of the grounds upon which, in part, the defendant may be held responsible. Even though the conductor, in ejecting the plaintiff, may have done only what was apparently (to him) his duty, it does not follow that the defendant is not responsible therefor. It would be responsible if, by its previous neglect of duty towards the passenger, it had justified him in assuming to continue his journey on a car from which the conductor, in accordance with the regulations of the defendant, should expel him for nonpayment of fare. *Pine v. Railway Co.*, (Minn.) 52 N. W. Rep. 392; *Murdock v. Railroad Co.*, 137 Mass. 293; *Railway Co. v. Fix*, 88 Ind. 381, and cases cited; *Railroad Co. v. Riley*, (Miss.) 9 South. Rep. 443; *Railroad Co. v. Rice*, 64 Md. 63, 21 Atl. Rep. 97; *Railroad Co. v. Griffin*, 68 Ill. 499. And under the circumstances the jury might have reasonably found that the defendant's conduct, through its agents, had justified the plaintiff in taking this car. The plaintiff, we repeat, was entitled to be carried over the cable line. He might presume that proper means, and a proper system or practice, had been provided for such service. He had done all that was required of him, at least prior to the time when he left the car taken off at the power house to get on the other. It is the duty of the carrier to give to its passengers such instructions or directions as to its own system or course of conduct as may be reasonably necessary to enable them to pursue their journey. *Dwinelle v. Railroad Co.*, 120 N. Y. 117, 24 N. E. Rep. 319. When it became apparent that the car was being taken off without previous notice, the passengers had a right to expect information from some one as to how they were to proceed on the journey. The conductor seems to have then disappeared, and when they were informed by the car driver that they should take the next car they were justified in acting on that information. We do not decide whether they might not have done this without such direction. They are not presumed to have known that passengers from cars thus taken off were not allowed to resume the journey by the next passing car. It was the duty of the defendant to make some provision

for them, and not only was this the course most naturally to be expected, but there seems to have been no other way provided, and the only way in which the plaintiff could avail himself of his right to be carried was to take the passing car, as he did do. The case is distinguishable from those where one enters a carriage, knowing that he is without such evidence of his right of passage as the reasonable regulations of the carrier require. In brief, it might have been found by the jury that the plaintiff was prevented from the enjoyment of his right to be carried, and was subjected to expulsion from the car, not by reason of any fault on his part, but by the fault of the defendant; and in such a case there would be a right of recovery. We are aware that our decision is not in apparent harmony with all of the authorities. Perhaps the seeming conflict of authority has resulted either from differences in the cases presented, or in the different views taken as to the real causes of action relied on. A distinction is to be observed between cases where courts, whether justified by the pleadings or not, have regarded the right of action as resting upon the bare fact of expulsion by a conductor or agent whose duty (to the carrier) required him to expel the passenger, and cases like this, where, as we consider, the cause of action is the conduct or neglect of the defendant, which results in, and also includes, the expulsion. It follows that the court erred in dismissing the case. The plaintiff showed a right of action. We do not consider what the measure of his recovery may have been, for that is not here involved. Order reversed.

PAGE et al. v. MILLE LACS LUMBER CO.
(Supreme Court of Minnesota. July 19, 1893.)

APPEAL—HEARING BEFORE RETURN FILED—EFFECT OF.

Where it appears that the hearing of an appeal was on what purported to be a return from the district court, but that in fact no return had been made, the order entered on such hearing will be set aside, as the court had no jurisdiction.

On motion for rehearing. Motion granted.
For former report, see 55 N. W. Rep. 608.

PER CURIAM. On the hearing of an order to show cause it has been conclusively established that the appeal considered and disposed of in the opinion in the above-entitled action was so considered and disposed of on a pretended return; no return, in fact, having been made by the clerk of the district court. This was not known to this court, of course, until after the opinion had been filed, nor was it within the knowledge of respondent's counsel. As the court had no jurisdiction of the cause, it is now

ordered that the pretended return be stricken from the files, and that the order heretofore made, whereby the order of the court below denying plaintiffs' motion for a new trial was reversed, be set aside and vacated.

BOHN MANUF'G CO. v. HOLLIS et al.
(Supreme Court of Minnesota. July 20, 1893.)
CONSPIRACY—COMBINATION OF WHOLESALERS—
VALIDITY OF CONTRACT—INJUNCTION.

1. Any man (unless under contract obligation, or unless his employment charges him with some public duty) has a right to refuse to work for or deal with any man or class of men, as he sees fit; and this right, which one man may exercise singly, any number may agree to exercise jointly.

2. A large number of retail lumber dealers formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, their secretary should notify all the members of the fact. The plaintiff having made such a sale, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association. Held not actionable, and no ground for an injunction.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Cornish, Judge.

Action by the Bohn Manufacturing Company against W. G. Hollis and others for an injunction. From an order denying a motion to dissolve the temporary writ issued, defendants appeal. Reversed.

Wm. A. Lancaster, for appellants. Warner, Richardson & Lawrence, for respondent.

MITCHELL, J. The pleadings in this case, and the affidavits read on the motion to dissolve the temporary injunction, are so voluminous, and so abound in mere inferences as to motives and consequences, and in adjectives and other qualifying epithets, as to convey the impression, at first sight, that the facts were both complicated and controverted. But a careful analysis of the record proves that there is no real dispute as to the material facts, which are comparatively simple. Stripped of all extraneous matter, the case discloses just this state of facts: The plaintiff is a manufacturer and vendor of lumber and other building material, having a large and profitable trade at wholesale and retail in this and adjoining states, a large and valuable part of this trade being with the retail lumber dealers. The defendant the Northwestern Lumberman's Association is a voluntary association of retail lumber dealers, comprising from 25 to 50 per cent. of the retail dealers doing business in the states referred to, many of whom are, or have been, customers of the plaintiff. A "retailer," as do-

fined in the constitution of the association, is "any person who is engaged in retailing lumber, who carries at all times a stock of lumber adequate to the wants of the community, and who regularly maintains an office as a lumber dealer, and keeps the same open at proper times." Any wholesale dealer or manufacturer of lumber who conforms to the rules of the association may become an honorary member, and attend its meetings, but is not allowed to vote. The object of the association is stated in its constitution to be "the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers." The object is more fully stated, and the means by which it is to be carried into effect are fully set out, in sections 3, 3½, 4, and 6 of the by-laws, which are all that we consider material in this case. The plaintiff sold two bills of lumber directly to consumers or contractors at points where members of the association were engaged in business as retail dealers. Defendant Hollis, the secretary of the association, having been informed of this fact, notified plaintiff, in pursuance of section 3 of the by-laws, that he had a claim against it for 10 per cent. of the amount of these sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff, from time to time, promised to adjust the matter, but procrastinated and evaded doing so for so long that finally Hollis threatened that unless plaintiff immediately settled the matter he would send to all the members of the association the lists or notices provided for by section 6 of the by-laws, notifying them that plaintiff refused to comply with the rules of the association, and was no longer in sympathy with it. Thereupon, plaintiff commenced this action for a permanent injunction, and obtained, ex parte, a temporary one, enjoining the defendants from issuing these notices, etc. This appeal is from an order refusing to dissolve the temporary injunction. It is alleged, and in view of the facts must be presumed to be true, that if these notices should be issued the members of the association would thereafter refuse to deal with the plaintiff, thereby resulting in loss to it of gains and profits.

The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the courts will

doubtless be frequently called to pass upon. There is, perhaps, danger that, influenced by such terms of illusive meaning as "monopolies," "trusts," "boycotts," "strikes," and the like, they may be led to transcend the limits of their jurisdiction, and, like the court of king's bench in *Bagg's Case*, 11 Coke, 98a, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, as Lord Ellmere puts it, "to manage the state." But whatever doubts or difficulties may arise in other cases, presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong, and even exaggerated, assertion, and in many words and expressions of very indefinite and illusive meaning, such as "wreck," "coerce," "extort," "conspiracy," "monopoly," "drive out of business," and the like. This looks very formidable, but in law, as well as in mathematics, it simplifies things very much to reduce them to their lowest terms. It is conceded that retail lumber yards in the various cities, towns, and villages are not only a public convenience, but a public necessity; also, that, to enable the owners to maintain these yards, they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade, in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade. Now, when reduced to its ultimate analysis, all that the retail lumber dealers, in this case, have done, is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other nondealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion, or intimidation, either towards plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on

plaintiff for 10 per cent. on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of nondealers at the same points, it would probably conclude to pay; otherwise, not. It cannot be claimed that the act of making this demand was actionable; much less, that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association, to prevent them from trading with the plaintiff. After they received the notices, they would be at entire liberty to trade with plaintiff, or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they were liable to be "expelled;" but this simply meant to cease to be members. It was wholly a matter of their own free choice, which they preferred,—to trade with the plaintiff, or to continue members of the association. So much for the facts, and all that remains is to apply to them a few well-settled, elementary principles of law:

1. The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits does not, of itself, render those acts unlawful or actionable. That depends on whether the acts are, in and of themselves, unlawful. "Injury," in its legal sense, means damage resulting from an unlawful act. Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious. *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Steamship Co. v. McGregor*, 21 Q. B. Div. 544.

2. If an act be lawful,—one that the party has a legal right to do,—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, "the exercise by one man of a legal right cannot be a legal wrong to another," or, as expressed in another case, "malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful." *Heywood v. Tillson*, 75 Me. 225; *Phelps v. Nowlen*, 72 N. Y. 39; *Jenkins v. Fowler*, 24 Pa. St. 308.

3. To enable the plaintiff to maintain this action, it must appear that defendants have committed, or are about to commit, some unlawful act, which will interfere with, and injuriously affect, some of its legal rights. We advert to this for the reason that counsel for plaintiff devotes much space to assailing this association as one whose object is unlawful because in restraint of trade. We fail to see wherein it is subject to this charge; but, even if it were, this would not, of itself, give plaintiff a cause of action.

No case can be found in which it was ever held that, at common law, a contract or agreement in general restraint of trade was actionable at the instance of third parties, or could constitute the foundation for such an action. The courts sometimes call such contracts "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense, merely, of "void" or "unenforceable" as between the parties; the law considering the disadvantage so imposed upon the contract a sufficient protection to the public. *Steamship Co. v. McGregor*, 23 Q. B. Div. 598, [1892] App. Cas. 25.

4. What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal one. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable. *Bowen v. Matheson*, 14 Allen, 499; *Steamship Co. v. McGregor*, 23 Q. B. Div. 598, [1892] App. Cas. 25; *Parker v. Huntington*, 2 Gray, 124; *Wellington v. Small*, 3 Cush. 145; *Payne v. Railway Co.*, 13 Lea, 507.

5. With these propositions in mind, which bring the case down to a very small compass, we come to another proposition, which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This

has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up, and stripped of all extraneous matter, this is all that defendants have done, or threatened to do, and we fail to see anything unlawful or actionable in it. *Com. v. Hunt*, supra; *Carew v. Rutherford*, 106 Mass. 1; *Steamship Co. v. McGregor*, [1892] App. Cas. 25.

Order reversed, and injunction dissolved.

VANDEBURGH, J., absent, took no part.

STATE ex rel. CHILDS, Attorney General,
v. SCHOOL DIST. NO. 152 OF BLUE
EARTH COUNTY.

(Supreme Court of Minnesota. July 20, 1893.)
SCHOOL DISTRICT—PRESUMPTION—LEGAL ORGANIZATION—MEANING OF "ORGANIZED."

1. The provision of Gen. St. 1878, c. 36, § 1, that "every school district shall be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of one year," establishes a conclusive presumption of law in the nature of a statute of limitation.

2. The term "organized" relates to the establishment or formation of the district, and not merely to the action of the voters in electing school officers.

(Syllabus by the Court.)

Information in the nature of quo warranto, brought by H. W. Childs, attorney general, in name of the state, against school district No. 152, county of Blue Earth. Quashed.

H. W. Childs, Atty. Gen., (Pfau & Young, of counsel,) for relator. Daniel Buck and Thos. Hughes, for respondent.

MITCHELL, J. Information in the nature of quo warranto to test the legal existence of the respondent as a school district. We do not find it necessary to follow counsel in their discussion of the question of the validity of the action of the board of county commissioners in establishing the district or the question of the discretionary power of the court in such cases, because, in our judgment, the proceeding was barred by the statute. The county commissioners made an order on May 7, 1891, assuming to establish this district out of a part of the territory of district No. 110. A meeting of the voters of the new district was held on September 17, 1891, at which they elected school officers, who immediately qualified and entered upon the duties of their offices, and it appears that it has ever since that date been in the exercise of all the franchises and privileges of a school district, such as hiring teachers, providing a school, buying a site for a schoolhouse, levying taxes, contracting debts for school purposes, drawing public school money from the state,

etc. This information was not filed until January 30, 1893. Gen. St. 1878, c. 36, § 1, provides that "every school district shall be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of one year." We think this must be construed as establishing a conclusive presumption of law in the nature of a statute of limitation. It is true the statute does not expressly say that the presumption shall be conclusive, but this is implied from the purpose which it was designed to effect.

It is a matter of common knowledge that municipal action is often exceedingly irregular, although taken in perfect good faith. If these municipalities are subject to be called into court to defend their original organization, and be subject to dissolution, after they have gone on raising taxes, buying property, contracting debts, and exercising all their usual franchises for years, the mischief and embarrassment that might ensue would be incalculable. These were the evils which the statute was designed to prevent by providing that, after a school district had exercised the franchises and privileges of a district for one year, the legality of its organization should not be questioned. To hold that the presumption is disputable, and merely shifts the burden of proof, would render the statute of very little value. The suggestion is made that the presumption applies only to the "organization," (that is, the action of voters in electing officers, etc.), as distinguished from the "establishment," of the district by the board of county commissioners. To give it this construction would also render the statute practically nugatory. The words "establish," "create," "form," and "organize" are evidently used interchangeably, and as practically synonymous. The word "organization" is clearly used in the sense of formation, and includes everything necessary to the creation of the district, or bringing it into being. Reference is made to certain understandings or verbal stipulations between individual voters in the district, or between them and the attorney general, that these proceedings, when commenced, might be deemed instituted as of an earlier date; but it is hardly necessary to say that any such understandings between individuals could not bind the district or affect its rights. Information quashed.

MASON v. MINNEAPOLIS ST. RY. CO.
(Supreme Court of Minnesota. July 20, 1893.)
STREET RAILWAYS—INJURY TO CHILD IN STREET
—NEGLIGENCE—QUESTION FOR JURY.

Held, that upon the evidence in this case the questions of negligence and contributory negligence should have been submitted to the jury.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Smith, Judge.

Action for personal injuries by D. Lee Mason against the Minneapolis Street-Railway Company. Defendant had judgment by direction, and plaintiff appeals. Reversed.

Larrabee & Gammons, for appellant.
Koon, Whelan & Bennett, for respondent.

MITCHELL, J. Action to recover damages for personal injuries to plaintiff's infant son, caused by the alleged negligence of defendant's servants in operating one of its cars. The only question is the correctness of the action of the trial court in dismissing the case when plaintiff rested.

There was evidence tending to prove the following facts: A train consisting of a motor and trailer was going north on Nicollet avenue at the rate of about three miles an hour. When it was a short distance north of Twenty-Sixth street, plaintiff's child, a boy aged 4 years and nearly 10 months, who had been playing on the sidewalk quite a little distance north of where the train then was, started and ran out into the street, with his hands or arms extended out in front of him, as if to intercept the approaching cars, or, as expressed by some of the witnesses, "as if he was going to catch hold of something." The motoneer stood on the front platform of the motor, and, so far as appears, was the only employe on the cars who saw the child until after the accident. While the child was still from 12 to 17 feet from the track, and the head of the train about the same distance south of him, the motoneer, seeing him, both "hollered" and motioned to him to go back. In view of the distance traversed by the cars after this and before the accident, it would seem that the child must, after the warning, have somewhat slackened his pace, but the testimony of the bystanders is that he continued to run, in the same attitude as before, until he reached the moving cars, which by this time had all passed that point, except the rear of the hind car; the entire length of the two cars being about 52 feet. The side of the car next to the child was closed or covered by a screen or netting to prevent passengers from getting off and on at that side. On reaching the cars, the child attempted to catch hold of this netting just in front of the hind wheels of the rear car, and in doing so fell or was thrown down with his foot across the rail, which was crushed by the wheel of the car. It also appeared that after the motoneer had warned the child he left his brake, stepped to one side, and turned his head, as if looking back, watching the child. It does not appear distinctly how long the motoneer continued to watch the child, or at what exact point of time he turned and applied the brake to the cars, but from the evidence the jury might have found that he did not

attempt to stop the cars until the boy was thrown down, or at least until he saw that the boy was in the act of laying hold of the cars, when he quickly turned around and applied the brake, and brought the cars to a stop within a distance of from 25 to 50 feet. The cars could have been stopped in about 25 feet by the application of the brake, and, in case of necessity, in 4 or 5 feet, by reversing the current of electricity. We do not understand, however, that it is claimed that the motoneer was negligent in not stopping the cars quickly enough after he applied the brake, but the contention is that, on seeing a child of this tender age approaching in a manner indicating that he was going to attempt to take hold of the cars, he ought, in the exercise of due care, to have stopped them before the child reached them. To determine when the evidence on a question of negligence makes a case for the jury is not always an easy matter. The present case is very near the line, but, after a good deal of consideration of the matter, and not without some hesitation, the majority of the court have arrived at the conclusion that the question of the motoneer's negligence should have been submitted to the jury, and for the following reasons: They think that the jury might have found from the evidence that the motoneer had good reason to apprehend that, notwithstanding the warning, the child was going to attempt to lay hold of the car, and, if so, that it was a fair question for the jury whether or not, in view of his very tender age, reasonable care required the motoneer to stop the cars before the child approached near enough to do so. We are also of opinion that, in view of the child's youth, the question whether he was guilty of contributory negligence was also one for the jury. Order reversed.

HENNESSY v. CITY OF ST. PAUL et al.
(Supreme Court of Minnesota. July 20, 1893.)

JUDGMENT FOR MUNICIPAL ASSESSMENTS—VALIDITY—IMPEACHMENT—RECOVERY OF INTEREST—PURCHASE OF PROPERTY BY BANK—ULTRA VIRES.

1. Judgments for assessments for local improvements under the charter of the city of St. Paul stand upon the same footing generally as other judgments of the district court, and are valid if the court had jurisdiction of the subject-matter of the assessment and of the person of the owner of the property; and all matters which might have been interposed as objections to the application for judgment are res adjudicata.

2. Such a judgment cannot be impeached in a collateral action by showing de hors the record that the clerk entered the judgment in the records of the court without direction or authority from the court.

3. The provision of the city charter authorizing the recovery of 12 per cent. interest on all assessments not paid within 30 days after publication of notice by the city treasurer that he has received the warrant for collection is valid.

4. The objection that an executed purchase of property by a national bank was ultra vires

can only be urged by the government of the United States. *Bank v. Hanson*, 21 N. W. Rep. 849, 33 Minn. 40, followed.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Willis, Judge.

Action by David J. Hennessy against the city of St. Paul and others. Judgment, from which plaintiff appeals. Affirmed.

Edmund S. Durment, for appellant. Davis, Kellogg & Severance, for respondents.

MITCHELL, J. This is the ordinary statutory action to determine an adverse claim to real estate. The claim set up in the answers is under a sale of the property under a judgment in favor of the defendant city against the land for an assessment for benefits from laying out and opening an alley contiguous to the property. In his reply the plaintiff assails both the judgment and the sale under it. The consideration of the case is much simplified from the fact that the attack on the judgment is collateral, and hence can only succeed on the ground that the court rendering the judgment was without jurisdiction of the subject-matter or of the plaintiff, the owner of the land. The assessment was made in 1885, and judgment for the amount in favor of the city rendered in February, 1886. In September, 1886, the plaintiff applied to the court to have the judgment vacated, and for leave to file objections to the city's application for judgment, which leave was granted. The plaintiff thereupon appeared and filed his objections. In September, 1888, judgment was again entered in favor of the city, reciting, among other things, that plaintiff's objections to the entry of judgment had been overruled, and adjudging that the city have judgment against the property for the amount of the assessment, interest, and costs. It was on this judgment that the property was sold and bid in by the city, which subsequently assigned the certificate of sale to one Bigelow, who in turn assigned it to the defendant bank. It is not questioned—in fact, it was admitted on the trial—that the court had jurisdiction to enter the first judgment, so that, however erroneous, it was valid. This being so, it is impossible for us to understand how the court lost jurisdiction to render the second judgment. Counsel claims that it was in an independent proceeding. If he means by this that there were two different and separate proceedings instituted to obtain judgment for this assessment, the record refutes the claim, for it is apparent that there was but one. If, on the other hand, he means that, by the action of the court reopening the case and allowing plaintiff to come in and defend, all proceedings had in the matter prior to judgment, such as filing the assessment warrant and treasurer's report, and giving notice of the application for judgment, were set aside, and had to be repeated, counsel is

clearly mistaken in his view of the law. As well might it be claimed that, where a party, after default in a civil action, is allowed to come in and answer, the plaintiff has to commence the action over again by service of the summons.

It is further claimed that the order referred to did not vacate the first judgment, and therefore the court had no jurisdiction to render the second. Assuming counsel's premise to be true, the entry of a second judgment would be at most a mere irregularity.

It is further claimed that the court erred in refusing to allow plaintiff to prove de hors the record that the court never had overruled his objections or rendered judgment, but that the clerk entered judgment without any order or authority from the court. Very clearly the judgment could not be impeached and contradicted in this collateral manner. In any collateral proceeding it must be conclusively presumed that every entry made in the records of the court is a statement of the action of the court, and was made by its direction and authority. If the facts were as plaintiff asserts, his remedy was by motion in the original proceedings to have the record corrected. Plaintiff appears to misapprehend the footing upon which judgments for assessments for local improvements under the city charter stand, and to have mistaken his remedy. These judgments stand upon the same footing as any other judgments of the district court, with such distinctions only as are created by the statute, and when it appears that the court had jurisdiction of the subject-matter of the assessment, and had acquired jurisdiction of the person of the owner either by the constructive notice prescribed by the charter or by his voluntary appearance in the proceedings, the judgment is valid, and any defense which the landowner has against the assessment on account of errors or irregularities in making the same or in the proceeding upon which it is based is *res adjudicata*. *Dousman v. City of St. Paul*, 23 Minn. 394; *Albrecht v. City of St. Paul*, 47 Minn. 531, 50 N. W. Rep. 608.

Exception is taken to the validity of the provision of the city charter which provides for the recovery of 12 per cent. interest on assessments for benefits remaining unpaid 30 days after publication of notice by the city treasurer that he has received the warrant for collection, while it provides for the payment of only 7 per cent. interest to those to whom damages are awarded. It is claimed that in this way the city is permitted to collect from the property benefited an amount in excess of the cost of the improvement. There is nothing in this point. The damages awarded to those whose property is taken may be, and usually is, only a part of the cost of the improvement. The interest allowed on delinquent assessments for benefits may be intended in part to re-

imburse the city for the expense of enforcing their collection and in part as a penalty to insure prompt payment. Whether designed to effect either or both of these purposes, we see nothing in the provision in conflict with section 1, art. 9, of the constitution.

The last point made is that the defendant bank, being a national bank, had no authority to purchase this certificate. It is well settled that no one but the government can raise this question, (*Bank v. Hanson*, 33 Minn. 40, 21 N. W. Rep. 849; *Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99; *Fortier v. Bank*, 112 U. S. 451, 5 Sup. Ct. Rep. 234;) and, even if the rule were otherwise, the fact that the assignment of the bank might be void would not entitle plaintiff to any relief, for, if the title to the certificate is not in the bank, it must still be in its assignor, *Bigelow*.

Order affirmed.

CROSWELL v. BENTON et al.

(Supreme Court of Minnesota. July 21, 1893.)

TAXATION—PAYMENT OF DELINQUENT TAXES—EXTINGUISHMENT OF LIEN—STATUTES—CONSTRUCTION.

1. When taxes upon real property are merely delinquent, and no judgment has been obtained against the same, and no sale has been made, payment of the amount certified by the county auditor to be due and delinquent for taxes and tax liens to the county treasurer will not have the effect of discharging the land from all taxes, in case of a failure, through a mistake of the auditor, to pay all that is actually due.

2. The facts in the case distinguished from those considered in *Forrest v. Henry*, 23 N. W. Rep. 848, 33 Minn. 434.

3. The title and the various provisions of Gen. Laws 1881, c. 135, clearly indicate that it applied to all lands which had become delinquent for nonpayment of taxes prior to the year 1879, and not solely to lands which had been forfeited to the state prior to that year.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Hicks, Judge.

Ejectment by Elizabeth B. Crosswell against Christina H. Benton and others. Defendants had judgment, and from an order granting a new trial they appeal. Reversed.

Benton, Roberts & Brown and Frank Healy, for appellants. Howe Paige, for respondent.

COLLINS, J. This was an action in ejectment, in which the defendants had a verdict. The present appeal is from an order granting a new trial because the court below was of the opinion that it erred when charging the jury. The plaintiff was the owner of the property, unless her title had been divested in proceedings under Gen. Laws 1881, c. 135,—the act to enforce the payment of taxes which became delinquent in and prior to 1879; and the regularity of the sale of the premises to defendants' predecessor

in interest under that act is not questioned, except as will appear from the following statement: The tax for the year 1875 against the property became delinquent June 1, 1876, at which time, under the law, the county treasurer returned the tax lists to the auditor. For some reason the latter officer took no further steps tending to enforce the collection of this tax until September, 1881, when he placed the property on the list provided for in section 1 of the act of 1881, as delinquent for the year 1875, and sale was had, as before stated. It appeared from the testimony that on June 14, 1877, plaintiff, by her agent, applied to the county auditor for a statement of all taxes upon this and other lands. A statement was delivered by the auditor, in which he certified that a certain sum was the amount of taxes delinquent on the tract in question "for the years specified." The blank space in which the year or years should have been designated was not filled, however, so that it did not appear for what year or years the delinquency existed. The sum specified was paid in the belief that it covered all delinquent taxes upon the land, the treasurer receipting therefor upon the auditor's statement or certificate. The fact was that the tax before mentioned as delinquent for the year 1875 was not included, and plaintiff only paid the amount then due as the delinquent tax for the year 1876.

It is asserted by respondent's counsel that no real distinction can be pointed out between the case at bar and that of *Forrest v. Henry*, 33 Minn. 434, 23 N. W. Rep. 848. There the land had been bid in by the state at the sale in 1875. The owner, wishing to redeem, applied, as required by the statute, to the auditor, for a statement or certificate of the amount necessary to be paid in redemption. It was made the duty of the auditor to furnish such statement or certificate on application, and the statute provided that in order to redeem it was necessary to pay, not only the amount for which the land was bid in, but also all subsequent taxes, penalties, and interest, this amount constituting one certain and indivisible claim of the state against the land. Furnished with the auditor's statement or certificate, the owner had the right to redeem by paying the amount specified to the county treasurer. The statute expressly provided that, "If the amount so paid for the purpose of redemption be less than the amount required by law, it shall not invalidate such redemption, but the auditor shall be liable for the deficiency to the person entitled thereto." Under these facts, and because of these statutory provisions, the court held that when a party had redeemed by paying the amount thus certified to by the auditor the redemption was valid, notwithstanding the amount so paid was, by reason of the auditor's mistake, less than that actually required by law. In the case at bar the land

had never been sold for taxes. They were simply delinquent when the application was made to the auditor. There was nothing from which to redeem, and what the owner desired to do, and the only thing she could do, was to pay the taxes, not to make redemption. When lands have become delinquent for nonpayment of taxes, and the lists have been returned to the auditor by the treasurer, and a party desires to pay the taxes, it is implied, at least, from the provisions of Gen. St. 1878, c. 11, § 69, that he must obtain a statement of the amount of the delinquency, including penalties and interest, from the auditor, and then pay to the treasurer. But there is no provision of the statute which authorizes or requires the auditor to certify generally that there are no delinquent taxes or tax liens on the property, or that delinquent taxes or tax liens exist for certain years only, or that gives any effect to a certificate of such a nature. There is such a provision when the lands have been sold, as was the case in *Forrest v. Henry*, and the cases of a redemption of land from a sale, and the payment of a delinquent tax when the land has not been sold, are entirely different. In the one case the amount for which the land has been sold, to the state or to an individual, with interest, and all subsequent taxes, penalties, and interest, is an entire claim, under the statute, all of which must be paid, as a condition of redemption, while in a case where there has been no sale a party may pay the tax for any one year without reference to what may be due for other years. If the redemption is not made effectual, either by payment of all that is actually due, or by a payment which, because of the statute, is equivalent to the payment of all that is due, the right to redeem may be lost, while in a case where the taxes are simply delinquent the land cannot be sold without proceedings to obtain judgment against it, of which the owner will have the notice provided by statute.

To hold that the payment made in 1877 by plaintiff's agent amounted to payment of all taxes then due, in the absence of a statute similar to that pertaining to redemption from sales, and passed upon in the action referred to, would lead to most serious results. Should an auditor erroneously inform a party that there were no delinquent taxes against his land, or should a treasurer, by mistake, inform one that there were no taxes assessed against his property for the current year, and reliance be placed upon this information, in utter disregard of future proceedings to enforce the collection of taxes through judgment and sale, no judgment could be obtained, and no sale had, which would not be open to attack, and liable to be avoided, by means of oral testimony as to what inquiries were made of the officials, and what answers they gave. This would be the inevitable re-

sult of such a holding, and, should we follow the cases cited by respondent's counsel, we could not stop short of it. Where judgment has been obtained and sale made in proceedings to enforce the collection of taxes, the statute points out with exactness the duty of the party desiring to redeem, and prescribes the force and effect of a payment made by him upon the auditor's statement as to the entire sum due. It provides that mistakes of the auditor shall not operate to the injury of the redemptioner. Not so when the act of the party is payment, merely, and not redemption, and herein lies the distinction between this case and that of *Forrest v. Henry*. The validity of tax sales cannot be placed at the mercy of any one who by design, or through honest mistake, testifies that at some date after the taxes became delinquent, and while they were delinquent, merely, he inquired of the auditor, and was informed that there were no delinquent taxes against his land, in the absence of a statute to that effect. Notice must be taken of subsequent statutory proceedings. With this view of the effect of the law of the case, there was no error in the charge of the court, prejudicial to the plaintiff.

There is nothing in the contention of respondent's counsel that the act of 1881 related only to lands which had been forfeited to the state. Its title and its various provisions clearly indicate that it had a broader scope. It was an act to enforce the payment of taxes which became delinquent prior to the year 1879.

Nor is there any merit in the claim that defendants' ancestor waived his right, and the right of his heirs, to assert against this plaintiff the tax title derived in 1881 by giving notice in 1887 to redeem from the sale made in 1883, and that such sale was redeemed from. It is sufficient to say, in respect to the offer to show what transpired in 1887 as to the notice to redeem, and the alleged redemption, that plaintiff did not offer to show that notice was served upon or addressed to her, or that she had anything to do with the redemption said to have been made. Order reversed.

VANDEBURGH, J., did not take part.

JONES et al. v. SWANK.

(Supreme Court of Minnesota. July 21, 1893.)
COUNTERCLAIM—DAMAGE TO PROPERTY ATTACHED
IN SUIT—CHANGE OF VENUE.

1. In an action for the value of goods, wares, and merchandise sold and delivered, and for services rendered and labor performed, a cause of action in defendant and against plaintiffs for willfully, maliciously, and with injurious intent causing the property of the former to be seized, in value greatly in excess of the amount claimed to be due, in attachment proceedings instituted upon the claims and causes of action set forth in the complaint in

the present action, and also for the neglect and misuse of the attached property with such intent, is not a defense by way of counterclaim.

2. Defendant's motion for a change of place of trial to the county in which he resided at the commencement of the action may be denied on the ground that the convenience of witnesses and the ends of justice will be promoted by such denial.

(Syllabus by the Court.)

Appeal from district court, Wadena county; Holland, Judge.

Action by David E. Jones and William R. Baumbach against David Swank. Plaintiffs had judgment, and defendant appeals. Affirmed.

T. R. Palmer, for appellant. Coppernoll & Wilson, for respondents.

COLLINS, J. This was an action for the value of goods, wares, and merchandise sold and delivered, and for services rendered and labor performed. As a second defense, by way of counterclaim, the answer alleged that prior to the commencement of this action plaintiffs caused proceedings in attachment to be instituted upon the claims and causes of action set forth in the complaint, and willfully, maliciously, and with intent to injure defendant caused his property to be seized and levied upon, greatly in excess in value of the amount demanded in the summons, and deprived defendant of the use of said property for a certain period of time; and, further, that in such proceedings plaintiffs, with said intent, misused and neglected said attached property. The value of the use of the property, and the decrease in value of such as was misused and neglected, was averred, and for the sum total defendant counterclaimed. A demurrer to the second defense or counterclaim was interposed, and by the court below sustained. It is apparent from the above statement that the cause or causes of action set up in the answer did not arise out of the contracts or transactions alleged in the complaint as the foundation of plaintiffs' claims, nor were they connected with the subject of the action. The defendant's right to recover damages for an abuse of the writ of attachment arose, if at all, out of plaintiffs' attempt to secure and collect the amount of their claims through attachment proceedings, and in no way were these proceedings connected with the subject of the action. The facts upon which defendant rested his alleged counterclaim arose subsequent to, and were wholly independent of, those set forth in the complaint, and had no connection with them. See *Schmidt v. Bickenbach*, 29 Minn. 122, 12 N. W. Rep. 349. The court below ruled correctly when sustaining plaintiffs' demurrer.

There is room for diversity of opinion on the question of practice raised by the 2d 3d, and 4th specifications of error. By Gen. St. 1878, c. 66, § 49, it is provided that actions of the nature of that at bar shall be tried in the county in which the defend-

ant shall reside at the time of their commencement. The method of removing actions instituted elsewhere is pointed out in section 51. But the right to have the cause tried in the county of defendant's residence is a qualified one, for the power of the court to change the place of trial for the convenience of witnesses and for other causes specified in the statute is undisputed. So the question is whether the defendant has the absolute right, in the first instance, and without regard to any other consideration, to have the action transferred to the county in which he resides, or can his motion for such transfer be met and resisted by a motion to retain it for trial in the county originally named in the summons, or, for that matter, to send it to a county other than that in which it was brought or the one in which defendant resides, for the reasons mentioned in the second subdivision of section 51? Attention has been called by counsel to decisions of the courts of last resort upon both sides of this question, and we are well aware of the difference of opinion existing among the judges of the district court within this jurisdiction. The writer, when serving upon the district bench, following the rulings of his predecessor, always changed the place of trial, upon proper showing, to the county in which the defendant resided, but without prejudice to the plaintiff's right to move the court to again transfer the cause for trial if good grounds existed for such a motion; and in one instance this method of procedure led to the presentation of two motions in the same action,—the first to change the place of trial from the county named in the summons to that in which the defendant resided, both counties being in the same judicial district, which motion was granted; and the second to return the action for trial to the county first mentioned, that the witnesses might be convenience, and the ends of justice promoted. This same condition might exist in every judicial district in this state save one, and seems quite absurd. We believe that no good reason exists for holding that a defendant's motion for change of place of trial to the county in which he resides cannot be met and opposed by counter affidavits, or considered with a motion to retain the cause in the county in which it has been brought, or to transfer it for trial to some third county, if it be made to appear that the convenience of witnesses and the ends of justice will be promoted by such a course. As has been said in one of the Wisconsin cases hereinafter cited, the statute contains no words expressly limiting the court to an investigation of the facts stated in support of a motion made under one clause, or prohibiting it from receiving counter affidavits, or listening at the same time to an opposing motion, made under some other clause. This mode of procedure will avoid the absurdity before mentioned, and prevent a multiplicity of mo-

tions. As before stated, the courts are at variance on the subject. Sustaining our views, we cite *Jenkins v. Stage Co.*, 22 Cal. 538; *Hall v. Railway Co.*, 49 Cal. 454; *Couillard v. Johnson*, 24 Wis. 533; *Bonnell v. Esterly*, 30 Wis. 552. A later case, *Meiners v. Loeb*, 64 Wis. 343, 25 N. W. Rep. 216, is based upon a statute unlike that considered in the earlier cases. Judgment affirmed.

PAYNE v. LOAN & GUARANTY CO. OF CONNECTICUT.

(Supreme Court of Minnesota. July 21, 1893.)

EQUITY—CANCELING MORTGAGE—EVIDENCE.

1. Where a mortgagee, without proper excuse, refuses to pay over to a mortgagor the full amount of the loan agreed upon, an action can be maintained by the latter to cancel the note evidencing the debt, and to satisfy and discharge the mortgage of record, proper terms being imposed by the court in its decree as to a repayment of that portion of the amount of the loan which had been received by the mortgagor.

2. Various rulings of the trial court excluding testimony offered by the defendant's counsel considered and disposed of.

(Syllabus by the Court.)

Appeal from district court, Meeker county; Powers, Judge.

Action by Ada A. Payne against the Loan & Guaranty Company of Connecticut to cancel a mortgage and note. Plaintiff had judgment, and defendant appeals. Affirmed.

A. Humphreys, (Keith, Evans, Thompson & Fairchild, of counsel,) for appellant. E. A. Campbell, for respondent.

COLLINS, J. A good cause of action was stated in the complaint herein, and the relief demanded was perfectly proper. The objections made by defendant's counsel upon the trial really amounted to a claim that, upon the allegations found in the pleading, plaintiff was not entitled to the relief demanded, which was the satisfaction and cancellation of her note and mortgage, with such other and further relief as was just. Even had such an objection to the complaint been raised by demurrer, it would have been of no avail. *Connor v. Board*, 10 Minn. 439, (Gil. 352.) The delivery of plaintiff's negotiable promissory note and real-estate mortgage, although the design was to immediately place the latter on record, was really conditional, the condition being that the amount agreed upon and represented by the note should be paid over to the mortgagor. She was not obliged to accept a less sum, nor was she compelled to resort to an action at law to collect that portion withheld by the defendant corporation, if any there was. If the latter failed to fully comply with the terms of its agreement, full and adequate relief could not be had short of a return of the note and a satisfaction of the record of the mortgage,

proper terms being imposed by the court as to payment of that part of the loan which had come to the hands of the plaintiff mortgagor, and which, according to the pleadings, she had offered to return and pay. Her right to the relief could not be made to depend upon the solvent or insolvent condition of the mortgagee, nor could she be deprived of this relief because a part of the money had been paid over to her. We are of the opinion that a sufficient demand for the unpaid portion of the loan was shown. There was no real controversy about this on the trial. Unquestionably the money had been sent by defendant company to Stoddard & Co., at Minneapolis, and by that firm forwarded to Stevens & Co., at Litchfield; and plaintiff's agent had repeatedly endeavored to obtain it from the latter firm, but without success.

Appellant's counsel assign as erroneous various rulings of the trial court excluding testimony offered for the purpose of showing that Stevens & Co. were respondent's agents, and not the agents of their client, and this was the real question in the case. Of this class of testimony was the application for a loan offered by the defense, and excluded by the court. The paper did not purport to bear the plaintiff's signature, or to have been made by her personally, but was signed "Addie Payne, Applicant, by R. J. Payne." Without referring to the discrepancy between the plaintiff's Christian name "Ada" and that of "Addie," it may be said that the court could not assume that the signature "R. J. Payne" was that of plaintiff's husband and conceded agent, and no attempt was made to prove or identify the alleged signature to be his. The court was right when holding that no foundation had been laid for the introduction of this paper as against the plaintiff's objection.

Upon objection being made by plaintiff's counsel the court refused to allow defendant's witnesses to answer several questions, which, in the absence of other evidence, might have had a bearing upon the main issue between the parties. Such, for instance, as the question respecting a correspondence between Stevens & Co. and defendant in relation to this and other loans, and whether the former were furnished by the latter with blanks upon which to make applications for loans. The court below may have been somewhat strict in its rulings, but, when made, the officers of the defendant corporation had already testified that they did not know Stevens & Co.; that the correspondence was with Stoddard & Co., and with no one else; that the application came through Stoddard & Co., and that blank applications were not furnished by defendant, but were gotten up by Stoddard & Co. for their own use. Had the questions been answered favorably to defendant, the evidence would have been mere repetition. No harm could have resulted by its exclusion, and

hence the rulings, if wrong, did not constitute prejudicial error.

The certificate of the trial judge fails to state that the settled case contains all of the evidence produced upon the trial, and the fact cannot be inferred from anything appearing in the record. Hence we are unable to pass upon appellant's eighteenth specification, that the court erred when directing a general verdict in plaintiff's favor. Error in this respect has not been made to appear.

Order affirmed.

WAGNER v. FINNEGAN.

(Supreme Court of Minnesota. July 21, 1893.)

COVENANTS OF WARRANTY — ACTION FOR BREACH — PLEADING.

1. In an action for the breach of the covenant of warranty the complaint must allege facts showing an eviction, actual or constructive.

2. A judgment merely establishing an adverse paramount title does not amount to a constructive eviction, at least, unless the premises are vacant and unoccupied.

3. A certain allegation of the complaint construed as being merely the pleader's conclusion as to the legal effect of the facts previously alleged, and not an additional allegation of fact.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Lochren, Judge.

Action by Henry Wagner against Andrew J. Finnegan for a breach of warranty in the conveyance of land. Plaintiff had judgment on demurrer to the complaint, and defendant appeals. Reversed.

Savage & Purdy, for appellant. Geo. R. Robinson, for respondent.

MITCHELL, J. The short facts alleged in the complaint are as follows: Defendant, Finnegan, for the consideration of \$750, conveyed, with covenants of seisin and warranty, the undivided half of a 40-acre tract to one Schuppel, who subsequently conveyed a part of the premises to plaintiff. That thereafter William Windom brought two actions,—one against plaintiff, claiming to be the owner of the premises conveyed to plaintiff, and another against Schuppel, claiming to be the owner of the remainder of the tract,—in each of which actions Windom asked that the title be adjudged in him. That Finnegan was notified of the commencement of these actions, and required to appear and defend them, which he did. That thereafter judgments were rendered in each of the actions adjudging Windom to be the owner of the whole tract by title superior and paramount to the title conveyed by Finnegan to Schuppel. "That by reason of the judgments aforesaid the said Schuppel and this plaintiff have been deprived of the quiet and peaceable possession of the premises conveyed by defendant to Schuppel, and every part thereof, and were wholly evicted therefrom, * * * whereby said Schuppel

and this plaintiff have sustained damages in the sum of one thousand dollars." That, prior to the commencement of this action, Schuppel assigned to plaintiff his claim against defendant, arising out of the breach of the covenants in the deed from defendant to Schuppel. This appeal is from an order overruling a demurrer to the complaint on the ground that it did not state a cause of action. Defendant's contentions are that the complaint does not state facts showing a breach of the covenant of seisin, which, being purely a covenant of title, is broken, if at all, as soon as made, and that it does not show a breach of the covenant of warranty, because it does not allege an eviction, either actual or constructive.

It is not claimed by plaintiff, and could not be, that the complaint shows any breach of the covenant of seisin, and hence it only remains to consider whether it states facts constituting a breach of the covenant of warranty. This depends entirely upon the construction to be placed upon the allegation quoted, as to eviction and loss of possession. On the principle that a pleading is to be taken most strongly against the pleader, we think that this must be construed, not as an additional and independent allegation of fact, but as merely the pleader's conclusion as to the result or legal effect of the facts previously alleged; that is, that as a matter of law a judgment establishing merely the naked question of title, in and of itself, amounts to a constructive eviction. Force is given to this view from the fact that the judgments in favor of Windom did not award him the possession. The construction we have suggested is the one which counsel himself apparently puts upon his pleading, for he says "the judgments destroyed Schuppel's and plaintiff's constructive possession." It is probably true that the assertion and establishment by judgment of an adverse paramount title would amount to a constructive ouster, if the premises are vacant and unoccupied. But this is not alleged. For anything that appears from the facts alleged, plaintiff and Schuppel may still be in the actual occupation of the premises.

2. It is further urged that the complaint is defective in that, while it sets forth two separate causes of action, there is no separate statement of the damages resulting from either, by itself. Even assuming that this point is raised by the demurrer, there is no merit in it. If there had been an eviction as to the entire tract, the measure of defendant's liability would be the purchase money, (\$750,) interest, and costs. The right to recover the whole of this would belong to the plaintiff, and it could make no sort of difference how it would have been apportioned between plaintiff and Schuppel before the assignment by the latter to the former. But for the insufficiency of the complaint, already referred to, the order appealed from is reversed.

**MAXCY v. NEW HAMPSHIRE FIRE INS.
CO. OF MANCHESTER.**

(Supreme Court of Minnesota. July 21, 1893.)

**INSURANCE—POLICY PAYABLE TO MORTGAGEE—
WHO MAY SUE—PLEADINGS.**

1. A fire insurance policy, by the terms of which the loss, if any, is made payable to a mortgagee as his interest may appear, is a contract for the benefit of such mortgagee; and he, or a person to whom he has assigned the claim after a cause of action has accrued, is entitled to recover in his own name the full amount of the insurance, if the same does not exceed the amount due upon the mortgage.

2. When, in such an action, it is alleged in the complaint that the mortgagee has sustained loss and damage in a certain amount, it is, as against a general demurrer, sufficiently alleged that the insured owner has sustained loss and damage; and under such an allegation the value of the property destroyed may be shown upon the trial.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Lochren, Judge.

Action on a policy of insurance by Charles H. Maxcy against the New Hampshire Fire Insurance Company of Manchester. From an order overruling its demurrer to the complaint, defendant appeals. Affirmed.

Kueffner & Fauntleroy and Freeman P. Lane, for appellant. Wilson & Van Derlip, for respondent.

COLLINS, J. 1. The complaint herein, although not as perfect as it should have been, was good, as against a general demurrer. The policy, set out in full, insured Thompson, as owner of the building described, against all direct loss or damage by fire, to the amount of \$750. This loss or damage, if any, under the policy, was made payable to one Mitchell, trustee for Emma C. Gregg, as mortgagee, as her interest might appear. It appeared from the pleading that when the property was insured, and when the fire occurred, said Mitchell, as trustee for Mrs. Gregg, held a mortgage upon the premises, executed by Thompson, for an amount greatly in excess of the sum payable under the policy; that no part of this mortgage debt had been paid; that the building was totally destroyed by the fire; and it was alleged, by reason of the total destruction, said Mitchell, as trustee, was damaged in the full sum of \$9,000. According to the allegations in the complaint, due proof of the loss was made, and the plaintiff had succeeded to the rights of the mortgagee by virtue of an assignment of all her interest in and to the policy, and the cause of action said to have accrued upon the same. The defendant's counsel point out, as ground for the general demurrer, that it is not directly averred in the pleading that the insured building was of any value, or that, through its destruction, the owner, Thompson, has suffered a loss, or sustained any damage. We are of the opinion that as against a general demurrer, where it is

alleged that the property insured has been totally destroyed, and that a mortgagee, to whom the loss has been payable, under the policy, has sustained loss and damage in a specified sum, the complaint sufficiently alleges loss and damage to the insured owner. When such facts exist the owner must have been damaged, and must have sustained loss. *Keeler v. Insurance Co.*, 16 Wis. 523. See, also, *Blasingame v. Insurance Co.*, 75 Cal. 633, 17 Pac. Rep. 925; *Insurance Co. v. Perkey*, 92 Ill. 164. This would be the inevitable result in every case, unless we are to assume, contrary to a common-sense view, that the property insured and destroyed had no value, and that loss and damage to the mortgagee by reason of its destruction was not necessarily loss and damage to the owner. The liability of the defendant company cannot exceed the actual cash value of the property when burned, and this value is to be ascertained and estimated from the proofs upon the trial, and under the allegations as to the amount of the loss and damage to the plaintiff, as the assignee of the mortgagee, to whom the loss, if any, was expressly made payable.

2. There was no defect of parties defendant. A policy of insurance, by the terms of which a loss thereunder is made payable to a mortgagee, is a contract for the benefit of such mortgagee; and he can enforce the liability in his own name, and without joining the insured. It is a sound doctrine, applicable to simple contracts generally, and to contracts of insurance, that if one make a promise to another for the benefit of, and available to, a third person, the latter can maintain an action upon the promise in his own name. A mortgagee is entitled to recover the full amount of insurance, in case of loss, if such insurance does not exceed the amount due upon and secured by the mortgage. *Motley v. Insurance Co.*, 29 Me. 337; *Hammel v. Insurance Co.*, 50 Wis. 240, 6 N. W. Rep. 806; *Tilley v. Insurance Co.*, 86 Va. 811, 11 S. E. Rep. 120; *Roussel v. Insurance Co.*, 41 N. Y. Super. Ct. 279; *Sanford v. Insurance Co.*, 12 Cush. 541; *Hastings v. Insurance Co.*, 73 N. Y. 141; *Meriden Sav. Bank v. Home Mut. Fire Ins. Co.*, 50 Conn. 396. And in the case of *Graves v. Insurance Co.*, 46 Minn. 130, 48 N. W. Rep. 684, this court assumed such to be the law; holding that a mortgagor's right to maintain an action in his own name upon a policy containing a clause like that in question depended upon his having paid the debt, or having in some other manner satisfied and discharged the mortgage lien, or, possibly, by alleging and proving that he had been authorized to recover by the mortgagee. Of course, Thompson, as the insured owner of the property, and Mrs. Gregg, as the original mortgagee, might be allowed to intervene in the action, upon proper motion, or, at the instance of the defendant company, either or both might be compelled

to interplead and take part in the litigation; but this does not demonstrate anything more than that, under some circumstances, one or both might be proper parties to the action; not that either is a necessary party to the controversy.

3. After the cause of action had accrued upon this policy, it became a chose in action, assignable by the party entitled to enforce the liability; and thereupon the assignee was, as the real party in interest, the proper person to bring the action. We need not cite authorities in support of this proposition. The order overruling defendant's demurrer must be, and is, affirmed.

VANDERBURGH, J., absent, took no part.

MARBLE v. BANG.

(Supreme Court of Minnesota. July 21, 1893.)

REAL-ESTATE AGENTS—AUTHORITY.

Authority to an agent to sell the land of the principal, unless otherwise expressly provided, is authority only to sell for cash on delivery of the deed.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Ensign, Judge.

Action by L. L. Marble against Andrew Bang to recover commissions earned by procuring a purchaser for certain property of defendant. Plaintiff's authority to negotiate a sale was contained in a written agreement, —Exhibit A. Therein, defendant gave plaintiff the exclusive agency, until April 1, 1892, to sell the premises in question, on the following terms: "Upon the sale of the said lands the said L. L. Marble * * * agrees to give the said Andrew Bang * * * the sum of \$2,000, providing the said lands are sold for \$3,000 or less; and the said L. L. Marble * * * further agrees to give, in addition to the \$2,000, one-third of all money received for said lands above the \$3,000; and it is further agreed and understood that the said lands are to be sold in connection with the homestead of said L. L. Marble. * * * The sale made by plaintiff was upon the terms contained in Exhibit B, wherein plaintiff acknowledged receipt from one Merritt of \$500 on account of the purchase price of defendant's land alone, and not including plaintiff's homestead, and further agreed "to make, execute, and deliver to said Merritt a good and sufficient warranty deed to said premises * * * upon being paid the further sum of \$3,500, to be paid on or before the first day of March, 1892, * * * and upon the execution of said deed, and payment of said sum of \$3,500, said Merritt is to give me an agreement to pay the further sum of \$1,000, whenever the patent for said land is issued and delivered to him * * *." Defendant repudiated this attempted sale. Upon the trial, defendant had a verdict, under instructions of the court.

Plaintiff appeals from an order denying a new trial. Affirmed.

O. F. Lamb, for appellant. John Jenswold, Jr., for respondent.

MITCHELL, J. The cause of action, if any, alleged in the complaint, is for commissions earned by procuring a purchaser for defendant's property, ready and willing to buy on the terms authorized, and not for damages for a revocation of plaintiff's agency before the expiration of the time named in the agreement of the parties. This disposes of plaintiff's contention that he was entitled to at least nominal damages on the latter ground.

Construing the agreement (Exhibit A) most favorably to the plaintiff,—that he would have earned his commission upon producing a purchaser ready, able, and willing to buy on the terms therein named,—and assuming (what is not very clear) that Merritt, the alleged customer, was ready and willing to buy on the terms named in the memorandum, (Exhibit B,) the plaintiff was not entitled to recover, for the reason that the terms named in the latter were not those authorized by the defendant. Authority to sell property is, unless otherwise provided, authority only to sell for cash on delivery of the deed. By the terms of the sale which plaintiff assumed to make, \$1,000 of the purchase money was not to be paid until "the patent for said land is issued and delivered." This was in excess of plaintiff's authority. The doctrine of "substantial performance of a contract," which plaintiff invokes, has no application. This is a question of authority, and not of performance. Plaintiff's contention is that this departure from the power was immaterial, because the amount to be paid down by the purchaser was more than would be coming to the defendant out of the entire purchase price, after deducting plaintiff's commissions. But this is not tenable, for there was no agreement that plaintiff was to receive his commission out of a deferred payment. According to the agreement, plaintiff was to receive as his compensation all that the property brought over \$2,000, up to \$3,000, and two-thirds of what it brought over the latter sum. Consequently, of the \$1,000, the payment of which was deferred, the plaintiff would be entitled to two-thirds, and the defendant to one-third. Order affirmed.

SNELL v. SNELL et al.

(Supreme Court of Minnesota. July 24, 1893.)

ACTION TO ESTABLISH TRUST IN REALTY—PRIORITY OF INTERESTS—REGISTRATION—EVIDENCE.

1. Except as affected by the registry law, rights or interests in real estate are to take effect and be sustained according to priority, unless there be circumstances—such, for instance, as amount to fraud or an estoppel—postponing a senior to a junior right. This is so although

the person claiming the junior right be a purchaser for value, and without notice of the senior right.

2. The right in her husband's real estate, which a wife acquires by her marriage, does not come within the registry law.

3. Where to disregard certain facts found will not affect the result, it is immaterial whether the finding is justified by the evidence. (Syllabus by the Court.)

Appeal from district court, Ramsey county; Willis, Judge.

Action by Helen M. Snell against George E. Snell and Jennie C. Snell to establish a trust in realty. Plaintiff had judgment, and defendant Jennie C. Snell appeals. Affirmed.

Frederick A. Pike, for appellant. A. G. Briggs, for respondent.

GILFILLAN, C. J. This action is to establish and declare a trust, and vest the title to the trust property (real estate) in the plaintiff. The court below found as facts, in brief, that the plaintiff furnished to the defendant George Snell the money with which to purchase a lot for her, and construct for her a house thereon, and that with said money he purchased the lot, and constructed the house, but that, fraudulently, and without her knowledge or consent, he took the title to the lot, on the purchase, in his own name, and that afterwards, in 1888, he made and delivered to her a memorandum in writing, subscribed by him, acknowledging and declaring that he held the property in trust for her; that in December, 1891, the two defendants became husband and wife. The evidence fully sustains those findings.

The court also found that in 1884, after the purchase, the plaintiff went into possession of the property, and remained continuously in possession, and exclusively controlled and managed the same, till the time of the trial, and that when the defendants intermarried the defendant Jennie C. had full knowledge and notice of all the foregoing facts. The findings as to plaintiff's possession, and as to the defendant Jennie having notice of the facts, are objected to as not justified by the evidence. If those findings stand, of course, the plaintiff is entitled to the relief she demands, for, in whatever relation the defendant Jennie C. stands to the rights which the law would give her in her husband's real estate,—whether (in law) in that of a purchaser or not,—such rights would certainly be subject to the rights of others, good against her husband, of which she had notice. But those findings are immaterial, and it is immaterial whether they are justified by the evidence, for if they be disregarded or reversed the plaintiff is still, in the absence of other facts not found, and which the court below was not asked to find, entitled to the same relief. Except as affected by the registry law, rights or interests in real estate are to take effect and be sustained according to priority in time, unless

there exist circumstances—such, for instance, as amount to fraud or an estoppel—which will postpone the senior to the junior right. And this is so although the claimant of the junior right was a purchaser for value, and without notice of the prior right. The registry law does not apply in the case, because no one is protected by it except one whose deed or instrument creating his right is first recorded. Those who acquire rights, except through instruments which can be and are recorded, do not come within its protection, and their case must be determined just as though there were no registry law. Unless, therefore, upon setting aside or disregarding the above findings as to the possession and notice to defendant, there remain facts which postpone the plaintiff's to defendant's rights, (even though she is to be regarded as a purchaser,) then it is immaterial, and will not affect the result, whether they be sustained or not. There is no fact found which suggests fraud by plaintiff; and, except for the findings referred to, there is nothing to suggest that defendant Jennie C. ever knew of the property,—ever knew that the title appeared to be in George. There is no finding that she ever supposed it to be in him. So that there is nothing upon which to base a claim of estoppel to assert plaintiff's rights. The plaintiff had a choice of remedies against George. She could either enforce the trust, or sue for misappropriation of the money. As no right acquired by Jennie C. could impair hers, her right to elect a remedy was not affected.

There is no other question, deserving special mention, raised by the assignment of errors. Order affirmed.

LAMPREY et al. v. MEAD et al.

(Supreme Court of Minnesota. July 24, 1893.)

PUBLIC LANDS—VALIDITY OF PATENT—WHO MAY AVOID.

Where a patent issues for a fractional lot appearing by the plat of the United States survey to be bounded on one side by a meandered lake, the patent is not void so far as it purports to convey the land under the water, though it was error in the survey to treat the tract covered by the water as lake to be meandered, instead of land to be surveyed. Conceding the patent to that extent to be voidable, it can be avoided only by the United States, in a proceeding to which the patentee is a party.

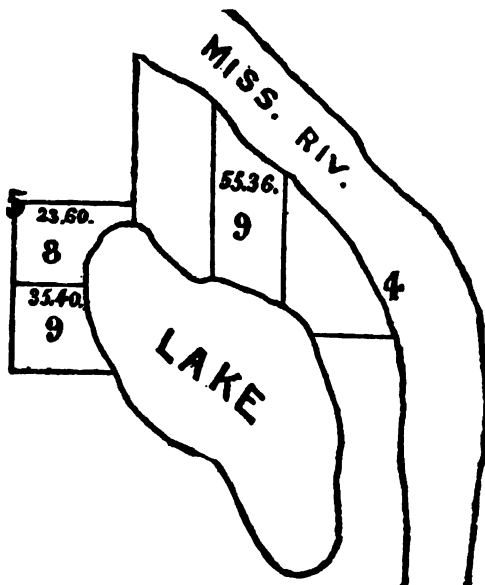
(Syllabus by the Court.)

Appeal from district court, Ramsey county; Brill, Judge.

Action by Uri L. Lamprey and others against Warren H. Mead, the St. Paul, Minneapolis & Manitoba Railway Company, and others, for partition. From the judgment entered defendant railroad company appeals. Affirmed.

M. D. Grover, (John M. Gilman and Stryker & Moore, of counsel,) for appellant. John A. Larimore, for respondents.

GILFILLAN, C. J. The action is for partition. The complaint claims that the plaintiffs and the defendants Mead, Reilly, and Metcalf are the owners, as tenants in common, of the land, and the other defendants are joined to determine their claim of title. The other defendants who answer claim under the railroad land grant to the territory in 1857. The lands in township No. 28 N., of range No. 22 W. of the fourth P. M., were surveyed in 1853, the subdivision lines being run in September of that year. The map or plat of the survey was filed in the office of the surveyor general, and was by him examined and approved February 27, 1854. In May, 1855, patents issued for lot 9, section 4, and lot 9, section 5, and in March, 1855, a patent issued for lot 8, section 5. The plaintiffs and defendants Mead, Reilly, and Metcalf claim under these patents. On the map or plat was a tract marked "Lake," on which the lots so patented abutted. The following rough diagram shows approximately the position of the lots with reference to the "lake."



All the lands surrounding the lake were surveyed, and appear platted as fractional lots. The controversy is over the bed of what is designated "Lake" in front of the patented lots, the plaintiffs claiming that, according to the law as laid down in *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838; *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840; and *Lamprey v. Metcalf*, (Minn.) 53 N. W. Rep. 1139,—the title to the bed of the lake in front of those lots passed by the patents, the defendants claiming under the land grant that by reason of the facts which they offered to prove it remained in the United States, and passed by the land grant to which those defendants have succeeded.

On the trial the plaintiffs introduced the plat and patents and deeds passing the titles derived under the patents to them and the defendants Mead, Reilly, and Metcalf, and rested. The other defendants made certain offers of evidence, which, on plaintiffs objecting, were overruled. These offers and the rulings thereon present the questions in the case. The offers are too long to be quoted in this opinion, but they included a survey of the land covered by the "lake," made and approved in 1861, and facts which it is claimed would establish, not that when the original survey was made the water did not cover the tract marked "lake," but that it ought to have been surveyed as land; and not to have been meandered as a lake. Conceding that the water was there at the time of the survey, and presented the question whether for the purpose of the survey it ought to be regarded as a lake or as land, the offers are, in effect, to impeach the survey by showing that it was error or mistake to regard it as a lake. The proposition suggests a question of great practical importance. It is a serious matter, in this state at least, where, as is of common knowledge, what was undoubted lake 10 years ago might 5 years later be only marsh, and to-day dry land, if, after the lapse of 40 years, a United States survey representing a tract of water as meandered lake, and according to which the government has conveyed the abutting land, can be impeached, and the rights of the patentees unseated. But the question is not presented in this case for solution. Of course, so long as the government had not conveyed any of the lands abutting on the lake, it could correct the survey, survey the tract under the water as land, and convey it as such. And it may be conceded (though it is by no means clear) that the government is not bound by an erroneous or mistaken survey, even after it has conveyed the land according to it; but it cannot correct such erroneous survey so as to defeat or injuriously affect the rights of its patentees by any ex parte acts, or in any way except by a proceeding to which such patentees are parties, and in which they have an opportunity to be heard. It has no more right to limit or diminish the effect of its past grants by its own acts than has a private grantor. *Lindsay v. Hawes*, 2 Black, 554, furnishes an instance in which, rights having been acquired under an erroneous survey, it was held that a subsequent correct survey did not defeat the rights so acquired. It follows that the survey of 1861 does not affect the case.

The patents conveyed the fractional lots according to the survey as it was represented by the plat. The latter was therefore part of the patents as much as though it were fully set forth in them. On their face they transferred to the patentees the right to the land under the water, not as defendants seem to argue, if appurtenant

and as appurtenant to the shore land, but they took the fee, (a fee cannot be appurtenant,) because, when land is bounded in the conveyance by a nonnavigable lake or river, it is presumed the parties intend the center, and not the shore, line to be the boundary. They may limit the grant to the shore line if that intention be sufficiently expressed. The patents, even though it could be proved that the survey was a mistake, and that the determination of the government surveyors and officials that the water on the land when the survey was made constituted a lake to be meandered was erroneous, were not void so far as they purported to convey the land under water. At worst they were only, to that extent, voidable at the instance of the government, in proper proceedings for reformation of the patents. *White v. Burnley*, 20 How. 235; *Spencer v. Lopsley*, Id. 264. The case is not one where a boundary given is an impossible one; where the monument given as marking it does not exist, or cannot be found. In such a case the boundary or monument must be disregarded, and the extent of the grant ascertained by other means, if the conveying instrument furnish them. There might be a case where the land is in terms bounded by a lake or river, and no lake or river is in fact to be found where the granting instrument indicates it to be. There might, in such a case, be a question how far the court will go to find such boundary before resorting to other means to define and locate the grant. Such a case was presented in *Whitney v. Lumber Co.*, 78 Wis. 240, 47 N. W. Rep. 425. In that case a fractional lot was wholly in a quarter of a quarter section, if full, and appeared by the plat of the survey to be bounded by a lake partly on that 40-acre tract. The decision was, in effect, that the court would not go, to find the lake as a boundary and locate the land, beyond the limits of the governmental subdivision of which the lot purported to be a fraction. Such is not this case. In this case the boundary given was where the survey indicated, the only claim being that it was mistake or error in the survey to treat the water as lake. The patents being at worst only in part voidable, they passed the land, and, if the government choose to acquiesce in and abide by them, no one else can complain. If a patent issue to A, when it ought to have issued to B, or if a patent issued to A prejudice the existing rights of B, the latter may have his remedy against A; but one who has no interest which is affected by the patent cannot question it. *Investment Co. v. Davis*, 40 Minn. 455, 42 N. W. Rep. 299. The defendants do not even stand in the position of one acquiring a subsequent title or claim of title from the United States. The grant of 1857 attached to no land which, when the lines of railroad were definitely located, had been otherwise appropriated by the United States.

The decisions are uniform that land, the claim to which, though ill founded, was sub judice,—that is, awaiting determination,—was excepted from the operation of the grant, because otherwise appropriated within the meaning of the act. An outstanding patent, though voidable, is an appropriation, within the reason of that rule.

Order affirmed.

MITCHELL v. MITCHELL et al.

(Supreme Court of Minnesota. July 26, 1893.)

TRESPASS—WHAT CONSTITUTES—UNLAWFUL ACTS OF ADMINISTRATOR—QUESTION FOR JURY.

1. Special administrators may take possession of the personal property of the estate.
2. Entering a house peaceably for that purpose, their entry is presumptively by license of the occupant; but, having so entered, they may not break open doors to get such possession.
3. Being unable to get possession without such violence, and being requested by the lawful occupant to depart, they become trespassers by persisting in remaining.
4. Becoming liable as trespassers, any abusive conduct on their part, not in itself constituting an assault or battery, may be considered in aggravation of damages.
5. Evidence held to present a case for the jury.

(Syllabus by the Court.)

Appeal from district court, Stearns county; Searle, Judge.

Action in tort by Margaret J. Mitchell against William B. Mitchell and others. Defendants had judgment, and plaintiff appeals. Reversed.

D. W. Bruckart and Taylor & Calhoun, for appellant. G. W. Stewart and Geo. H. Reynolds, for respondents.

DICKINSON, J. Upon the evidence presented at the trial, the court directed a verdict for the defendants. On this appeal we are to consider whether the case tended to show a state of facts which would have justified a recovery by the plaintiff. The plaintiff is the widow of one James S. Mitchell. The defendants were appointed special administrators of his estate, and they qualified as such. The deceased had left a will, by which he bequeathed his books and china ware to certain persons. Within a day or two after the burial of the plaintiff's husband, the defendants, who were then such special administrators, came with two men, acting under their direction, to the house where the plaintiff with her children was residing, this being the family homestead. Entering the house with the two men, without force, as it seems, they, as such administrators, demanded from the plaintiff the books and china ware of the deceased. According to the testimony of the plaintiff, they demanded all the books and china ware in the house, which would have included property belonging to the plaintiff, they saying to her that, when it was legally decided what was hers, she

would get it back. The books and china ware were in other rooms, which were locked, and the plaintiff refused to surrender the same. According to the evidence on the part of the plaintiff, the defendants threatened to break open the doors, and, in the course of the conversation, threatened to strike her if she did not cease talking as she was doing. Although she requested them to leave the house, they remained from about half past 6 o'clock in the evening until after 12 o'clock of that night. The plaintiff testified that she, being in ill health, was frightened and made sick by this conduct of the defendants.

If the facts were as shown by the evidence for the plaintiff, the defendants were guilty of a wrong, and the case should have been submitted to the jury. Under the modern system of procedure, we are not embarrassed by questions as to whether, for the acts complained of and shown, the right of action is technically for trespass or on the case. It is only necessary to consider whether such acts constituted a wrong, as respects the plaintiff, of which the law will take notice. The plaintiff was lawfully in possession of the house. The defendants, as special administrators, rested under the duty of taking into their possession the personal property of the estate, including the books and china bequeathed as above stated. The defendants seem to have entered the house peaceably, and without opposition from the plaintiff; one of them, indeed, going in with her. Under the circumstances, and in view of their legal right to take possession of property which was in the house, there arises an implication of a license to enter, and the mere entry is not to be deemed to have been a trespass. But, al-

though thus peaceably let into the plaintiff's house, the defendants had not the right to break open doors, or to commit like acts of violence to secure possession of the property. They should resort to legal process. See Toll. Ex'rs, 225; Williams, Ex'rs, 993; Schouler, Ex'rs, 272. But the license to enter presumably conferred by the plaintiff was revocable, and she did revoke it, as the evidence tended to show, by requesting them to leave the house. They learned that the property was locked in rooms into which they had no legal right to force an entrance. Their demand for its possession was refused. It was beyond their legal power to take it, and there was no legal excuse for their refusal to depart from the house. By their persistency in remaining so long a time, and until so late an hour of the night, disregarding the plaintiff's command, they became trespassers. *Davis v. Stone*, 120 Mass. 228. The legal justification for their presence in the house ceased when it was learned that the property was where they could not rightfully take it, when the plaintiff refused to surrender it, and requested them to leave the house. They had no right or license to remain, to coerce or worry her into compliance with their demands. In such conflicts of asserted rights, resort must be had to legal measures. Any other rule would encourage violence and disorder. A person cannot be allowed to adjudge his own cause, and to carry his own judgment into effect with force and violence. The defendants becoming liable as trespassers, any abusive conduct towards the plaintiff, even though not in itself constituting an assault or battery, might be considered in aggravation of damages.

Order reversed.

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To take case out of statute, see "Limitation of Actions," 12-14.

In general.

1. Where a deed and the acknowledgment are regular on their face, it will not impair the effect of the record that the acknowledgment was in fact taken before the deed was complete, as where the name of the grantee, or description of the premises, had not been inserted.—*Roussain v. Norton*, (Minn.) 55 N. W. 747.

Certificate.

2. Where an officer has authority to take acknowledgments anywhere in the state, the addition, in the venue to the certificate, of a wrong county, or a county which does not exist, will not affect its validity.—*Roussain v. Norton*, (Minn.) 55 N. W. 747.

Foreign acknowledgment.

3. A deed executed in a foreign state, and acknowledged there before a purported justice of the peace, as to whose genuine signature, official character, and power there is no accompanying certificate of a proper officer having a seal, is good as between the grantor and grantee.—*Connell v. Galligher*, (Neb.) 55 N. W. 229.

Foreign law—Presumption as to requirements.

4. Code, § 259, provides that a notary's seal shall have engraved on it the words "Notarial Seal," the name "Iowa," and the sur-
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name and at least the initials of the notary's Christian name. *Held* that, in the absence of proof to the contrary, it will be presumed that the requirements of another state in which an acknowledgment is taken are the same as those of Iowa.—*Hewitt v. Morgan*, (Iowa,) 55 N. W. 478.

ACTION.

See, also, "Continuance;" "Election of Remedies;" "Interpleader;" "Limitation of Actions;" "Lis Pendens;" "Parties;" "Pleading;" "Practice in Civil Cases;" "Removal of Causes;" "Trial;" "Venue in Civil Cases."

Against association for boycott, see "Conspiracy."

—receiver, see "Receivers," 4.

Between husband and wife, see "Husband and Wife," 10.

—partners, see "Partnership," 8.

By assignee, see "Assignment," 4-6.

By assignee for benefit of creditors, see "Assignment for Benefit of Creditors," 5, 6.

For assault and battery, see "Assault and Battery."

For breach of promise, see "Breach of Marriage Promise."

For damages from public improvements, see "Municipal Corporations," 35, 36.

For flowage, see "Railroad Companies," 3, 4;
"Surface Water," 3.

For injuries from defective street, see "Municipal Corporations," 22-30.

For other negligence, see "Carriers;" "Hospital;" "Master and Servant;" "Negligence;" "Railroad Companies."

For price, see "Sale," 22.

For wages, see "Master and Servant," 2-7.

On bonds, see "Bonds."

On contracts, see "Contracts," 23-26.

On guaranty, see "Guaranty," 5.

On note or check, see "Negotiable Instruments," 13, 14.

On policies, see "Insurance," 12-16.

Particular actions, see "Assumpsit;" "Conspiracy;" "Creditors' Bill;" "Death by Wrongful Act;" "Deceit;" "Divorce;" "Ejectment;" "False Imprisonment;" "Forcible Entry and Detainer;" "Fraudulent Conveyances;" "Libel and Slander;" "Malicious Prosecution;" "Malpractice;" "Partition;" "Quieting Title;" "Replevin;" "Trespass;" "Trove and Conversion."

To construe will, see "Wills," 9.

To determine tax title, see "Taxation," 16-18.

To enforce lien, see "Mechanics' Liens," 24-30.

—trust, see "Trusts," 6, 7.

To foreclose, see "Mortgages," 6-13.

Who may sue, see "Parties," 5, 6.

Who may sue.

1. A servant may sue the purchaser of his master's business for back wages which the purchaser assumed as part of the price.—*Barnett v. Pratt*, (Neb.) 55 N. W. 1050.

2. Where, in a contract between two persons, one promises the other to do something for the benefit of a stranger to the contract, and there is nothing but the promise, no consideration from the stranger, and no duty or obligation to him on the part of the promisee, the stranger cannot recover upon the contract.—*Jefferson v. Asch*, (Minn.) 55 N. W. 604;
Union Railway Storage Co. v. McDermott, Id. 608.

Joinder of causes.

3. An action to rescind a sale of land on the ground of fraud cannot be joined with an action on the covenants of seisin and right to convey contained in the deed thereof, since the former is a disaffirmance, while the latter is an affirmation, of the contract.—*McLennan v. Prentice*, (Wis.) 55 N. W. 764.

Administration.

See "Executors and Administrators."

Admissions.

See "Criminal Law," 12; "Evidence," 5-16.

ADULTERY.**Indictment—Pleading and proof.**

1. Where defendant was charged with adulterous cohabitation while living with his wife, and there was proof of such adulterous cohabitation during a portion of the period laid in the information, a single act of adultery at a time outside the period of adulterous cohabitation thus proved is a separate offense, for which defendant may be punished under a second count, though committed within the period of adulterous cohabitation laid in the information.—*Bailey v. State*, (Neb.) 55 N. W. 241.

2. Where a defendant is charged with adulterous cohabitation while living with his wife, proof of such adulterous cohabitation during any portion of the period laid in the information is sufficient to sustain the charge.—*Bailey v. State*, (Neb.) 55 N. W. 241.

Adverse Claims to Land.

See "Quieting Title."

ADVERSE POSSESSION.

By tenant in common, see "Tenancy in Common."

As against United States.

1. A holder of a tax title acquires no title by adverse possession, where the land, when sold for taxes, belonged to the United States.—*Durham v. Hussmann*, (Iowa,) 55 N. W. 11.

Character and sufficiency of possession.

2. A person claiming land adapted to grazing and growing hay, every year, for a period of more than 10 years, cut the grass and harvested the hay from such portions of the land as permitted it, using the land in connection with, and in the same manner as he used, other tracts claimed by him, and adjacent thereto, —there being at different periods fences or plowed strips, not entirely inclosing the whole, but of such a character as to indicate a connection between the tracts,—and paid all the taxes, and at intervals warned off trespassers, and distrained cattle grazing thereon. *Held*, that such acts constituted actual, continuous, notorious, and adverse possession.—*Lantry v. Parker*, (Neb.) 55 N. W. 962.

3. Plaintiff made a contract to convey land to his son, which was not recorded. Defendant and his grantors, claiming title under a deed from the son, held exclusive possession of the land for the statutory period. Plaintiff at various times attempted to gain possession, but his acts were trespasses; and he brought an action to recover the land, which was dismissed without prejudice. *Held*, that plaintiff had lost his title to the land.—*Mendenhall v. Price*, (Iowa,) 55 N. W. 321.

4. In a suit by a railroad company to enjoin a village from opening a street across its tracks and station yard, the sole issue was whether plaintiff had acquired the land by adverse possession. It appeared that the land had been dedicated for a street, and that, more

than 15 years before, plaintiff had entered upon it and laid its tracks. *Held*, that a finding that the use of the land by plaintiff had been such as to exclude the public from the use thereof was not equivalent to a finding that the possession had been adverse, and that consequently a judgment for defendant would be affirmed. *Mitchell, J., dissenting*.—*St. Paul & D. R. Co. v. Village of Hinckley*, (Minn.) 55 N. W. 560.

5. In ejectment, where defendant claimed under a deed from B., and relied on the adverse possession of himself and grantor, there was evidence that in 1861 B. employed a farmer to look after the land; that the farmer did substantially nothing more than drive his cattle there at times to pasture, and authorized two men to cut the grass; that the land was used by the neighborhood as a pasture, and that any one who chose cut the grass; that the supervision of the farmer ended in 1876 or 1878; and that the land remained unoccupied until 1882. *Held*, that the evidence of adverse possession was not sufficiently "clear and cogent" to allow the question to go to the jury.—*Judson v. Duffy*, (Mich.) 55 N. W. 837.

6. The words "under claim of title," as used in the statute defining adverse possession, do not require that the disseisor should think that the land belongs to him before entry, but it is sufficient if the entry be hostile to all the world, and he intend to hold the land as his own, and does hold it for the statutory period.—*Chicago & N. W. Ry. Co. v. Groh*, (Wis.) 55 N. W. 714.

Notice of adverse claim.

7. Where a mortgagor remains in possession after foreclosure and sale for 7 years, and his widow continues in possession 30 years after his death, the statute of limitations does not begin to run against the true owner's right to recover possession until notice to him of the hostile claim.—*Neilson v. Grignon*, (Wis.) 55 N. W. 890.

8. Where a mortgagor remains in possession after foreclosure and sale for 7 years, and his widow continues in possession 30 years after his death, but gives no notice of any claim of title to the true owner, who pays the taxes, such widow cannot claim title by adverse possession, though she made substantial improvements on the land while in possession by clearing, fencing, and cultivating it.—*Neilson v. Grignon*, (Wis.) 55 N. W. 890.

Possession by agent.

9. The possession of one's agent is, for the purpose of the statute of limitations, the possession of the principal.—*Lantry v. Parker*, (Neb.) 55 N. W. 962.

Right to accretion.

10. Where a disseisor enters upon land bordering upon navigable water, which he inclosed with a fence, and holds by adverse possession, title to the shore includes title to the accretion, and it is not necessary that he continually extend his fence to the water's edge.—*Chicago & N. W. Ry. Co. v. Groh*, (Wis.) 55 N. W. 714.

Province of jury.

11. In an action involving the issue as to whether defendants, and those under whom they claim, have acquired title to land by adverse possession, where there is evidence showing that the property was unoccupied during a portion of the time relied on by defendants, it is error for the court to direct a verdict in their favor, though a great preponderance of the evidence shows the possession claimed, since it is for the jury to determine, on conflicting evidence, whether there has been an actual, continued, visible, notorious, distinct, and hostile possession.—*Pendill v. Marquette County Agricultural Soc.*, (Mich.) 55 N. W. 884.

Color of title.

12. A tax deed purporting on its face to convey title to land, though void for failure to comply with the statutes, affords color of title.—*Lantry v. Parker*, (Neb.) 55 N. W. 962.

13. In ejectment by remainder-men against the grantees of the life tenant, commenced 14 months after her death, it appeared that defendants had been in possession nearly 20 years under their deed, and a tax deed obtained while the life tenant was in possession, and before her right to redeem had expired. *Held*, that defendants held possession without any color of right.—*Little v. Edwards*, (Wis.) 55 N. W. 43.

Advertisement.

Foreclosure by, see "Mortgages."

Affidavit.

Accompanying assignment, see "Assignment for Benefit of Creditors," 2, 3.
For attachment, see "Attachment," 2, 3.
For service by publication, see "Writs and Notice of Suits," 4-6.
To account for lien, see "Mechanics' Liens," 13.
To secure allowance of attorney's fee, see "Costs," 3.

After-Acquired Title.

See "Estoppel," 4, 5.

Agency.

See "Principal and Agent."

Aider by Verdict.

See "Pleading," 16-18.

Alcoholic Liquors.

See "Intoxicating Liquors."

ALIENS.

Right to acquire land.

Acts 22d Gen. Assem. c. 85, §§ 1, 2, provide that nonresident aliens are prohibited from "acquiring title or taking or holding" real estate "by descent, devise, purchase, or otherwise," except that any nonresident alien may "acquire and hold" real property to the amount of \$10,000, providing that within five years from the date of "purchase" of said property the same is placed in the actual possession of a person related to such "purchaser" within the third degree, etc. Code, § 45, provides that "words and phrases shall be construed according to the context and the approved usage of the language." *Held*, that the word "purchase" includes the acquisition of real property by devise as well as by a sale for a consideration.—*Bennett v. Hibbert*, (Iowa,) 55 N. W. 93.

Alimony.

See "Divorce," 8.

Alteration of Highway.

See "Highways," 8-12.

ALTERATION OF INSTRUMENTS.

Presumption and burden of proof.

1. Where defendant alleges that the note sued on had been altered since execution, a charge that, if it was found that the note had been altered since execution in the manner claimed, then the law presumed that such alteration was made with a fraudulent purpose, and by the payee or plaintiff, is correct. *Robinson v. Reed*, 46 Iowa, 220, followed.—*Shroeder v. Webster*, (Iowa,) 55 N. W. 569.

2. Where defendant alleges that the note sued on had been altered since execution by substituting the word "bearer" for "order," the burden is on him to show the alteration, and if this is established the burden is on plaintiff to show that the alteration was made with defendant's knowledge and consent. *Hagan v. Insurance Co.*, 46 N. W. 1114, 81 Iowa, 321, distinguished. *Robinson v. Reed*, 46 Iowa, 220, followed.—*Shroeder v. Webster*, (Iowa,) 55 N. W. 569.

3. In an action on a note by a purchaser before maturity, defendant pleaded an unauthorized alteration in the note. Plaintiff filed a general denial to the answer, and on the trial placed the note in evidence, and rested. Defendant showed that the payee had made unauthorized alterations by filling in interest blanks left by defendant. *Held*, that the burden of proving that defendant was guilty of such negligence in leaving the blanks in the note as would estop him from denying liability was upon plaintiff, and that plaintiff did not assume the burden.—*Conger v. Crabtree*, (Iowa,) 55 N. W. 335.

Amendment.

Of pleading, see "Pleading," 9.
—effect on running of statute, see "Limitation of Actions," 11.
Of statutes, see "Statutes," 4, 5.

ANIMALS.

Killing or injury by railroad, see "Railroad Companies," 18-22.

Trespassing animals.

1. Comp. St. c. 2, art. 3, § 1, making the owners of live stock liable for damage done by them on cultivated lands, makes liable also one who has stock in custody as depasturer, though the owner pay him nothing for his services.—*Lafin v. Svoboda*, (Neb.) 55 N. W. 1049.

2. Comp. St. c. 2, art. 3, § 2, gives to the owner of cultivated land a lien on trespassing stock, and section 11 provides that nothing in the law contained shall prevent the person injured from suing for damages. *Held*, that the landowner's surrender of the cattle, and consequent waiver of his lien, did not waive his action for damages.—*Lafin v. Svoboda*, (Neb.) 55 N. W. 1049.

—Killing dog.

3. The fact that a dog wanders from a highway upon uninclosed land, and is about to destroy growing plants there, does not justify killing him, although the landowner may have been subjected also to repeated annoyances of the same sort from other dogs.—*Tenhopen v. Walker*, (Mich.) 55 N. W. 657.

Answer.

See "Pleading," 8.

APPEAL.

I. JURISDICTION.

II. REQUISITES.

III. PRACTICE.

IV. REVIEW.

V. DECISION.

VI. LIABILITY ON APPEAL BOND.

See, also, "Certiorari," "New Trial."

Costs on appeal, see "Costs," 6.

Discretion of court with reference to vacating judgment, see "Judgment," 24.

Effect, restitution of premises pending, see "Forcible Entry and Detainer," 4.

Exceptions to instructions, see "Trial," 36, 37.

In criminal cases, see "Criminal Law," 22-23.

Taxation of costs, see "Costs," 4, 5.

I. JURISDICTION.

In general.

1. Neither the district court nor the supreme court can give a party a right to appeal after the time for appeal prescribed by the statutes has passed.—*Burns v. Phinney*, (Minn.) 55 N. W. 540.

2. The main defendant in garnishee proceedings cannot appeal from a judgment against the garnishee, after the latter has sued out and served a writ of certiorari in the same proceeding.—*McCormick Harvesting Mach. Co. v. Reed*, (Wis.) 55 N. W. 147.

Who may appeal.

3. One who claims no interest in the subject of controversy cannot be heard on appeal.—*Burns v. Phinney*, (Minn.) 55 N. W. 540.

Appealable judgments and orders.

4. An order requiring a bill of particulars to be made more specific is not appealable.—*Van Zandt v. S. H. Wood Produce Co.*, (Minn.) 55 N. W. 863.

II. REQUISITES.

Time of taking.

5. An appeal will be dismissed, as not having been taken within six months from the rendition of the judgment, as required by Code, § 3173, where the only showing in the abstract as to the date of the judgment is that the court, at the conclusion of the trial, sustained a motion to take the case from the jury, and enter judgment for plaintiff, and it appears that the trial took place some 10 months before the appeal was taken.—*Wambach v. Grand Lodge of Iowa, Legion of Honor*, (Iowa,) 55 N. W. 516.

6. 2 How. St. § 6784, provides that if any person aggrieved by the act of a judge of probate shall, without fault on his part, omit to claim or prosecute his appeal, the circuit court, if it shall appear that justice requires a revision of the case, may allow an appeal to be prosecuted as if taken seasonably. *Held*, that the clause "or prosecute his appeal" refers to the appeal from the determination of the judge of probate, and not to the proceedings in the probate court.—*Merriman v. Jackson Circuit Judge*, (Mich.) 55 N. W. 1021.

7. An undertaking for an appeal, delivered to a county judge at 9:30 P. M. of the tenth day after a judgment was rendered by him is within 10 days from the rendition of the judgment, as required by statute.—*McKinley v. Chapman*, (Neb.) 55 N. W. 882.

8. Under Rev. St. § 1699, providing that an appeal from an order allowing or disallowing a claim against an estate in the hands of an assignee for creditors shall be taken "within 30 days from the entry of the order," an appeal from an order dated October 15th may be perfected November 12th, though the order states that it is "as and for September 19th," when the meaning of this is merely that the order appealed from is a modification of an order of the earlier date.—*Jones v. Piening*, (Wis.) 55 N. W. 413.

Notice of appeal.

9. In an action to foreclose a trust deed, to which junior judgment creditors are made defendants, a notice of appeal by them from a decree adjudging plaintiff's lien to be valid, and superior to theirs, need not be served on their codefendants, since the determination of the question involved will not affect the interests of the latter.—*Wolfe v. Jaffray*, (Iowa,) 55 N. W. 91.

10. In proceedings by a city under Laws 1887, Act 48, to condemn land for the extension of a public street, an appeal by the city, after a verdict that the opening of such street is not a public necessity, will be dismissed if no notice of appeal is served on all of defendants, as required by section 21 of the act.—*City of Grand Rapids v. Chicago & W. M. Ry. Co.*, (Mich.) 55 N. W. 859.

III. PRACTICE.

Assignments of error.

11. An assignment of error, that "the court erred in not directing a verdict for defendant," is too general to be reviewed on appeal.—*Alberts v. Village of Vernon*, (Mich.) 55 N. W. 1022.

12. An assignment of error, in trespass, that the court erred in finding certain tax deeds, under which the appellant claimed title, void, is not sufficient to entitle him to a review of the facts upon which such conclusion of law is based.—*Hecock v. Van Dusen*, (Mich.) 55 N. W. 1024.

13. An assignment of error, "that the court erred in rendering judgment for the defendants," will not be considered on appeal.—*Hecock v. Van Dusen*, (Mich.) 55 N. W. 1024.

14. An assignment of error calling in question the correctness of the findings of a court is of no avail when it specifies no particular findings, but is applicable alike to several.—*Dallemand v. Swensen*, (Minn.) 55 N. W. 815.

15. Assignments of error that "the verdict is contrary to law," and that "the court erred in rendering judgment upon the verdict," are too general.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa,) 55 N. W. 496.

16. The statutory assignment, in a motion for a new trial, of "errors of law occurring at the trial, and duly excepted to," is sufficient to present for review the ruling of the court upon a demurrer, *ore tenus*, interposed before the introduction of any evidence.—*Riverside Coal Co. v. Holmes*, (Neb.) 55 N. W. 255.

17. The failure of a jury, in assessing the amount of recovery, to allow interest upon a sum due upon contract, is not presented for review by the assignment, in a motion for a new trial, that the verdict is not supported by sufficient evidence.—*Riverside Coal Co. v. Holmes*, (Neb.) 55 N. W. 255.

18. An assignment of error that "the court errs in overruling intervenor's motion to direct a verdict for intervenor," the motion referred to containing 12 distinct grounds, is insufficient; in not pointing out the particular grounds of error complained of.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa,) 55 N. W. 496.

19. A general assignment of error directed against a charge is in violation of Code, § 3206, and will not be considered.—*Shroeder v. Webster*, (Iowa,) 55 N. W. 569.

Record.

20. Error cannot be alleged upon, nor irregularity or misconduct of the trial court shown on appeal by, any statement of what took place at the trial contained in the finding of facts or decision filed by the trial judge.—*Prouty v. Hallowell*, (Minn.) 55 N. W. 627.

21. A defeated party to an action in the county court, who promptly orders a transcript of the proceedings to be prepared for the purpose of appealing the case, will not be denied the right of appeal because the county judge fails to prepare the transcript within 30 days after the rendition of judgment, as required by law.—*Omaha Coal, Coke & Lime Co. v. Fay*, (Neb.) 55 N. W. 211.

22. The municipal court act of Minneapolis § 13, provides that a party demanding a jury in a civil action shall be required to pay a certain jury fee, and unless the jury is demanded, and the fee paid, upon the calling of the calendar on the first day of the term at which the action is set for trial, a jury will be considered waived, and the action tried by the court. *Held*, that an appellant who assigns as error the denial of his demand for a jury trial should make it appear from the record that his demand was accompanied by payment of the jury fee into court.—*McGeagh v. Nordberg*, (Minn.) 55 N. W. 117.

23. Errors in the abstract of the record filed on appeal will not prevent the trial *de novo* of a case tried below in equity without objection, where, on the abstract being ques-

tioned, a complete transcript is filed.—*Hoyt v. McLagan*, (Iowa,) 55 N. W. 18.

24. On appeal from the commissioner's report in proceedings to settle disputed boundaries, it is proper to incorporate in the abstract the opinion of the lower court.—*Williams v. Tschantz*, (Iowa,) 55 N. W. 202.

25. An additional abstract filed by appellee because appellant's abstract omits evidence and other material matters will be stricken from the files, where such additional abstract contains merely the deductions and conclusions of counsel as to what the record is, instead of setting out the omitted portions, as required by rule 19.—*Peck v. Hutchinson*, (Iowa,) 55 N. W. 511.

26. Documents which have been set out in the petition and admitted in the answer, and which have been properly identified in the stenographer's minutes and offered in evidence, are part of the record on appeal, even though they were not filed and left with the clerk as evidence in the case.—*Novelty Iron Works v. Capital City Oatmeal Co.*, (Iowa,) 55 N. W. 518.

27. An abstract must show that it contains all the evidence, a certificate of the judge and reporter as to the contents of the transcript being insufficient.—*Thatcher v. Stickney*, (Iowa,) 55 N. W. 488.

28. Where, at the close of the trial of an action at law, the shorthand notes were filed, and the translation thereof was filed prior to the time the clerk made his abstract, it is not ground for striking all of the evidence from the abstract that the translation was not filed within six months from the rendition of judgment, and that it had not been filed on the date of the service of appellee's additional abstract; appellee never having called for a transcript of the notes, and the filing of his additional abstract being the first notice to appellant that a translation of the notes would be required. *Lowe v. Lowe*, 40 Iowa, 220, and *Harrison v. Snair*, 41 N. W. 315. 76 Iowa, 558, distinguished. *Hammond v. Wolf*, 42 N. W. 778, 78 Iowa, 228, followed.—*Slone v. Berlin*, (Iowa,) 55 N. W. 341.

29. An appeal will not be dismissed for failure to pay or secure the clerk his fees for a transcript of the testimony, although the record shows that the fees were not paid until after the date when the translation of the stenographer's notes was filed, there being no claim that the fees have not in fact been paid.—*Slone v. Berlin*, (Iowa,) 55 N. W. 341.

30. Defects in the record, which are not such as to prevent a full consideration of the case on its merits, afford no ground for refusing a trial de novo in the supreme court.—*Smith v. Watson*, (Iowa,) 55 N. W. 68.

31. Errors assigned on rulings on objections to interrogations and answers, referred to in the assignment by number only, cannot be considered on an abstract in which the questions and answers, with their numbers, are not preserved, but are condensed, and in narrative form, so that the court cannot locate the matter objected to.—*Bem v. Bem*, (S. D.) 55 N. W. 1102.

32. When refusal to suppress a deposition is assigned as error, the record must show the existence of the facts upon which the motion was based. It cannot be assumed that the facts existed because they were stated in the notice as the grounds upon which the motion would be made.—*Bem v. Bem*, (S. D.) 55 N. W. 1102.

33. Where a transcript, for the purpose of appealing a case to the district court, is filed after the statutory period has elapsed, the appellee, by filing pleadings, and contesting the case on its merits, waives his right to object to the delay, even though this action be taken after the overruling of a motion made by him to challenge the validity of the appeal.—*Omaha Coal, Coke & Lime Co. v. Fay*, (Neb.) 55 N. W. 211.

Record—Bill of exceptions.

34. Comp. Laws, § 5103, provides that, when there is an answer, the judgment roll shall consist of the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict, etc. Section 4756 defines "verdict" as including findings of fact by a judge or referee. *Held*, that the court's findings of fact are a part of the judgment roll, and need not be included in a bill of exceptions.—*Colonial & U. S. Mortg. Co. v. Bradley*, (S. D.) 55 N. W. 1108.

35. Affidavits used on the hearing of a motion in the district court cannot be considered in the supreme court unless embodied in a bill of exceptions.—*Maggard v. Van Duyn*, (Neb.) 55 N. W. 263.

36. Where in an action at law, in which the evidence was taken by a shorthand reporter, there was a skeleton bill of exceptions which properly identified every item of evidence, so that the clerk of the court was enabled to make up his transcript with certainty, the evidence is sufficiently identified and preserved to be properly in the record on appeal.—*Wright v. Everett*, (Iowa,) 55 N. W. 4.

37. Where appellee, in his amendment to appellant's abstract, says that appellant's abstract is misleading, and does not contain all the testimony, or a fair substance thereof, and that by reason of appellant's unfair abstract the two abstracts, taken together, do not contain a truthful and fair account of all the testimony, the two together will not be held to contain all the evidence, so as to dispense with a bill of exceptions.—*Barber v. Scott*, (Iowa,) 55 N. W. 502.

38. Objectionable remarks of counsel cannot be preserved for review on appeal in affidavits, a bill of exceptions being necessary.—*Ford v. Easley*, (Iowa,) 55 N. W. 336.

39. A bill of exceptions not filed within the time allowed cannot be considered.—*Barber v. Scott*, (Iowa,) 55 N. W. 502.

Hearing and rehearing.

40. Where it appears that the hearing of an appeal was on what purported to be a return from the district court, but that in fact no return had been made, the order entered on such hearing will be set aside, as the court had no jurisdiction.—*Page v. Mille Lacs Lumber Co.*, (Minn.) 55 N. W. 1119.

IV. REVIEW.

In general.

41. Where an appeal is from an order granting or continuing a temporary injunction, the only purpose of the injunction being to hold the property involved in statu quo during the pendency of the litigation, and where the title to the property in dispute is in doubt, depending on many questions of law, and probably of fact, not discussed by counsel on such preliminary appeal, the supreme court will treat the question of title as a doubtful one, and decide only whether, under such circumstances, the temporary injunction was rightly granted.—*Huron Waterworks Co. v. City of Huron*, (S. D.) 55 N. W. 750.

42. Where parties consent to try their cause below on a particular theory of what the law of the case is, though it be erroneous, they cannot complain, if the result be correct according to that theory.—*Davis v. Jacoby*, (Minn.) 55 N. W. 908.

43. Where, on appeal in an equity case, the decision of the court below is substantially correct, the mere fact that some of the findings are erroneous will not reverse the decree.—*Smith v. Knight*, (Iowa,) 55 N. W. 180.

44. Where no briefs are filed by either party on error, the court will examine the pleadings and evidence, and, if the judgment conforms thereto, it will be affirmed.—*Phoenix Ins. Co. v. Reams*, (Neb.) 55 N. W. 1074.

45. On an appeal from a judgment asserting the invalidity of a tax title the appellate

court will not be confined to a consideration of the grounds for the decision pointed out by the lower court.—*Tillotson v. Webber*, (Mich.) 55 N. W. 837.

On second appeal.

46. Where, on an appeal from an order denying a new trial, the order is affirmed, all questions that might have been raised on that appeal are *res judicata*, and will not be considered on an appeal from the judgment entered on the verdict or finding.—*Tilleney v. Wolverton*, (Minn.) 55 N. W. 822.

Objections not raised below.

47. Where defendant, in trover, is a corporation, and claimed on the trial that it had a lien on the property for lumber and machine work, and that plaintiff agreed that it might remain until the bill was paid, it cannot be heard to say, on appeal, that the detention of the property by its president was without its authority.—*Ruppel v. Adrian Furniture Manufg Co.*, (Mich.) 55 N. W. 995.

48. Where the averments of an answer are met in the reply by matter of avoidance conjointly with a denial of such averments, a special finding of the jury, sustaining such denial, will not be set aside on the ground of the admission in the reply, when no objection was made in the trial court.—*Sun Fire Office of London v. Ayerst*, (Neb.) 55 N. W. 635.

49. Where the record on appeal shows that certain evidence offered on the trial was objected to, but no ruling appears to have been made on it, it will be presumed that the objection was waived.—*Shroeder v. Webster*, (Iowa,) 55 N. W. 569.

50. Where the referee omits to make any finding on one or more of the issues presented by the pleadings in a case before him, and the parties suffer the report to be made the basis of judgment by the court, without any suggestion to the court, or objection, that all the issues are not reported on, and judgment is entered which is consistent with, and supported by, the findings returned, such judgment will not be reversed on account of such neglected issues unless appellant shows that evidence was offered on one or more of such issues, and that such evidence would have supported a finding which would countervail the findings actually made, and thus have required a different judgment to be entered.—*Merchants' Nat. Bank v. McKinney*, (S. D.) 55 N. W. 929.

51. An objection to a petition for alleged insufficiency, not presented by any pleading nor by motion in arrest of judgment, will not be considered on appeal.—*Peregoy v. Wheeler*, (Iowa,) 55 N. W. 462.

52. Where a person in whose favor an excessive verdict was rendered files a remitter of the excess, the court, on appeal, will not reverse a judgment entered for the full amount of the verdict, unless it appears that the lower court, with knowledge of the remitter, has refused to reduce the judgment.—*J. P. Ketcham & Bro. v. Larkin*, (Iowa,) 55 N. W. 472.

53. In a proceeding to establish a claim against a decedent's estate, an objection that the claim was not filed and proved within the required time (Code, § 2421) cannot be raised for the first time on appeal.—*Stevens v. Witter*, (Iowa,) 55 N. W. 535.

54. In an action on a note, where the defense is an estoppel, and the jury are instructed, without objection, that the burden was on defendant to establish it by a preponderance of evidence, the verdict for defendant will not be disturbed on a theory, raised for the first time on appeal, that the estoppel must be made out by conclusive proof, and, the evidence being conflicting, the court, on appeal, will examine it to see if, with or without conflict, it creates an estoppel.—*Jandt v. Bronk*, (Iowa,) 55 N. W. 347.

Necessity for motion for new trial.

55. In order to review the proceedings in the trial of an equity case by a petition in

error, a motion for a new trial must be filed, as in an action at law.—*Gray v. Disbrow*, (Neb.) 55 N. W. 255.

Discretion of trial court.

56. The granting or dissolving of a temporary injunction pendente lite restraining a railroad company from constructing its road over certain land is in the discretion of the court.—*Meyers v. Duluth Transfer Ry. Co.*, (Minn.) 55 N. W. 140.

Presumptions.

57. A writ issued by a judge within his circuit, concluding as follows: "Witness the Hon. William Gardner, Judge of the Circuit Court. In open court, at * * *. [Signed] William Gardner, Judge,"—will be deemed the act of the court, and not of the judge.—*Evans v. Bradley*, (S. D.) 55 N. W. 721.

58. An order made by a judge within his circuit, which he is authorized to make as a court or judge, will be presumed to be made by the court, unless it clearly appears from the order that it was intended to be the order of the judge, and not that of the court.—*Evans v. Bradley*, (S. D.) 55 N. W. 721.

59. When the facts stated in an alternative writ of mandamus are sufficient to authorize the court to issue a peremptory writ, the supreme court, in the absence of proof to the contrary in the record, will presume that the facts stated in such alternative writ were proven to the satisfaction of the court, and that the peremptory writ was properly issued.—*Evans v. Bradley*, (S. D.) 55 N. W. 721.

60. Where no exception is taken to the failure of the court to rule on a motion to dismiss the case and strike out testimony, and it does not appear that the matters were called to the attention of the court afterwards, and before the decision of the case, it will be presumed that the motions were waived.—*Payne v. Dicus*, (Iowa,) 55 N. W. 483.

61. Exhibits which the record shows were offered in evidence will not be presumed to have been held from the consideration of the jury, in support of a contention that the verdict was unsupported by the evidence.—*Dawson v. Williams*, (Neb.) 55 N. W. 284.

Sufficiency of evidence.

62. On a trial to the court, where there was a conflict in the evidence, a judgment for plaintiff should not be disturbed.—*Smalley v. Fullerton*, (Iowa,) 55 N. W. 320.

63. The contention that a verdict is without support in the evidence cannot be maintained when the explicit and consistent testimony of one witness sustains it, even though a number of witnesses may as explicitly testify to the contrary.—*Taylor v. Jones*, (N. D.) 55 N. W. 593.

64. Where, in an action on a contract to haul cedar logs at a fixed price "per cord," defendant attempts to prove that, by a particular custom, a "cord" of cedar logs is 256 cubic feet, but the evidence does not conclusively show such custom, a verdict that the term "cord" has its ordinary meaning will not be disturbed.—*McMannus v. Loudon*, (Minn.) 55 N. W. 139.

65. Where, in an action for money had and received, defendant sets up an equitable counterclaim, and the evidence preponderates in favor of his contention, a decree granting him affirmative relief will not be disturbed.—*Ruppin v. Lee*, (Iowa,) 55 N. W. 338.

66. Where from an examination of the evidence it is apparent that the verdict is wrong, it will be set aside.—*Wood River Bank v. Dodge*, (Neb.) 55 N. W. 234.

67. Where a bill of exceptions discloses that important evidence has been therefrom omitted, the settlement and authentication thereof will not control, though the recitations therein are to the contrary, and the verdict will not be disturbed as contrary to the evidence.—*Dawson v. Williams*, (Neb.) 55 N. W. 284.

68. To authorize the interference of the supreme court in the matter of damages, it

should appear that they are so excessive as to create the belief that the jury were misled by passion, prejudice, or ignorance.—*Dugan v. Chicago, St. P., M. & O. Ry. Co., (Wis.)* 55 N. W. 894.

69. Where, in replevin, the burden of proof is upon the plaintiff to establish the bona fides of a chattel mortgage under which he claims, a verdict in favor of defendant will not be set aside on the ground that the verdict is not sustained by the evidence, unless the evidence offered by plaintiff is clear and convincing.—*Fitzgerald v. Meyer, (Neb.)* 55 N. W. 296.

Harmless error.

70. In an action for malpractice, the reading from an old edition of a medical work to show the proper practice is harmless error, where the evidence fully shows the modern and better practice.—*Peck v. Hutchinson, (Iowa.)* 55 N. W. 511.

71. In an action for services rendered in surveying, where defendant admitted that he employed plaintiff, but alleged that he did it for a certain company, he was asked whether he gave plaintiff notice that he was an agent of the company. *Held*, that the error in sustaining an objection to such question was harmless, as plaintiff had already testified that when he employed plaintiff he told him that the work was to be done on the land of the company, and that he, defendant, was not personally liable therefor.—*Seyring v. Eschweiler, (Wis.)* 55 N. W. 164.

72. In an action to recover a balance on a note signed by defendant as surety, the defense was that the time of payment had been extended by an agreement between plaintiff and the maker without defendant's consent. *Held* that, where plaintiff testified positively that he had never given any extension, the admission of testimony by him that he had never given such an extension of time on the note "as would put it out of his power to sue thereon at any time," though erroneous as being a conclusion of law, was harmless error.—*Butterfield v. Graves, (Wis.)* 55 N. W. 171.

73. In an action to recover the price of four great gross of papers of pins, defendant, who was a small retail merchant, set up fraud, and alleged that his order was for only four gross. He was permitted to testify without objection that a merchant doing his business would not sell four great gross of papers of pins in ten years. *Held*, that it was not prejudicial error to permit defendant to further testify that it would take him two or three years to sell four gross, since, even if not relevant, substantially the same evidence had been already admitted without objection.—*Alfred Shrimpton & Sons v. Philbrick, (Minn.)* 55 N. W. 551.

74. Where, in an action for the price of a wheel, defendant counterclaims for damages resulting from an alleged defect in the wheel, the exclusion of evidence of such damage is harmless, where the jury found for plaintiff.—*Valley Iron-Works Manuf'g Co. v. Grand Rapids Flouring-Mill Co., (Wis.)* 55 N. W. 693.

75. The exclusion of competent evidence offered by plaintiff is not without prejudice because he failed to make a case, when, if such evidence had been admitted, with possibly other evidence depending thereon, plaintiff might have stated a case entitling him to go to the jury.—*McNamara v. Corporation of New Melleray, (Iowa.)* 55 N. W. 322.

76. A judgment will not be set aside because an expert witness was permitted to answer a hypothetical question assuming a fact unsupported by the evidence, when such fact was the only hypothesis of the question, was not combined with others based upon evidence, and the answer could not mislead the jury.—*Hewitt v. Eisenbart, (Neb.)* 55 N. W. 252.

77. After the submission of an equitable action for final determination, there is no prejudicial error in refusing an amendment of the petition to meet the alleged proofs, where, upon a full consideration of all the evidence, it is

found that the relief prayed must in any event be denied.—*Horbach v. Marsh, (Neb.)* 55 N. W. 286.

78. An error of the court in admitting evidence that conclusively appears to have been innoxious, and could have worked no prejudice to the party objecting, is not ground for reversal.—*State v. McGahey, (N. D.)* 55 N. W. 753.

79. Where it appears that on the uncontroverted facts plaintiff cannot recover in the action, a judgment for defendants will not be disturbed on appeal, even when the record shows errors in procedure.—*Prairie School Tp. v. Haseleu, (N. D.)* 55 N. W. 938.

80. Error cannot be predicated on a failure to make a finding on any issue, when the record shows that such finding, if made, must have been against him.—*Merchants' Nat. Bank v. McKinney, (S. D.)* 55 N. W. 929.

81. Where, on undisputed facts, no other verdict than the one returned could have been properly rendered, the supreme court will not examine an alleged error in allowing the jury to separate temporarily without being admonished by the trial court not to converse among themselves, or with others, upon the subject of the trial, as it is evident that no prejudice resulted therefrom.—*Kirby v. Western Union Tel. Co., (S. D.)* 55 N. W. 759.

82. Error in sustaining a demurrer to a counterclaim is harmless where the alleged facts on which it is based are negated by the findings of fact.—*Wendlandt v. Cavanaugh, (Wis.)* 55 N. W. 408.

83. A cause will not be reversed for failure to award nominal damages.—*Ellithorpe v. Reidessell, (Iowa.)* 55 N. W. 313.

84. Where evidence is improperly excluded, and afterwards admitted, the error in excluding it is harmless.—*Smalley v. Fullerton, (Iowa.)* 55 N. W. 320.

V. DECISION.

Dismissal.

85. An application to dismiss a writ of error for want of prosecution will be denied, where neither party has noticed the case for hearing.—*Leand v. Township of Blair, (Mich.)* 55 N. W. 444.

86. This right is not taken away by section 6782, as amended by Act 174, Laws 1887, providing that on appeal from the probate court, if the party fails to file a certified copy of the proceedings in the circuit court within 30 days, the appeal shall be of no effect, but may be reinstated on application made within the first 10 days of the next term.—*Merriman v. Jackson Circuit Judge, (Mich.)* 55 N. W. 1021.

87. A party appealing from a judgment of a justice of the peace to the district court may dismiss his appeal, without the consent of the appellee, at any time before the cause is submitted to the court or jury.—*Berggren v. Railroad Co.,* 37 N. W. 470, 23 Neb. 620, and *Robbins v. Railroad Co.,* 42 N. W. 905, 27 Neb. 73, distinguished.—*Eden Musee Co. v. Yohe, (Neb.)* 55 N. W. 868.

88. An appeal from the county court to the district court should be dismissed, on motion, when the transcript was not filed within 30 days from the date of the judgment, and no reason is shown for the delay.—*Maggard v. Van Duyn, (Neb.)* 55 N. W. 263.

89. An appeal will be dismissed where appellee files an additional abstract, in which he denies that the trial judge certified the evidence as set out in appellant's abstract, denies that any certificate whatever in reference thereto was filed in the case, and denies that both abstracts contain all the evidence, and appellant fails, not only to meet this denial, but to file any argument.—*Cook v. Thuman, (Iowa.)* 55 N. W. 516.

Mandate and proceedings below.

90. Where, on a prior appeal of an action to rescind a sale of land, the evidence showed

an absence of title in defendant, as to part of such lots, at the time he conveyed, and there was an entire absence of evidence as to the title to the other lots, the decision of the court, on such appeal, that on such facts plaintiff was entitled to recover the entire consideration, and interest, is not res judicata on a new trial, wherein the title to part of such lots appears to be vested in plaintiff.—*McLennan v. Prentice*, (Wis.) 55 N. W. 764.

91. A decision of the supreme court reversing an order of the district court, on the ground that the form of relief granted was not warranted, does not preclude a renewal of the application, upon the same facts and record, for the appropriate relief.—*Gerdtsen v. Cockrell*, (Minn.) 55 N. W. 58.

92. The district court cannot, where a cause is remanded by the supreme court for decree merely in accordance with opinion, entertain a motion to correct a computation by the supreme court of the amount due.—*Lombard v. Gregory*, (Iowa.) 55 N. W. 471.

93. Under *Sanb. & B. Ann. St. § 3072*, providing that where the supreme court orders a new trial the record shall be transmitted to the lower court, and proceedings had thereon, within a year of the order, and section 3072a, providing that it shall be plaintiff's duty, when a judgment in his favor is reversed on defendant's appeal, to pay the costs and procure the cause to be remitted to the trial court, and bring it to trial within a year, plaintiff's duty is waived where, within the year, defendant voluntarily pays the costs, procures the record to be transmitted to the lower court, and there takes proceedings for reference and trial of the cause.—*Wheratt v. Ellis*, (Wis.) 55 N. W. 407.

VI. LIABILITY ON APPEAL BOND

In general.

94. After judgment in proceedings to enforce a logging lien, defendant obtained an order to extend the time for settlement of a bill of exceptions on filing a bond according to the statute. Defendant filed a bond providing that, if he "shall prosecute his said writ of error to effect, and shall pay," etc. The bill of exceptions was filed, but no further proceedings were taken. *Held*, that the bond was enforceable as a common-law bond, it being, in effect, a contract to prosecute the writ of error.—*Healey v. Newton*, (Mich.) 55 N. W. 666.

95. Where a bond on appeal recites a judgment against the principal obligor, the recital is conclusive between the parties.—*Healey v. Newton*, (Mich.) 55 N. W. 666.

APPEARANCE.

General appearance.

1. When a party who has not been properly served with process appears, and asks to have a decree against him set aside because the court had no jurisdiction of his person, and that such decree was procured by fraud and deceit, and was without evidence to support it, such appearance is general, and waives all defects in the service of process.—*Yorke v. Yorke*, (N. D.) 55 N. W. 1093.

Effect as waiver of objections.

2. The notice required by Code, § 2975, to be served on defendant before trial of issues raised by the garnishment, is waived by appearance of defendant.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa.) 55 N. W. 496.

3. A general appearance will not validate a decree otherwise invalid for fraud in its procurement.—*Yorke v. Yorke*, (N. D.) 55 N. W. 1095.

4. Where an unauthorized appeal to the district court was taken from the judgment of a justice of the peace, and the parties appeared in the district court, submitted to its jurisdiction, amended their pleadings, and consented to a trial of the case on a day fixed,

the district court acquired jurisdiction to hear and determine the case on its merits, notwithstanding the irregular mode in which it was brought into that court.—*Wrolsen v. Anderson*, (Minn.) 55 N. W. 597; *Kneis v. Green*, *Id.* 598.

Application.

For insurance, see "Insurance," 4.

Appointment.

Of receiver, see "Receivers," 1, 2.

Appropriation.

By legislature, see "States and State Officers," 15, 16.

ARBITRATION AND AWARD.

Submission—Validity of agreement.

1. An agreement for a statutory arbitration is of no effect where the names of the arbitrators are not in it when acknowledged.—*Northwestern Guaranty Loan Co. v. Channell*, (Minn.) 55 N. W. 121.

2. A provision in a submission to arbitration that it should not operate as a discontinuance of the actions or the garnishments auxiliary thereto, but should stay proceedings until their discontinuance, to follow on the award therein made, was valid; and, the award not having been paid, it was proper to move for trial and judgment.—*Sohns v. Sloteman*, (Wis.) 55 N. W. 158.

Argument of Counsel.

See "Trial," 17-20.

Of prosecuting attorney, see "Criminal Law," 8-10.

ARREST.

In criminal case—Without warrant.

In an action for false imprisonment it appeared that a newspaper article stated that plaintiff and some companions boarded a street car, when drunk, and refused to pay their fare; that the conductor and motorman attempted to put them off, when a fight ensued, and a lady passenger became frightened, jumped from the car, and was injured. *Held*, that there was nothing in the article to justify an arrest without a warrant on the ground that a felony had been committed under *How. St. §§ 9274, 9275*, which make it criminal willfully and maliciously by act or intimidation to impede or obstruct the regular operation of a railroad.—*White v. McQueen*, (Mich.) 55 N. W. 843.

ASSAULT AND BATTERY.

With intent to commit manslaughter, see "Homicide," 3.

— to rape, see "Rape," 15, 16.

Civil action—Evidence.

1. In an action for damages for an assault evidence is immaterial that plaintiff appeared in justice's court, on a criminal prosecution against defendant, with a large bandage on his head, with intent to deceive as to the extent of his injuries.—*Kaline v. Stover*, (Iowa.) 55 N. W. 346.

— Instructions.

2. An instruction that the burden of proof is on plaintiff to show by a preponderance that defendant assaulted plaintiff "substantially as claimed in his petition" is erroneous, since it is sufficient if he showed a good cause of action on any of the grounds stated therein.—*Kaline v. Stover*, (Iowa.) 55 N. W. 346.

3. An instruction that it was plaintiff's theory that defendant, without cause, first

struck plaintiff with a hatchet, and afterwards with his fist with brass knuckles on, and pounded plaintiff when he was down; that it was defendant's theory that plaintiff came at him as if to strike him, and that defendant struck him in self-defense; and that the jury must determine from all the facts which theory is correct,—is erroneous, as tending to require proof of all matter alleged to entitle plaintiff to a recovery.—*Kaline v. Stover*, (Iowa,) 55 N. W. 346.

Assessment.

For public improvements, see "Municipal Corporations," 37-42.
Of taxes, see "Taxation," 4.

Assets.

See "Executors and Administrators," 1.

ASSIGNMENT.

Of mortgage, see "Gaming;" "Mortgages," 4.
Of soldier's additional homestead, see "Public Lands," 1.
Waiver of rights thereunder, see "Election of Remedies."

What property passes.

1. Where a partnership is dissolved, and the partners form a corporation, an assignment by the firm to the corporation of all its stock in trade, accounts, and all contracts entered into by the firm for the purchase and delivery of goods, transfers to the corporation a contract for the purchase of goods, not specifically mentioned in the bill of sale.—*Shadbolt & Boyd Iron Co. v. Topliff*, (Wis.) 55 N. W. 854.

Validity.

2. Where a tax-sale certificate is taken by an agent in his own name, to protect the interest of his principal, a mortgagee of the land, and he afterwards delivers the same to a grantee of the mortgagor with his blank indorsement, to have it surrendered and canceled, and without his knowledge an assignment is written over his signature, purporting to transfer the same to a third party, such assignment is void.—*Beardsley v. Day*, (Minn.) 55 N. W. 46.

Necessity of recording.

3. Code, § 1923, providing that no sale or mortgage of personal property, where the mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is recorded in the county where the holder of the property resides, does not apply to "accounts."—*Lawrence v. McKenzie*, (Iowa,) 55 N. W. 505.

Action by assignee.

4. While an assignment of a part interest in a demand or obligation may be made, and the courts will protect the equitable interest of the assignee, a separate and independent action cannot be maintained by him to recover his share of the debt, where the debtor refuses to consent to the assignment, since an entire demand cannot be made the subject of several different actions; but there must be but one suit, in which all persons interested are made parties plaintiff or defendant.—*Dean v. St. Paul & D. R. Co.*, (Minn.) 55 N. W. 628.

5. Where one, in his own name, and upon his own responsibility, enters into a contract to deliver goods, and afterwards arranges with a third person to deliver the same, such third person cannot maintain an action under the contract for the price of the goods.—*Peirce v. Closterhouse*, (Mich.) 55 N. W. 663.

6. Where defendants sold certain standing timber to one G., who agreed to transfer the contract to plaintiff on payment of the advances made by G., plaintiff, on transfer of the

contract, had a right of action against defendants, on the breach of the contract.—*Larson v. Cook*, (Wis.) 55 N. W. 703.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

What constitutes.

1. In an action to declare void a chattel mortgage and bill of sale, it appeared that defendant K., a merchant, executed to defendant L., to secure a certain indebtedness, a mortgage covering his present stock, and all that might thereafter be added. The mortgage was not recorded for a year. Between the execution and filing thereof, plaintiffs, having no knowledge of the mortgage, sold K. goods on credit, and, about the time the mortgage was filed, recovered judgments for the unpaid balance. On the day after the mortgage was filed, K. and some of his creditors, including L., met, and it was decided that K. should make a general assignment. On the following day, K. executed to L., who knew of K.'s insolvency, a bill of sale covering the goods embraced in the mortgage, and on the same day executed a general assignment. *Held*, that the two instruments constituted one transaction,—an assignment for creditors, with a preference,—and therefore the bill of sale was void.—*Falker v. Linehan*, (Iowa,) 55 N. W. 503.

Validity—Inventory and affidavit.

2. The verified inventory required to be made by an assignor for benefit of creditors does not necessarily show on its face that it does not contain all the creditors of the assignor because it shows certain of its lands are subject to mortgages, while the holders of such mortgages do not appear as creditors, as the assignor may have bought such lands subject to the mortgages, without assuming to pay them.—*Wright v. Lee*, (S. D.) 55 N. W. 931.

3. In a general assignment by a corporation, verification of the inventory by the secretary is a sufficient compliance with Comp. Laws, § 4663, providing that every person executing a general assignment must make an affidavit of the truth of the inventory, though the board of directors had authorized the president and secretary to execute the assignment.—*Wright v. Lee*, (S. D.) 55 N. W. 931.

Preferences.

4. The fact that, on the day of an assignment for the benefit of creditors, judgments were confessed against the assignor on instruments executed by him from two months to four years before, and that on that day entry was made on the books of a corporation of assignments of stock previously made to creditors, does not constitute the entering of judgment and transferring of stock part of the general assignment, and therefore render it void, as an attempt to make a general assignment, with preferences, in violation of Code, § 2115.—*Le Moyne v. Braden*, (Iowa,) 55 N. W. 14.

Actions by assignee.

5. Under Laws 1882, c. 170, Laws 1883, c. 349, and Laws 1885, c. 292, relating to assignments for the benefit of creditors, which give the assignee the right to maintain actions to avoid transfers fraudulent as to creditors, the right of the assignee is exclusive, and a creditor cannot sue the debtor and garnish a mortgagee of chattels who collusively withheld the mortgage from record in order to sustain the mortgagor's credit.—*Valley Lumber Co. v. Hogan*, (Wis.) 55 N. W. 415.

6. The fact that the prosecution of a cause of action would not benefit all the creditors, but only a part, is immaterial.—*Valley Lumber Co. v. Hogan*, (Wis.) 55 N. W. 415.

Discharge—Effect.

7. A creditor who has appeared and objected to the discharge, as against his claim, of

an assignor for the benefit of creditors, and after the granting of such discharge has accepted a dividend, and neglected to appeal, cannot maintain an action for the balance of his claim, on the ground that he was not bound by the discharge, since he was a nonresident creditor, and the statute purporting to make the discharge effective against nonresident creditors was not retroactive, and, if retroactive, was unconstitutional, as the judgment of discharge was *res judicata* as to these questions.—*Osborn v. Dobrinz*, (Wis.) 55 N. W. 403.

Assignment of Errors.

See "Appeal," 11-19.

Associations.

See "Conspiracy;" "Corporations;" "Religious Societies."

ASSUMPSIT.

When lies.

1. Where a garnishee discloses that he, as maker of a note, owes defendant, as payee thereof, and pays the money to the sheriff, by whom it is remitted to plaintiff, it cannot be recovered from the latter by an assignee of the note as money had and received.—*Corey v. Webber*, (Mich.) 55 N. W. 982.

Pleading and proof.

2. In an action to recover the amount paid for a contract appointing plaintiff general agent in certain counties, because of misrepresentations, the declaration counted specially on the contract, naming the counties covered, and generally on the common counts. The proofs showed that the contract had, by subsequent agreement, been changed by substituting other counties. *Held*, that the contract, thus changed, was properly admitted in evidence, (1) because the change was immaterial, and (2) because it was admissible under the common counts.—*Angell v. Loomis*, (Mich.) 55 N. W. 1008.

3. Under Code Civil Proc. § 134, allegations of value in a pleading are not to be taken as true because of a failure to deny them; and in all cases founded upon a quantum meruit, where the value of the services is not expressly admitted, the question of value is in issue, and must be proved.—*Campbell v. Brosius*, (Neb.) 55 N. W. 21b.

Evidence.

4. In an action for money loaned, it was not error to admit evidence of the value of the support of plaintiff's mother, for his share of which defendant claimed plaintiff had paid the money, where a set-off, of which notice was given, was practically abandoned, and defendant did not claim an agreement that plaintiff would pay any particular sum, but merely his share.—*Hough v. Comstock*, (Mich.) 55 N. W. 1011.

Sufficiency.

5. In *assumpsit* it appeared that defendants were sureties for B. on a contractor's bond conditioned to pay all indebtedness for a city improvement; that B., becoming in arrears, sought assistance of plaintiff on giving him as security an order on the city for estimates as they should become due; that defendants induced the city not to accept such order, and plaintiff declined to furnish the money to B.; that the parties then met at a bank, and, by indorsing B.'s note to him for \$500, plaintiff procured the money of the bank, and gave it to defendants to pay the laborers to whom B. was indebted. Plaintiff and B. testified that the money was procured on plaintiff's credit alone, and that defendants promised plaintiff that if he would get the money, and give it to them, they would repay him. Defendants denied making any promise whatever to plaintiff. *Held*, that

the testimony was sufficient to support the finding that defendants agreed to repay the \$500 to plaintiff.—*Sweet v. Colleton*, (Mich.) 55 N. W. 984.

6. In an action for money loaned, defendant, plaintiff's sister-in-law, testified that his mother spent some three years at her home; that he, at different times, expressed the intention of paying his share towards his mother's support; and that the sum claimed was voluntarily paid her, for such purpose. *Held*, that the question as to whether the money claimed by plaintiff was voluntarily paid on his mother's board was for the jury.—*Hough v. Comstock*, (Mich.) 55 N. W. 1011.

7. In an action for repairs made in 1889 on an artesian well dug by plaintiff for defendant in 1886, where plaintiff proves the performance of the labor and that the materials were furnished as alleged, in 1889, at defendant's request, he is entitled to recover unless defendant establishes by a preponderance of evidence that the work was done under the original contract.—*Gates v. Banholzer*, (Minn.) 55 N. W. 597.

8. In an action to recover an amount due for boarding employes, against a corporation which had been operating a mine in its own name, but on a certain date turned the work over to a contractor, it appeared that by arrangement the board bills had been reported to defendant, who deducted the amounts from the employes' wages, and credited same to plaintiff, that plaintiff had no notice of the change in the employment, and that such arrangement continued after such change. *Held*, that plaintiff should recover.—*Tousignant v. Shafer Iron Co.*, (Mich.) 55 N. W. 681.

Assumption of Risks.

See "Master and Servant," 15.

ATTACHMENT.

See, also, "Execution;" "Garnishment."

Unlawful seizure, liability of officer, see "Sheriffs and Constables."

When authorized.

1. Plaintiff agreed to indorse for defendant, who was engaged in business, certain notes then indorsed by B., which were represented to amount to about \$1,000; to indorse renewals thereof, and other notes; and to guaranty bills thereafter purchased by her. *Held* that, though plaintiff indorsed notes which had been indorsed by B. to the amount of \$1,800, being ignorant of the fact that there were others of them, amounting to \$1,200, which defendant had secretly paid from the business, the transaction was tainted with fraud, and plaintiff was entitled to an attachment for all sums for which he had become liable; they having, by the terms of the agreement, become due and payable by defendant to plaintiff.—*May v. Newman*, (Mich.) 55 N. W. 364.

Affidavit.

2. An affidavit for attachment which states that defendant is a nonresident, on information, as plaintiff believes, may be amended to make such averment positive, by leave of court, even after motion to quash the proceedings for that defect.—*Clarke Banking Co. v. Wright*, (Neb.) 55 N. W. 1000.

3. An affidavit of attachment signed by plaintiff's agent, which, in describing the nature of the claim, inadvertently stated that "plaintiff" makes oath, instead of using the word "affiant," is not defective.—*Whipple v. Hill*, (Neb.) 55 N. W. 227.

Issuance of writ—On legal holiday.

4. Comp. St. c. 19, § 33, providing that "no court can be opened nor any judicial business be transacted on Sunday, or any legal holiday," does not prohibit a county judge from issuing,

on a legal holiday, an order of attachment on a debt past due, since that is a ministerial, and not a judicial, act.—*Whipple v. Hill*, (Neb.) 55 N. W. 227.

Bond for release of property.

5. A landlord brought attachment for rent against J. and E. J. was personally liable as lessee, and E.'s goods, which had been purchased from J., were seized. To release his goods, E. executed a bond conditioned to deliver the property or its value "to satisfy any judgment that may be rendered against said defendant in said suit." On the trial E.'s goods were found to be liable for the rent, but personal judgment was entered against J. alone, directing that a "special execution issue therefor." *Held*, that the bond was valid as a common-law bond, and E. was liable thereon for the amount of the judgment, as, so far as it directed special execution to issue, it is a judgment against E. within the meaning of the bond.—*Painter v. Gibson*, (Iowa,) 55 N. W. 84.

Lien.

6. Code, § 2628, provides that, during the pendency of an action affecting real estate, no interest can be acquired by third persons in the subject-matter, as against plaintiff's title. *Held*, that the filing of a bill in equity to subject certain land to the payment of a claim pending for judgment gives a lien on the land so affected, superior to that created by an attachment levied after the filing of the equity bill.—*Keith v. Losier*, (Iowa,) 55 N. W. 952.

7. Defendant, residing in J. county, gave plaintiff two notes. One was payable in H. county, where plaintiff resided. The other note did not state the place of payment. Plaintiff commenced an action on the notes, aided by attachment, in H. county. *Held*, that under Code, § 2580, providing that, if defendant is a resident of the state, an action, aided by attachment, must be brought in the county of his residence, or that in which the contract was to be performed, and section 2589, providing that, if a suit be brought in the wrong county, "it may there be prosecuted to a determination, unless the defendant, before answer, demand a change of place of trial," as to the action on the note not stating the place of payment, defendant not having objected to the jurisdiction, a subsequent attaching creditor had no right to do so, and plaintiff's attachment created the superior lien.—*Payne v. Dicus*, (Iowa,) 55 N. W. 483.

Motion to vacate.

8. Under Comp. Laws, § 5011, providing that in all cases defendant may move to discharge the attachment, a defendant may unite in the same motion, as grounds for the discharge, that the affidavit is insufficient in either form or substance, and that it is untrue in fact.—*Wilcox v. Smith*, (S. D.) 55 N. W. 1107.

9. When, on motion to discharge, under Comp. Laws, § 5011, defendant duly traverses all the statements of the plaintiff's affidavit, plaintiff must support such statements by further evidence. Otherwise the motion must be granted.—*Wilcox v. Smith*, (S. D.) 55 N. W. 1107.

10. Where a motion to discharge an attachment, on the ground that the facts stated in the affidavit are untrue, is heard upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence.—*Whipple v. Hill*, (Neb.) 55 N. W. 227.

11. On attachment by a creditor against a debtor it appeared that the debtor had consented to a sale of all his property under the guise of chattel mortgages given to a few of his largest creditors. *Held*, that it was error to dissolve the attachment on the application of defendant, whose interest in the property was limited to such residue as might remain after the mortgages were satisfied.—*McCord-Brady Co. v. Krause*, (Neb.) 55 N. W. 215.

ATTORNEY AND CLIENT.

Argument of counsel, see "Criminal Law," 8-10; "Trial," 17-20.

Authority of attorney to receive service, see "Judgment," 26.

City attorney, see "Municipal Corporations," 4.

Privileged communications, see "Witness," 2.

Authority of attorney.

1. The mere employment of an attorney to foreclose a mortgage does not give him authority to receive from the sheriff money paid after foreclosure to redeem the property from a sale to the mortgagee.—*Williams v. Grundysen*, (Minn.) 55 N. W. 557.

2. The foreclosure of a mortgage under a power of sale is not "a special proceeding," within the meaning of Gen. St. 1878, c. 88, § 9, providing that an attorney has authority to receive money claimed by his client in an action or special proceeding, during the pendency thereof, or within two years after judgment.—*Williams v. Grundysen*, (Minn.) 55 N. W. 557.

3. In an action by a sheriff on a bond given to release goods taken under attachment for rent, it appeared that the bond was assigned to plaintiff by the attorney for the plaintiff in attachment, who claimed the bond to be insufficient, and that the sheriff was liable for releasing the attached property; that the sheriff paid the landlord's attorney the amount of his claim, receiving the assignment of the judgment in return. *Held*, that, in the absence of proof to the contrary, Y.'s attorney is presumed to have had authority to make the assignment.—*Painter v. Gibson*, (Iowa,) 55 N. W. 84.

4. A controversy arose between defendant and M., execution creditors, as to the legality and priority of a levy of M.'s execution on shares of stock. Defendant testified that he told his attorney that if a proposition was made by M.'s attorney which the former thought was reasonable, "if he would submit it to me. I would state whether I would accept it or not." His attorney testified with regard to the agreement that he told M.'s attorney that if it was satisfactory to the latter, witness would submit it to defendant, and if he got his authority he would sign it. *Held*, that the question as to whether or not defendant's attorney had authority to make the compromise agreement was for the jury.—*Mygatt v. Tarbell*, (Wis.) 55 N. W. 1031.

Compensation—Lien.

5. Comp. Laws, § 470, subds. 3, 4, provide that an attorney shall have a lien on the money due his client, in the hands of the adverse party, or attorney for such party, in an action in which the attorney claiming the lien was employed. *Held*, that the lien extends to the judgment rendered in the action to recover such moneys, to the undertaking to pay such judgment, given by the defendant on appeal, and also to the cause of action on such undertaking against the surety thereon.—*Clark v. Sullivan*, (N. D.) 55 N. W. 733.

6. Under Comp. Laws, § 470, subd. 4, providing that after judgment the lien of the attorney for the judgment creditor may be "made effective against the judgment debtor" by entering notice in the docket opposite the judgment entry, the entry of notice is not notice to the surety on the judgment debtor's appeal bond.—*Clark v. Sullivan*, (N. D.) 55 N. W. 733.

7. When a surety on an undertaking on appeal, after the attorney for respondent had secured a lien on the judgment, but before the surety had notice thereof, purchased a judgment against the client, the surety's right, in an action by respondent on the undertaking, to set off such judgment is absolute, and is unaffected by the attorney's lien.—*Clark v. Sullivan*, (N. D.) 55 N. W. 733.

Autrefois Acquit and Convict.

See "Criminal Law," 2.

Bailment.

See "Banks and Banking;" "Carriers;"

"Pledge."

Sale by bailee, see "Sale," 25.

Ballots.

See "Elections and Voters," 6-9.

Bankruptcy.

See "Assignment for Benefit of Creditors."

BANKS AND BANKING.

Checks, evidence of custom relating to, see "Custom and Usage," 1.

Powers of banking corporation.

1. A banking corporation organized under the laws of the state of Nebraska has no power to become a stockholder in an insurance company.—*Bank of Commerce v. Hart*, (Neb.) 55 N. W. 631.

Collections—Negligence.

2. Saturday, May 31st, about the close of banking hours, M. indorsed in blank, and deposited in a bank of Wymore, Neb., checks drawn to his order by B. on a bank in Courtland, Neb. Wymore and Courtland are 27 miles apart, but connected by telegraph, telephone, and railroad; and a mail left Wymore at 6 P. M. daily, arriving at Courtland at 9 P. M. The Wymore bank made no inquiry of the Courtland bank whether the checks were good, nor did it advise the latter that it held the checks, but mailed them to a bank in St. Joseph, Mo., which bank sent them to a bank in Omaha, Neb., and this bank forwarded them to the bank in Courtland, at which they arrived June 5th, and were protested for nonpayment. *Held*, that the Wymore bank did not present them to the Courtland bank in a reasonable time, and that the indorser was discharged.—*First Nat. Bank v. Miller*, (Neb.) 55 N. W. 1064.

— Failure to protest, etc.

3. As a general rule, where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter. Still where a bill remains in a bank to be protested for nonpayment by the president and manager thereof, who is a notary public, and who, though aware of the instructions to the contrary, delays noting for protest or giving notice, in consequence of which the indorsers are discharged, such notary will be held to be the agent of the bank, and the latter will be liable for his negligence.—*Wood River Bank v. First Nat. Bank*, (Neb.) 55 N. W. 239.

4. When a bank receives commercial paper for collection there is an implied undertaking on its part that, in case of its dishonor, it will take all steps necessary to protect the holder's rights against all previous parties to the paper; and an allegation in a complaint that the holder instructed the bank to do so only states what the law implies, and changes neither the issues nor the burden of proof.—*Jagger v. National German American Bank*, (Minn.) 55 N. W. 545.

5. In an action against a bank for failure to protest a note which had been left for collection, the clerk, to whom the note was delivered, testified that the holder told him not to protest it in case of nonpayment, and in corroboration of his testimony having introduced the collection book in which he had, at the time, made an entry to that effect, defendant offered to prove that the clerk was a careful man, and that this was the only error ever attributed to him. *Held*, that the evidence was inadmissible.—*Jagger v. National German American Bank*, (Minn.) 55 N. W. 545.

Officers.

6. The cashier of a banking corporation has, by virtue of his office, no authority to accept in payment of a debt due the bank certificates of the capital stock of an insurance company.—*Bank of Commerce v. Hart*, (Neb.) 55 N. W. 631.

Insolvency—Set-off of deposit against claim.

7. A depositor in a bank which makes an assignment for the benefit of creditors may set off against his deposit the amount of his note held by the bank, though the note is not due at the time of the assignment.—*Jones v. Piening*, (Wis.) 55 N. W. 413.

National bank—Ultra vires.

8. The objection that an executed purchase of property by a national bank was ultra vires can only be urged by the United States.—*Hennessy v. City of St. Paul*, (Minn.) 55 N. W. 1123.

BASTARDY.**Evidence.**

1. On a trial of bastardy, where it is alleged that the child was born May 12th, and complainant testifies without objection that she had intercourse with defendant in October preceding, which is not denied except by plea of not guilty, the admission of other testimony to the same effect, if erroneous, is without prejudice.—*State v. Black*, (Iowa,) 55 N. W. 105.

Instructions—Burden of proof.

2. A charge that, if about the time complainant became pregnant she had sexual intercourse with other men, such fact should be considered, and, if the evidence failed to satisfy their minds that defendant was the bastard's father, they should find for defendant, is not objectionable as requiring defendant to establish his innocence by a preponderance of evidence, when read in connection with the whole charge, by which the jury were plainly told the burden of proof was on the state.—*State v. Black*, (Iowa,) 55 N. W. 105.

Best and Secondary Evidence.

See "Evidence," 1-3.

Bill of Exceptions.

See "Appeal;" "Criminal Law."

Bills and Notes.

See "Negotiable Instruments."

Board.

Medical board, see "Physicians and Surgeons," 1.

Bona Fide Purchasers.

Of city bonds, see "Municipal Corporations," 43-45.

Of goods, see "Sale," 24, 25.

Of land, see "Vendor and Purchaser," 9-14.

Of negotiable instrument, see "Negotiable Instruments," 5.

BONDS.

See, also, "Principal and Surety."

Appeal bond, see "Appeal," 94, 95.

Authority to issue, see "Counties," 10.

For costs, see "Costs," 2.

For release of attached property, see "Attachment," 5.

Of city, see "Municipal Corporations," 43-45.

Of guardian, approval of bond, see "Guardian and Ward," 1.

Of school district, power of officers, see "Schools and School Districts," 4, 5.
Required from liquor dealer, see "Intoxicating Liquors," 4.

Actions on—Pleading and proof.

1. In an action against the sureties on a bond to a manufacturing company that W. would pay for all goods furnished him, by the company, the petition alleged that the company sold W. a bill of goods, and that he had not paid for the same, and claimed expenses incurred in prosecuting the claim against W. to judgment. *Held*, that the petition did not state a cause of action against the sureties.—*Barr v. Ward*, (Neb.) 55 N. W. 282.

2. In an action against the sureties on a bond to a manufacturing company that one W. would pay for all goods furnished him by the company, the petition alleged that on the date of the bond the company sold W. a bill of goods, and that he had never paid for the same; and claimed expenses incurred in prosecuting the claim for such goods to judgment. Plaintiff introduced evidence of the protest of a note given by W. to the company "for goods delivered, or to be delivered," and also the transcript of a judgment on the note in favor of plaintiff, showing the constable's fees and justice's costs. *Held* that, as the petition stated no cause of action against the sureties, the evidence was not admissible.—*Barr v. Ward*, (Neb.) 55 N. W. 282.

3. Defendants, as sureties, signed a bond to a manufacturing company that one W. would pay for all goods furnished him by the company. An assignee of the bond brought suit thereon against the sureties, alleging that on the date thereof the manufacturing company sold a bill of goods to W., and that he had not paid for the same. To sustain these allegations he introduced in evidence a note made by W. to the company of the same date as the bond, with evidence that the note was given "for goods delivered, or to be delivered," by the company to W. *Held*, that under the pleadings the note was not admissible.—*Barr v. Ward*, (Neb.) 55 N. W. 282.

BOUNDARIES.

Of state, see "States and State Officers," 1.

Evidence.

1. In ascertaining the true line of a city street, fences built by adjoining lot owners on the line of the street, according to stakes set by the surveyor soon after the original survey was made, and maintained for 45 years, are better evidence of the location of such line than a new survey, made 40 years after the original survey, which changes such line.—*City of Racine v. Emerson*, (Wis.) 55 N. W. 177.

Establishment.

2. On appeal from the commissioner's report in proceedings to settle disputed boundaries and lost corners, under Acts 15th Gen. Assem. c. 8, the appellee may, at the close of appellant's evidence in chief, file a reply to appellant's exceptions to the report, alleging that the line established by the commissioner, though different from the government line, is nevertheless the true line, because maintained and acquiesced in by appellant and those interested for more than 10 years. Given, J. dissenting.—*Williams v. Tschantz*, (Iowa,) 55 N. W. 202.

3. In proceedings to establish boundaries, evidence of corners recognized and acquiesced in by the adjoining owners for over 10 years was competent.—*Williams v. Tschantz*, (Iowa,) 55 N. W. 202.

Bounty Warrants.

Cancellation, see "Public Lands," 11-15.

Boycott.

See "Conspiracy."

Breach.

Of warranty, see "Sale," 13-16.

BREACH OF MARRIAGE PROMISE.

Evidence.

1. In an action for breach of a promise of marriage it was proper to show plaintiff's condition after she heard of defendant's marriage with another woman.—*Robertson v. Craver*, (Iowa,) 55 N. W. 492.

2. The court properly excluded declarations of plaintiff's feelings towards defendant, made after the marriage contract was broken, where it was not shown that the declarations related to plaintiff's feelings towards defendant before the breach.—*Robertson v. Craver*, (Iowa,) 55 N. W. 492.

3. In an action for breach of marriage promise, the questions as to "what the plaintiff was doing in the way of getting ready to be married," and "Do you know anything about Rosa making preparations for marriage?" are not objectionable on the ground that they assume the existence of a contract.—*Robertson v. Craver*, (Iowa,) 55 N. W. 492.

4. The court properly excluded evidence that plaintiff had kept company with another man a short time before she began going with defendant, when there was no evidence that the intercourse between them was other than that which exists in case of friendship between persons of the opposite sex who do not contemplate marriage.—*Robertson v. Craver*, (Iowa,) 55 N. W. 492.

5. In an action for breach of promise of marriage, it was error to exclude evidence of declarations by plaintiff, made after the breach, that she had never cared for defendant, and only wanted his money.—*Robertson v. Craver*, (Iowa,) 55 N. W. 492.

Instructions.

6. An instruction that, if the parties had entered into a marriage contract, the admission by defendant of his marriage to another woman would constitute a breach, is not open to the objection that there was evidence that the engagement had been broken, and that the instruction assumed that the evidence failed to establish that fact, when defendant rested his whole case upon the fact that no contract ever existed, and the case was tried on that theory.—*Robertson v. Craver*, (Iowa,) 55 N. W. 492.

7. An instruction that the jury, in assessing damages, might consider the "personal pain" suffered by plaintiff, is not open to the objection that "personal pain" means physical suffering, and was not in issue.—*Robertson v. Craver*, (Iowa,) 55 N. W. 492.

BRIDGES.

Liability for defects.

1. Where a bridge in a highway has been openly out of repair for from six months to a year, it will be presumed that those charged with the care thereof had notice of its condition.—*Waud v. Polk County*, (Iowa,) 55 N. W. 528.

2. Where a person, knowing the defective condition of a bridge which is open for public travel, undertakes to cross the same, and is injured by reason of the defect, the question of whether he was guilty of contributory negligence in going on the bridge should be submitted to the jury.—*Waud v. Polk County*, (Iowa,) 55 N. W. 528.

3. In an action for injuries received in attempting to cross a bridge, a question submitted to the jury, whether a hole in the bridge, at

which plaintiff's horses became frightened, was an insufficiency, or a want of repair of the bridge, at the time of the accident, naturally calculated to frighten horses of ordinary gentleness, was answered in the negative. *Held* that, as there was involved, among other things, the question of what constitutes an insufficiency, and the jury may have thought there could be none unless the hole was so large and so connected with the traveled track that the horses were liable to step in or on it, and thereby become frightened, and as there were no findings as to its location and size, or as to how the horses were frightened thereby, the court was warranted in setting the verdict aside as defective.—*Schillinger v. Town of Verona*, (Wis.) 55 N. W. 1040.

4. So, too, the court was warranted in setting aside the verdict as defective on a finding that at the time of the accident the team became more than momentarily unmanageable, there being no finding as to the distance the horses backed before coming in contact with a defect in the embankment at the end of the bridge, over which embankment, at a point further from the bridge, plaintiff was thrown, and the jury having been charged that, if the horses became unmanageable and remained beyond the control of plaintiff a length of time sufficient to regain control by ordinary care and skill on his part "before he was thrown out of the buggy," he could not recover.—*Schillinger v. Town of Verona*, (Wis.) 55 N. W. 1040.

Liability of city—Private bridge in highway.

5. A city is liable for injuries resulting from the falling of a bridge built by mill owners in a public highway, and by the side of a public bridge, where the public are allowed to use both indiscriminately, without notice as to the private character of the one in question.—*Detwiler v. City of Lansing*, (Mich.) 55 N. W. 361.

Brokers.

See "Factors and Brokers."

Burden of Proof.

See "Alteration of Instruments;" "Limitation of Actions," 15.

Of breach of warranty, see "Sale," 20.

Cancellation.

Of contract, see "Equity," 7-17.

Of warrants by land office, see "Public Lands," 11-15.

Capacity.

To make will, see "Wills," 1-3.

Careless Driving.

See "Negligence," 7.

CARRIERS.

I. OF GOODS.

II. OF PASSENGERS.

See, also, "Telegraph Companies."

I. OF GOODS.

Lien.

1. The lien of a carrier and warehouseman for keeping property is superior to that of a pledgee who has procured the property to be transported and stored.—*Cooley v. Minnesota Transfer Ry. Co.*, (Minn.) 55 N. W. 141.

II. OF PASSENGERS.

In general.

2. Street-railway companies are common carriers of passengers, and are liable as such on common-law principles.—*Spellman v. Lincoln Rapid Transit Co.*, (Neb.) 55 N. W. 270.

3. Plaintiff, a passenger on defendant's street-car line, paid his fare, and received a transfer check which entitled him to continue his journey by the "next" connecting car on another line of the company. He took the next car on such line, and the conductor took up his transfer check. Without notice to plaintiff, this car was shortly taken off. The conductor having disappeared, plaintiff was informed by the driver of that car that he should take the next passing car. He did so, but was put off by the conductor because he had no transfer check, and refused to pay fare again. *Held*, that plaintiff showed, prima facie, a right to recover.—*Appleby v. St. Paul City Ry. Co.*, (Minn.) 55 N. W. 1117.

Injuries to passengers.

4. Common carriers of passengers are bound to exercise extraordinary care, and are liable for the slightest negligence.—*Spellman v. Lincoln Rapid Transit Co.*, (Neb.) 55 N. W. 270.

5. Where a street car is derailed, and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption.—*Spellman v. Lincoln Rapid Transit Co.*, (Neb.) 55 N. W. 270.

6. Where a passenger, without negligence on his part, is injured by the derailment of a street car in which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that, by the exercise of the utmost care, the casualty could not have been prevented.—*Spellman v. Lincoln Rapid Transit Co.*, (Neb.) 55 N. W. 270.

7. Under Comp. St. c. 72, art. 1, § 3, it is necessary, in order to recover against a railroad company, only to show that the person injured was at the time being transported as a passenger over defendant's line, and that the injury resulted from the operation of the railroad; and a presumption thereupon arises that such operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that the injury was the result of the violation of some express rule of the railroad company actually brought to the notice of the party injured.—*Missouri Pac. Ry. Co. v. Baier*, (Neb.) 55 N. W. 913.

8. Where the rear platform of a car is not at a safe place for passengers to alight, failure on the part of the carrier to warn passengers of that fact is negligence, though it was safe to alight at the front platform.—*McDonald v. Illinois Cent. R. Co.*, (Iowa.) 55 N. W. 102.

9. In an action against a street-railway company for personal injuries, it appeared that, on the morning of the injury, the car was so crowded that plaintiff had to stand on the platform; that the car was run at such a rate of speed that, in rounding a curve, the crowd on the platform was swayed against the gate, breaking off the hinges, and causing plaintiff to fall therefrom. The evidence tended to show that it was usual to slacken the speed on approaching the curve, and that it was negligence not to do so, especially when the platform was crowded. *Held*, that the evidence justified a verdict for plaintiff.—*Brusch v. St. Paul City Ry. Co.*, (Minn.) 55 N. W. 57.

Contributory negligence of passengers.

10. It is not negligence for a passenger to leave a railroad car at the rear platform.—*McDonald v. Illinois Cent. R. Co.*, (Iowa.) 55 N. W. 102.

Certificate.

Of acknowledgment, see "Acknowledgment," 2.

CERTIORARI.

To review removal of officer, see "Municipal Corporations," 8, 9.

When lies.

1. Where an appeal is not taken within five days from a judgment confirming the jury's award in a street opening proceeding, as provided by How. St. § 3064o, certiorari will not lie six months thereafter to review such proceeding on the petition of a part, only, of the respondents therein, in the absence of a statute authorizing such writ in such case, since it must be presumed that the other respondents interested in such proceeding, and who might be prejudiced if the judgment were disturbed, have acquiesced in the result, and complied with all further requirements.—*City of Detroit v. Murphy*, (Mich.) 55 N. W. 441.

Review.

2. On review by certiorari of proceedings before a municipal body to remove a person from office, the sufficiency and reasonableness of the charges preferred are questions of law for the court.—*State v. Common Council of Duluth*, (Minn.) 55 N. W. 118.

Chancery.

See "Equity."

Change of Venue.

See "Venue in Civil Cases."

CHATTEL MORTGAGES.

Execution by partner, see "Partnership," 5.

Sale of property not included, see "Trove and Conversion," 1, 2.

Tender to joint mortgagee, see "Tender," 1.

What constitute.

1. On a settlement of a farming partnership, it was agreed that plaintiff should take certain stock as his individual property, and that M. should have the balance of the stock, with the grain and feed, when he should have paid a note signed for him by plaintiff; plaintiff to retain the ownership of said stock as security for the payment of the note. *Held*, that this agreement constituted a chattel mortgage, which was invalid, as to third parties, unless properly filed, and not a conditional sale.—*Strong v. Hoskin*, (Wis.) 55 N. W. 852.

Validity.

2. A mortgage of a butcher's stock in trade, including perishable meats and poultry, which would have to be sold before maturity of the mortgage, cannot be conclusively deemed fraudulent against an attachment levied only two days after it was executed, there being no proof of the quantity of such perishables, nor of the amount of sales during the two days, nor of the mortgagee's knowledge of them, had there been any. The case is one for the jury.—*Houck v. Heinzman*, (Neb.) 55 N. W. 1062.

Mortgage of accounts.

3. Accounts may be mortgaged.—*Lawrence v. McKenzie*, (Iowa,) 55 N. W. 505.

Mortgage of future crops.

4. A person conveyed land for a nominal sum, subject to several mortgages, in which the grantee was interested. By an agreement made at the time, the grantee was to sell the grantor the same land on semiannual payments; the grantor to pay taxes, insurance, and costs of foreclosure, if necessary. Possession was to remain in the grantee until part of the debt should be paid, and until then all

crops, except, etc., were to belong to the grantee, who was to apply the proceeds on the debt. In case of default the agreement was to be void, and the grantor to deliver up the premises to the grantee. *Held* an attempted mortgage of crops afterwards to be planted, and therefore inoperative as to creditors.—*Merchants' & Mechanics' Sav. Bank v. Holdredge*, (Wis.) 55 N. W. 108.

5. There having been no change of possession, the agreement was inoperative, also, as to creditors, under Rev. St. § 2313, whether their rights accrued before or after its date, or the time when the crop was raised.—*Merchants' & Mechanics' Sav. Bank v. Holdredge*, (Wis.) 55 N. W. 108.

6. A stipulation allowing a mortgagor to retain such portion of the crops raised on the land mortgaged, for at least 10 years, as may be necessary to feed his stock, and furnish food for his family, is fraudulent and void as to creditors.—*Merchants' & Mechanics' Sav. Bank v. Holdredge*, (Wis.) 55 N. W. 108.

Construction and effect.

7. A mortgage upon a stock of merchandise, under that general description, attaches only to such merchandise as was in the stock when the mortgage was executed, and not to any afterwards purchased.—*Rockford Watch Co. v. Manifold*, (Neb.) 55 N. W. 238.

Description.

8. A mortgage described 90 head of two and three year old steers, marked diamond hole in right ear, branded C on right hip, and 98 head of three year old steers, marked diamond hole in right ear, branded like the first. It was not asserted that any of the steers claimed under the mortgage were so branded. Some of them were said to bear the diamond mark partly obliterated, but other witnesses called this a "swallow fork." Defendants being innocent purchasers, *held*, that the sufficiency of the description to put them on inquiry was for the jury.—*Iowa Sav. Bank v. Dunning*, (Neb.) 55 N. W. 1079.

Of accounts.

9. A description of accounts in a mortgage thereof which fails to schedule them, or to give the names of the parties owing them, is insufficient to impart constructive notice of such mortgage to a person to whom such accounts have previously been assigned.—*Lawrence v. McKenzie*, (Iowa,) 55 N. W. 505.

Acknowledgment.

10. The record of a bill of sale, intended merely as security for a debt, and filed as a chattel mortgage, but not duly acknowledged, is not constructive notice to creditors and subsequent mortgagees or purchasers.—*St. Paul Title Insurance & Trust Co. v. Berkey*, (Minn.) 55 N. W. 60.

Filing and recording.

11. In Comp. Laws, § 4379, declaring a chattel mortgage "void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith for value," unless filed, the words "in good faith for value," apply only to subsequent purchasers and incumbrancers, and not to creditors.—*W. W. Kimball Co. v. Kirby*, (S. D.) 55 N. W. 1110.

12. Comp. Laws, § 4379, requiring as against third persons the filing of the original mortgage or "an authenticated copy," only permits the use of a copy in cases provided for by section 4382, when the original is filed in some other county, where a part of the property is situated.—*W. W. Kimball Co. v. Kirby*, (S. D.) 55 N. W. 1110.

13. In replevin of a stock of goods, against an assignee for the benefit of creditors, it appeared that the chattel mortgage on the stock, given plaintiff by defendant's assignor, and under which plaintiff claimed by virtue of an insecurity clause, was not recorded until some time after its execution, and that meantime

the assignor purchased certain goods on credit. *Held* that, as the mortgage was void as to creditors who became such between the execution and filing of the mortgage, defendant was entitled to possession, and hence to a general verdict, and the costs of the court below, in the absence of a tender by plaintiff of the amount of such creditors' lien.—*Kennedy v. Dawson*, (Mich.) 55 N. W. 610.

14. It appearing that a portion of the indebtedness for which defendant had a lien belonged to plaintiff, defendant, having waived a return of the goods, is entitled to a verdict for the value of the goods, less such claim of plaintiff.—*Kennedy v. Dawson*, (Mich.) 55 N. W. 616.

15. The complaint, in an action to declare void a chattel mortgage and bill of sale, alleged that the mortgage was withheld from record in pursuance of an agreement between the parties thereto. It appeared that defendant K., a merchant, executed to defendant L., to secure a certain indebtedness, a mortgage covering his present stock, and all that might thereafter be added. The mortgage was not recorded for a year. Between the execution and filing thereof, plaintiffs, having no knowledge of the mortgage, sold K. goods on credit, and, about the time the mortgage was filed, recovered judgments for the unpaid balance. K. testified that, when the mortgage was executed, L. said he would have to record it, to which K. objected on the ground that such action would injure his credit. L. thereupon agreed to keep the mortgage in his safe. L. denied any agreement to withhold the mortgage, but failed to satisfactorily explain why the same was not recorded. *Held*, that the mortgage was void as to plaintiffs.—*Falker v. Linehan*, (Iowa,) 55 N. W. 503.

16. Where a chattel mortgage is bona fide, a creditor seeking to establish a superior equity must show that he belongs to the class of creditors who are entitled to challenge the validity of the mortgage as against them, because not duly or seasonably recorded.—*St. Paul Title Insurance & Trust Co. v. Berkey*, (Minn.) 55 N. W. 60.

Lien—Notice of mortgage.

17. Though such person knew that the mortgagees were in possession of the books of account and claiming such books, such facts would not be notice that they were claiming the accounts themselves.—*Lawrence v. McKenzie*, (Iowa,) 55 N. W. 505.

18. Though the record of a bill of sale, intended merely as security for a debt, and filed as a chattel mortgage, but without an acknowledgment, is not constructive notice to creditors, still, if a creditor deals with the mortgagor with actual knowledge of such lien, his rights will be subordinate to those of the mortgagee.—*St. Paul Title Insurance & Trust Co. v. Berkey*, (Minn.) 55 N. W. 60.

Payment and release.

19. A chattel mortgage running to several mortgagees jointly to secure a joint debt may be paid to and released by either mortgagee.—*Flanigan v. Seelye*, (Minn.) 55 N. W. 115.

Enforcement—Rights of unsecured creditors.

20. Unsecured creditors of a mortgagor of chattels are entitled to have the mortgages foreclosed as required by law, and a sale otherwise than as the law provides, though in accordance with an agreement between the mortgagor and mortgagees, is no protection to those participating in the proceeds of the sale, but they are liable to account to such creditors for the value of the goods, less the valid liens thereon.—*Rockford Watch Co. v. Manifold*, (Neb.) 55 N. W. 236.

Checks.

See "Negotiable Instruments."

Children.

See "Parent and Child."

Church.

See "Religious Societies."

City.

See "Municipal Corporations."

City Attorney.

See "Municipal Corporations," 4.

Claim and Delivery.

See "Replevin."

Claims.

Against decedent's estate, see "Executors and Administrators," 5-10.

By third persons on garnishment, see "Garnishment," 5, 6.

CLERK OF COURT.

Appointment of deputies.

3 How. St. § 7091g, as amended March 6, 1893, provides that the clerk of the justices' courts of Detroit "shall have power to appoint one or more deputies, when the necessity therefor shall be certified by the justices, and said clerk may revoke said appointment at pleasure." *Held*, that where the justices certified that seven deputy clerks were necessary, and that number were appointed by the clerk, who afterwards revoked the appointment of two of them, the fact that the justices then certified that it was unnecessary to fill the vacancies, as five were enough to do the work, did not render invalid appointments by the clerk to fill the vacancies, as it was for the clerk to name those who should remain, on the reduction of the force.—*Seabury v. Board of Auditors of Wayne County*, (Mich.) 55 N. W. 456.

Cloud on Title.

See "Quieting Title."

Collateral.

See "Pledge."

Collateral Attack.

See "Judgment," 22.

Color of Title.

See "Adverse Possession," 12, 13.

Commission.

Of real-estate broker, see "Factors and Brokers," 2-5.

Common Carrier.

See "Carriers."

Compensation.

For taking property, see "Eminent Domain."
Of child for services, see "Parent and Child," 2.
Of city officers, see "Municipal Corporations," 10, 11.
Of county supervisor, see "Counties," 8.
Of partner, see "Partnership," 9.
Of physician, see "Malpractice," 3.
Of real-estate agent, see "Factors and Brokers," 2-5.

Competency.

Of witness, see "Witness," 1-7.

Complaint.

See "Pleading," 1-6.

COMPOSITION WITH CREDITORS.

Validity of note—Fraud on other creditors.

Where, in an action on a note, the issue is whether the note was given by defendant in payment of that part of a debt due plaintiffs, but released by them under a compromise between defendant and his creditors, or whether it was given plaintiffs for services rendered defendant by plaintiffs' agent in securing the compromise, it is proper to charge that, if plaintiffs entered into such a compromise with defendant, a note taken for the amount rebated by the compromise is a fraud on the other compounding creditors, and cannot be enforced.—*Frieberg v. Treitschke*, (Neb.) 55 N. W. 273.

Compromise.

See "Composition with Creditors;" "Payment;" "Release and Discharge."

Stipulation for, see "Practice in Civil Cases," 5, 6.

Computation.

Of time, see "Time."

Condition.

Of delivery, see "Escrow."

Of policy, see "Insurance," 5-9.

Conditional Sales.

As mortgage, see "Chattel Mortgages," 1.

Condonation.

See "Divorce," 4.

Confession.

See "Criminal Law," 12.

As conviction, see "Criminal Law," 13.

CONFLICT OF LAWS.**Contracts.**

1. A note executed and delivered in Michigan on Sunday, in payment of goods sold and delivered there, though payable in Ohio, where the vendors live, is governed by the laws of Michigan, and is void, under How. St. § 2015.—*Arbuckle v. Reaume*, (Mich.) 55 N. W. 808.

Descent and distribution—Rights of widow.

2. On a claim by a widow for an allowance, and a distributive share of her husband's estate, it appeared that, while residing with her husband in Wisconsin, in consideration of his securing a certain sum to her, she waived all claim which she might have as his widow "by or under the laws of Wisconsin." Held that, as it did not appear from the record whether the law of that state gives to the widow the same allowance and distributive share in the husband's estate as does the law of Michigan, it must be assumed that the common law, which gives neither, prevails there, and hence it could not be claimed that she had waived her rights to such share and allowance under the law of Michigan.—*Knapp v. Knapp*, (Mich.) 55 N. W. 353.

v.55N.W.—73

CONFUSION OF GOODS.

When doctrine applies.

Where lumber sold is delivered on the purchaser's dock, but refused by him as not of the proper kind, and becomes so mingled with other lumber that it is difficult to ascertain what part came into the hands of his assignee, the owner may recover the full quantity supplied, if necessary, from other lumber of the assignor.—*Starke v. Paine*, (Wis.) 55 N. W. 185.

Consideration.

For conveyance, see "Fraudulent Conveyances," 5.

For note, see "Negotiable Instruments," 2.

For sale of patent right, see "Patents for Inventions."

Imported by use of seal, see "Covenants," 2.

Of contract, see "Contracts," 5-8.

CONSPIRACY.

Associations—Boycott.

A large number of retail lumber dealers formed a voluntary association, agreeing that they would not deal with any manufacturer or wholesaler who should sell directly to consumers at any point where a member of the association was retailing, and that, whenever any wholesaler or manufacturer made such sale, their secretary should notify all the members. Plaintiff having made such a sale, the secretary threatened to send such notice. Held not actionable, nor ground for an injunction.—*Bohn Manuf'g Co. v. Hollis*, (Minn.) 55 N. W. 1119.

Constable.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

See, also, "Eminent Domain," 1.

Police power of cities, see "Intoxicating Liquors," 1.

Repeal of statute by constitution, see "Statutes," 15, 16.

Requirement of uniform rule of naturalization, see "Indians," 1.

Subject and title of acts, see "Statutes," 6-11.

Uniformity of taxation, see "Municipal Corporations," 40.

Legislative powers.

1. Under Const. art. 4, § 33, as amended in 1891, the legislature has power to repeal any existing special or local law.—*Pushor v. Village of Morris*, (Minn.) 55 N. W. 143.

Monopolies and privileges.

2. McClain's Code, §§ 2543, 2547, providing for a board to examine and license physicians, is not in conflict with Const. art. 1, § 6, providing that all laws of a general nature shall have a uniform operation, and that the general assembly shall not grant to any class of citizens privileges or immunities which, on the same terms, shall not equally belong to all citizens.—*Iowa Eclectic Medical College Ass'n v. Schrader*, (Iowa,) 55 N. W. 24.

Retrospective laws.

3. Statutes which change the rule as to parties necessary to the determination of controversy may take effect upon prior as well as subsequent contracts, and the actions arising thereon.—*Tompkins v. Forrestal*, (Minn.) 55 N. W. 813.

Vested rights.

4. Laws 1881, c. 135, § 7, providing for a limitation of nine months within which to bring any form of action to test the validity of a tax judgment or sale, confers vested rights on purchasers, and is not affected by Laws 1887, c. 127, § 1, providing that any person claiming

title to land may commence, at any time, an action against any person who claims through a tax deed hereinafter or hereinbefore issued to test the validity of the tax sale or judgment, and repealing all former laws in conflict with it.—*Whitney v. Wegler*, (Minn.) 55 N. W. 927.

Obligation of contracts.

5. Since the plank-road act of 1848 gave to companies organized under it a right to build and maintain their gates where they may deem necessary, Pub. Acts 1879, p. 197, which prohibits them from maintaining tollgates within the limits of any city or village, is unconstitutional, as impairing the obligation of contracts; and such a company, notwithstanding the act of 1879, may erect a tollgate within the limits of a village at a place where none had previously existed. *Detroit v. Detroit & H. Plank-Road Co.*, 5 N. W. 275, 43 Mich. 140, followed.—*Village of Highland Park v. Detroit & B. Plank-Road Co.*, (Mich.) 55 N. W. 382.

Taxation.

6. Comp. St. c. 40, authorizing suit to be maintained against the party legally bound for the support of an insane person, by the county which has paid for the care, board, and treatment of such insane person at the insane hospital of this state, upon the finding of such insanity by the commissioners of said county, is in conflict with Const. art. 9, § 1, providing that the legislature shall collect such revenue as may be needful by levying a tax by valuation, so that every person shall pay a tax in proportion to the value of his property.—*Baldwin v. Douglas County*, (Neb.) 55 N. W. 875.

7. Pub. Acts 1891, No. 200, provides that, in computing the taxable property of insurance companies organized under the laws of the state, the value of the land on which the company pays taxes shall be deducted from its net assets above all liabilities, as shown by the last report of the insurance commissioner, and the remainder shall be the amount for which the company shall be assessed. Pub. Acts 1893 amend such statute by adding a proviso thereto that no such deduction shall be made for real-estate mortgages owned by such companies. *Held*, that such amendment, so far as it provides that there shall be no deduction from their assets for mortgages upon which they pay taxes, is in contravention of Const. art. 14, §§ 11, 12, providing that taxation shall be uniform, and that all assessments on property shall be at its cash value.—*Standard Life & Acc. Ins. Co. v. Board of Assessors of Detroit*, (Mich.) 55 N. W. 112.

8. Laws 1881, c. 135, § 7, providing for a limitation of nine months within which to bring any form of action to test the validity of a tax judgment or sale, is constitutional, since the proceedings in which the tax judgment is rendered are not by acts in pais, but all persons interested in the land are made parties. *Baker v. Kelley*, 11 Minn. 480, (Gil. 358,) distinguished.—*Whitney v. Wegler*, (Minn.) 55 N. W. 927.

Construction.

Of contracts, see "Contracts," 9-14.
Of mining leases, see "Mines and Mining."
Of mortgage, see "Mortgages," 1.
Of railroad, see "Railroad Companies," 2-4.
Of wills, see "Wills," 6-8.

Constructive Trusts.

See "Trusts," 3.

Contempt.

Violation of injunction, see "Injunction," 7.

Contest.

Of election, see "Elections and Voters," 13, 14.
Of will, see "Wills."

CONTINUANCE.

To procure witnesses.

The trial court does not abuse its discretion in refusing a continuance to obtain witnesses to rebut certain oral evidence introduced by plaintiff, showing the consideration for a written contract, where defendant himself introduced evidence on that question, and the continuance would have taken the case beyond the term.—*Independent Dist. of Eden, No. 2, v. Rhodes*, (Iowa,) 55 N. W. 524.

CONTRACTS.

See, also, "Assignment;" "Assignment for Benefit of Creditors;" "Carriers;" "Chattel Mortgages;" "Covenants;" "Deed;" "Dures;" "Factors and Brokers;" "Frauds, Statute of;" "Fraudulent Conveyances;" "Insurance;" "Landlord and Tenant;" "Master and Servant;" "Mechanics' Liens;" "Mortgages;" "Negotiable Instruments;" "Partnership;" "Payment;" "Principal and Agent;" "Principal and Surety;" "Release and Discharge;" "Sale;" "Specific Performance;" "Usury;" "Vendor and Purchaser."

Avoidance, see "Insanity," 2.
Evidence of custom to explain, see "Custom and Usage," 2.
Gambling contracts, see "Gaming."
Impairing obligation, see "Constitutional Law," 5.
Measure of damages, for breach, see "Damages," 2-15.
Of city, see "Municipal Corporations," 12-14.
Of corporation, ultra vires, see "Corporations," 7.
Of guardian before appointment, see "Guardian and Ward," 2.
Of school district, see "Schools and School Districts," 5, 6.
Of wife, liability, see "Husband and Wife," 2-5.
Parol evidence to vary or explain, see "Evidence," 35-43.
Reformation of, see "Equity," 2-8.
Rescission and cancellation, see "Equity," 7-17.
Sunday contracts, see "Conflict of Laws," 1.

Acceptance of proposition.

1. A controversy arose between defendant and M., execution creditors, as to the legality and priority of a levy of M.'s execution on shares of stock. M.'s attorney proposed to defendant's in writing that the sheriff secure a proper levy on the stock, that neither levy have priority over the other, and that the proceeds of the sale be divided equally between their clients. Defendant's attorney afterwards handed M.'s an unsigned paper, which referred to the latter's proposition, and stated, in substance, that since the levy of M.'s execution defendant's has been levied on the stock; that this was deemed expedient in view of the fact that service of the other execution was made out of the state; and that on behalf of defendant the attorneys consent that the proceeds of the sale on his execution shall be divided equally between him and M., the latter assigning to defendant so much of his judgment as the proceeds paid to him amount to. *Held* that, if the latter paper be considered binding. It was not an acceptance of M.'s proposition, since it added a condition that the latter assign his judgment pro tanto on receipt of his share of the proceeds of the proposed sale.—*Mygatt v. Tarbell*, (Wis.) 55 N. W. 1031.

2. An order for trees, by a third party, through a general agent of a nursery firm, does not become a binding contract with the firm until the firm, or some one authorized to bind it, assents thereto in writing, and gives such third party notice thereof.—*Bronson v. Herbert* (Mich.) 55 N. W. 359.

Unconscionable contracts.

8. The provision in an agreement by which plaintiff undertook to indorse certain papers for defendant, that in case defendant should refuse to secure, on demand, the amount for which plaintiff had become liable, it should be treated as a sum due and payable to plaintiff from defendant, is not unconscionable.—*May v. Newman*, (Mich.) 55 N. W. 364.

Certainty—Agreement to make contract.

4. An agreement to enter into a contract in the future, in order to be enforceable, must express all the material and essential terms of such future contract, and not leave any of them to be agreed upon in the future.—*Shepard v. Carpenter*, (Minn.) 55 N. W. 906.

Consideration.

5. A controversy arose between defendant and M., execution creditors, as to the legality and priority of a levy of M.'s execution on shares of stock. M.'s attorney proposed to defendant's in writing that the sheriff secure a proper levy on the stock, that neither levy have priority over the other, and that the proceeds of the sale be divided equally between their clients. *Held*, in the absence of any evidence that M. or his attorney agreed to surrender some rights claimed under his levy, defendant's agreement, if made, was nudum pactum, even if such levy was valid, since the mere existence of a valid levy was no consideration for a promise by defendant to divide the proceeds of sale under his levy.—*Mygatt v. Tarbell*, (Wis.) 55 N. W. 1031.

6. A release of a mortgage on certain lots on which the owner of the land wished to erect a building is a sufficient consideration for a promise by the contractors to pay the mortgagee the amount of his mortgage out of the payments made to them as the building progressed.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

7. A note and mortgage given in settlement of a claim for damages made by the payee on account of the adultery of the maker with the former's wife, and executed after the cause of action for the tort was barred by the statute, are without consideration, and void.—*Peterson v. Breitag*, (Iowa.) 55 N. W. 86.

8. The facts that the claim for damages was made by an attorney on behalf of the payee; that if suit had been brought, and the maker had failed to plead the statute, plaintiff would have been entitled to recover; and that the note and mortgage were given to avoid such litigation,—are insufficient to constitute a consideration.—*Peterson v. Breitag*, (Iowa.) 55 N. W. 86.

Interpretation.

9. Defendants had the right to cut timber on certain land up to April 23, 1883. They sold such timber to plaintiff's assignor under a contract providing: "Said timber to be removed in the years 1882 and 1883; more time to be allowed" if more time was allowed them. *Held* an express agreement that plaintiff's assignor should have the whole of the years 1882 and 1883 to remove the timber.—*Larson v. Cook*, (Wis.) 55 N. W. 703.

10. A contract under which plaintiff, a claimant against decedent's estate, was to cut a certain amount of timber for decedent, provided that the cutting should be "under the direction of a scaler" furnished by decedent. *Held* to give the scaler authority to direct the manner in which the timber should be cut, but not the right to stop the cutting when he should be of opinion that plaintiff could not get any more logs than he had already cut, to the river, in the time specified by contract.—*McGregor v. Ross' Estate*, (Mich.) 55 N. W. 658.

11. A contract "to at once proceed to procure, and use all reasonable efforts to procure," from a specified person, a release of her interest

in certain land, is not an absolute undertaking to procure the release, but only to make reasonable effort to do so.—*Orme v. Mackubin*, (Minn.) 55 N. W. 560.

12. A contract recited that to aid "the construction of the Battle Creek & Bay City Railroad, and in consideration of the benefits to be derived therefrom," defendant promised to pay, to the order of a trustee, a specified sum "when the road is constructed, and the cars are running thereon, from Midland to West Bay City, Michigan." *Held*, that the money was payable when that portion of the road between Midland and West Bay City was completed, and cars were running thereon, and the completion of the entire line was not a condition precedent to defendant's liability.—*Gardner v. Walsh*, (Mich.) 55 N. W. 355.

13. A written contract reciting that "on demand I promise to deliver to the order of F. \$800 * * * in wall paper, at wholesale price, good, clean, assorted stock out of my store," is unambiguous, and means that such "wholesale price" is to be determined as of the time demand is made for the paper.—*Fawcner v. Lew Smith Wall Paper Co.*, (Iowa.) 55 N. W. 200.

—Question for jury.

14. In replevin of lumber on which defendant claimed a lien for sawing for plaintiffs' vendor, the agent of the latter testified that defendant was to have a specified sum per 1,000 feet for sawing and piling it; that defendant was to cut all the vendor had, and the latter was to give him all he could cut; that he was to get in cash the amount of his pay roll every two weeks, which he thought would not amount to more than one-half of the bill, and the balance was to be settled in the fall with 60-day paper, on estimates. Defendant insisted that the fall settlement was to be in cash, and that, as the lumber was shipped, he was to be paid in full. *Held*, that the question as to what the contract was between defendant and plaintiffs' vendor was for the jury.—*Hughes v. Tanner*, (Mich.) 55 N. W. 661.

Performance.

15. A contract recited that whereas defendant S. had conveyed land to plaintiffs, the deed to be held in escrow until the contract was performed, "it was agreed between S. and plaintiffs" that, in consideration of such conveyance, plaintiffs should furnish defendant W. a certain quantity of cigars, to be shipped, in equal monthly shipments, on W.'s order; and that, if W. should not perform his part, he should forfeit the deed. After the execution of the contract and deposit of the deed, plaintiffs agreed to send W. samples; the evidence as to the time they were to be sent being in dispute. Owing to wet weather, they were unable to send them until a few days before the date agreed on for the first shipment. *Held* that, the agreement to send samples being unconnected with the contract, a failure of plaintiffs to send them when expected gave defendant no right to delay sending in his order, nor to demand a forfeiture on plaintiffs sending in a shipment at the date specified in the contract, but without defendant's order.—*Smith v. Watson*, (Iowa.) 55 N. W. 68.

16. A contract under which plaintiff, a claimant against decedent's estate, was to cut a certain amount of timber for decedent, provided that the cutting should be "under the direction of a scaler" furnished by decedent. *Held* that, where such scaler directed plaintiff to stop work before the specified amount of timber was cut, and he did stop work, under protest, such fact would constitute a breach of the contract, which would entitle plaintiff to damages.—*McGregor v. Ross' Estate*, (Mich.) 55 N. W. 658.

17. A contract under which plaintiff, a claimant against decedent's estate, was to cut a certain amount of timber for decedent, provided that the cutting should be "under the direction of a scaler" furnished by decedent.

The scaler directed plaintiff to stop work. *Held* that, though decedent first broke the contract, plaintiff could not perform so much of it as he saw fit, and recover the value of the work he did, but must either abandon the contract altogether, and sue for the work already done, and damages for the breach, or continue, under the contract, to do as much work as he was permitted to do, and recover damages for the interruption.—*McGregor v. Ross' Estate*, (Mich.) 55 N. W. 658.

18. Where, by the terms of a building contract, the owner agrees with the contractor to convey to him certain real property on the final completion of the building, but the contractor makes default in payment for materials used, so that the building becomes incumbered with liens, the owner is not bound to make such conveyance until the liens are discharged, but may hold the property for his security.—*Erickson v. Brandt*, (Minn.) 55 N. W. 62.

19. Where plaintiff agrees "that the mill, as a whole, shall have a capacity of 100 barrels of good merchantable meal in 24 hours," and it is alleged that the drying kilns did not have the required capacity, the contract is sufficiently complied with where it appears that, at the test, 45 barrels of meal were made in 11 hours.—*Novelty Iron Works v. Capital City Oatmeal Co.*, (Iowa.) 55 N. W. 518.

20. Where a deed deposited in escrow in accordance with a contract was inspected by plaintiffs before so deposited, and no objection made to it, they waived the right of insisting on a warranty deed, as provided by contract.—*Smith v. Watson*, (Iowa.) 55 N. W. 68.

Rescission.

21. Plaintiff agreed in writing to sell to defendant a certain lot, and received \$100 as part payment on the purchase price. Afterwards defendant stated to plaintiff that he did not want the lot, and that he had got to lose the \$100 paid. To this plaintiff only replied that he (plaintiff) "must see about it." *Held*, that the conversation did not constitute a rescission of the contract, nor estop defendant to insist on his equitable interest in the lot, even if a parol surrender of such interest would be valid.—*O'Donnell v. Brand*, (Wis.) 55 N. W. 154.

22. Where one of the parties to a written contract was induced to execute it by the intentional fraud of the other party, the defrauded party may defend against its enforcement, notwithstanding he was lacking in ordinary business prudence in executing it.—*Alfred Shrimpton & Sons v. Philbrick*, (Minn.) 55 N. W. 551.

Actions on.

23. In an action on a contract to "use all reasonable efforts to procure" from a woman a release of her interest in land, there was evidence that plaintiff's attorneys told defendant that the woman was a widow, whereas she had a husband, but had not lived with him for 20 years; that the release sent by defendant to the woman to sign was returned with the word "widow" scratched out; that after her death, and the fact that her husband was living was discovered, defendant offered him and his widow's heirs a reasonable sum to sign a release, but that they refused. *Held*, that the evidence justified a finding that defendant had used reasonable efforts to procure a release.—*Orme v. Mackubin*, (Minn.) 55 N. W. 560.

24. In an action on a contract, a request to charge that the jury were not to consider whether or not defendant owed the contractor is properly refused.—*Evans v. Montgomery*, (Mich.) 55 N. W. 302.

Questions for jury.

25. Where a building contract provides that the work shall be done to the satisfaction of the architect, and that any dispute as to claims for extra work shall be referred to him, and that his decision shall be final, it is error, in

an action by the builder on the contract, to refer to the jury such questions as to extra work and the performance of the contract, in the absence of evidence of fraud, or if the question of fraud is not submitted to the jury.—*Guthat v. Gow*, (Mich.) 55 N. W. 442.

26. A controversy arose between defendant and M., execution creditors, as to the legality and priority of a levy of M.'s execution on shares of stock. In an action by M.'s administrator to enforce an alleged agreement for an equal division of the proceeds of the sale of such stock on defendant's execution, the latter's attorney testified that the proposition of M.'s attorney was never accepted; that he submitted the unsigned paper to the latter, and told him if it met his views to let the witness know, and he would submit it to his client, and if he obtained his authority he would sign it as a definite proposition; and that his proposition was never accepted. M.'s attorney testified that his proposition was accepted orally, and that it was afterwards accepted in writing by the unsigned paper, the signing of which he waived. *Held*, that it was not error to submit to the jury the question as to whether or not there was a contract for the equal division of the proceeds of such sale.—*Mygatt v. Tarbell*, (Wis.) 55 N. W. 1081.

Contributory Negligence.

See "Negligence," 9-14.

Of passenger, see "Carriers," 10.

Of person crossing railroad, see "Railroad Companies," 14-18.

Of servant, see "Master and Servant," 16-21.

Of traveler on street, see "Municipal Corporations," 20, 21.

Conversion.

See "Trove and Conversion."

Conveyances.

See "Chattel Mortgages;" "Covenants;" "Deed;" "Fraudulent Conveyances;" "Mortgages;" "Sale;" "Vendor and Purchaser."

Of homestead, see "Homestead," 5.

CORONER.

Coroner's inquest—When authorized.

1. Under Comp. St. c. 18, § 97, a coroner can lawfully hold an inquest on the dead bodies of only such persons as are supposed to have died by unlawful means.—*Lancaster County v. Holyoke*, (Neb.) 55 N. W. 950.

Fees of coroner.

2. Under Comp. St. c. 28, § 7, prescribing the fee "for viewing a dead body," a coroner is not entitled to the fee where he did not impanel a jury, as the word "viewing" means an inquiry by a coroner and jury.—*Lancaster County v. Holyoke*, (Neb.) 55 N. W. 950.

Compensation of physicians summoned.

3. McClain's Code, § 503, provides that the coroner may, when he deems it requisite, summon at an inquest one or more physicians, "who, instead of witness fees, shall receive such reasonable compensation as may be allowed by the county board of supervisors." *Held*, that the compensation so allowed by the board is conclusive, in the absence of fraud, and that a physician is not entitled to maintain an action to determine whether his services are not in fact reasonably worth more than the amount allowed.—*Moser v. Boone County*, (Iowa.) 55 N. W. 327.

CORPORATIONS.

See, also, "Banks and Banking;" "Carriers;" "Horse and Street Railroads;" "Insurance;" "Municipal Corporations;" "Railroad Companies;" "Religious Societies;" "Telegraph Companies."

Power of bank to become stockholder in other corporation, see "Banks and Banking," 1.

Quo warranto against, see "Quo Warranto," 2.

Ultra vires acts, see "Banks and Banking," 8.

Venue of action against, see "Venue in Civil Cases," 3.

Estoppel to deny corporate existence.

1. Where, in an action by a river improvement company to recover tolls for driving logs, it is alleged and admitted that the owner of the logs was a stockholder in the company, and had received dividends on his stock, defendant is estopped to insist that the company has no corporate existence because of the unconstitutionality of an act extending the time for the expiration of its charter.—*Black River Imp. Co. v. Holway*, (Wis.) 55 N. W. 418.

2. Defendant is also estopped by counterclaiming, and asking judgment for damages against plaintiff as a corporation.—*Black River Imp. Co. v. Holway*, (Wis.) 55 N. W. 418.

Notice of meeting of directors.

3. The fact that notice of a special meeting of a board of directors was not given as provided by the by-laws of a corporation is immaterial if all the members of the board were in fact present and participated in the proceedings.—*Minneapolis Times Co. v. Nimocks*, (Minn.) 55 N. W. 546.

Power of committee of directors.

4. Where the charter of a river improvement company required tolls for driving logs to be fixed by the directors, it is sufficient that they are fixed by an executive committee, and ratified by the board of directors.—*Black River Imp. Co. v. Holway*, (Wis.) 55 N. W. 418.

Purchase of corporate property by off-floor.

5. An officer of a corporation, who in good faith purchases at judicial sale the property of the corporation, will be protected in such purchase, provided he shows that he has paid the full value of the property.—*Horbach v. Marsh*, (Neb.) 55 N. W. 286.

Ratification of acts of officer.

6. Where a corporation retains and uses money borrowed for it by its officer in excess of his authority, it ratifies the transaction, and is liable.—*Willis v. St. Paul Sanitation Co.* (Minn.) 55 N. W. 550.

Contracts.

7. A contract by which a mutual benefit society undertakes to pay the death losses of another insurance company is ultra vires and void. *Lucas v. Transfer Co.*, 30 N. W. 771, 70 Iowa, 542, followed.—*Twiss v. Guaranty Life Ass'n of Iowa*, (Iowa,) 55 N. W. 8.

Meeting of stockholders.

8. Where the charter or by-laws of a corporation fix the time and place at which regular meetings shall be held, this is itself sufficient notice to stockholders, and no further notice is necessary.—*Morrill v. Little Falls Manuf'g Co.*, (Minn.) 55 N. W. 547.

9. Unless otherwise provided in the charter or by-laws of a corporation, such of the stockholders as actually assemble at a properly convened meeting, whether one or more, and though a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business.—*Morrill v. Little Falls Manuf'g Co.*, (Minn.) 55 N. W. 547.

Who entitled to vote stock.

10. Where stock is transferable only on the books of the corporation, the person in whose

name the stock stands on such books is entitled to vote it, and the books of the company are conclusive upon the question as to who is entitled to vote stock legally issued.—*Morrill v. Little Falls Manuf'g Co.*, (Minn.) 55 N. W. 547.

Actions by stockholders.

11. A stockholder of a corporation, who seeks as such to impress with an express trust the property of the corporation regularly sold at judicial sale to an officer of the same, must commence proceedings within a reasonable time after such sale, and must, when such proceedings are unreasonably delayed, establish by a preponderance of the evidence the facts upon which such trust is based.—*Horbach v. Marsh*, (Neb.) 55 N. W. 286.

12. A stockholder of a corporation filed a verified petition to set aside an order pro confesso entered in an action to foreclose a mortgage against the corporation, and for leave to intervene and answer. The petitioner alleged fraud and collusion between the mortgagees and the company's directors, but stated no facts on which his charges were based. The answer tendered was not sworn to, and on the hearing many of the assertions of fraud therein were contradicted by the record evidence produced. *Held*, that it was not an abuse of discretion to deny the petition.—*Stradley v. Pailthorp*, (Mich.) 55 N. W. 807.

When knowledge of stockholders imputed to corporation.

13. To render the knowledge of the individual corporators the knowledge of the corporation it must be the knowledge of all of them.—*Mercantile Nat. Bank v. Parsons*, (Minn.) 55 N. W. 825.

Insolvency and receivers.

14. When the receiver or assignee of an insolvent corporation allows a claim, the debtor or other party interested in the assets, or their distribution; may, before the decision of the receiver or assignee has become final by acquiescence, apply to the court for a judicial examination and decision of such claim; but the application must be in a direct proceeding, and not as a part of, or collateral to, some other proceeding, such as a proceeding to authorize a dividend, or to call in the assets.—*Minnehaha Driving-Park Ass'n v. Dickens*, (Minn.) 55 N. W. 598.

15. Under Laws 1881, c. 148, proof of claims against an insolvent corporation is, in the first instance, to be made to the receiver or assignee, and his decision upon them, if acquiesced in, is final.—*Minnehaha Driving-Park Ass'n v. Dickens*, (Minn.) 55 N. W. 598.

16. In proceedings under Laws 1881, c. 148, upon an assignment by a corporation for the benefit of its creditors, the court may make or direct calls upon the unpaid subscriptions to stock subject to call.—*Minnehaha Driving-Park Ass'n v. Dickens*, (Minn.) 55 N. W. 598.

17. The authority of the court to call in unpaid subscriptions depends on the necessity of applying them to payment of debts.—*Minnehaha Driving-Park Ass'n v. Dickens*, (Minn.) 55 N. W. 598.

18. Such a call does not determine the liability of stockholders, but only makes due and payable whatever they may be liable for under a call, so that suit may be brought for it.—*Minnehaha Driving-Park Ass'n v. Dickens*, (Minn.) 55 N. W. 598.

Foreign corporations.

19. A corporation duly organized under the laws of another state, and publicly doing business in South Dakota, without having complied with the law of the state, is, until its authority is challenged by the state, a de facto corporation.—*Wright v. Lee*, (S. D.) 55 N. W. 931.

20. The right of a duly-organized foreign corporation to do business in South Dakota without having complied with the statutes of the state cannot be questioned collaterally,

but only in a proceeding brought by the state for that purpose.—*Wright v. Lee*, (S. D.) 55 N. W. 931.

21. Comp. Laws, §§ 5345, 5346, providing that a civil action may be maintained to "annul the existence of a corporation," include a proceeding against a foreign corporation which has not complied with the law of the state so as to authorize it to do business therein.—*Wright v. Lee*, (S. D.) 55 N. W. 931.

Corroboration.

Of prosecutrix, see "Rape," 16; "Seduction," 1.

COSTS.

In proceedings to establish drain, see "Drainage."

In replevin, see "Replevin," 9.

Right to costs.

1. In replevin by a mortgagee against the mortgagor to recover the mortgaged chattels, where it appears that the mortgage was given to secure a usurious loan of money, defendant can recover costs, though the verdict is in favor of plaintiff.—*Rodgers v. Graham*, (Neb.) 55 N. W. 243.

Bond for costs.

2. Where a judgment for a nonresident plaintiff is reversed, and a new trial ordered, defendant is not entitled to a judgment in the appellate court against the sureties on plaintiff's bond for costs. *Ortmann v. Bank*, 4 N. W. 167, 42 Mich. 464, followed.—*Wheeler v. Meyer*, (Mich.) 55 N. W. 688.

Taxation.

3. Acts 18th Gen. Assem. c. 185, § 3, provides that before any allowance of attorney's fee shall be made the attorney shall make affidavit to certain facts, "which affidavit shall be filed with the original papers." *Held* that, where a proper affidavit was filed on the commencement of the case, and afterwards a substituted attorney filed a second or amended affidavit, an allowance of the fee is proper.—*Fletcher v. Kelly*, (Iowa,) 55 N. W. 474.

— On appeal.

4. Where no motion is made in the trial court to retax costs, the question of the taxation of costs will not be considered on appeal.—*Snell v. Dubuque & S. C. Ry. Co.*, (Iowa,) 55 N. W. 310.

5. Under Comp. St. 1891, c. 43, § 43, requiring the court in a judgment on a policy on realty to allow plaintiff a reasonable sum as attorney's fee, to be taxed as costs, the motion for such fee and proof of the reasonable amount must be made in the trial court, and cannot be raised in the supreme court after affirmance of the judgment on appeal by the company.—*German Ins. Co. v. Eddy*, (Neb.) 55 N. W. 1073; *Queens Ins. Co. v. Same, Id.*; *German Fire Ins. Co. v. Same, Id.*

Costs on appeal.

6. Where a printed case on appeal contains 174 pages, when 75 pages would have been sufficient, much immaterial matter being contained in it, and there being seemingly no attempt to condense, costs will be taxed for printing 75 pages only.—*Baumgart v. Modern Woodmen of America*, (Wis.) 55 N. W. 713.

Liability in criminal cases.

7. Crim. Code, § 500, provides that, where the crime is punishable by fine and costs, defendant may be imprisoned until the same are paid or secured, or be otherwise legally discharged. Section 501 requires costs to be taxed to defendant on conviction. Section 528 enacts that when, after all legal means are exhausted, it shall be made to appear that the person confined for fine or costs has no estate wherewith to pay, the court shall discharge him, provided that he must have been confined

at least one day for every three dollars of the amount adjudged against him. *Held* that, though the prisoner has paid his fine, he must remain in jail one day for each three dollars of his costs.—*In re Dobson*, (Neb.) 55 N. W. 1071.

Counsel.

Argument of, see "Criminal Law," 8-10; "Trial," 17-20.

Counterclaim.

See "Set-Off and Counterclaim."

COUNTIES.

See, also, "Drainage;" "Highways;" "Schools and School Districts;" "Towns."

Liability for expenses of coroner's inquest, see "Coroner," 3.

Support of paupers, see "Poor and Poor Laws."

Submission of questions to voters.

1. The county board may, upon a petition being presented under Acts 1862, c. 77, for the sale of swamp lands for the erection of a county building, without formal vote, agree to order an election; the order being thereupon duly recorded, and the record read and approved.—*Rock v. Rinehart*, (Iowa,) 55 N. W. 21.

2. Under Laws 1876, c. 80, § 1, (Miller's Code, p. 80,) it is not competent for the county board to order the erection of a courthouse, when the probable cost will exceed \$5,000, without first submitting the proposition to the voters of the county. Under Laws 1862, c. 77, counties owning swamp and overflowed lands may devote the proceeds thereof to the erection of county buildings, provided that the question be first submitted at some election to the people of the county. *Held*, that a ballot submitting the question whether a courthouse, to cost not to exceed \$50,000, shall be erected "from the proceeds arising from the sale of lands belonging to said county," is not objectionable as containing two propositions,—the erection of the courthouse, and the sale of the lands.—*Rock v. Rinehart*, (Iowa,) 55 N. W. 21.

Application of proceeds of swamp lands.

3. Lands received by a county as swamp and overflowed lands, or as indemnity therefor, under the laws of congress and of Iowa, are within the contemplation of Acts 1862, c. 77, § 1, and may be sold, and the proceeds thereof applied to the erection of public buildings for the use of the county.—*Rock v. Rinehart*, (Iowa,) 55 N. W. 21.

Removal of county seat.

4. Under Comp. St. c. 17, art. 3, § 1, to entitle the county board to call an election for the removal of a county seat, a petition must be presented to it by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election, showing the section, township, and range on which, or the town or city in which, the petitioners reside, together with their age, and time of residence in the county.—*Crews v. Coffman*, (Neb.) 55 N. W. 265.

5. Where objections to a petition to change the county seat are made by any resident elector on oath, charging that some of the petitioners are minors, that others are not electors, that certain names are fictitious, and that some have been bribed, the aggregate of which will reduce the number of petitioners below three-fifths of the votes cast at the preceding general election, it is the duty of the county board to set a reasonable time for a hearing of the objections, to enable parties to offer proof in support of their charges.—*Crews v. Coffman*, (Neb.) 55 N. W. 265.

6. Parties interested are entitled to examine the original petition for an election to

change the county seat, filed in the office of the county clerk before the election is called, and should have a reasonable time for that purpose.—*Crews v. Coffman*, (Neb.) 55 N. W. 285.

Power of county board to examine books of officers.

7. Const. art. 10, § 10, confers on the board of county auditors of Wayne county exclusive authority to fix the compensation for services rendered the county, and adjust claims against it. Section 10 provides for a board of supervisors in each county, with powers as prescribed by law. Act 1889, § 8, (3 How. St. § 5181,) gives the board of auditors of Wayne county authority to examine the books of the county treasurer, and audit the accounts, and provides that after such audit it shall not be necessary for the board of supervisors to audit them. The legislature also conferred by a general law on boards of supervisors power to examine county treasurers' accounts. *Held*, that the county supervisors of Wayne county had no authority to examine the books of the board of county auditor, nor those of the county treasurer.—*Clegg v. Board of Auditors of Wayne County*, (Mich.) 55 N. W. 621.

Compensation of supervisor.

8. How. St. § 502, provides, specifically, the compensation that shall be allowed a supervisor for his services and mileage, to be audited by the board, and paid by the county, to be in full for all services and expenses in attending the meetings of the board, and for all services and expenses while acting upon any committee of the board, during its sessions, and that any supervisor receiving further compensation for such services shall be guilty of a misdemeanor, etc. *Held*, that a member of such board is not entitled to receive compensation for services as a member of a committee of the board while the board is not in session.—*Ewing v. Ainger*, (Mich.) 55 N. W. 996.

Unauthorized contracts—Ratification.

9. Where the amount of a purchase by county commissioners was greater than could be paid out of the annual revenue of the county for the current year, and they failed to submit the question of the purchase to a vote of the people, as required under Comp. Laws, § 607, a ratification so as to render the county liable can only be made, under section 3972, by a vote of the people.—*State v. Getchell*, (N. D.) 55 N. W. 585.

Bonds—Limitation of indebtedness.

10. Bonds issued by a county in excess of the 5 per cent. of taxable property allowed by Const. art. 11, § 3, for indebtedness created in any manner or for any purpose by a county, are void.—*Anderson v. Orient Fire Ins. Co.*, (Iowa,) 55 N. W. 348.

Liability for negligence.

11. A county is not liable for negligently constructing or failing to keep open a ditch constructed under Code, § 1207, which is paid for, not out of the general fund, but by assessments upon the property of persons benefited.—*Dashner v. Mills County*, (Iowa,) 55 N. W. 468.

COURTS.

See, also, "Justices of the Peace;" "Removal of Causes;" "Venue in Civil Cases."

Mandamus to, see "Mandamus," 1, 2.

Jurisdiction—Unknown defendants.

1. Under Laws 1881, (Ex. Sess.) c. 81, which gives plaintiff in an action brought under Gen. St. 1878, c. 75, § 2, to determine adverse claims to real estate, the right to make defendants, in addition to those named, "all other persons or parties unknown" claiming an interest in such real estate, the court acquires jurisdiction to determine the rights of the unknown defendants, though the named defend-

ant is dead when the action is commenced.—*Inglee v. Welles*, (Minn.) 55 N. W. 117.

Of inferior jurisdiction.

2. In proceedings by a landlord against his tenant under Gen. Laws 1878, c. 84, to recover possession of the premises, equitable matter, which requires affirmative relief to make it a defense per se, cannot properly be interposed in the answer, and if interposed the case cannot for that reason be certified to the district court. *Petsch v. Biggs*, 18 N. W. 101, followed.—*Norton v. Beckman*, (Minn.) 55 N. W. 603.

Power of probate judge.

3. A probate judge has no authority to review or set aside an order admitting a will to probate.—*Corby v. Wayne Probate Judge*, (Mich.) 55 N. W. 386.

COVENANTS.

In general.

1. Where a warranty deed to certain lots is in the statutory form, and part of such lots lie under the shoal waters of a bay, between the bank and navigable water, there is a breach of all the covenants, as to them, at the time of the conveyance, since such lots or lands are not the subject of private ownership, so that they may be conveyed in fee or otherwise.—*McLennan v. Prentice*, (Wis.) 55 N. W. 764.

Consideration—Use of seal.

2. A covenant under seal imports a valid consideration.—*Erickson v. Brandt*, (Minn.) 55 N. W. 62.

Warranty.

3. Where lots conveyed by a warranty deed, of which the grantee is not put in actual possession, are vacant, except that a railroad company, which has a track on an adjoining street, has put an embankment thereon, which is used by others in rolling logs from cars into an adjacent bay, and there is no obstacle preventing plaintiff from taking actual possession, there is no eviction, in the absence of any showing that the use made of the lots is adverse to plaintiff's title, and the latter is not entitled to recover substantial damages.—*McLennan v. Prentice*, (Wis.) 55 N. W. 764.

4. A complaint alleging defendant's conveyance to plaintiff by warranty deed, and judgments afterwards had in favor of a third person, declaring him owner of the land by title superior and paramount to defendant's, and that, by reason of said judgments, plaintiff has been deprived of the quiet and peaceable possession of the land, and wholly evicted, does not state a cause of action for breach of covenant of warranty, said judgments not awarding the third person the possession, and the allegation of eviction being simply a conclusion of law, erroneous in the absence of an averment that the land was vacant and unoccupied at the time of the judgment.—*Wagner v. Finnegan*, (Minn.) 55 N. W. 1129.

Damages for breach.

5. Where the grantor in a warranty deed of lots, of which the grantee is not put in actual possession, acquired title to part of the lots after the execution of the deed, and before the grantee attempts to rescind the entire sale, the latter is not entitled, in an action on the covenant of seisin, to recover the entire purchase money, with interest, since defendant's after-acquired title inures to plaintiff's benefit, and as to such lots he is only entitled to nominal damages, especially where, after the grantee has knowledge of the state of the title to each lot, it is arranged between him and the grantor that his title thereto should be perfected.—*McLennan v. Prentice*, (Wis.) 55 N. W. 764.

6. Where title to some of certain lots fails, the measure of plaintiff's damages is such fractional part of the whole consideration paid as

the value, at the time of the purchase, of the part to which title failed, bears to the whole of the lots purchased, and interest during the time plaintiff has been deprived of the use of such part, not exceeding six years.—*McLennan v. Prentice*, (Wis.) 55 N. W. 764.

Credibility.

Of witness, see "Witness," 18-20.

CREDITORS' BILL.

When lies.

1. Code, § 8150, provides that after judgment an action in equity may be brought to subject any property, money, etc., belonging to the defendant to the satisfaction of such judgment, and that persons indebted to the judgment debtor, or holding any property in which such debtor has any interest, or the evidence of sureties for the same, may be made defendants. Section 3152 provides that in such a case a lien shall be created on the property of the judgment debtor, or his interest therein, in the hands of any defendant, or under his control, which is sufficiently described in the petition, from the time of the service of notice and copy of the petition on the defendant holding or controlling such property. *Held*, that the action might be commenced though plaintiffs therein had no lien or interest in the property in question at the time, and that by the commencement thereof they acquired a lien on the same.—*Falker v. Linehan*, (Iowa,) 55 N. W. 503.

To reach debts due nonresidents.

2. In an action under Sanb. & B. St. § 8029, in the nature of a creditors' suit to enforce a judgment against a nonresident, the situs of debts due the latter and evidenced by notes and mortgages will be considered as at the domicile of the resident debtors owing them.—*Bragg v. Gaynor*, (Wis.) 55 N. W. 919.

3. By serving writs of injunction upon the resident debtors, restraining them from paying the debts to the nonresident judgment debtor, the court acquired jurisdiction of the debts, though the nonresident debtor never appeared, and it could collect and apply them to the payment of the judgment.—*Bragg v. Gaynor*, (Wis.) 55 N. W. 919.

Parties.

4. In an action under Sanb. & B. St. § 3029, in the nature of a creditors' suit by an assignee of a judgment to enforce payment, where one of the original judgment plaintiffs claimed the entire judgment, and executed a release of it, it was proper to make such a joinder of defendants that the release might be canceled if fraudulent.—*Bragg v. Gaynor*, (Wis.) 55 N. W. 919.

Pleading.

5. A bill filed in aid of execution, claiming that a deed by the execution defendant to his wife was without consideration, and made in fraud of creditors, alleged that such defendant had "no real or personal estate liable to levy and sale, except the premises aforesaid, on which the sheriff could make a levy." *Held*, that the bill was not insufficient, as failing to show that said debtor was insolvent.—*Dunsback v. Collar*, (Mich.) 55 N. W. 435.

CRIMINAL LAW.

See, also, "Arrest;" "Grand Jury;" "Habeas Corpus;" "Indictment and Information;" "Jury;" "Witness."

Alder and abettor, see "Rape," 3.

Arrest without warrant, see "Arrest."

Complaint, see "Intoxicating Liquors," 5.

Conviction of less offense than charged, see "Indictment and Information," 4, 5.

Crimes committed on Indian reservation, see "Indians," 2, 3.

Discharge for defect in commitment, see "Habeas Corpus," 2.

Insanity as defense, see "Homicide," 4.

Instructions, burden of proof, see "Bastardy," 2.

Liability for costs, see "Costs," 7.

Obstruction on railroad, see "Railroad Companies," 28.

Particular crimes, see "Adultery;" "Assault and Battery;" "Bastardy;" "Conspiracy;" "Forcible Defilement;" "Forgery;" "Homicide;" "Indecent Exposure;" "Intoxicating Liquors;" "Libel and Slander;" "Prostitution;" "Rape;" "Receiving Stolen Goods;" "Seduction."

Sentence, see "Forgery."

Waiver of jury trial, see "Jury," 9, 10.

Knowledge of right and wrong.

1. Where one charged with crime is above the age at which capacity to commit crime is presumed, his own testimony that he did not know it was wrong to do the act constituting the crime will not, in the absence of any evidence as to his general mental capacity, tend to remove the presumption.—*State v. Kluseman*, (Minn.) 55 N. W. 741.

Former jeopardy.

2. Where an indictment is fatally defective, although a jury is impaneled to try defendant, there being no trial or verdict, and the jury being discharged, defendant is not put in jeopardy so that he cannot be tried under a new indictment.—*State v. Smith*, (Iowa,) 55 N. W. 198.

Conduct of trial.

3. On a prosecution for seduction it is error to take the case from the jury after prosecutrix has testified, but before the state has rested, where it is possible that the state may have had other evidence of defendant's seductive arts.—*State v. Harper*, (Iowa,) 55 N. W. 197.

Trial of separate issues before same jury.

4. Under Laws 1883, c. 164, providing that if, upon the preliminary trial of a special issue of insanity, the jury shall be unable to agree, the court shall "discharge them from the further consideration of such issue," and, unless the plea of insanity be withdrawn, "forthwith order the trial upon the plea of not guilty to proceed, and the question of insanity involved in such special issue shall be tried and determined by the jury with the plea of not guilty," where the jury disagrees, it is error to order the trial upon the pleas of not guilty and insanity to proceed before the same jury, because such jury is not impartial, and defendant is deprived of his right to have the jury specially impaneled to try him for the crime charged, and is denied his right of challenge.—*French v. State*, (Wis.) 55 N. W. 566.

Compelling state to call witness.

5. No duty rests on the prosecution in a criminal case to call as witnesses for the state every eyewitness to the transaction, where the testimony of those called, or some of them, is direct and positive, and apparently covers the entire transaction.—*State v. McGahey*, (N. D.) 55 N. W. 753.

Objections to evidence.

6. On a criminal trial, evidence which on its face is clearly incompetent and prejudicial to accused should not be introduced; and if the state, without a promise to prove other facts to render it competent, is permitted to introduce such evidence, a subsequent order of the court to strike it out does not wholly cure the wrong, and its admission may be cause for reversing the judgment.—*Bedford v. State*, (Neb.) 55 N. W. 263.

7. It is a matter of discretion with the court whether to strike out evidence received

without objections.—*Proper v. State*, (Wis.) 55 N. W. 1035.

Arguments of prosecuting attorney.

3. Error cannot be predicated on comments by the prosecuting attorney to the jury on the fact that defendant had not testified in his own behalf, where the evidence of defendant's guilt was conclusive and uncontradicted.—*State v. Ahern*, (Minn.) 55 N. W. 959.

9. Code, § 3636, provides that if a defendant in a criminal case does not testify the state's attorney shall not refer to such fact, but, should he do so, defendant shall be entitled to a new trial. *Held*, that a statement that "they have the same right we have to put the defendant upon the stand, and let him tell his story, the same as we have," made in argument, in the presence of the jury, by the state's attorney, was in violation of the statute.—*State v. Baldoser*, (Iowa,) 55 N. W. 97.

10. The control of the remarks of counsel for the state during a criminal trial is a matter largely in the discretion of the trial court; and where the objectionable remarks are of a general character, and such as would not be likely, under the attending circumstances, to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to strike out such remarks, or caution the jury against them, is not such an abuse of discretion as will constitute error.—*State v. McGahey*, (N. D.) 55 N. W. 753.

Admissibility of evidence.

11. Letters written by third persons in another state to third persons in this, but not in answer to letters written by accused, or connected therewith, are not admissible in evidence against the accused to prove a material fact in the case.—*Bedford v. State*, (Neb.) 55 N. W. 263.

Confessions.

12. Defendant, indicted for rape, while in jail, and in the presence of the prosecuting witness, told the sheriff that he had intercourse with the prosecuting witness. The sheriff swore that the statement was voluntary. Defendant did not testify as to the interview. *Held*, that it was for the jury to say whether the statement was voluntary.—*People v. Flynn*, (Mich.) 55 N. W. 834.

Other crimes.

13. Evidence that, while the prosecuting witness was sleeping with another girl in defendant's house, defendant got into the bed, and had sexual intercourse with the other girl, is admissible, as tending to render more credible the evidence of the prosecuting witness.—*Proper v. State*, (Wis.) 55 N. W. 1035.

14. Proof of other attempts to rape than the one charged in the indictment is admissible in corroboration of the substantive charge.—*Proper v. State*, (Wis.) 55 N. W. 1035.

Judgment and sentence.

15. A judgment on conviction for more than one offense should not fix the date on which each successive term of imprisonment should begin, but should direct each term to commence at the expiration of the former one. This because the first sentence may have been shortened by good conduct, or otherwise.—*In re Walsh*, (Neb.) 55 N. W. 1075.

16. It being the constitutional right of one accused of crime to be present during the trial and to confront the witnesses against him, a conviction of murder will be set aside where neither the minutes of the clerk nor the record shows that the accused was present when the verdict was rendered and sentence pronounced against him, or that he was asked by the court if he had anything to say why sentence should not be pronounced against him.—*French v. State*, (Wis.) 55 N. W. 566.

17. Where a police justice imposes a fine of \$10 or three days' imprisonment, and applies

out of a certificate of deposit in his possession, taken as bail at the time of the arrest, the amount of the fine, he is not liable in detinue, though the prisoner preferred to serve the jail part of the sentence, since, until the judgment was satisfied, it might be enforced by collection or imprisonment, and the prisoner's election was no bar to its collection.—*Wills v. Neilan*, (Iowa,) 55 N. W. 527.

Punishment for second offense—Prior "conviction."

18. A confession of guilt on a prosecution for violation of the local option law is a "conviction," within the meaning of the statute, which imposes a heavier penalty on a conviction for a second offense; and such penalty is properly imposed for the second offense, though the judgment and sentence for the first offense may have been void for noncompliance with the statute.—*People v. Adams*, (Mich.) 55 N. W. 461.

New trial—Newly-discovered evidence.

19. A motion for a new trial should be granted on the ground of newly-discovered evidence tending to impeach a witness by showing declarations contradicting his testimony, when such evidence is of so controlling a character that it would probably change the verdict.—*Bailey v. State*, (Neb.) 55 N. W. 241.

20. In a prosecution for adultery the only evidence of defendant's marriage was that of the complaining witness, the woman alleged to be his wife. The marriage relied upon was by words of consent without the presence of a solemnizing officer or of witnesses. A new trial was asked on the ground of newly-discovered evidence, alleged to consist of the declaration of the complaining witness contradicting the testimony as to the marriage. *Held*, that the motion should have been sustained.—*Bailey v. State*, (Neb.) 55 N. W. 241.

21. Evidence of a witness that stolen goods had been sold by some one other than defendant, at a place where witness was employed, and in witness' presence, cannot be regarded as newly-discovered, for the purposes of a new trial, even if a new trial can be granted in criminal cases for newly-discovered evidence, where such witness had testified on the trial, and no diligence is shown in ascertaining what he knew about the matter.—*State v. Dimmitt*, (Iowa,) 55 N. W. 531.

Appeal.

22. Code, § 4532, providing that appeals in criminal cases shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, and decided, if practicable, "unless continued for cause, or by consent of the parties," does not allow a party to postpone the hearing beyond the time fixed by statute by naming a later time in his notice of appeal.—*State v. Fitzpatrick*, (Iowa,) 55 N. W. 529.

23. Where the trial court reads the same charge twice, exception must be taken and preserved by bill of exceptions, and will not be considered on appeal on affidavit of counsel.—*State v. Black*, (Iowa,) 55 N. W. 105.

24. Where the record in a criminal case does not show that it contains all the evidence, the verdict will not be disturbed on appeal, on the ground that there is no evidence to support it.—*State v. Stone*, (Iowa,) 55 N. W. 6.

25. Where the complaint is sent to the jury without objection, its sufficiency will not be reviewed where objection is raised for the first time on appeal.—*State v. Black*, (Iowa,) 55 N. W. 105.

26. A judgment in a criminal case will not be reversed on appeal because of improper remarks of counsel, unless the trial court has, on application, refused a new trial.—*Grier v. Johnson*, (Iowa,) 55 N. W. 80.

Crops.

Mortgage of, see "Chattel Mortgages," 4-6.

Cross-Examination.

Of witness, see "Witness," 13-16.

Crossings.

Of highway by railroad, see "Railroad Companies," 2-4.

— accidents, see "Railroad Companies," 8-18.

Custody.

Of children, see "Parent and Child," 1.

CUSTOM AND USAGE.

When may be proven.

1. Where a check is payable to a named person or bearer, and the payee indorses it in blank, and delivers it to a bank, and receives credit for it, in an action by the indorsee against the maker, evidence that, by a custom among bankers, where a check is drawn on a bank and presented to another bank, it is passed to the credit of the customer, but that the credit so given is treated as a receipt for the check, and not as a payment, is inadmissible, as the indorsement and check evidence the agreement between the payee and indorsee, and the transfer of the check is governed by the law merchant.—*Shaw v. Jacobs*, (Iowa,) 55 N. W. 333.

2. Defendants ordered from plaintiffs "600 2-inch boiler-flue ferrules; 1,500 $2\frac{1}{2}$ inch; and 1,200 3-inch. This is outside diameter." *Held*, in an action for the price of the goods, that it was competent to show, to explain the meaning of the order, that in this line of trade boiler-flue ferrules were standard articles, and that it was the custom to designate them by the size of the flues on which they were to be used; that boiler flues were always manufactured in certain standard sizes of exact outside diameters, and that, if the dimensions named in the order were to be applied to the ferrules, and not to the flues, the ferrules could not be used as "boiler-flue ferrules."—*Merchant v. Howell*, (Minn.) 55 N. W. 131.

DAMAGES.

See, also, "Death by Wrongful Act."

For breach of covenant, see "Covenants," 5, 6.

— of warranty, see "Sale," 21.

From public improvements, see "Municipal Corporations," 35, 36.

Proximate cause.

1. In an action for a malicious prosecution of a garnishment suit, the complaint alleged that by reason of the garnishment tying up plaintiffs' money they were unable to pay their rent and employees, and because they were so unable their landlord became dissatisfied, and terminated their lease, and their employees became dissatisfied, and refused to work, and in consequence thereof their business was ruined. *Held*, that the injury to the business was not the natural and proximate result of the garnishment.—*O'Neill v. Johnson*, (Minn.) 55 N. W. 601.

Measure for breach of contract.

2. Where a contract to provide machinery for an oatmeal mill calls for an "adjustable brush, specially for oats," and an adjustable brush such as is used in flour mills is put in, which plaintiff refuses to replace, and which defendant replaces, and notifies plaintiff that the old brush is subject to its order, the measure of damages is not the difference between the two brushes, but the value of the new brush and the cost of putting it in.—*Novelty Iron Works v. Capital City Oatmeal Co.*, (Iowa,) 55 N. W. 518.

3. In an action to recover the price of machinery for an oatmeal mill, the contract provided that, when ready to start, defendant

would furnish all needed help and grain for testing the mill. *Held* that, where plaintiff notified defendant that the mill was about ready to start, defendant was entitled to recover the reasonable wages paid to a servant, whom defendant called from another part of the state, while waiting for plaintiff to complete the work.—*Novelty Iron Works v. Capital City Oatmeal Co.*, (Iowa,) 55 N. W. 518.

4. In an action to recover the price of machinery for an oatmeal mill, where the contract provides that, when ready to start, defendant will furnish all needed help and grain for testing the mill, defendant is not entitled to credit for the services of the engineer, nor for the time for which he was paid previous to starting, though the mill was not ready to start until three months from the time set in the contract.—*Novelty Iron Works v. Capital City Oatmeal Co.*, (Iowa,) 55 N. W. 518.

5. Defendant cannot recover for coal consumed in making steam to test the mill.—*Novelty Iron Works v. Capital City Oatmeal Co.*, (Iowa,) 55 N. W. 518.

6. Where defendants contracted to fill orders "for all steel bow sockets for the year 1888," their declaration that they would "ship no more sockets on any of your unfilled orders" may have been intended to mean merely that they would not fill outstanding orders, and did not render them liable for damages for failure to deliver sockets that had not been ordered.—*Shadbolt & Boyd Iron Co. v. Topliff*, (Wis.) 55 N. W. 854.

7. Where defendants contracted to fill orders "for all steel bow sockets for the year 1888," damages were not recoverable for their failure to deliver sockets ordered in 1898, but intended for the 1889 trade.—*Shadbolt & Boyd Iron Co. v. Topliff*, (Wis.) 55 N. W. 854.

8. They were liable for failure to fill only such specific orders as were rightfully made under the contract, and for loss of profits on sales which plaintiffs had the opportunity of making, and would have made but for the refusal of defendants, in advance, to fill any more such orders.—*Shadbolt & Boyd Iron Co. v. Topliff*, (Wis.) 55 N. W. 854.

9. Defendants had the right to cut timber on certain land up to April 23, 1883. They sold such timber to plaintiff's assignor under a contract providing: "Said timber to be removed in the years 1882 and 1883." The owner of the land prevented plaintiff from removing timber after April 23, 1883. *Held*, that the measure of his damages against defendants was such fractional part of the price paid as the value at the time of the purchase of the part to which title falls bears to the value of the whole purchase, with interest during the time plaintiff was deprived of such fractional part.—*Larson v. Cook*, (Wis.) 55 N. W. 703.

10. The measure of damages for delay in completing a contract for the erection of an oatmeal mill is the reasonable rental value of the mill during such time, though it is proper to consider the cost of the mill, the depreciation of the machinery while in motion, and the profits that could be made, to arrive at such value.—*Novelty Iron Works v. Capital City Oatmeal Co.*, (Iowa,) 55 N. W. 518.

11. Plaintiffs contracted with defendant to solicit orders for its electric protective system and furnish all necessary appliances for use, in connection with such offices of plaintiffs as might be thereafter designated. Defendant, after procuring several customers, refused to go on with the contract. *Held*, that evidence of the cost of running such business was competent, in estimating the amount of damages, to show whether or not any profits were made.—*Ramsey v. Holmes Electric Protective Co.*, (Wis.) 55 N. W. 301.

12. In an action by a purchaser for the breach of a contract to sell certain goods, the measure of damages is the difference between the contract price and the price at the time when and the place where the goods were to be

delivered.—*Olson v. Sharpless*, (Minn.) 55 N. W. 125.

13. In a suit for violation of a contract, the courts will not, for the measure of the damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed.—*Bates v. Diamond Crystal Salt Co.*, (Neb.) 55 N. W. 258.

14. Plaintiffs contracted with defendant to solicit orders for its electric protective system and furnish all necessary appliances for use, in connection with such offices of plaintiffs as might be thereafter designated; plaintiffs agreeing to maintain such apparatus, and serve defendant's customers according to the contract between defendant and such customers, and to receive as compensation 50 per cent. of the rentals. The contract was for three years. *Held*, that where defendant, after procuring several customers, refused to go on with the contract, though the profits were wholly prospective, plaintiffs were entitled to damages.—*Ramsey v. Holmes Electric Protective Co.*, (Wis.) 55 N. W. 391.

15. Plaintiffs contracted with defendant to solicit orders for its electric protective system and furnish all necessary appliances for use, in connection with such offices of plaintiffs as might be thereafter designated. Defendant, after procuring several customers, refused to go on with the contract. The contract provided that, at the expiration of a three-year term, plaintiff should have an option to renew it for five years. *Held* that, there being no evidence that such option had been converted into a contract, it was error to allow damages for profits which might have accrued during the additional term of five years.—*Ramsey v. Holmes Electric Protective Co.*, (Wis.) 55 N. W. 391.

Measure for torts—Personal injuries.

16. Mental suffering and anxiety caused by the physical injury is an element of damage, whether or not the injury was willfully caused.—*American Waterworks Co. v. Dougherty*, (Neb.) 55 N. W. 1051.

17. In an action for malpractice, there can be no recovery for expense incurred in efforts to cure an injury, unless it be shown that the expense was the result of defendant's negligence, and that it was reasonably necessary.—*Hewitt v. Eisenbart*, (Neb.) 55 N. W. 252.

Avoidable consequences.

18. Where a married woman is injured by an obstruction in a highway, and her medical advisor does not caution her to avoid pregnancy, and there is no evidence that she knew that her injury was such that it was not prudent for her to do so, her pregnancy, occurring eight weeks after the accident, is not necessarily and as a matter of law sufficient ground to justify a reduction of damages, though the results of the injury may be thereby prolonged or her recovery delayed.—*Salladay v. Town of Dodgeville*, (Wis.) 55 N. W. 696.

19. Where a married woman is injured by an obstruction in a highway, the question as to whether or not plaintiff was negligent by her conduct subsequent to the injury is for the jury.—*Salladay v. Town of Dodgeville*, (Wis.) 55 N. W. 696.

Overflowing land.

20. In an action against a railroad company for damages caused by an overflow, the petition set up a cause of action for an improper construction of the embankment, but the issue raised by the answer and reply, and on which the case was tried, was defendant's failure to keep open the ditch. *Held*, that the cause of action was not a single one accruing at the time of the construction of the embankment, but that plaintiff could recover for all damages sustained during the last preceding five years.—*Willits v. Chicago, B. & K. C. Ry. Co.*, (Iowa.) 55 N. W. 313.

21. In an action against a railroad company for damages caused by an overflow, it was

proper to charge in allowing damages the jury should consider the difference in the value of the land before and after each flooding which occurred as a result of the embankment during the last five years, but that, if plaintiff planted crops on the land when it was evidently useless to do so because it was certain to be flooded, he could not recover the value of such crops, though in that case the rental value and permanent injury to the land might be considered.—*Willits v. Chicago, B. & K. C. Ry. Co.*, (Iowa.) 55 N. W. 313.

Excessive damages.

22. A verdict for \$4,100 for a broken leg is excessive.—*Slette v. Great Northern Ry. Co.*, (Minn.) 55 N. W. 137.

23. In an action against a street-car company for personal injuries, where it appears that they are severe, lasting, and liable to end fatally, a verdict for plaintiff for \$6,000 is not excessive.—*Watson v. Minneapolis St. Ry. Co.*, (Minn.) 55 N. W. 742.

24. When injured, plaintiff was 30 years old, his expectancy of life was 34 years, and he was earning \$65 per month. He was confined to his bed for one week, and could not work for three months, nor perform labor of any sort, except chores, for nine months. There was also evidence that plaintiff was permanently disabled from following his business as conductor of a freight train. *Held*, that a verdict awarding him \$7,660 was not excessive.—*Harker v. Burlington, O. R. & N. Ry. Co.*, (Iowa.) 55 N. W. 316.

25. Where plaintiff, at the time of the injury, was 20 years old, and earning \$60 a month, and was not injured beyond the loss of a foot, a verdict of \$12,000 was excessive.—*Kroener v. Chicago, M. & St. P. Ry. Co.*, (Iowa.) 55 N. W. 28.

Inadequate damages.

26. Plaintiff, by reason of defendant's negligence, had several of her ribs fractured and her hip injured. She was laid up for several weeks at the time of the injury, and three years after she was still somewhat lame, and her health impaired. There was also some testimony, though not conclusive, that her injuries would be permanent. *Held*, that an award of \$1,000 was not so disproportioned to the injuries received as to warrant the court in setting aside the verdict.—*McDermott v. Chicago & N. W. Ry. Co.*, (Wis.) 55 N. W. 179.

Pleading.

27. If a complaint show any right to damages at all, the fact that it employs a wrong theory of the measure or kind of damages recoverable is not ground for demurrer.—*Hudson v. Archer*, (S. D.) 55 N. W. 1099.

28. In an action for damages for refusing to deliver goods in pursuance of a contract of sale, when no consequential damages are claimed, it is not necessary to allege the market value of the goods.—*Riverside Coal Co. v. Holmes*, (Neb.) 55 N. W. 255.

Evidence.

29. In an action for the breach of a contract for the sale of goods to be delivered at P., evidence as to the price of such goods in N., where plaintiff bought them, on defendant's refusal to perform the contract, is admissible, where it appears that the goods are manufactured by one mill, are under the control of a single agent in N., and have a uniform price in trade.—*Olson v. Sharpless*, (Minn.) 55 N. W. 125.

30. In an action for personal injuries, it being contended by defendant that the condition of the foot and ankle was the result of eczema, and that she had been troubled with it before the injury, the physician testifying for defendant should, in addition to his testimony that the injured limb was covered with eczema, have been permitted to have testified to a scar on the other limb, which, in his opinion, was the effect of the disease before the

injury.—*Edwards v. Common Council of Three Rivers, (Mich.)* 55 N. W. 1003.

81. Testimony as to the physical condition of a plaintiff in a malpractice case, just before the trial, and two or more years after undergoing the treatment complained of, is competent, when such condition is shown to be the result of the injury in question, and is of a permanent nature.—*Hewitt v. Eisenbart, (Neb.)* 55 N. W. 252.

82. Statements made to an attending physician by an injured party in respect to his injuries and pain suffered by him are competent evidence, in an action for personal injuries, in connection with his examination and observation of the patient.—*Brusch v. St. Paul City Ry. Co., (Minn.)* 55 N. W. 57.

Evidence—Exhibition of injured limb.

83. Plaintiff's contention being that the injury from a defect in a sidewalk resulted in the swelling of the ankle and cracking of the skin of the foot, and that this condition was continuous to the time of the trial, plaintiff was properly allowed to exhibit her limb, that its then condition might be seen.—*Edwards v. Common Council of Three Rivers, (Mich.)* 55 N. W. 1003.

Instructions.

84. In an action for personal injuries, where there is no claim in the complaint or in the evidence that plaintiff's mental powers were in any manner impaired by the injury, it is error to instruct the jury that in estimating the damages they may take into account the effect of the injury on plaintiff's mental powers.—*Comaskey v. Northern Pac. R. Co., (N. D.)* 55 N. W. 732.

85. Where the law provides a definite measure of damages the court should instruct the jury, specifically, how the damages should be assessed, and an instruction stating a general principle in the admeasurement of damages, broader than is applicable to the particular case presented, and not qualified by other instructions, is erroneous.—*Omaha Coal. Coke & Lime Co. v. Fay, (Neb.)* 55 N. W. 211.

86. Where only consequential damages are claimed, they must be specially pleaded, and the jury should be confined by the instructions, in assessing the amount of recovery, to the consideration of such damages as are so pleaded.—*Omaha Coal. Coke & Lime Co. v. Fay, (Neb.)* 55 N. W. 211.

Dangerous Premises.

See "Negligence," 8.

Days of Grace.

See "Negotiable Instruments," 7.

DEATH BY WRONGFUL ACT.

Damages—Evidence.

1. In an action by an administrator under Comp. St. c. 21, for the wrongful death of his decedent, the petition alleged that decedent left surviving her eight children, ranging from 2 to 17 years of age, who were her only children and next of kin, and that said children were dependent upon her for a mother's care and attention, and that said children had been otherwise injured by her death to the amount of \$5,000. *Held*, that it was competent, under the averments of the petition, to prove the value of decedent's services as a housekeeper, in connection with proof of her expectancy of life at the time she was injured.—*Missouri Pac. Ry. Co. v. Baier, (Neb.)* 55 N. W. 913.

Instructions.

2. In an action for negligently causing the death of plaintiff's child the court said: "I don't see what damages the parents would suffer for the death of a child 6 years of age. You are entitled to their services until they

are 21, but it costs a great deal more to raise them than they can suffer." *Held* reversible error, as the value of the child's services, less his care and support, was a question for the jury.—*McCahill v. Detroit City Railway, (Mich.)* 55 N. W. 668.

Decedents.

See "Executors and Administrators."

DECEIT.

See, also, "Fraud;" "Fraudulent Conveyances."

When action lies.

1. A representation by defendant that plaintiff could have possession of a certain building on property leased to plaintiff on a certain date, several months after the making of such representation, is not actionable, though such event did not occur, in that it relates to a future, and not to a past or present, event.—*Sheldon v. Davidson, (Wis.)* 55 N. W. 161.

2. A representation by defendant that plaintiff could have possession of a certain building or property leased to plaintiff on a certain date, several months afterwards, is not actionable, being a mere opinion, on which plaintiff had no right to rely.—*Sheldon v. Davidson, (Wis.)* 55 N. W. 161.

Pleading.

3. A complaint in an action for damages, alleging that defendant, in order to induce plaintiff to lease from him certain premises, fraudulently concealed the fact that a certain building thereon did not belong to him, but which fails to allege that defendant knew or had reason to know that plaintiff was ignorant of the fact that defendant did not own such building, and that the leasing of the premises by plaintiff was actually induced by such concealment, is demurrable for failure to state a cause of action.—*Sheldon v. Davidson, (Wis.)* 55 N. W. 161.

Evidence.

4. In an action to recover the amount paid for a contract appointing plaintiff general agent in certain counties, because of misrepresentations, evidence as to whether defendant intended any fraud is inadmissible, as the result to plaintiff is the same whether defendant acted in good or bad faith.—*Angell v. Loomis, (Mich.)* 55 N. W. 1008.

Declarations.

See "Pleading," 1-6.

As evidence, see "Evidence," 5-18.

DEDICATION.

Of streets and highways.

1. Certain railways were indicted for obstructing a public street alleged to have been established by dedication across certain depot grounds. The plat, which was the only evidence of dedication, showed a solid line across the street, as well as other streets, bordering on the grounds, while streets which crossed the right of way at either end of the grounds were indicated by dotted lines. Two other streets which also crossed the right of way were indicated again by solid lines. Several of the streets were named on one side the grounds, followed by the word "street," standing alone on the other side. *Held* not to establish a dedication beyond the reasonable doubt required in criminal cases.—*State v. Dubuque & S. C. R. Co., (Iowa.)* 55 N. W. 727.

2. Where a person made and executed a plat of land by his duly-authorized attorney in fact, and after the recording thereof sales were made of lots therein described and houses built on them, streets opened, and highway la-

bor performed on them, such acts constituted a dedication and acceptance thereof by the public of such streets, and it was immaterial that such person did not himself sign and acknowledge the certificate attached to the plat.—*Rudiman v. Taylor*, (Mich.) 55 N. W. 376.

3. In trespass against road supervisors for plowing up plaintiff's land for 33 feet from his north line as a highway, defendants relied upon a dedication by conduct. On cross-examination, plaintiff testified that in setting out a grove of trees about his house he did not set any close to the line on the north side, but left a space of 19 feet. *Held*, that it was error not to permit plaintiff to testify on redirect examination that he left this space, not for a highway, but as a way to reach his barn in the rear of the house, since there can be no dedication without an intention to grant land.—*Goodfellow v. Riggs*, (Iowa.) 55 N. W. 319.

4. On cross-examination, it appeared that certain rumors of the existence of a road along the north line had come to plaintiff's notice, and defendants relied, in part, upon this knowledge of plaintiff, and his acts in pursuance of it. *Held*, that it was error not to permit plaintiff to testify that when he heard the rumors he employed counsel to investigate as to the existence of a road, and that counsel informed him that there was none.—*Goodfellow v. Riggs*, (Iowa.) 55 N. W. 319.

DEED.

See, also, "Acknowledgment;" "Covenants;" "Escrow;" "Fraudulent Conveyances;" "Vendor and Purchaser."

Estoppel by, see "Estoppel," 1-5.

Of trust, see "Mortgages."

Reformation, see "Equity," 2-6.

Tax deed, see "Taxation," 15.

Names of parties.

1. Where land is conveyed to "Ashbel Green, of New York," and is subsequently conveyed by "Ashbel Green, of the township of Palisades, in the county of Bergen, and state of New Jersey," such grantee and grantor will be presumed to be the same person.—*Tillotson v. Webber*, (Mich.) 55 N. W. 837.

Delivery.

2. Plaintiff executed a deed to her daughter, and, after having it recorded, placed it in a box in her room, where it remained for some months, till the daughter's husband took it, without plaintiff's knowledge or consent. The deed was never in the daughter's possession, nor did she claim any interest in the land, and after her husband obtained possession of it they rented the land from plaintiff, and paid rent therefor. The deed was to be signed by plaintiff's husband, which, she had been advised, was necessary to pass title, but this was not done. *Held*, that the deed was not delivered.—*Hutton v. Smith*, (Iowa.) 55 N. W. 326.

3. Deceased, having decided on a certain division of his property among his children, had deeds prepared, and his wife and he duly executed and acknowledged them. At the same time he arranged with an old acquaintance, K., to see that they were delivered to the grantees immediately before his death, or as soon after as possible. He and K. went at once to the city, and deposited them in a separate envelope in deceased's rented box in a trust company's vault, and K. then and there agreed to deliver them as requested. While on his deathbed, deceased urged K. not to forget to do so. Soon after the decease, K. went with the widow to the vault, took out the deeds, and delivered them. *Held*, that, as against the widow, the delivery to K. must be deemed sufficient.—*Haeg v. Haeg*, (Minn.) 55 N. W. 1114.

4. The owner of a homestead executed a deed thereof to her niece, who was living with her, and at the same time executed a will,

which did not specifically mention the homestead, but which made the niece the residuary devisee. After submitting them to the inspection of probate officers, she delivered them to B., a neighbor. Thereafter she demanded the deed from him, and destroyed it, afterwards stating that it had not been delivered. *Held*, that there had been no such delivery as would prevent a revocation of the deed.—*Burk v. Sproat*, (Mich.) 55 N. W. 985.

5. Where there is no exception to the covenant of warranty of a deed left in escrow, though a building on the land belonged to a third person, the deed will not, when delivered, relate back to the time of its execution, when it appears that prior to the delivery the grantee paid for the building, and the evidence shows that he did this because he had agreed to take the lot subject to the right of the third person to remove it.—*Hoyt v. McLagan*, (Iowa.) 55 N. W. 18.

Construction.

6. Where a deed conveys two adjoining tracts of land, and immediately following the description of the last tract are the words "for a road to and from said premises first above described," these words, of themselves, are not sufficient either to limit the grant of the second tract to an easement, or to create a condition subsequent.—*Soukup v. Topka*, (Minn.) 55 N. W. 824.

7. Though a conveyance of land contained a clause providing that the grantee was to reconvey the land to the grantor upon receiving a certain sum within a specified time, such fact will not affect the construction of the instrument as a deed with an option to repurchase, it appearing that repurchase was optional with the grantor, and that the conveyance was made and accepted in payment of an existing debt.—*Reed v. Bond*, (Mich.) 55 N. W. 619.

Default.

Judgment by, see "Judgment," 4, 5.

Defects.

In highways, see "Highways," 14-17.

In streets, see "Municipal Corporations," 16-33.

Delivery.

Of deed, see "Deed," 2-5; "Escrow."

Demand.

Before replevin, see "Replevin," 8-5.

Demurrer.

See "Pleading," 7.

DEPOSITION.

Length of notice.

Comp. Laws, § 5289, provides that "the notice shall be served so as to allow the adverse party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sundays and the day of service." A notice was short, in not allowing the one day for preparation, but both parties appeared, and the notifying party offered to postpone the examination, so as to afford the adverse party such day. The latter refused the offer without explanation or reason given, and participated in the examination without further objection. *Held*, that the error was harmless.—*Bem v. Bem*, (S. D.) 55 N. W. 1102.

Deputies.

See "Clerk of Court."

Descent and Distribution.

See "Executors and Administrators;" "Wills."
Rights of widow, see "Conflict of Laws," 2.

Description.

In mortgage, see "Chattel Mortgages," 8, 9.

Devise and Legacy.

See "Wills."

Directing Verdict.

See "Trial," 33.

Discharge.

See "Release and Discharge."

Of assignor, see "Assignment for Benefit of Creditors," 7.

Dismissal.

Of action, see "Practice in Civil Cases," 2, 3.

Of appeal, see "Appeal," 85-89.

Dissolution.

Of firm, see "Partnership," 9-14.

Diversion.

Of water course, see "Waters and Water Courses."

DIVORCE.

Validity of judgment, see "Judgment," 3.

Jurisdiction—Domicile.

1. The question as to whether the parties in divorce proceedings reside in different counties is one of fact.—*McConnell v. McConnell*, (Neb.) 55 N. W. 292.

2. Under Comp. St. c. 25, § 6, the parties in divorce proceedings may reside in different counties.—*McConnell v. McConnell*, (Neb.) 55 N. W. 292.

Grounds.

3. In an action for divorce, plaintiff testified that her husband constantly struck and kicked her, and a witness who was present before and after plaintiff's confinement corroborated statements made by plaintiff as to inexcusable neglect during her sickness. *Held*, that defendant was entitled to a divorce.—*Schichtl v. Schichtl*, (Iowa.) 55 N. W. 309.

Condonation.

4. A wife may condone the cruelty of her husband, but the husband, to avail himself of such condonation in proceedings for divorce, must establish the same by clear and satisfactory proof.—*McConnell v. McConnell*, (Neb.) 55 N. W. 292.

Evidence—Sufficiency.

5. In a suit by a husband for divorce on the ground of desertion, defendant denied in her testimony that she left plaintiff without his consent, or that she ever refused to live with him, but testified that he told her to go; that she must not interfere in a certain matter; and that, if she could not refrain from doing so, she could leave. The evidence in the case was conflicting. *Held*, that, while the defense was not very clear or satisfactory, a finding that the charge of desertion was not sustained would be affirmed.—*Hosmer v. Hosmer*, (Minn.) 55 N. W. 630.

Judgment.

6. An order for a judgment of divorce without an entry of judgment thereon does not change the status of man and wife.—*State v. Eaton*, (Wis.) 55 N. W. 890.

7. Though a judgment of divorce is entered as of the date of the findings and order

for judgment on which it is based, it does not take effect from the date of such order, and render an intervening marriage by one of the parties legal, so as to support an information for adultery, alleged to have been thereafter committed by the other party to the latter marriage.—*State v. Eaton*, (Wis.) 55 N. W. 890.

Alimony and attorneys' fees.

8. Where, in an action for divorce, and for a division of defendant husband's estates between the parties, it appeared that defendant owned a homestead worth \$1,800, furniture worth \$850, and other personalty worth \$925, over all indebtedness, and that he could earn \$1,000 per year over his expenses; that plaintiff had \$780, and that she was of an age to render her incapable of engaging in any work which would bring in much income,—an award to plaintiff, on granting her a divorce, of the homestead, furniture, and \$100 attorneys' fees, is not excessive.—*Harran v. Harran*, (Wis.) 55 N. W. 400.

Custody of children.

9. In an action for divorce, it appearing that plaintiff had always been thoughtful of the children's comfort and education, and was industrious, while the testimony failed to show that defendant had the ability or disposition to suitably provide for them, it was proper to award their custody to plaintiff.—*Schichtl v. Schichtl*, (Iowa.) 55 N. W. 309.

Vacation of decree.

10. Where, after obtaining a decree of divorce by default, complainant remarries, and defendant has knowledge of that fact, to entitle the latter to institute proceedings to vacate the decree because of a misnomer of defendant it is proper to require notice of such proceedings to be given the second wife.—*Carlisle v. Carlisle*, (Mich.) 55 N. W. 673.

Docket.

See "Practice in Civil Cases," 4.

Doctor.

See "Physicians and Surgeons."

Documents.

As evidence, see "Evidence," 27-34.

Domicile.

In divorce suits, see "Divorce," 1, 2.

Donations.

In aid of railroad, see "Public Lands," 2.

DOWER.**Devise in lieu—Election.**

Rev. St. § 2172, provides that a widow shall be deemed to have elected to take under her husband's will unless, within one year after his death, she file a notice of her election to take the provision made by law. *Held*, that where a widow sealed and acknowledged her notice of election to take the provision made by law for her, but died before filing it, the election was not complete, and a filing thereof by her executor, though within one year after the death of her husband, did not make such election valid.—*In re Gunyon's Estate*, (Wis.) 55 N. W. 152; Appeal of Church, Id.

DRAINAGE.

See, also, "Surface Water."

Proceedings to establish—Costs.

Laws 1885, Act No. 227, c. 8, § 1, provides that no drainage commissioner shall take action

towards establishing a drain until there is filed with him an application signed by not less than five freeholders of the township; that the petitioners shall be jointly and severally liable for the costs if the commissioners decide that the same is not necessary, or if the proceedings be dismissed for other cause; that the commissioner may recover such expenses by suit at law if petitioners refuse to pay. *Held* that, where a petition was filed for the extension of a drain, and the proceedings were dismissed on the ground that the proposed drainage was unnecessary, the persons who filed such petition cannot, in order to defeat an action against them for costs, claim that it was impossible to determine the necessity of such drain because the line was not sufficiently described in the petition; it not being permissible for them to take advantage of defects in their own petition. —*Rosenstiel v. Miller*, (Mich.) 55 N. W. 655.

DURESS.

What constitutes.

In an action on a confession of judgment, where defendant admits the execution of the instrument, but seeks to avoid liability thereon, on the ground that it was executed under duress, a charge that if the instrument "was obtained by means of threats, coercion, or subjecting the defendant to fear," or "obtained by force, threats of violence, or fear," plaintiffs could not recover, is defective in not going further, and advising the jury as to the nature of the threats or coercion or fear which would avoid apparent consent. —*McCormick v. Volsack*, (S. D.) 55 N. W. 145.

EASEMENTS.

Obstruction, damages, see "Eminent Domain," 2 3.

Flowage of water.

The natural flowage of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, though the flowage be not in a natural water course with well-defined banks. —*Leidlein v. Meyer*, (Mich.) 55 N. W. 367.

EJECTMENT.

See, also, "Adverse Possession;" "Quieting Title."

New trial as of right, see "New Trial," 5.

When lies.

1. Plaintiff may maintain ejectment for wild and unoccupied land against one claiming under a tax deed paid for, procured, and recorded by the latter. —*Tillotson v. Webber*, (Mich.) 55 N. W. 837.

Pleading—Amendment.

2. Where a declaration in ejectment is defective because it does not set forth plaintiff's estate in the land, he should be permitted, on the trial, to amend it. —*Ludeman v. Hirth*, (Mich.) 55 N. W. 449.

Evidence.

3. In an action to recover land, and damages for the wrongful possession and use thereof, defendant pleaded, in justification, title to the land in his wife and her mother. *Held* that, where the sufficiency of such plea was not challenged by demurrer evidence in support thereof is admissible. —*Van Sickle v. Keith*, (Iowa.) 55 N. W. 42.

4. Where the action to recover a strip of and between adjoining premises, and for damages because of defendant's wrongful possession and use thereof, is based on the claim that the strip is embraced within the description in plaintiff's grant, evidence of a conventional boundary and adverse possession thereunder is inadmissible, though allegations of

such facts are embraced in the count of the principal cause of action. —*Van Sickle v. Keith*, (Iowa.) 55 N. W. 42.

5. In ejectment to recover a strip of land 14 feet wide extending along D. street across the front of lot 2, defendant alleged and testified that, when plaintiff sold him lot 2, D. street was not opened in front of it, but that where it had been opened it was 80 feet wide; that the land was described by such metes and bounds as were thought necessary to reach D. street; that subsequently D. street was opened in front of the lot with a width of only 66 feet; that consequently the land as described in the deed did not reach D. street, but left a strip of 14 feet, which was the land in issue. Plaintiff's evidence did not disclose anything except that he thought the street would be 80 feet wide. Defendant had been in possession of the land nearly long enough for one to acquire title by adverse possession. *Held*, that a judgment for plaintiff was against the weight of the evidence, and would be set aside. —*Emery v. Johnson*, (Neb.) 55 N. W. 225.

6. One in possession of land under an executory contract for purchase quitclaimed to a railroad a right of way thereon, and afterwards assigned his interest under the contract. After several mesne assignments, the holder, knowing of the right of way deed and that the railroad had been run on said right of way nearly 10 years without objection, got a deed for the land, and brought ejectment against the road. *Held*, that he could not recover. —*Stratton v. Omaha & R. V. Ry. Co.*, (Neb.) 55 N. W. 1058.

Election.

Between counts, see "Pleading," 6.

By widow, see "Dower."

ELECTION OF REMEDIES.

What constitutes.

Where plaintiff had left certain accounts assigned to him by defendant with defendant as his agent, to collect and account therefor until his indebtedness was satisfied, the possession of such agent was the possession of plaintiff, and, by garnishing property of defendant's debtors for the same debt, plaintiff waived all rights under the assignment. —*Lawrence v. McKenzie*, (Iowa.) 55 N. W. 505.

ELECTIONS AND VOTERS.

Election to remove county seat, see "Counties," 4-6.

Qualification of voters—Indians.

1. Act Cong. Feb. 8, 1887, § 6, declares every Indian born within the United States to whom land has been allotted under that act, or under any law or treaty, to be a citizen of the United States. Const. Neb. art. 7, § 1, makes electors all male persons of 21 or upward, who have lived in the state six months, and are citizens of the United States. *Held*, that male, adult, Omaha Indians, who have left their tribe, and received allotments, are electors of Nebraska. —*State v. Norris*, (Neb.) 55 N. W. 1086.

2. Act Cong. Feb. 8, 1887, § 3, provides that the United States shall make the allotments through a special agent, who shall certify them to the secretary of the interior, and, on his approval, patents shall issue. *Held*, that male, adult Indians, who had complied with the law in every respect by severing their tribal relations, and choosing their allotments, and had received the special agent's certificates, were electors of Nebraska, though they had not yet received their patents. —*State v. Norris*, (Neb.) 55 N. W. 1086.

Nominations.

3. An objection that the "convention," "primary meeting," "committee," or "electors"

nominating a candidate for a public office had not legal authority to make such nomination must be made before the election, and in the manner provided by section 136, c. 26, of the Compiled Statutes; and, if not so made, the legal authority of such "convention," etc., to make such nomination—the certificate thereof being in apparent conformity with the provisions of the election law—will, in the absence of fraud, be conclusively presumed.—*State v. Norris*, (Neb.) 55 N. W. 1086.

4. Comp. St. c. 26, § 136, provides that certificates of nomination, in apparent conformity with law, shall be deemed valid unless objected to within three days after filing. Section 141 empowers the judge to order the correction of any errors or omissions in the name or description of a candidate, or in the printing of the ballots, on application and affidavit of any voter. Certain ballots called a candidate "N., Republican. N., Independent;" and others, "N., Republican Independent." No "Independent" party was entitled to a candidate, but the "People's Independent" party was. The court took judicial notice that the same party was meant, and that N. had received its nomination, as well as the Republican. *Held*, that the mistake did not vitiate N.'s election.—*State v. Norris*, (Neb.) 55 N. W. 1086.

Election precincts and voting places.

5. When reservation Indians have complied with the provisions of Act Cong. Feb. 8, 1887, and so become citizens of the United States, their reservations are so far under state government, as that election precincts may be set apart and polling places established thereon.—*State v. Norris*, (Neb.) 55 N. W. 1086.

Ballots.

6. The indorsement of the name "Eagle-horn" upon a ballot vitiates the same, under Comp. St. c. 26, § 154, forbidding the marking of his ballot by an elector.—*Spurgin v. Thompson*, (Neb.) 55 N. W. 297.

7. By the provisions of section 141, c. 26, of the Compiled Statutes, a candidate may make objections to the ballots as printed by the county clerk, and invoke the power of the courts to correct any error or omission in the name or description of his competitor; but, if such candidate neglects to make such objection until after the election, he cannot then object to the result because of any error in the political designation of his competitor on said ballots, without a showing of fraud, and that the error, by deceiving the electors, prevented a full and fair expression of the voters' wills.—*State v. Norris*, (Neb.) 55 N. W. 1086.

8. Though the statute requires that the cross which signifies the preference of an elector shall be placed, in ink, in a space designated for that purpose, still, under Comp. St. c. 26, § 150, providing that when a ballot is sufficiently plain to gather therefrom a part of the intention of the voter the judges of election shall count such part, a ballot upon which the preferred candidate is indicated by a cross made with a lead pencil, outside the space designated, but opposite his name, should be counted.—*Spurgin v. Thompson*, (Neb.) 55 N. W. 297.

— Deposit in wrong box.

9. Where, at an election, two ballot boxes are provided, one for ballots for judges, and another for ballots for municipal officers, and some of the ballots cast are deposited in the wrong box, the voters will not be deprived of their rights by the mistake or fraud of the election officers in so doing.—*State v. Horan*, (Wis.) 55 N. W. 157.

Mandamus to canvassing board.

10. The answer of the board of supervisors to a mandamus compelling them to reconvene and canvass the votes for removal of a county seat alleged that prior to the election the board of election commissioners distributed official ballots to be used in voting for certain officers and on the question of the removal of the coun-

ty seat; that a great many of said ballots were cast against such removal; that thereafter the election inspectors furnished other electors a different ballot to be cast in a separate box on the question of removal, and that the election inspectors then decided that the votes cast against the removal on the official ballots were illegal. The answer further asked that it be taken as a petition for an order to show cause against the inspectors of election why they had not returned the statement of the votes on the official ballots. *Held* that, as the decision of the board of supervisors under How. St. § 491, in determining the result of the canvass was conclusive and final, and the votes cast on the official ballot should not be excluded, the order to show cause against the inspectors would issue.—*Double v. McQueen*, (Mich.) 55 N. W. 564.

11. Mandamus will not issue to compel a county board of supervisors to reconvene and canvass the vote for removal of the county seat, where their return to the petition alleges that they have not refused to canvass the votes, but propose to make a canvass on a day to which they have adjourned.—*Double v. McQueen*, (Mich.) 55 N. W. 564.

Majority vote.

12. The "Enabling Act," providing for the admission of North Dakota into the Union, provided for the submission, at the same time that the proposed constitution was submitted to the electors, of separate articles to be voted upon, and required for their adoption a "majority of the legal votes cast." At the same time that the proposed constitution was submitted, a full set of state officers was elected under a provision in such constitution. *Held*, that an article which received a majority of all the votes cast upon the question of its adoption, and upon the question of the adoption of the constitution, was legally adopted, though it failed to receive a majority of the votes cast for governor.—*State v. Barnes*, (N. D.) 55 N. W. 883.

Contest.

13. Where, in an election contest in the county court, the incumbent dismisses, before judgment, a paragraph of his answer alleging the improper refusal to count certain ballots, he cannot, by an original amendment in the district court, over the contestant's objection, set up the same matters embraced in the paragraph dismissed.—*Spurgin v. Thompson*, (Neb.) 55 N. W. 297.

14. Under Gen. Laws 1801, c. 4, § 76, an election contest over a county office must be instituted by an appeal from the decision of the board of canvassers to the district court, and notice thereof must be entered with the clerk within 20 days after the day of election, or the district court acquires no jurisdiction of the proceedings.—*Seeley v. Killoran*, (Minn.) 55 N. W. 132.

Electric Light Companies.

See "Municipal Corporations," 2, 3.

Electric Railroads.

See "Horse and Street Railroads."

EMINENT DOMAIN.

Adequacy of provision for compensation.

1. The charter of the city of St. Paul, as amended in 1891, in regard to taking private property for a public improvement, provides that, the assessment being confirmed, it shall be a lawful and sufficient condemnation, and "the city * * * shall thereupon cause to be paid to the owner of such property the amount of damages over and above all benefits which may have been awarded therefor within six

months after date of the confirmation of such assessment, with interest at the rate of seven per cent. per annum;" and section 8 provides that, upon the confirmation of the assessment, the city shall have the right to take possession of the premises ordered to be condemned. *Held*, that the charter imposed upon the city the duty of paying the compensation assessed, and hence was constitutional.—*State v. Otis*, (Minn.) 55 N. W. 143.

Right to compensation — Obstructing easement.

2. Plaintiff alleged that he was the owner of a lot on Ninth street, in a named city, and that defendant railroad company built an embankment for its track along S. street, and across Ninth and Tenth streets near his said lot; that an embankment was made, "where the railroad is located on said streets," at an unnecessary height, so that the necessary approach thereto raised Ninth street, in front of said lot, two feet, and that the embankment and approaches thereto constituted an obstruction to Ninth, Tenth, and S. streets, where they are used in going to and from his lot, and rendered it subject to overflow, and difficult of access. *Held*, that the petition stated a cause of action for damages.—*Hitchcock v. Chicago, St. P. & K. C. Ry. Co.*, (Iowa.) 55 N. W. 337.

— Additional servitude on street.

3. A street railway imposes no additional servitude upon a street.—*Elftel v. Stillwater St. Ry. Co.*, (Minn.) 55 N. W. 116.

Employee.

See "Master and Servant."

EQUITY.

See, also, "Fraudulent Conveyances;" "Injunction;" "Mortgages;" "Partnership;" "Quieting Title;" "Receivers;" "Specific Performance;" "Trusts."

Equitable liens, see "Liens," 2, 3.

Estoppel in pais, see "Estoppel," 8-19.

Relief against judgment, see "Judgment," 28-30.

Suit to enforce trusts, see "Trusts," 6, 7.

Transfer to equity docket, see "Practice in Civil Cases," 4.

Jurisdiction.

1. Where the only question involved in garnishment proceedings is whether the garnishee subscribed a certain amount to the capital stock of defendant company, the court of law has jurisdiction of the subject-matter, and it cannot be contended that equity alone has jurisdiction because of matters of account involved.—*Des Moines Sav. Bank v. Colfax Hotel Co.*, (Iowa.) 55 N. W. 67.

Reformation of contracts.

2. Where a married woman fails to join her husband in a deed, through the ill advice of a notary,—that it is not necessary, to effect the purpose of the parties,—the deed may be reformed.—*Whitmore v. Hay*, (Wis.) 55 N. W. 708.

3. A person owning lots 6, 7, and 8, facing M. street on the north, and lying side by side, with S. street as the east boundary of lot 6, sold lot 8 to plaintiff, and, as the parties supposed, a perpetual right of way over the south 12 feet of the lots to S. street. The deed, however, provided: "Except the south 12 feet of said lot, to be used as an alley to adjoining lots, and leading east to S. street." Next he deeded the west half of lot 7, "with the exception of the south 12 feet, to be reserved for a private alley." Thereafter he deeded lot 6, and the east half of lot 7, to defendant L., without any reservation or exception; but prior to the sale to L. the grantees of lots 7 and 8 had raised the grade of the rear 12 feet of the lots about 2 feet, and were in constant use of

the strip as an alley, claiming a right of way over it by purchase, to the knowledge of L. *Held*, that L.'s knowledge of the facts was sufficient to bind him by a reformation of plaintiff's deed giving him a right of way over the south 12 feet of the lots, and to cause him to hold his title subject to the deed of plaintiff as reformed, and that the judgment might properly require him to remove obstructions of the alley at the rear of his lots, but that it could not reform the deed to L., to which plaintiff was neither party nor privy.—*Fischer v. Laack*, (Wis.) 55 N. W. 398.

4. In an action to reform a note made to the order of a husband and wife, by limiting the interest of the wife therein to a life estate, and to enjoin the administrator of the wife from taking possession of the note, it appeared that the husband sold land owned by him, and took the note for a portion of the purchase price; that before the sale he had made a will devising to his wife a life estate in the land sold, and that two days after the sale he made another will, by which he bequeathed his residuary estate, including the note in question, to his executors, in trust to convert the same into money, and pay the income to his wife during her life; that the will was admitted to probate, and that the widow up to the time of her death received the income from the note, and never claimed to own it; that the husband during his lifetime dealt with the note as his own, and that the note was not drawn in accordance with the intention of the parties. *Held*, that the note was equitably a part of the estate of the husband, and should be reformed accordingly. *Montgomery, J.*, dissenting.—*McLeod v. Free*, (Mich.) 55 N. W. 685.

5. A contract recited that whereas defendant S. had conveyed land to plaintiffs, the deed to be held in escrow until the contract was performed, "it was agreed between S. and plaintiffs" that, in consideration of such conveyance, plaintiffs should furnish defendant W. a certain quantity of cigars, to be shipped, in equal monthly shipments, on W.'s order; one-third of each shipment cash; money to accompany order; first shipment to be made on a specified date, and others monthly thereafter. *Held*, that where S. had title to the land solely as trustee for W., and signed the contract only to secure W.'s performance of the agreement to convey the land, that portion of the contract reading, "it was agreed between S. and plaintiffs," should be reformed by inserting therein W. for S., as being a mutual mistake.—*Smith v. Watson*, (Iowa.) 55 N. W. 68.

6. An agreement by W. to convey land in exchange for goods to be delivered him by plaintiffs stipulated that if either should not perform his or their part of the agreement, plaintiffs should pay W. \$5,000 liquidated damages, and, if W. should not perform his part, he should forfeit the deed. The attorney who drew the contract testified positively that plaintiffs were to pay W. \$5,000 only in case "they" failed to perform their part of the contract, and that by mistake he failed to make the contract express the intent of the parties; and the agent who brought the parties together, and one of plaintiffs, testified to the same effect. *Held*, that the contract should be reformed.—*Smith v. Watson*, (Iowa.) 55 N. W. 68.

Rescission and cancellation of contracts.

7. The deed of an insane person may be avoided, as against a grantee without notice of the grantor's insanity, and against an innocent purchaser from such immediate grantee, and in the latter case it is not necessary to restore the consideration paid by such purchaser to the immediate grantee.—*Dewey v. Algire*, (Neb.) 53 N. W. 276.

8. The mere fact that one of the parties to a contract was insane the not having been so adjudged by judicial proceedings does not render the contract void, but at most only

voidable, and constitutes no ground for setting it aside where the other party had no notice of the insanity, and derived no inequitable advantage from it, and where the parties cannot be placed in statu quo.—*Schaps v. Lehner*, (Minn.) 55 N. W. 911; *Same v. Kulzer, Id.*; *Same v. Diederich, Id.*

9. Where a party seeks the aid of a court to rescind a contract, it is not necessary that he should previously have attempted a rescission, or made a tender to the other party, except where a tender is necessary to put the other party in default. *Knappen v. Freeman*, 50 N. W. 533, 47 Minn. 491, followed.—*Nelson v. Carlson*, (Minn.) 55 N. W. 821.

10. In an action to rescind an exchange of real property on the ground that defendant fraudulently pointed out to plaintiff one lot as the land that was to be conveyed to him, while the lot in fact conveyed was an entirely different one, the right of plaintiff to a rescission depends, not upon whether the lot pointed out was worth more than the one actually conveyed, but upon the fact that he did not get the property which it was represented that he was getting.—*Nelson v. Carlson*, (Minn.) 55 N. W. 821.

11. In an action to cancel a mortgage, it appeared that defendant had two mortgages for \$1,500 each, one on a "business," and the other on a "residence," lot, and the issue was whether defendant, in order to enable a subsequent mortgage to plaintiff's company to have priority, executed a release of the one on the residence lot. It was admitted that, when defendant executed the alleged release, she did execute another instrument releasing her mortgage on the business lot. It was also undisputed that, if a release of the mortgage on the residence lot was executed, it was a separate instrument from the other. Defendant testified that she executed only one instrument, which was a release of the "residence" mortgage, and the notary who took her acknowledgment thought there was only one paper, though he was not positive. A witness, who was present, testified that there was only one, and to the same effect, and in positive terms, was the testimony of defendant's three sons. *Held*, that a finding that she did not make the release was justified.—*Hendrickson v. Tracy*, (Minn.) 55 N. W. 622.

12. Where a mortgagee, without proper excuse, refuses to pay over to a mortgagor the full amount of the loan agreed on, the latter need not bring action at law, but may sue to cancel the note and satisfy the mortgage of record, proper terms being imposed as to repayment of the portion of the loan received.—*Payne v. Loan & Guaranty Co.*, (Minn.) 55 N. W. 1128.

13. A deed will not be set aside for mutual mistake in description where defendant evidently believed that he was purchasing the lands described, and paid the full consideration therefor.—*Darling v. Jewell*, (Mich.) 55 N. W. 610.

14. In an action by an heir of a deceased person to set aside an assignment of his interest in the estate, the court made a decree directing defendant to file a reassignment of the interest in question within 40 days after entry of the decree, and directing the plaintiff to pay into court the consideration paid for the assignment within 10 days after the filing of the reassignment, and providing that in case the defendant neglected to file the reassignment the decree should stand in place thereof. *Held* that, where defendant failed to file the reassignment within the time limited, plaintiff's failure to make the payment into court within 10 days thereafter did not put plaintiff in default, as the decree did not require him to pay the consideration until after defendant had filed the reassignment.—*Crane v. Michigan Trust Co.*, (Mich.) 55 N. W. 433.

15. Where an heiress conveys her interest in the estate of decedent, takes mortgages in

payment, and assigns the mortgages, and, after discovering that the deed has been procured from her through fraud and for an inadequate consideration, with the advice of counsel, pursues the assignee for several months to recover the amount to be paid for the mortgage, it amounts to a ratification of the sale, and she is not entitled, eight months thereafter, without tendering the amount received by her, in a suit against the grantee, assignee, and administrator, to have the deed vacated.—*Bedier v. Reaume*, (Mich.) 55 N. W. 366.

16. Plaintiff, to secure the performance of her husband's contract, executed to one P. a deed of a certain lot. She afterwards sued P. and one R., alleging that her husband had fully performed his contract; that she was entitled to a return of the deed; but that P. had conveyed the lot to R., who had notice of the facts, and prayed for a cancellation of both deeds. On the trial it appeared that, after the execution of the deed by plaintiff, P., by an oral agreement, purchased from her the lot in question, paid full consideration, went into possession, and subsequently conveyed the same to R. *Held*, that the complaint was properly dismissed.—*Frede v. Pfugradt*, (Wis.) 55 N. W. 159.

17. In an action to cancel a deed given to secure the performance of a contract, on the ground that the contract had been performed, it was not necessary that defendant, to avail himself of a subsequent parol agreement for the purchase of the lot conveyed, should sue for specific performance of the same, or that he should set it up as a counterclaim, but it was sufficient to simply plead it as a matter of defense.—*Frede v. Pfugradt*, (Wis.) 55 N. W. 159.

Accounting.

18. An action for an accounting will lie, where several parties are interested in a fund held by a trustee, where the facts are complicated, and where fraud is alleged in the procurement of a draft, the surrender of which is asked.—*Holmes v. Malcolm McDonald Lumber Co.*, (Mich.) 55 N. W. 450.

Laches.

19. Where persons purchase land from one holding tax deeds therefor, regular on their face, in good faith, and without notice of any illegalities in the tax sales, and go into possession, the former owner of the land, who has discontinued paying the taxes and has remained quiet for more than 20 years, is estopped to assert his title in equity against them, where no excuse is offered for the delay. *Mathews v. Culbertson*, (Iowa.) 50 N. W. 201, followed.—*Hewitt v. Morgan*, (Iowa.) 55 N. W. 478.

20. Where a man purchases land with his wife's money, and, contrary to her direction, takes the title in his own name, and they occupy the land as a homestead for more than 20 years after the wife discovers that the title is in him, laches will not be imputed to the wife, so as to defeat an action by her against his heirs to enforce the resulting trust, because she failed to bring such action against him in his lifetime, unless it is barred by some statute of limitations.—*Fawcett v. Fawcett*, (Wis.) 55 N. W. 405.

21. Where a person purchases land from those holding the patent title, who, during the 26 years they held the title, did not concern themselves about it, and paid no taxes, he takes the title charged with all the defects thereto in the hands of his grantors, and their abandonment of the land cannot be cured by his subsequent activity in asserting his rights; but he is barred from recovery as against the purchaser from one holding tax deeds therefor regular on their face, and who in good faith, and without notice of an adverse claim or of any illegalities in the tax sales, goes into possession of the land. *Mathews v. Culbertson*, (Iowa.) 50 N. W. 201, followed.—*Pitts v. Seavey*, (Iowa.) 55 N. W. 430.

Bill—Multifariousness.

23. An objection that a bill is multifarious should be raised by demurrer, and comes too late when made for the first time after complainant has succeeded on the merits.—*Snook v. Pearsall*, (Mich.) 55 N. W. 459.

Parties—Waiver of defect.

23. After distributing his property among his children, a father, for 20 years, respected the right of a daughter to certain mortgages assigned to her in her own right, and to certain other mortgages assigned to her in trust for her children; the father, by agreement, retaining possession of the mortgages, reinvesting the proceeds, and applying a part of the interest to his own support, but paying the balance to his daughter. The daughter filed her bill praying for a receiver to take charge of the mortgages, alleging that her father was denying her rights therein; that, by reason of his age and enfeebled condition, he was not properly managing the property; and that his son now claimed a joint interest in the mortgages so assigned. Held that, after complainant had succeeded on the merits, it was too late for defendants to object that her children had not been made parties, since the bill did not seek to reduce the property to complainant's possession, but only to place it in the hands of a receiver under the direction of the court.—*Snook v. Pearsall*, (Mich.) 55 N. W. 459.

Decree.

24. Where, in an action against R. and T. to subject to the payment of R.'s debt to plaintiff certain land that had been purchased by R. of T., the title to which still remained in T. to secure unpaid purchase money, T. files a cross petition, asking that his claim be adjudged a first lien on the land, and R., though answering, does not appear further, a decree establishing T.'s claim as a first lien is proper.—*Keith v. Losier*, (Iowa.) 55 N. W. 952.

Error, Writ of.

See "Appeal;" "Certiorari;" "Criminal Law;" "New Trial."

ESCROW.

See, also, "Deed," 5.

What constitutes.

1. Where persons executing deeds to each other leave them in the hands of a third person until they get proper abstracts of title, reserving to themselves the determination of whether the abstracts are proper, they will be held to have been left in escrow, and not delivered, though each party took immediate possession under the deed to him.—*Hoyt v. McLagan*, (Iowa.) 55 N. W. 18.

Performance of conditions.

2. Plaintiff owned an equity in certain lots, to some of which P. acquired title, subject to a mortgage. P. agreed to convey same and other land to defendant, to make certain improvements, and to pay off incumbrances, in consideration for which defendant agreed to convey a tract of land to P. A deed to such tract was delivered in escrow, delivery to be made to P. on his performance of the contract. Thereupon, P. conveyed to plaintiff the land described in the deed from defendant, in consideration for which plaintiff directed the release of the lots to which P. had title from the aforementioned mortgage. Subsequently, P. being unable to pay off the incumbrances on the land conveyed by him, and not having completed the improvements as agreed, the contract was rescinded, and the deed held in escrow was returned to defendant, the latter having no knowledge of the conveyance to plaintiff. Held, that title did not vest in P. until his performance of the contract, and, not having performed, he had no title that he could convey,

as against defendant, who had a right to rescind.—*Jackson v. Rowley*, (Iowa.) 55 N. W. 339.

ESTATES.

See, also, "Dower;" "Homestead;" "Tenancy in Common;" "Wills."

Liability of life tenant.

The fact that a reversioner, occupying jointly with a life tenant, mortgages the reversion, agreeing with the mortgagee to pay the taxes, does not relieve the tenant of that duty.—*Jenks v. Horton*, (Mich.) 55 N. W. 372.

ESTOPPEL.

By laches, see "Equity," 19-21.

By recitals in bond, see "Appeal," 95.

Of city, validity of bonds, see "Municipal Corporations," 43-45.

Res judicata, see "Judgment," 7-18.

To deny corporate existence, see "Corporations," 1, 2.

To object to instructions, see "Trial," 38, 39.

To sue to set aside conveyances, see "Fraudulent Conveyances," 12.

By deed.

1. In ejectment, where plaintiff asserts title under a railroad land grant, defendant, claiming under a tax deed, cannot attack the regularity of the proceedings under the grant by which the government's title was divested, since the validity of the tax deed is dependent on the government having parted with the title, and it will be assumed that the taxes for which the land was sold were assessed to plaintiff or his grantors.—*Tillotson v. Webber*, (Mich.) 55 N. W. 837.

2. Where plaintiff claims certain land under a deed which describes it as block B, he cannot, in an action therefor against one claiming from his grantor under a prior mortgage covering all of block B, dispute the deed, and show that the land was not a part of block B.—*Thompson v. Smith*, (Mich.) 55 N. W. 889.

3. Where a mortgagor executes a deed to a second mortgagee, fraudulently including a provision that the grantee shall assume and pay the first mortgage and a third mortgage, of which the grantee knows nothing, and the deed is not delivered, but put on record by the grantor, and is repudiated by the grantee as soon as its contents are known, the grantee in the deed is not estopped by the record thereof to deny the merger, as against an assignee of the third mortgage, where the second mortgage appears of record, undischarged.—*Cook v. Foster*, (Mich.) 55 N. W. 1019.

— To assert after-acquired title.

4. A deed reciting that the parties have by amicable arrangement divided among themselves the property of their father's estate, and that, to carry the agreement into effect, and in consideration of one dollar to each in hand paid, the parties have granted, sold, and conveyed "all their right, title, and interest" in the land mentioned, does not carry on its face, either in express terms or by necessary implication, a statement that the grantors or their ancestors were seized of a title in fee in the premises, and hence does not estop one of the grantors from asserting an after-acquired title in fee against one claiming under the grantee.—*Pendill v. Marquette County Agricultural Soc.*, (Mich.) 55 N. W. 384.

5. A mortgage given by a wife alone on property held in common, being void in its inception, did not estop the wife or her heirs from asserting the interest in the land afterwards acquired by her on the death of her husband; and How. St. § 8506, providing that, after the time of redemption from foreclosure sale, after-acquired title by the mortgagor shall inure to the purchaser at foreclosure,

does not apply.—*Naylor v. Minock*, (Mich.) 55 N. W. 684.

By record—Pleadings.

6. In an action to quiet title under a tax deed, where the petition alleges that the deed was recorded in the county records, and the answer, as a basis for affirmative relief, alleges "that the said pretended tax deed, and the record thereof, * * * constitute a cloud" on his title, an objection that the "deed is not properly acknowledged, indexed, and recorded as required by statute," cannot be raised when the deed is offered in evidence.—*Hewitt v. Morgan*, (Iowa,) 55 N. W. 478.

7. Where, in an action to quiet title, both plaintiff and defendant claim under decrees adjudging the land to have been the property of R., the fact that in proceedings by plaintiff to correct the decree, in his favor, recovered in an action against R. and wife, the representatives of the wife, then deceased, were not made parties, is immaterial.—*Keith v. Losier*, (Iowa,) 55 N. W. 952.

In pais.

8. A lessee mortgaged all buildings on the premises to secure payment of the rent, and erected buildings capable of being removed without injury to the freehold. After the lessee had assigned the lease to defendant the lessor made an affidavit to renew the mortgage on the files of the clerk, and the lessee subsequently sold defendant his interest in the improvements. *Held*, that the lessor was estopped to deny defendant's right to remove the buildings during the term.—*Platto v. Gettelman*, (Wis.) 55 N. W. 167.

9. Where the purchaser of pine lands procures an extension on deferred payments, and attempts to make contracts with the vendors for permission to lumber the land, and otherwise treats it as his own, after he knows that certain representations of the latter as to the amount of pine thereon were false, and were fraudulently made to induce the purchase, he is precluded from setting up such fraud in avoidance of the contract of sale.—*Wylie v. Gamble*, (Mich.) 55 N. W. 377.

10. Where the owners of land plat it as an addition to a town, so as to show what appears to be the prolongation of its streets, (though not so designated,) and for eight years acquiesce in the grading and public use of such apparent streets, the erection of sidewalks, and the construction of costly improvements upon adjacent private property, and represent to a person who, on the faith thereof, purchases a portion of the addition adjoining the apparent street, that such portion will abut upon the same as streets, they are estopped to deny the existence of the streets.—*Likes v. Stone*, (Neb.) 55 N. W. 878.

11. A treasurer of a township deposited its money in a bank, which subsequently made an assignment for the benefit of its creditors. The township brought suit against the bank and assignee to have a trust in the assigned property declared in its favor for the amount of the debt, and subsequently attached property which the assignor had conveyed prior to the assignment, and also property which it thought had not passed by the assignment. *Held*, that the attachment was not inconsistent with the attempt to follow the property as a trust fund.—*District Tp. of Eureka v. Farmers' Bank*, (Iowa,) 55 N. W. 342.

12. Where, in an action against a person who has disappeared from home, a homestead is set off to his wife, plaintiff is not estopped to deny that the absentee is a nonresident, as against parties who have sued him as such.—*Hershey v. Botna Val. State Bank*, (Iowa,) 55 N. W. 342.

13. A bank declined to pay money on deposit to the depositor's daughter, and drew a paper, which the depositor signed, to the following effect: "Allow A., my wife, to sign *yr.* books, and allow her draw any and all mon-

ey standing in my name as depositor." *Held*, that the fact that the bank drew the paper, and paid money thereon for the burial expenses of the wife after the death of the depositor, does not estop it to deny the sufficiency of the order, as it did not undertake, as a professional adviser, to guaranty the efficiency of the paper.—*Wayne County Sav. Bank v. Airey*, (Mich.) 55 N. W. 355.

14. Defendant, in attachment to enforce a logging lien under Laws 1887, (Act No. 229,) made certain objections to the sale of the logs under execution issued on judgment for plaintiff therein. *Held*, in replevin for the logs by such defendant against the purchaser at the execution sale, that plaintiff's failure to object at the time of the sale that jurisdiction was not acquired in the attachment suit, by reason of the fact that the affidavit and writ did not issue on the same day, did not estop him to raise the point where defendant bid on the advice of his counsel, who had examined the records of the attachment suit, and reported thereon.—*Northern Michigan Lumber Co. v. Lyon*, (Mich.) 55 N. W. 438.

15. The fact that an assignee has commenced an action to set aside a transfer of stock by the assignor, as in fraud of his creditors, does not estop the assignee, in an action against him by another, from claiming that the assignment is valid.—*Le Moynes v. Braden*, (Iowa,) 55 N. W. 14.

16. Where the heirs interested in a decedent's estate, before the appointment of the general administrator, without objection, participate in the hearing of claims before the judge of probate, they are estopped to question the regularity of such hearing, or to insist on the appointment of commissioners on claims after the appointment of such administrator.—*Jenks v. St. Clair Probate Judge*, (Mich.) 55 N. W. 563.

— To assert title.

17. The mere fact that the owner of property has intrusted the possession of it to another will not estop him from asserting his ownership against one who purchases from the bailee in the belief that such bailee was the owner.—*Baker v. Taylor*, (Minn.) 55 N. W. 823.

— To assert lien.

18. Where a mortgagee of certain lots on which the owner wished to erect a building released his mortgage in consideration of a written promise by the contractors that they would pay him the amount thereof out of the payments made to them as the building progressed, which promise they failed to keep, they will be estopped, in an action by them to enforce mechanics' liens on the premises, from claiming liens prior to that of the mortgagee.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

19. In replevin of lumber on which defendant claimed a lien for sawing for plaintiffs' vendor, it appeared that, before plaintiffs purchased, one of them visited defendant's mill, looked over the lumber, and afterwards communicated to their vendor their acceptance, and that no knowledge of such acceptance, the terms of the contract, or the time or place of delivery was brought home to defendant. The only facts showing knowledge were that the initials of one of plaintiffs were placed on the piles of lumber sold, and that defendant saw him at the mill while the sale was being negotiated. *Held*, that there was no such transaction in defendant's presence as made it his duty to assert his lien, and he was not estopped from doing so in the replevin suit.—*Hughes v. Tanner*, (Mich.) 55 N. W. 661.

Eviction.

Of tenant, see "Landlord and Tenant," 1.

EVIDENCE.

Burden of proof, see "Alteration of Instruments;" "Limitation of Actions," 15.
 — of breach of warranty, see "Sale," 20.
 Exhibition of injured member in action for personal injuries, see "Damages," 33.
 Expert testimony as to insanity, see "Homicide," 4.
 Harmless error, see "Appeal," 70-84.
 In action for damages from fire, see "Railroad Companies," 27.
 — for injuries by defective street, see "Municipal Corporations," 22-30.
 — on bonds, see "Bonds," 1-3.
 In criminal prosecutions, see "Bastardy," 1; "Criminal Law," 11-14; "Homicide," 5; "Indecent Exposure;" "Intoxicating Liquors," 11-13; "Libel and Slander," 7; "Rape," 5-14; "Seduction."
 In particular actions, see "Assault and Battery;" "Assumpsit," 4-8; "Breach of Marriage Promise," 1-5; "Deceit," 4; "Ejectment," 3-6; "False Imprisonment," 5-7; "Malpractice," 4-6; "Trove and Conversion," 3, 4.
 Newly-discovered, see "New Trial," 3, 4.
 Objections, see "Criminal Law," 6, 7; "Trial," 12-16.
 Of agency, see "Principal and Agent," 2.
 Of boundaries, see "Boundaries," 1.
 Of breach of warranty, see "Sale," 19.
 Of custom, see "Custom and Usage."
 Of damages, see "Damages," 29-33.
 Of fraud, see "Fraud," 2; "Fraudulent Conveyances," 14, 15.
 Of insanity, see "Insanity."
 Of marriage, see "Marriage."
 Of negligence, see "Negligence," 15-20.
 Of payment, see "Payment," 2.
 Pleading and proof, see "Pleading," 10-15.
 Presumptions, see "Alteration of Instruments,"
 — as to foreign law, see "Acknowledgment," 4; "Conflict of Laws," 2.
 — as to organization of school district, see "Schools and School Districts," 1, 2.
 — of capacity to commit crime, see "Criminal Law," 1.
 — of payment, see "Payment," 3, 4.
 Reception of, see "Trial," 4-11.
 Review of sufficiency, see "Appeal," 62-69.
 View by jury, see "Trial," 2.

Best and secondary.

1. In a proceeding to establish a claim against a decedent's estate for work rendered decedent, it is proper to allow claimant to testify in regard to the possession of a written contract between him and deceased, which has been lost, but he should not be allowed to testify as to the contents of such contract.—*Stevens v. Witter*, (Iowa,) 55 N. W. 535.

2. A copy of a letter purporting to have been written by plaintiff to a third person is not admissible to contradict plaintiff's testimony, where the only evidence of the existence of the letter was defendant's testimony that he knew plaintiff's handwriting, and that he had had such a letter in his possession, but was satisfied it was lost.—*Angell v. Loomis*, (Mich.) 55 N. W. 1008.

3. In an action against a stockholder to recover an assessment on stock, without deciding whether the law recognizes any degrees in the various kinds of secondary evidence, it was proper to permit plaintiff's secretary to give oral testimony of the contents of the notice of the call sent defendant, when it did not appear that plaintiff had a copy in its possession.—*Minneapolis Times Co. v. Nimocks*, (Minn.) 55 N. W. 546.

Hearsay.

4. In an action for false imprisonment, where plaintiff was arrested under a mistake as to his identity, it is error to permit defendant to testify as to the opinions of third persons, given after the arrest, touching the resemblance between such photograph and plain-

tiff, both of the latter being in court.—*Filer v. Smith*, (Mich.) 55 N. W. 909.

Declarations and admissions.

5. In an action by an administrator against a railroad for the wrongful death of plaintiff's decedent, the declarations of decedent, made a few minutes after the accident, and explanatory of it, are part of the *res gestae*, and are admissible.—*Missouri Pac. Ry. Co. v. Baier*, (Neb.) 55 N. W. 913.

6. In an action of claim and delivery to recover a colt, plaintiff claimed under chattel mortgages from D., while defendant claimed as the agent of the original owner of the dam, and alleged that his principal had sold the dam to D., and reserved the unborn colt. *Held*, that statements of D., since deceased, made prior to the execution of the mortgages, that he bought the dam, but did not get the colt, were admissible as declarations against interest.—*Baker v. Taylor*, (Minn.) 55 N. W. 823.

7. In an action for plastering a house, in which defendant claims the work was done for his contractor, evidence of what was said in a conversation between defendant and his architect is not admissible in behalf of defendant.—*Evans v. Montgomery*, (Mich.) 55 N. W. 362.

8. In an action for plastering a house, in which defendant claims the work was done for his contractor, where plaintiff claims to have originally agreed to do two-coat work, and that the specifications called for, and he did, three-coat work, it is not error to admit evidence that after he began work such specifications were produced, and he was told to do the work according to them, and he should have his pay.—*Evans v. Montgomery*, (Mich.) 55 N. W. 362.

9. In an action for plastering a house, in which defendant claims the work was done for his contractor, evidence was admissible that, after the work was completed, defendant's wife, in his presence, stated to plaintiff that the money was in the bank to pay for it, and that defendant made no reply.—*Evans v. Montgomery*, (Mich.) 55 N. W. 362.

10. In an action for plastering a house, in which defendant claims the work was done for his contractor, who was to furnish materials, and construct the building, it is not error to admit evidence that plaintiff told defendant at the time of their agreement that such contractor already owed him, and he would have nothing to do with him.—*Evans v. Montgomery*, (Mich.) 55 N. W. 362.

11. In an action to recover property levied on as that of others, evidence of the declarations of such third persons, not parties to the suit, respecting the ownership, is inadmissible though they are in possession of the property.—*Olson v. Swensen*, (Minn.) 55 N. W. 596.

12. In an action to recover property levied on as that of another, it is proper, on cross-examination, to question plaintiff in regard to his admissions to third parties, touching the ownership of the property in controversy.—*Olson v. Swensen*, (Minn.) 55 N. W. 596.

13. Declarations of a party to the suit, explanatory of his physical condition at the time the declarations are made, are admissible, when the circumstances warrant the inference that they were made spontaneously, and not with a view to their effect upon the controversy; and the question whether they fall within this rule must be left largely to the discretion of the trial court.—*Hewitt v. Eisenbart*, (Neb.) 55 N. W. 252.

14. In attachment, it appeared that an intervening company which claimed accounts garnished by plaintiff owned defendant company, and did business under its name. It did not appear when such relation ceased. *Held*, that statements of defendant's president, made to plaintiff as a basis for obtaining credit, were admissible against intervenor.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa,) 55 N. W. 496.

15. Complainant wrote defendant iron company, asking the price of certain land. De-

defendant replied, stating certain prices, which were accepted. Prior to this correspondence, defendant had written that, if a sale was effected, the usual mineral rights would be reserved. There had been, also, several conversations with defendant's president, in which the same statement had been made, and in which complainant's attention had been called to the form of deeds used by defendant. Complainant did not deny these conversations, but insisted that nothing was said about including stone in the reserved rights. The deed handed complainant, however, contained such reservation. Complainant, instead of having it altered, gave his check for the amount, and said merely that he would write defendant about it. *Held*, that the letters and evidence as to the conversations were properly admissible in an action to compel the making of a deed without the reservations.—*Butler v. Iron Cliffs Co.*, (Mich.) 55 N. W. 670.

16. In garnishment proceedings, where it appears that the garnishee presided at a meeting of defendant company's board, at which a report was read showing the amount of the garnishee's indebtedness to defendant, which the garnishee did not deny, such report is admissible as evidence against the garnishee.—*Des Moines Sav. Bank v. Colfax Hotel Co.*, (Iowa.) 55 N. W. 67.

Opinion evidence.

17. In trover for a bedroom set, it appeared that the set was the first constructed after a unique design invented by plaintiff, an expert wood carver, and could not be said to have an ascertained market value. Testimony was given by experts of its value. *Held*, that a witness who had worked 10½ months on the set, and testified that he knew how much time plaintiff had spent on it, was properly permitted to state how much it would cost to make another just like it.—*Ruppel v. Adrian Furniture Manuf'g Co.*, (Mich.) 55 N. W. 995.

18. One who has witnessed a person's acts, appearance, and speech may express an opinion as to whether he was intoxicated.—*McKillop v. Duluth St. Ry. Co.*, (Minn.) 55 N. W. 739.

19. It was proper to allow a witness, who lived near the scene of the accident, and had seen many trains pass, to give his opinion as to how many miles an hour the train was running, though it appeared that he did not know how many feet or rods there were in a mile.—*Ward v. Chicago, St. P., M. & O. Ry. Co.*, (Wis.) 55 N. W. 771.

20. Where, in an action for the price of a harvesting machine, defendant testifies that the agent gave him certain instructions as to running the machine, without stating what they were, it is error to permit him to further state that "I did just as he said," since such evidence is the statement of a conclusion.—*McCormick Harvesting Mach. Co. v. Brower*, (Iowa.) 55 N. W. 537.

— Experts.

21. It is not prejudicial error to permit an expert to state what steps he would take in a given case, if the question does not refer to any matter in dispute, but is merely introductory in its character.—*Hewitt v. Eisenbart*, (Neb.) 55 N. W. 252.

22. One who has been a conductor of an electric street car for two months is competent to testify within what distance such a car, going at a specified rate of speed, can be stopped.—*Watson v. Minneapolis St. Ry. Co.*, (Minn.) 55 N. W. 742.

23. In an action for personal injuries, where a medical witness has testified as to plaintiff's injury in December, and as to his condition in April following, it was proper to ask the witness whether plaintiff's condition in April was the result of his injuries in December, without embodying in the question the fact of the injury.—*McDonald v. Illinois Cent. R. Co.*, (Iowa.) 55 N. W. 102.

24. One who is engaged in selling flour in the various markets of the state, and knows the value of flour at the point in question, may testify as to the quality and value of flour sold, on the issue of breach of warranty.—*Reed Bros. Co. v. R. T. Davis Milling Co.*, (Neb.) 55 N. W. 1068.

25. On the question of the market value of certain land, the opinion of a geological expert, not published or known so as to affect people's estimate of the value, that there is valuable stone beneath the surface, is not admissible.—*Roussain v. Norton*, (Minn.) 55 N. W. 747.

26. In an action against a railroad company for damages caused by an overflow, it was proper to allow a civil engineer to state that a couple of culverts through the embankment would materially help in draining the land.—*Willitts v. Chicago, B. & K. C. Ry. Co.*, (Iowa.) 55 N. W. 313.

Documents.

27. A party's pleadings in an action may be admissible against him in another action, as his admissions; but the judgment in the first action, the parties to the two not being the same, is not admissible, either as an admission, or as evidence of the fact on which it is based.—*O'Riley v. Clampet*, (Minn.) 55 N. W. 740.

28. A copy of letters of administration, when duly certified to be a correct copy, as appears from the original on file in the county court wherein such letters were granted, is admissible in evidence with the same effect as the original.—*Missouri Pac. Ry. Co. v. Baier*, (Neb.) 55 N. W. 913.

29. In attachment, it appeared that an intervening company which claimed accounts garnished by plaintiff owned defendant company, and did business under its name, and it did not appear when such relation ceased. *Held*, that it could not be said that intervener was a stranger to the entries in defendant's books, so as to make the admission of them against it error.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa.) 55 N. W. 496.

30. Where a deed is insufficient for want of a proper acknowledgment, it is not reversible error to receive it in evidence, where the deed is pleaded in the complaint, and not denied in the answer, and defendant acquired the interest in the land which he claimed before the deed was executed, and was not affected by any want of notice of the deed, nor by any defect in its acknowledgment.—*Hewitt v. Morgan*, (Iowa.) 55 N. W. 478.

31. A certified copy of a deed executed after the passage of the curative act is not admissible as evidence where the certificate of acknowledgment, purported to be made by a notary public, was not attested by a seal.—*Pitts v. Seavey*, (Iowa.) 55 N. W. 480.

32. Since a defectively acknowledged deed is good between the parties, it is competent evidence, in an action against a tenant, to show ownership in the grantee.—*Banbury v. Sherin*, (S. D.) 55 N. W. 723.

33. An exemplification from the records of the land office of a list of lands selected by the agent of the state under a railroad grant is not insufficient because it includes only the lands in such list which are involved in the case at issue, it appearing that such a certification complies with the practice of the land office.—*Tillotson v. Webber*, (Mich.) 55 N. W. 837.

— Photographs.

34. Photographic views of the premises which would not have assisted the jury, which were taken over a year after the cause of action arose, and of the accuracy of which there was no proof, were properly excluded.—*Leidlein v. Meyer*, (Mich.) 55 N. W. 367.

Parol evidence.

35. Where, in an action of trespass, the title to real estate is directly in issue, it cannot be established by parol evidence.—*Moe v. Chesrown*, (Minn.) 55 N. W. 832.

36. An instrument acknowledging receipt from P. of a sum in cash, and that said P. also agrees to pay H. another sum for certain property described, "this being a receipt in full for all the above property," is a mere receipt or memorandum, and may be varied by oral proof that the purchaser agreed to pay the back wages of the seller's employe in the business sold, said agreement being omitted from the receipt at the purchaser's request, lest a third person should learn, it.—*Barnett v. Pratt*, (Neb.) 55 N. W. 1050.

37. School bonds were delivered by the school board, consisting of the treasurer and others, at a bank for negotiation and sale. The cashier thereupon delivered to the treasurer a writing as follows: "\$1,000. Grand Rapids, Dakota, Sept. 28th, 1883. Received of William Haseleu, Treas. Prairie School Township, one thousand dollars in bonds of Prairie Tp., La Moure Co., D. T., for placing and cr. A. H. Huelster, Cashier Bank of Grand Rapids." *Held*, that such writing was both a receipt and a contract, and therefore its terms could be varied and explained by parol evidence only as to that part which is a mere receipt.—*Prairie School Tp. v. Haseleu*, (N. D.) 55 N. W. 938.

38. Testimony that a mortgagor pointed out and told the mortgagee what lands were to be included in the mortgage is not admissible to show that the mortgage, which described the land as all of block B, did not include parts of that block.—*Thompson v. Smith*, (Mich.) 55 N. W. 886.

39. Where plaintiff made a written contract to operate a roller flouring mill, doing "custom" work, parol evidence of a conversation in which a party to the contract said that a mill was wanted which would receive the grain, grind it, and return the identical flour made from it, is inadmissible, since it contradicts the contract.—*Hutchinson v. Cleary*, (N. D.) 55 N. W. 729.

40. It is competent to prove by parol the existence of a separate oral agreement as to matter in regard to which a written instrument is silent, and which is not inconsistent with its terms, when it is apparent that the parties did not intend the writing to be a complete statement of the whole transaction between them.—*Phoenix Pub. Co. v. Riverside Clothing Co.*, (Minn.) 55 N. W. 912.

41. In an action on a written contract for the sale of logs "boomed and delivered to tug," a contemporaneous oral agreement to inclose the logs within a boom, and fasten the two separate ends of the boom to the shore, being at variance with the written agreement, is inadmissible.—*Gasper v. Heimbach*, (Minn.) 55 N. W. 559.

42. Plaintiff contracted in writing to work for defendants for a stated term, it being agreed that, if defendants continued "in the manufacturing business" after the expiration of such time, plaintiff should be employed for a further term. *Held*, in an action for wages for such further term, the issue being whether defendants continued in the manufacturing business, that the contract was unambiguous, and parol evidence was not admissible to explain it.—*Whitworth v. Brown*, (Wis.) 55 N. W. 422.

43. In an action to deliver wall paper at a certain price under a written contract, parol evidence is inadmissible to show that at the time of making the contract the parties agreed that the wholesale price should be as stated on a printed card then delivered to the purchaser. 49 N. W. 1003, reversed.—*Fawcner v. Lew Smith Wall Paper Co.*, (Iowa.) 55 N. W. 200.

Evidence at former trial.

44. On the preliminary inquiry in a case, where it is sought to introduce the testimony of a nonresident witness, given on a former trial, as to whether the witness is domiciled out of the state, or is likely to remain out of the reach of the process of the court, the

witness' declarations of intention are admissible, in connection with evidence of the fact of his departure or absence from the state.—*King v. McCarthy*, (Minn.) 55 N. W. 960.

Competency, relevancy, and materiality.

45. In an action for the conversion of timber, and iron dogs used to hold it together, which plaintiff claimed had been stolen, defendants admitted purchasing seven pieces of the timber from one G., but denied plaintiff's claim as to the balance. *Held*, that it was not error to permit G. to testify that he was paid \$15 by defendants for the seven pieces.—*Davidson v. Kolb*, (Mich.) 55 N. W. 373.

46. In an action for a balance alleged to be due on a contract to build a mill, defendants set up a breach of the contract as a counterclaim, and alleged that instead of turning out from 50 to 70 barrels a day, as the contract provided, the mill only turned out 35 barrels a day. *Held*, where a miller who had been in defendants' employ testified that he had made a test of the mill, and that it turned out 60 barrels of first-class flour in a day, it was proper to ask him on cross-examination whose wheat he was grinding, in order to lay a foundation for showing that the flour was not first-class.—*Pye v. Bakke*, (Minn.) 55 N. W. 904.

47. When the evidence is conflicting on the question whether a certain price was orally agreed to be paid for doing certain work, evidence of the value of the work is admissible.—*Saunders v. Gallagher*, (Minn.) 55 N. W. 600.

Examination.

Of witness, see "Witness," 8-17.

Exceptions.

To instructions, see "Trial," 36, 37.

Exceptions, Bill of

See "Appeal;" "Certiorari;" "Criminal Law."

Excessive Damages.

See "Damages," 22-25.

EXECUTION.

See, also, "Attachment;" "Exemptions;" "Garnishment."

Unlawful seizure, liability of officer, see "Sheriffs and Constables."

Issuance and validity.

1. The fact that the execution under which certain land was sold was issued in an equity suit in aid of an attachment, rather than in the attachment suit itself, will not defeat the title of the purchaser at such execution sale, as against one claiming under a lien inferior to the attachment.—*Keith v. Losier*, (Iowa.) 55 N. W. 952.

Levy—Description of land.

2. A description of land in an execution levy was "the undivided $\frac{1}{2}$ of the following described land, to wit: The S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$," while in subsequent proceedings the description was: "The undivided $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$." *Held*, that the latter description meant the undivided $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, as well as the undivided $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and that both descriptions were therefore identical, and could not mislead any one.—*Hoffman v. Buschman*, (Mich.) 55 N. W. 458.

Claims by third persons.

3. In an action by a son to recover certain horses and a delivery wagon which were levied on as the property of his parents, plain-

tiff testified that he had been a partner with his father, furnished money for the business, and put the property into it, and that when he quit and went away he squared up with his father, and left the property in the business. In addition he had permitted his father to mortgage the property as his own. *Held*, that the evidence was insufficient to make a case for the jury.—*Olson v. Swensen*, (Minn.) 55 N. W. 596.

Sale.

4. The right, under Gen. Laws 1862, c. 19, to have, in certain cases, a second certificate of sale on execution from the officer making the sale, was reserved to one who purchased before its repeal by Gen. St. 1866, c. 121, § 4, providing that such repeal should not affect any right accruing, accrued, or established.—*Olsen v. Peterson*, (Minn.) 55 N. W. 815.

5. Even if two contiguous 40-acre parcels, occupied as one farm, can be considered within How. St. § 6116, which requires each lot, tract, or parcel of land to be sold separately on execution sale, the failure to do so is a mere irregularity, which cannot be questioned in effectment for the premises by the purchaser against the judgment debtor.—*Hoffman v. Buschman*, (Mich.) 55 N. W. 458.

6. Prior to Act 1889, (3 How. St. § 6173a.) providing that all levies of executions theretofore made should cease to be liens at the expiration of five years from the time the law took effect, there was no limitation on the existence of a lien by execution levy. How. St. § 8736, provides that actions upon judgments must be brought within 10 years after the entry of judgment. *Held*, that where judgment was rendered and execution issued and levy made in April, 1878, and the land advertised for sale in March, 1888, a sale made in May, 1888, was valid; it being immaterial that the sale took place after the expiration of the time within which suit could be brought on the judgment, the proceedings for sale having been commenced within such time.—*Ludeman v. Hirth*, (Mich.) 55 N. W. 449.

Redemption of realty.

7. Where an attaching creditor, by seeking to defeat the priority of an earlier attachment, permits the statutory period of redemption from the execution sale under the earlier attachment to pass, equity will not interfere to permit redemption.—*Keith v. Losier*, (Iowa.) 55 N. W. 952.

8. Code, §§ 3102-3105, provide that the right to redeem from an execution sale shall be exclusively in the execution defendant for the first six months; then in his creditors having liens in common with defendant, and as between each other, for the next three months; and to defendant exclusively for the last three months. Section 3123 provides that defendant's rights to redeem are transferable, and the assignee has the like power to redeem. *Held*, that where an execution defendant conveyed his real estate by a deed absolute on its face, but which was in fact a mortgage, and the mortgagee quitclaimed to a third person, such person took no greater rights than the mortgagee had, and had the right to redeem as a creditor only.—*Robertson v. Moline, Milburn & Stoddard Wagon Co.*, (Iowa.) 55 N. W. 495.

— Who may question right.

9. A purchaser at execution sale was entitled to question the right of one attempting to redeem, and to ask that an attempted redemption be set aside as a cloud on his title, where those entitled to redeem had failed to do so.—*Robertson v. Moline, Milburn & Stoddard Wagon Co.*, (Iowa.) 55 N. W. 495.

Injunction against.

10. The purchaser of a homestead, though not in possession, may enjoin a sale thereof on an execution issued on a judgment rendered against the grantor while he owned and occu-

pled the premises.—*Smith v. Zimmerman*, (Wis.) 55 N. W. 956.

11. The complaint need not show that the premises were the grantor's homestead at the time of the issuing of the execution, and its levy.—*Smith v. Zimmerman*, (Wis.) 55 N. W. 956.

12. Where administration was granted by a probate court in Ohio of property there located, an action in a district court in Iowa by an heir living in that state to require an accounting of the administrator cannot be maintained before final settlement and order of distribution by the probate court in Ohio.—*Snyder v. Hochstetler*, (Iowa.) 55 N. W. 573.

EXECUTORS AND ADMINISTRATORS.

See, also, "Wills."

Assets.

1. Code, § 2402, provides that an administrator may take the rents of land accruing after the death of the owner, "if there be no heir or devisee present and competent to take possession." Section 2403 provides that under the order of the court the administrator may apply the profits of the real estate to the payment of the taxes and claims against the estate, in case the personal assets are insufficient. *Held*, where a mortgage on land was foreclosed after the death of the owner, that the administrator cannot maintain an action against the heirs for the rents and profits received by them during the time for redemption, though there are no other assets to pay debts.—*Dexter v. Hayes*, (Iowa.) 55 N. W. 491.

Powers.

2. Code, § 2402, provides that, "if there be no heir or devisee present, and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate, and demand and receive the profits thereof." *Held*, that an administrator had power to enforce a lien for rent, where, four years before, there was no heir present, or competent to take possession of the land, and the administrator had had possession of and rented the land since that time, and there was nothing to show that he was not entitled to possession.—*Durlam v. Steele*, (Iowa.) 55 N. W. 509.

3. Acts 18th Gen. Assem. c. 162, provides that no executor of a will first admitted to probate in another state shall convey any land until three months after the recording of a copy of the will in the probate record of the county where the land is situated. *Held* that, though defendant sold such land within less than three months after record of the will, (the will having been first probated in another state,) such defect would not necessarily invalidate the sale, and that, while it might have authorized the purchaser to refuse the deed tendered, it was a personal right, which he might waive.—*Dorsey v. Banks*, (Iowa.) 55 N. W. 574.

Liability on bond.

4. In an action on the bond of an administrator de bonis non, parol evidence is not admissible that he received only a certain amount; but the judgment of the court on the accounting by him, charging him with a certain larger amount, is conclusive.—*Holden v. Curry*, (Wis.) 55 N. W. 965.

Allowance of demands.

5. Where a claim against an estate filed by the administrator was allowed, a subsequent vacation of the allowance, on the application of one who knew of the time for hearing, but failed to appear and oppose the claim, and whose only excuse for not appearing was that he felt confident that the administrator would administer the estate honestly, and not permit unjust claims to be allowed, is abuse

of discretion.—*In re Kidder's Estate*, (Minn.) 55 N. W. 738; *Kidder v. True*, *Id.*

6. Where a claim is for work done for a decedent under a contract, claimant must not only show the contract, and the performance of the work in accordance therewith, but also that he has not been paid for it.—*Stevens v. Witter*, (Iowa,) 55 N. W. 535.

7. Under Code, § 2410, providing that claims filed against an estate, and not expressly admitted in writing signed by the executor, with the approbation of the court, shall be considered as denied, without any pleading in behalf of the estate, a note alleged to have been executed by a decedent is not admissible in evidence, in an action thereon against her executor, in the absence of evidence to prove the genuineness of decedent's signature.—*Smith v. King*, (Iowa,) 55 N. W. 88.

8. Services rendered and money spent by a son in taking care of his mother and her minor children at the special request of his uncle, on his promise to pay therefor, constitute a valid claim against the uncle's estate, after his decease.—*Grimm v. Taylor's Estate*, (Mich.) 55 N. W. 447.

9. In a suit for services, where the mother of claimant testifies that claimant was to be paid by deceased "when he was done with the property. He always told me he would leave me a thousand dollars, too, as well as him,"—and another witness testifies that deceased said he would pay claimant \$1,000, but the other testimony is that claimant was to be well paid for his services, it is error to submit the question as to whether there was a distinct contract to pay claimant \$1,000 for his services rendered.—*Grimm v. Taylor's Estate*, (Mich.) 55 N. W. 447.

10. An allegation, in a claim filed against a decedent's estate, for "services in the care and aiding and supporting" decedent's sister and minor children, is broad enough to include aid and support by the contribution of money.—*Grimm v. Taylor's Estate*, (Mich.) 55 N. W. 447.

Allowance to widow.

11. Under Code, § 2375, providing that the court shall, if necessary, set off to the widow, and children under 15 years of age, of a decedent, sufficient to support them for a year, the amount of the allowance is within the court's discretion; and where a widow, with two children under the specified age, has no means of support except from the estate, an allowance of \$500, in addition to \$400 worth of exempt property, \$80 in money, and clothing, is not unreasonable, where the estate is of the value of \$40,000.—*In re Dewell's Estate*, (Iowa,) 55 N. W. 11.

EXEMPTIONS.

See, also, "Homestead."

Allowance to widow, see "Executors and Administrators," 11.

Liability of sheriff for unlawful seizure, see "Sheriffs and Constables," 1, 2.

Power of partner to waive, see "Partnership," 6.

Right to exemption.

1. A judgment debtor's right to exemption under Code Civil Proc. §§ 522, 523, is not dependent upon the mere intent with which the exemption is claimed.—*Kriesel v. Eddy*, (Neb.) 55 N. W. 224.

Evading exemption law.

2. Where there were due a resident of Nebraska, from a railroad company operating a road through Iowa and Nebraska, wages, which, in Nebraska, were exempt from attachment, but which, nevertheless, by means of an assignment of the claim to a resident of Iowa, were procured, by the garnishment of the railroad company in Iowa, to be applied to the payment of the claim, the assignor is liable to such debtor for the amount appropriated.—*O'Connor v. Walter*, (Neb.) 55 N. W. 867.

Experts.

Testimony of, see "Evidence," 21-26.

FACTORS AND BROKERS.

See, also, "Principal and Agent."

Duty to principal.

1. A real-estate agent must disclose to his principal all the information he has concerning sales of the property, and he cannot become a purchaser for his own benefit without the full knowledge and acquiescence of his principal.—*Jansen v. Williams*, (Neb.) 55 N. W. 279.

Commissions.

2. Authority to an agent to sell land, unless otherwise expressly provided, is authority only to sell for cash on delivery of the deed; and the fact that the cash payment would be more than was coming to the seller on the entire transaction is immaterial as regards the agent suing for his commission, since there was no agreement that the commission should come out of a deferred payment.—*Marble v. Bang*, (Minn.) 55 N. W. 1131.

3. When a real-estate broker is employed to procure a purchaser for land he is entitled to compensation when he has secured a proposed purchaser, ready and able to buy on the terms on which the said broker was authorized to procure a purchaser; and this right to compensation will not be impaired by the subsequent inability or unwillingness of the owner to consummate a sale on the terms prescribed.—*Jones v. Stevens*, (Neb.) 55 N. W. 251.

4. Where an agent to sell land is not authorized to execute a conveyance, but merely to obtain a purchaser, he is entitled to compensation upon finding a person ready and willing to make the purchase, although, owing to the owner's selling the land, the sale is not consummated.—*Ford v. Easley*, (Iowa,) 55 N. W. 330.

5. M.'s agent agreed to pay plaintiff a commission for selling M.'s land, and defendant offered to exchange his land therefor, and for \$210 in addition. Plaintiff submitted the proposition to M.'s agent, who accepted it, and an agreement for exchange was executed by such agent, in accordance with defendant's proposition, and placed in plaintiff's hands, to have defendant sign it. Without disclosing the fact that an agreement for exchange had already been executed by M., plaintiff told defendant that the trade could be made, and defendant said that he would pay no commissions, but would trade "even," if such a trade could be effected, and executed a written agreement to that effect. The exchange was duly made on the terms first proposed by defendant, and the \$210 paid over to him. *Held*, to show that plaintiff was acting as M.'s agent, and that he was not entitled to recover the \$210 or any other commission from defendant.—*Wilson v. Webster*, (Iowa,) 55 N. W. 571.

FALSE IMPRISONMENT.

Arrest without warrant, see "Arrest."

What constitutes.

1. In an action for false imprisonment, it appeared that defendant, a sheriff, received from the sheriff of another county information that one R. and a Mrs. N. had eloped, taking with them her five children. In the letter was a description of both, and a photograph of R. On receiving a telegram from defendant that the man wanted was at his city, the sheriff who sent the letter replied that he had a warrant for R.'s arrest, and requested that he be arrested; and defendant arrested plaintiff, who was not R., but a traveling salesman. He had been in the city five days, and boarded where there were several other boarders, and where, three days before, a woman who first gave her

name as C., and afterwards as N., and who had two children, was arrested for larceny. There was a resemblance between the photograph and plaintiff, but in the letter R.'s age was given as 50, while plaintiff was 36. Plaintiff at no time manifested any concern regarding the woman, and there was no evidence of any intimacy between them. Defendant made no inquiry as to plaintiff's business, or as to his relations with the woman. When arrested, plaintiff exhibited letters, tax receipt, and his memorandum book, with his name on it. *Held*, that the jury should have been instructed that defendant was not justified in arresting plaintiff.—*Filer v. Smith*, (Mich.) 55 N. W. 999.

Probable cause.

2. Where the facts are admitted, probable cause is a question of law for the court.—*White v. McQueen*, (Mich.) 55 N. W. 843.

3. Whether the facts in a particular case constitute probable cause, which justifies an officer in arresting a person without a warrant, on information that a felony has been committed, and on suspicion that the person arrested is the guilty party, is generally a question of law, for the court.—*Filer v. Smith*, (Mich.) 55 N. W. 999.

4. In an action for false imprisonment against a sheriff, an instruction is misleading which states that if defendant had good reason to, and in good faith did, believe that plaintiff was guilty of adultery, he was warranted in making the arrest on such charge, and holding him therefor, since a prosecution for adultery can only be instituted by the husband or wife of one of the guilty persons, and an officer, whatever his suspicions may be, has no right to make such an arrest.—*Filer v. Smith*, (Mich.) 55 N. W. 999.

Pleading and proof.

5. In an action against a sheriff for false imprisonment, a defense that a felony had been committed, and that defendant had reasonable grounds to believe that plaintiff was guilty, and consequently arrested him, must be specifically pleaded, and cannot be shown under a plea of not guilty.—*White v. McQueen*, (Mich.) 55 N. W. 843.

6. In an action for false imprisonment, evidence of the advice of attorneys, given defendant after the arrest, was improper.—*Filer v. Smith*, (Mich.) 55 N. W. 999.

7. Where the declaration in an action for false imprisonment alleges the publication in a newspaper of an account of plaintiff's arrest, it is error to exclude the publication from the evidence.—*Filer v. Smith*, (Mich.) 55 N. W. 999.

False Pretenses.

See "Deceit;" "Fraudulent Conveyances."

False Representations.

See "Deceit."

Fee Simple.

See "Wills," 6-8.

Fellow Servant.

See "Master and Servant," 14.

Filing.

Of chattel mortgage, see "Chattel Mortgages," 11-16.

Of pleading, see "Practice in Civil Cases," 7, 8.

Fire Insurance.

See "Insurance."

Fires.

See "Railroad Companies," 23-27.

FIXTURES.

What constitute.

1. On the foreclosure of a mortgage of a leasehold it appeared that, when the mortgagor commenced the erection of the building thereon, he expected to obtain a conveyance of the premises, but only received a lease for 20 years, and then erected the building, as first planned. The lease required the lessee to maintain on the premises an hotel and eating house, to be operated in connection with the lessor's railroad station, and provided for a renewal of the lease on its termination, or a disposition of the building under certain circumstances, but in no event could the lessee remove the same without the lessor's consent. *Held*, that the building was not a mere fixture, but a part of the realty, so that the lien thereon of a mortgage on the leasehold, taken without notice, was superior to that of a prior chattel mortgage on the building only.—*Fletcher v. Kelly*, (Iowa,) 55 N. W. 474.

2. A mortgage on real estate used as a foundry and machine shop covers machinery which was placed by the owner in a building erected by him many years before foreclosure of the mortgage, though some of the machines were not fastened to the soil, because they were so heavy it was not necessary; especially where the parties understood that such property was covered by the mortgage.—*Smith v. Blake*, (Mich.) 55 N. W. 978.

Flowage.

See "Damages;" "Railroad Companies;" "Surface Water."

FORCIBLE DEFILEMENT.

What constitutes.

1. On an indictment under Code, § 3862, for compelling a woman to be defiled against her will, it appeared that before the alleged commission of the crime F., one of defendants, had been criminally intimate with the woman, and that he and B., the other defendant, arranged that B. should surprise F. and the woman in flagrante delicto, and, under threats of exposure, compel the woman to allow B. to have sexual intercourse with her, and that, when surprised, the woman refused to consent to B.'s proposal, but did so under fear of B.'s threats of exposure. *Held*, that the evidence was sufficient to warrant a conviction.—*State v. Fernald*, (Iowa,) 55 N. W. 534.

2. To constitute a crime under Code, § 3862, providing that any person who by force or duress defiles a woman shall be fined, etc., the woman defiled need not be of previous chaste character.—*State v. Fernald*, (Iowa,) 55 N. W. 534.

FORCIBLE ENTRY AND DETAINER.

When lies.

1. Under Code Civil Proc. § 1019, allowing the action to any person entitled to possession as against another who has unlawfully and forcibly obtained possession, or whose possession, originally rightful and peaceable, is afterwards forcibly and unlawfully held, one whose complete possession has been ended by the wrongful entry of another may recover possession from him, even though the entry was made under claim of a paramount title, and surreptitiously, by a breach in the fence.—*Brown v. Feagins*, (Neb.) 55 N. W. 1048.

Instructions.

2. In an action to recover possession of farm lands and a dwelling house, both of which were alleged to be forcibly detained, plaintiff's request for an instruction which defined the

rights of defendant to the whole subject of controversy as though they should be tested by his rights to the possession of the dwelling house alone, was properly refused.—*Wagner v. Haines*, (Neb.) 55 N. W. 240.

Judgment on pleadings.

3. In proceedings by a landlord against his tenant under Gen. St. 1878, c. 84, to recover possession of the premises, judgment on the pleadings may be ordered as in other cases.—*Norton v. Beckman*, (Minn.) 55 N. W. 603.

Restitution pending appeal.

4. Gen. St. 1878, c. 84, as amended by Gen. Laws 1881, Ex. Sess., c. 9, (the forcible entry and unlawful detainer act,) providing that in actions before a justice of the peace to recover land held under a written lease after the expiration of the time specified therein, restitution of the premises shall be made notwithstanding an appeal, has no application to actions originally brought in the district court.—*State v. District Court of Hennepin County*, (Minn.) 55 N. W. 630.

Foreclosure.

Of mortgage, see "Mortgages," 6-13.

Foreign.

Corporations, see "Corporations," 19-21.
Law, presumptions, see "Acknowledgment," 4.
Receivers, see "Receivers," 3.

FORGERY.

Information—Sentence.

An information which charges the same person with forging an instrument and fraudulently uttering the same instrument charges but one crime, and, on conviction, but one penalty can be inflicted.—*In re Walsh*, (Neb.) 55 N. W. 1075.

Former Jeopardy.

See "Criminal Law," 2.

FRAUD.

See, also, "Deceit;" "Fraudulent Conveyances." As ground for attachment, see "Attachment," 1. Averment of facts constituting, see "Fraudulent Conveyances," 13.

Effect on statute of limitations, see "Limitation of Actions," 5-8.

In procuring will, see "Wills," 4, 5.

On creditors, see "Composition with Creditors."

Rescission of contract for, see "Contracts," 22.

Validity of judgment, see "Judgment," 3.

Pleading.

1. An answer setting up fraud or deceit as a defense to an action on a promissory note should show damage and the extent thereof.—*Parker v. Jewett*, (Minn.) 55 N. W. 56.

Evidence—Sufficiency.

2. Evidence, in an action on a check, that it was given in payment for hogs; that the seller warranted them to be sound; that, about the time the sale was made, there were some dead hogs in the yard where those sold were kept; and that most of the hogs sold died within three weeks from the time they were delivered,—without any evidence as to the nature of the disease of which the hogs died, or that the seller knew that they were diseased, is insufficient to show fraud.—*Shaw v. Jacobs*, (Iowa,) 55 N. W. 333.

FRAUDS, STATUTE OF.

Sufficiency of memorandum.

1. An agent of a wholesale house obtained from a retail merchant an order for goods. The

order was forwarded by the agent to his house with a request to notify the merchant at once if the order was accepted. The acceptance thereof with some modifications was telegraphed, and, on the date of its receipt, the merchant wrote, accepting the modifications. *Held*, that the order, telegram, and letters, taken together, constituted a contract for the sale of goods, and were a sufficient memorandum thereof to satisfy the statute of frauds.—*Olson v. Sharpless*, (Minn.) 55 N. W. 125.

Promise to answer for debt of another.

2. Defendant's contract for the erection of an opera house provided that, if the contractors failed to furnish material, defendant could supply the material, and deduct the cost from the price. Plaintiffs, after furnishing certain material on the contractors' credit, refused to furnish more, and an arrangement was made whereby, on the contractors' written order to defendant, the architect was to make the estimates and payments directly to plaintiffs. *Held*, that the agreement was not within the statute of frauds, as it was not a promise to pay plaintiffs' debt, but to benefit defendant, by the immediate acquisition of materials for the building. *Calkins v. Chandler*, 38 Mich. 324, followed.—*Bice v. Marquette Opera-House Bldg. Co.*, (Mich.) 55 N. W. 382.

Agreements relat ng to land.

3. A parol contract provided that plaintiff should enter appearance to a foreclosure suit pending, and waiving the nine-months stay of sale allowed him by law, in consideration of which defendant should bid in said premises at the amount of the decree, interest, and costs, resell at private sale, and pay plaintiff the amount realized in excess of the bid. *Held* a valid contract, and not within Comp. St. c. 32, § 3, as creating, granting, assigning, surrendering, or declaring, an estate, interest, trust, or power in land.—*Jones Nat. Bank v. Price*, (Neb.) 55 N. W. 1045.

4. Where a conveyance of land is made to put it beyond the reach of the grantor's creditors, a secret trust and agreement, resting in parol, to reconvey, is void under the statute of frauds.—*Pierson v. Conley*, (Mich.) 55 N. W. 387.

5. To take the case of a parol contract for the sale of land out of the statute, on the ground of the possession of the vendee, such possession must be with the consent, express or implied, of the vendor, and in pursuance of the contract.—*Pawlak v. Granowski*, (Minn.) 55 N. W. 831.

6. A partnership may be formed by parol for the purpose of buying, improving, and selling a particular piece of real estate.—*Fountain v. Menard*, (Minn.) 55 N. W. 601.

FRAUDULENT CONVEYANCES.

See, also, "Assignment for Benefit of Creditors;" "Chattel Mortgages," 2-6.

Action by assignee to set aside, see "Assignment for Benefit of Creditors," 5, 6.

Statute of limitations, see "Limitation of Action," 5-8.

To defeat collection of taxes, see "Taxation," 9.

What constitute.

1. The presumption of fraud in a mortgage of stock in trade by a son to his mother without change of possession is so far overcome as to support a verdict, when the mother proves the advancement of the sum named; that it was understood that she should be secured by mortgage; that she asked for it several times before she got it; that she knew nothing about her son's other creditors, but wanted to be secured; and that she would not have been so particular about a small sum.—*Houck v. Heinzman*, (Neb.) 55 N. W. 1062.

2. Plaintiff's husband, after consulting with defendant with reference to investing in a com-

pany with which defendant was connected, made an agreement for stock therein to the amount of \$1,500. Thereafter, to enable the husband to make a further purchase, defendant indorsed his note for \$3,500, the money from which, with the \$1,500, entitled him to 100 shares, which he agreed to deposit with defendant to secure him for his indorsement. At the husband's request only 1 share was issued in his name and 99 in his wife's name. The stock was then handed to defendant in an envelope. The husband afterwards obtained it, on an agreement that he would bring it back, or the proceeds of a trade which he proposed to make with it. He obtained in exchange certain land, which was deeded to plaintiff, and \$3,500 in notes. He returned the envelope to defendant, who supposed that it contained the shares or their proceeds. He afterwards again obtained the envelope on a like promise, but never returned it. He had no property except the stock and the proceeds thereof. There was nothing to show that the \$1,500 was furnished by plaintiff. *Held*, that defendant having been obliged to pay the \$3,500, plaintiff could not hold the land against him.—*Van Hoesen v. Teachout*, (Iowa,) 55 N. W. 486.

3. By agreement between L. and M., certain money in their hands, as trustees, was loaned to the former, for which he executed his note to M., as trustee, and agreed to give security. Soon thereafter, M. died, and L., who was insolvent, on demand of some of the beneficiaries of the trust, executed a trust deed to plaintiff to secure the note, which had previously been delivered to the latter. *Held*, that such deed was not given by L. to secure a debt due to himself, but to secure a debt due from him to the beneficiaries of the fund which he had converted, and was valid against his personal junior judgment creditors.—*Wolfe v. Jaffray*, (Iowa,) 55 N. W. 91.

4. C., being largely indebted to various parties, conveyed all of her property to one R., with a secret agreement that R. should sell the lots, retain the amount owing him by C., and return the surplus to C., or such person as she might name. *Held*, that the conveyance was fraudulent as to the other creditors of C.—*Gillespie v. Cooper*, (Neb.) 55 N. W. 302.

5. Defendant, having obtained from his father-in-law \$800 to aid in the purchase of land, gave a bond to the latter, conditioned for his support during life, and a mortgage on the land to secure a note for \$800, payable on breach of the bond. Later the father-in-law certified on the margin of the record that the mortgage was fully paid, but he did not give up the bond and mortgage, nor was the \$800 in fact returned. The father-in-law was an ignorant man, unable to speak English, and it appeared that he intended, not to discharge the debt or agreement for support, but merely to facilitate the sale by defendant of part of the land to avoid foreclosure. All but two acres of the land was sold, and this two acres defendant conveyed to the father-in-law. *Held*, that there was a sufficient consideration as against creditors for the conveyance by defendant to his father-in-law.—*Ramash v. Scheuer*, (Wis.) 55 N. W. 700.

6. In an action by a creditor of a deceased insolvent whose claim had nearly all been contracted since 1882, to subject the estate of the insolvent's mother to the payment of the residue of the claim after deducting the pro rata share which the creditor had received from the insolvent's estate, there was evidence that in 1882 the insolvent, who was then worth at least \$5,000, erected a house and made improvements on the land of his mother, which cost to exceed \$2,000, and continued to assist her in a limited degree until 1886, when he died. *Held*, that the evidence failed to show that deceased was insolvent when he assisted his mother, or that assisting her caused his in-

solveny.—*Johnson v. Johnson*, (Neb.) 55 N. W. 217.

7. In a suit to reach land, the title to which was in the wife of the judgment debtor, and a stock of goods and business carried on in the name of his sons, it appeared that when the debtor became indebted to plaintiff he was doing business in his own name; that he had borrowed money of his wife, giving his note therefor; that she obtained judgment on the note, and on a sale of the debtor's goods on execution on this, and judgments obtained by other creditors, the wife and two other creditors purchased sufficient of the goods to satisfy their joint claims; that the wife then purchased his share of the goods of one of the creditors, giving her note therefor, and by agreement with the other creditor they continued the business, employing the debtor as a clerk; that after such creditor had been paid all his claim, except \$500, the wife purchased his interest, and continued the business in her name, employing the debtor as manager, at an agreed salary; that the wife paid her indebtedness to the two creditors, and afterwards sold the business to her sons for a valuable consideration; that the real estate which was in the wife's name was her home, and was heavily mortgaged. *Held*, that plaintiff could not recover, as there was no fraud shown in any of the transactions.—*Mayers v. Kaiser*, (Wis.) 55 N. W. 688.

What constitute—Conveyances between husband and wife.

8. A wife let her husband have money received from her father's estate without promise to repay, or any note or other writing. The husband used the money as he saw fit, finally buying a piece of land, which he took in his own name. This land was retained by him until the insolvency of a firm in which he was interested, and then conveyed to the wife. *Held*, that the wife was not entitled thereto as against persons who had given the firm credit believing that the land was that of the husband, and who were unable to find other property of the firm or partners.—*Porter v. Goble*, (Iowa,) 55 N. W. 530.

9. A wife intrusted her separate property to her husband to invest and manage in his own name, he to transfer it to her when she so desired. While it so stood in his name, he entered into business, and bought merchandise of persons who knew from the records that it was in his name, and who relied on his apparent ownership in giving him credit. It was conveyed by the husband to the wife while he was still solvent. *Held*, that it not having been put in the husband's name for the purpose of giving him credit, and no representations that it was his having been made, and the wife not having known that credit was given him on the faith of such apparent title, she was not estopped to claim it as her own.—*Marston v. Dresen*, (Wis.) 55 N. W. 884.

10. C., being largely indebted to various parties, conveyed all her property—four city lots—to one R., with a secret agreement between them that R. should sell the lots, and retain the amount of the debt owing him by C., and return the surplus to C., or such person as she might designate. Two of the lots were sold. R.'s debt paid, and at C.'s request the remaining two lots were conveyed to her husband, without consideration. *Held*, that the conveyance by R. to C.'s husband was fraudulent as to the creditors of C.—*Gillespie v. Cooper*, (Neb.) 55 N. W. 302.

Action to set aside.

11. In trover by the assignee of a mortgage on a stock of goods, it appeared that plaintiff's assignor bought the goods from an insolvent debtor, paying him cash, and giving him notes for the balance of the price, one of which was to be delivered at a stated time, if there had then been no litigation about the property. Thereupon the assignor resold the stock of

goods to the debtor, being given the mortgage under which plaintiff claimed, and being allowed to retain certain articles of property. *Held*, that defendant, to whom the debtor subsequently made an assignment for the benefit of creditors, and who took no title because of his failure to give bond, could not insist that the transfer was in fraud of creditors, the latter not complaining.—*Abbott v. Chaffee*, (Mich.) 55 N. W. 833.

12. A junior mortgagee of chattels, who agrees with the senior mortgagee, and the mortgagor that the goods mortgaged may be sold and the proceeds applied to the payment of the mortgages in the order of their priority, cannot, after such sale and appropriation of the proceeds, maintain an action to avoid the senior mortgage for fraud in its inception, without proof that the facts constituting the fraud were discovered after the agreement and sale.—*Rockford Watch Co. v. Manifold*, (Neb.) 55 N. W. 236.

Pleading.

13. In an action to avoid a conveyance or mortgage for fraud, the facts constituting the fraud must be specifically pleaded; a general allegation of fraud is insufficient.—*Rockford Watch Co. v. Manifold*, (Neb.) 55 N. W. 236.

Evidence.

14. After intervenor, who claimed the accounts garnished by plaintiff, had introduced in evidence that part of defendant corporation's minute book showing the action of defendant's board of directors ordering the assignment of accounts to intervenor, plaintiff, on cross-examination, read the remainder of the minutes of the meeting of defendant, relating to the assignment of notes and accounts to other creditors, and to the fixing and payment of the salaries of defendant's officers. *Held* that, though it was not admissible under Code, § 3050, as relating to the same subject, it was proper, in connection with other evidence, as tending to show fraud in the disposition of defendant's property.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa.) 55 N. W. 496.

15. Where fraud was claimed in the assignment of claims by defendant to intervenor, it was proper to show that the same persons were officers in both companies.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa.) 55 N. W. 496.

Sufficiency of evidence.

16. On attachment proceedings, where the question was whether a conveyance of land to defendant's brother was made in fraud of creditors, a number of witnesses filed affidavits that defendant had told them that there was no consideration for the conveyance to his brother, but that he had placed the property in his hands so that creditors could not reach it. An affidavit by defendant's brother alleged that the consideration for the land was a credit on a note given by defendant for money borrowed, but the affidavit was unsatisfactory, and did not allege the amount of money he loaned defendant. *Held*, that an order discharging the attachment was against the weight of the evidence.—*Jones v. Bivin*, (Neb.) 55 N. W. 248.

17. In a suit under Sanb. & B. St. § 3020, in the nature of a creditors' suit to enforce a judgment, one of the issues was whether certain assignments by the judgment debtor of notes and mortgages were valid. The assignments bore date prior to the commencement of the action, but were brought to the register of deeds to be recorded six months after the alleged assignment, and after the action had been commenced. Several witnesses familiar with handwriting testified that when the assignments were presented for registry they looked as if they had been recently written. It did not appear that the pretended assignee made any inquiry of the mortgagors, or at least of two of them, as to the validity of the mortgages and the value of the property, and his subsequent statements and actions did not seem

like those of a bona fide purchaser, but rather in the interest of his assignor. *Held*, that the assignments were fraudulent.—*Bragg v. Gaynor*, (Wis.) 55 N. W. 919.

Frightening Horses.

See "Negligence," 4-6.

Frivolous Pleading.

See "Pleading," 8.

GAMING.

Assignment of mortgage for gambling debt.

The fact that the consideration for the assignment of a mortgage was a gaming debt owed the assignee by the assignor is no defense to an action by the assignee against the mortgagor for the foreclosure of the mortgage.—*Reed v. Bond*, (Mich.) 55 N. W. 619.

GARNISHMENT.

See, also, "Attachment;" "Exemptions;" "Execution;" "Election of Remedies."

Evading exemption law, see "Exemptions," 2. Objections waived, see "Appearance," 2.

Persons subject to.

1. A railway company, after transporting property to its destination, and while holding the same as a warehouseman, is liable to garnishment in respect to such property.—*Cooley v. Minnesota Transfer Ry. Co.*, (Minn.) 55 N. W. 141.

2. Where the trustee and the beneficiaries under a deed of trust made by defendant have filed pleadings in which they unite in demanding judgment for plaintiff for whatever amount may be found due defendant from the garnishee, the garnishee cannot defend on the ground that he is bound to pay his debt to the trustee.—*Des Moines Sav. Bank v. Colfax Hotel Co.*, (Iowa.) 55 N. W. 67.

Of pledged property

3. An existing creditor of the pledgors of certain property, by a subsequent garnishment of the same, does not acquire a right thereto superior to that of the pledgee.—*Cooley v. Minnesota Transfer Ry. Co.*, (Minn.) 55 N. W. 141.

Procedure.

4. Where the money or property in the hands of a garnishee is claimed by a person not a party to the action, the mode of procedure is governed by Gen. St. 1878, c. 66, § 174, and not by section 175, which has reference only to cases where the garnishee does not answer truthfully, or where he himself claims title to the money or property by conveyance that is void as to the creditors of defendant; and consequently the supplemental complaint provided for is one against the garnishee only in order to charge him.—*Smith v. Barclay*, (Minn.) 55 N. W. 827.

Claims by third persons.

5. Under a simple issue of ownership plaintiff may prove any facts tending to impeach the validity, as to him as creditor, of any transfer of the property from defendant to claimant; and it is not necessary in such a case for plaintiff, in his answer to claimant's complaint, to allege, what has been already alleged or appears in the action, that he is a creditor of defendant, and has attached the property by garnishment.—*Smith v. Barclay*, (Minn.) 55 N. W. 827.

6. The affirmative in maintaining his right to the property is on the claimant, who must serve the first pleading in the nature of a complaint, setting up his claim, to which the plaintiff may answer.—*Smith v. Barclay*, (Minn.) 55 N. W. 827.

Good Will.

Of firm, right of surviving partners, see "Partnership," 15, 16.

GRAND JURY.**Summoning and impaneling.**

1. On a motion to quash an indictment because of irregularity in drawing the jury returning the same, it appeared that the ballots, written by the auditor, containing the names of jurors, were placed in a box; that the sheriff would draw a name from the box, and he or the auditor would state from what township the person drawn was, and if one had already been drawn from that township the ballot would be laid aside; if not, the name would be written by the auditor in the jury book, and by the clerk in the venire. The clerk testified that the auditor or sheriff looked at the poll book showing the township from which the several names were drawn. *Held*, that the drawing was a substantial compliance with Code, § 240, providing that the auditor shall write out the names on the jury list, which have not been previously drawn as jurors during the year, on separate ballots, and the clerk of the district court and the sheriff, "having compared said ballots with the list, and corrected them, if necessary, shall place the ballots in a box provided for that purpose."—*State v. De Bord*, (Iowa,) 55 N. W. 70.

2. Code, § 4256, provides that if, from any cause, the number of the panel be reduced to a less number than required, the court may order the sheriff to summon a sufficient number of qualified persons to complete the panel. *Held*, that where the grand jury returned a defective indictment, and was still in session when defendant was put on trial, it was proper to bring in the grand jury to find a new indictment, and, each member of the panel that returned the indictment being excused on defendant's challenge because of having formed an opinion, to summon other persons to complete the panel.—*State v. Smith*, (Iowa,) 55 N. W. 198.

GUARANTY.

See, also, "Principal and Surety."

Promise to answer for debt of another, see "Frauds, Statute of," 2.

Right of guarantor to lien, see "Liens."

Construction of agreement.

1. Under an agreement to guaranty the payment of a draft for a certain sum, a person will not be required to guaranty the payment of a draft for an amount equal to such sum and the interest thereon up to the date the draft is payable.—*Tansey v. Peterson*, (Iowa,) 55 N. W. 577.

2. Defendant sold plaintiffs a stock of goods and certain notes and accounts, giving a guaranty that a certain amount should be realized thereon, which was less than the face of the accounts, the contract providing that plaintiffs should "use due diligence in their collections." *Held*, that the contract was a guaranty of each individual account, requiring resort to legal process to collect each before recourse on the guarantor, and that no showing of diligence was sufficient which did not include proof that the accounts had been put in judgment, and execution taken out, and returned unsatisfied.—*Clark v. Kellogg*, (Mich.) 55 N. W. 667.

Release of guarantors.

3. The holder of a matured note stated, in reply to inquiries made by a guarantor, that the maker had "taken care of" the note. *Held*, that the guarantor had a right to rely on such statement, and was released where the holder did not endeavor to enforce the note against the maker, though he was solvent for several years afterwards, and made no claim against

the guarantor until the maker had become insolvent.—*Yale v. Watson*, (Minn.) 55 N. W. 957.

4. The fact that, after the expiration of the term for a bailment, the bailors consent to the retention of the property by the bailees, exonerates the guarantor of the bailees from liability for failure to return it.—*Cushing v. Cable*, (Minn.) 55 N. W. 736.

Action on—Pleading.

5. An averment in the declaration in an action on a guaranty that plaintiff had used due diligence was an averment that he had pursued the course which the law imposed on him to charge the guarantor, and he could not show that defendant had by any subsequent agreement waived this diligence without counting on such waiver in his declaration.—*Clark v. Kellogg*, (Mich.) 55 N. W. 667.

GUARDIAN AND WARD.

See, also, "Parent and Child."

Appointment of guardian—Approval of bond.

1. Under Sanb. & B. St. §§ 3966, 4013, providing that, before appointing any person guardian of a minor, the court shall require him to give a bond, which shall not be deemed sufficient unless it shall have been examined and approved by the judge, and his approval indorsed thereon in writing, parol evidence is not admissible that the judge orally appointed a guardian, and approved his bond, prior to the time the records show such appointment and approval.—*Holden v. Curry*, (Wis.) 55 N. W. 965.

Agreements before appointment.

2. The agreement of a person, before being appointed guardian of an infant, to take an order of an administrator in payment of the infant's claim, does not bind the infant, or prevent an action on the administrator's bond for the amount of the claim.—*Holden v. Curry*, (Wis.) 55 N. W. 965.

HABEAS CORPUS.**Hearing and determination.**

1. Notwithstanding Gen. St. 1878, c. 80, § 22, providing that persons committed by virtue of a final judgment of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued thereon, are not entitled to prosecute a writ of habeas corpus, the jurisdiction of the tribunal whose judgment is involved over the person detained and the subject-matter may be inquired into at all times on habeas corpus, but the writ cannot have the force of a writ of error or certiorari or appeal, nor is it designed as a substitute for either.—*State v. Kinmore*, (Minn.) 55 N. W. 830.

Discharge for defect in commitment.

2. Under How. St. § 8594, subd. 1, one committed on failure to comply with an order to give security to keep the peace, and discharged on habeas corpus for a defect in the commitment, may be subsequently arrested and imprisoned on a second commitment, in due form, issued on said order.—*In re Reinheimer*, (Mich.) 55 N. W. 460.

Harmless Error.

See "Appeal," 70-84; "Criminal Law," "Trial."

HAWKERS AND PEDDLERS.**Who is peddler.**

Under a city ordinance which provides that any person who shall sell, or offer for sale, barter, or exchange, any goods or other articles of value, in any street or alley or other public place, or in wagons or other vehicles, or at

private or public houses, shall be deemed a peddler, a person who delivers goods previously sold by another is not a peddler.—*City of Stuart v. Cunningham*, (Iowa,) 55 N. W. 811.

HIGHWAYS.

Control of street by city, see "Municipal Corporations," 15.

Crossing by railroad, see "Railroad Companies," 2-4.

Dedication of, see "Dedication."

Defective streets, see "Municipal Corporations," 16-33.

Estoppel to deny existence, see "Estoppel," 10.

Establishment by user and prescription.

1. Where a road is openly used as a highway by the public, and is recognized by a railway company as such, by permitting the public to cross the track, and by assuming to maintain a crossing at that point, it is immaterial that the road has not been legally established where it is sought to hold the company liable for defects in the crossing. *Kelly v. Railway Co.*, 9 N. W. 588, 28 Minn. 98, followed.—*Lillstrom v. Northern Pac. R. Co.*, (Minn.) 55 N. W. 624.

2. The operation of Gen. St. 1878, c. 13, § 74, as amended by Laws 1879, c. 51, declaring that when a road shall have been continuously used, kept in repair, and worked for six years it shall be a public highway, is not affected by the fact that proceedings previously commenced to lay it out as a highway are still pending.—*Elfelt v. Stillwater St. Ry. Co.*, (Minn.) 55 N. W. 116.

3. A road which has been used by the public, kept in repair, and worked by the public authorities for more than 10 years is a public highway, within Gen. St. 1878, c. 13, § 74, as amended by Laws 1879, c. 51, declaring that where a road has been continuously used, kept in repair, and worked for six years it shall be a public highway.—*Elfelt v. Stillwater St. Ry. Co.*, (Minn.) 55 N. W. 116.

4. How. St. § 1315, provides that all roads which have been laid out, and not recorded, and which have been used eight years or more, shall be deemed public highways, subject to be discontinued by certain proceedings for that purpose. *Held*, that where a road had been laid out by a township, and actually used for eight years, it became a public highway, and the mere nonuser for a period of two years, in the absence of any proceedings to discontinue it, did not entitle a railroad company crossing the road to exclude the public by fencing in its right of way.—*McNamara v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, (Mich.) 55 N. W. 440.

Establishment by statutory proceedings.

5. Code, § 940, relating to highways, provides that when claims for damages are filed, and on the day appointed for filing the same, the auditor must appoint three appraisers to view the ground on the day fixed by him, and report the damages sustained by the claimants; such report to be filed in the auditor's office within 30 days after the appointment. *Held* that, where appraisers were appointed prior to the day appointed for filing claims, without notice to the claimants, the proceedings were illegal.—*Abney v. Clark*, (Iowa,) 55 N. W. 6.

6. The fact that such claimants had filed their claims for damages before the appraisers were appointed does not render the time of the appointment of the appraisers immaterial, since claimants were entitled to be present when such appointments were made, and to be heard in relation thereto.—*Abney v. Clark*, (Iowa,) 55 N. W. 6.

7. Where the appraisers of damages possessed no jurisdiction, an appeal from the allowance of damages by the board of supervisors would furnish no remedy for the illegality in the proceedings, and certiorari will lie to review the same.—*Abney v. Clark*, (Iowa,) 55 N. W. 6.

Alteration and vacation.

8. A petition "for a change in the road as follows: Beginning at a point * * *: thence east 16.41 chains, intersecting with old road; and that the old road beginning at the point first above mentioned * * * be vacated and abandoned, or that the old road be vacated only, and no change made, or new road established; and that a commissioner be appointed to view the proposed change of road,"—is sufficient, under Code, § 922, declaring the form for a petition to establish, vacate, or alter a highway.—*Harris v. Board Sup'r's Mahaska County*, (Iowa,) 55 N. W. 324.

9. There is no objection to asking in the same petition for the vacation of one highway and the establishment of another, when the latter is to be used in place of the former.—*Harris v. Board Sup'r's Mahaska County*, (Iowa,) 55 N. W. 324.

10. In a certiorari proceeding to set aside the action of the board of county supervisors in vacating a portion of one highway and establishing another, the question whether the action was expedient cannot be considered.—*Harris v. Board Sup'r's Mahaska County*, (Iowa,) 55 N. W. 324.

11. The fact that the order of the supervisors required petitioners for a change of highway to open and put the new highway in as good condition as the old one did not render it illegal.—*Harris v. Board Sup'r's Mahaska County*, (Iowa,) 55 N. W. 324.

12. Owing to a hill at the point where two roads came together at right angles along section lines, travel had diverged, leaving one road and entering the other a few rods from the junction. *Held*, that the parts of the roads which had ceased to be used were not discontinued and abandoned within Rev. St. § 1294, as amended by Laws 1882, c. 253, (1 Sanb. & B. Ann. St. 801,) providing that any highway which shall be entirely abandoned as a route of travel, and on which no highway tax has been expended for five years, shall be considered legally discontinued, and the land shall revert to the owners.—*Maire v. Kruse*, (Wis.) 55 N. W. 389.

Obstructions.

13. In an action against a town for damages for the destruction of a certain hedge, which defendants allege was in a public street, an instruction directing a verdict for plaintiffs if the hedge was within the street, and was not a material obstruction to the free use of the street by the public for the purpose of travel, is erroneous, since the town had a right to require its removal if the hedge was in the street. *Quinton v. Burton*, 16 N. W. 549, 61 Iowa, 471, distinguished. *Emerson v. Babcock*, 23 N. W. 656, 66 Iowa, 257, followed.—*Philbrick v. Town of University Place*, (Iowa,) 55 N. W. 345.

Liability for defects.

14. Sanb. & B. Ann. St. § 1339, requires as a condition precedent to an action for damages caused by a defective highway that within 90 days after the injury a notice in writing by such person shall be given a supervisor of the town against which damages are claimed, stating the place where such damages occurred, and describing "generally" the defect which occasioned it. *Held*, that a notice which recited that, while traveling on the road from D. past the F. schoolhouse in defendant town, the undersigned was injured by reason of the insufficiency of such highway, "at a point about 100 yards east of the residence of F., and somewhere near the line of sections 20 and 29, in town 7 north, range 3 east," in such town, and that such defect was "the general bad condition of said highway, and also some loose stones lying in the traveled track," was sufficient where, before it was served, the precise defect was pointed out to defendant's supervisor, who examined the entire road through the rocky point mentioned, and in the absence

of evidence showing any other practicable method of describing the locus in quo by its surroundings.—*Salladay v. Town of Dodgeville*, (Wis.) 55 N. W. 696.

15. The fact that such notice recited that the injury was caused by loose stones, and the evidence showed that it was caused by a stone partly imbedded in the road, does not render the notice insufficient, since the variance is immaterial.—*Salladay v. Town of Dodgeville*, (Wis.) 55 N. W. 696.

16. In an action against a town to recover for injuries caused by an obstruction in the highway in July of a certain year, it is not error to permit a witness to testify to the condition of the road at the point in question two weeks after the accident, and during the spring and summer of such year, where the evidence tends to show that its condition remained practically the same during all such time.—*Salladay v. Town of Dodgeville*, (Wis.) 55 N. W. 696.

17. In an action against a town to recover for injuries caused by an obstruction in the highway, where the jury views the premises, and defendant attempts to show that there had been no material change in the road down to the time of trial, it is proper to permit plaintiff to show in rebuttal that in the fall before the trial earth was plowed on the bank and thrown in on the track, materially changing its condition.—*Salladay v. Town of Dodgeville*, (Wis.) 55 N. W. 696.

Holidays.

Issuance of attachment, see "Attachment," 4.

HOMESTEAD.

Entry of public lands, see "Public Lands," 1.

Acquisition.

1. Where defendants purchased and moved on certain premises before the materials were bought for building a house thereon, with the design of making it their home, they thereby made it their homestead, and the fact that the building erected on the land was an hotel made no difference.—*Lamont v. La Fevre*, (Mich.) 55 N. W. 687.

Lease—Exemption of rent.

2. Where a judgment debtor, who is the head of a family, and temporarily absent from her homestead for a year for the purpose of educating her daughter, executes a lease of the homestead during such absence, the money due her for rent under the lease is exempt from execution issued on a judgment against her.—*Morgan v. Rountree*, (Iowa.) 55 N. W. 65.

Rights of widow.

3. The homestead rights of a widow are limited to the land which her husband had actually devoted to homestead purposes, and was occupying as such at the time of his decease.—*King v. McCarthy*, (Minn.) 55 N. W. 960.

Abandonment.

4. One who, with his family, removes from his farm, and lives continuously in a city for five years thereafter, where he votes and claims his residence, abandons the farm as a homestead, though he may have left some of his household effects there.—*Hoffman v. Buschman*, (Mich.) 55 N. W. 458.

Conveyance by husband alone.

5. A married man deeded land, including his homestead, to a son; the consideration being money, and an agreement for life support of himself and wife. The wife, however, did not sign. *Held*, that the deed was, after full performance by the son, enforceable, notwithstanding the declaration in Rev. St. § 2203, that no mortgage or other alienation of a homestead should be valid without the signature of the

wife.—*Whitmore v. Hay*, (Wis.) 55 N. W. 708.

HOMICIDE.

Murder.

1. On a prosecution for murder, proof that the wounds which caused death were inflicted with a deadly weapon by the accused raises an inference, in the absence of explanatory circumstances, that there was intent to take life, which will justify a verdict of murder in the first degree.—*People v. Wolf*, (Mich.) 55 N. W. 357.

Manslaughter.

2. There being evidence from which it might have been found that defendant had no malice towards deceased, but that, after being attacked by deceased, he, in the heat of passion and in the excitement and confusion caused by the assault, fired the fatal shot, an instruction should have been given on manslaughter.—*People v. Palmer*, (Mich.) 55 N. W. 994.

Assault with intent to commit manslaughter.

3. An assault with intent to commit manslaughter is a crime in Iowa. *State v. McGuire*, (Iowa.) 54 N. W. 202, followed.—*State v. Stone*, (Iowa.) 55 N. W. 6.

Insanity as defense—Expert testimony.

4. The rule permitting a nonexpert to testify as to the sanity of an accused does not allow him to testify that, at the date of the crime, accused knew the difference between the right and wrong of his act.—*Shultz v. State*, (Neb.) 55 N. W. 1080.

Evidence.

5. Evidence that a couple of weeks before the murder accused stated that he must hurry to get some money, as he was going to get married, was admissible when followed by evidence that accused supposed deceased to have money at the time of the killing.—*People v. Wolf*, (Mich.) 55 N. W. 357.

Instructions.

6. On trial of defendant for killing his brother, it appeared that, after a dispute between them in a saloon, defendant armed himself with a gun, and deceased remained in the saloon, and armed himself with a revolver. Defendant, on returning, called to his brother, who was in the rear of the saloon, to come up. The evidence was conflicting as to who fired first. There was evidence that deceased, after arming himself, had threatened to kill defendant if he crossed his path. *Held*, that the court should have given the substance of a requested instruction that, in considering which was the aggressor, and the probable character of the assault, the jury should consider the threats made by deceased, and the purchase and exhibition of the loaded revolver by him, as a person who has made threats against the life of another, and purchased and loaded a revolver a few minutes before, is more likely to make an assault than a person who has made no threats.—*People v. Palmer*, (Mich.) 55 N. W. 994.

HORSE AND STREET RAILROADS.

As common carriers, see "Carriers," 2.

Liability for negligence.

1. A grant of a franchise by the electors of a city to a corporation to build and operate a street railway in the streets of the city does not exempt the company from liability for injuries caused by its negligence, whether such negligence consists in the improper and careless management of its property, or in the character of the motive power employed in propelling its cars.—*Lincoln Rapid Transit Co. v. Nichols*, (Neb.) 55 N. W. 872.

2. Where a street-railway company, without direction from the city council, lays its track in accordance with a grade established for a contemplated paving of the street, and so laying the track renders the street, until paved, unsafe, it is an act of negligence on the part of the company.—*McKillop v. Duluth St. Ry. Co.*, (Minn.) 55 N. W. 739.

—Injuries to person in street.

3. A boy less than five years old, on seeing an electric train of two cars coming along the street, ran from the sidewalk, with extended arms. The motorman saw him, and shouted and motioned to him to go back. The child, however, continued to run, and, catching at the side netting of the rear car, was thrown down and injured. *Held*, that the question whether the motorman should have stopped the cars in view of the tender age of the child, and his apparent intention to lay hold of the car, should have been submitted to the jury.—*Mason v. Minneapolis St. Ry. Co.*, (Minn.) 55 N. W. 1122.

4. In an action against a street-car company for personal injuries, there was evidence that plaintiff, who was a stranger in a city, boarded a street car, which, after going some distance, was compelled to stop and extinguish the electric lights on account of a severe storm; that plaintiff left the car, stepped upon a parallel track, which he could not see, on account of the rain and darkness, and was struck by a car which was running at a high rate of speed. *Held*, that the question of the negligence of the respective parties should be submitted to the jury.—*Boyer v. St. Paul City Ry. Co.*, (Minn.) 55 N. W. 825.

—Collision with vehicles.

5. In an action against a street-car company for personal injuries, plaintiff testified that while she was driving down a street which was crowded with vehicles, so as to make it difficult to turn, a car came rapidly behind her, and struck her buggy. The testimony for defendant was that, as the car was moving along at the rate of about three miles an hour, the buggy, either from the want of self-possession or from incompetency on the part of its driver to handle a horse, was backed suddenly against the car. *Held*, that the case should have been submitted to the jury.—*Peterson v. St. Paul City Ry. Co.*, (Minn.) 55 N. W. 906.

6. In much-traveled streets in a city it is negligence to run an electric street-railway car over a crossing at a high and dangerous rate of speed; and it is also negligence to run it over a crossing, the person in charge of the car not being on the lookout, nor having the car under control, nor using the proper means to stop it, so as to avoid a collision.—*Watson v. Minneapolis St. Ry. Co.*, (Minn.) 55 N. W. 742.

7. As high a degree of care is required at a street crossing of those in charge of an electric street car as of those driving other vehicles.—*Watson v. Minneapolis St. Ry. Co.*, (Minn.) 55 N. W. 742.

8. A street-railway car has no priority of way at a street crossing, with respect to other vehicles; and when the driver of another vehicle, approaching the street-railway track to cross it, sees a car coming at such a distance that he can apparently make the crossing safely, he has a right to attempt it, and it is not negligence per se in him to attempt it without looking a second time at the car.—*Watson v. Minneapolis St. Ry. Co.*, (Minn.) 55 N. W. 742.

Obstruction of cars by street contractors.

9. Contractors, under a contract with a city to pave a certain street, have no power to obstruct the passage of street cars over such street during the paving of the same, where the contract gives no such power, and it is shown that such work has been, and can be, done without such interference.—*Milwaukee St. Ry. Co. v. Adam*, (Wis.) 55 N. W. 181.

HOSPITAL.

Negligence of superintendent.

A complaint, in an action against the superintendent of a county hospital to recover damages for breaches of defendant's duty, alleging that plaintiff was lawfully an inmate of the hospital, and, as such, was entitled to proper care, treatment, and food; that defendant had full control of the hospital, and was furnished with necessary assistance, help, food, and supplies; and that he failed to supply plaintiff with wholesome food, so that his sickness was augmented,—states a good cause of action.—*Dre-fahl v. Connell*, (Wis.) 55 N. W. 160.

HUSBAND AND WIFE.

See, also, "Divorce;" "Dower;" "Homestead;" "Marriage."

Competency as witnesses, see "Witness," 1. Conveyances between, see "Fraudulent Conveyances," 8-10.

Estoppel of wife by deed, see "Estoppel," 5.

Laches of wife, see "Equity," 20.

Rights of widow in homestead, see "Homestead," 3.

Rights of wife in husband's land.

1. The right in her husband's real estate, which a wife acquires by her marriage, does not come within the registry law, and is postponed to an unrecorded trust.—*Snell v. Snell*, (Minn.) 55 N. W. 1131.

Liability of wife on contracts.

2. Comp. Laws, § 2500, provides that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject, in transactions between themselves," to the rules of transactions between persons in confidential relations. *Held*, that a married woman can bind herself by signing a note with her husband for her individual debt.—*Colonial & U. S. Mortg. Co. v. Bradley*, (S. D.) 55 N. W. 1108.

3. A mortgage given by a wife, alone, to secure a debt for necessities furnished to the husband,—an insane person,—on land owned in common, is not valid.—*Naylor v. Minock*, (Mich.) 55 N. W. 664.

4. A mortgage given by a wife, alone, to secure the debt of her husband, on land which they owned as tenants in common, is void.—*Naylor v. Minock*, (Mich.) 55 N. W. 664.

5. Under Comp. Laws, § 2590, providing that either husband or wife may enter into any engagement with the other, or with any other person, "respecting property," which either might, if unmarried, a married woman is liable on a note signed by her as surety for her husband, though she does not charge her separate estate with the payment thereof.—*Colonial & U. S. Mortg. Co. v. Stevens*, (N. D.) 55 N. W. 578.

Husband carrying on wife's business—

Rights of husband's creditors.

6. Where a wife engages in business, employing her husband as agent and manager, the latter's creditors are not entitled to receive payment of their claims out of the property accumulated, beyond the present needs of his family, by his skill and industry in conducting the business.—*Mayers v. Kaiser*, (Wis.) 55 N. W. 688.

Contract in contemplation of separation.

7. A husband's executor cannot recover from the widow the amount received by her under an agreement with his testator to relinquish all her rights in her husband's property in case she survive him, made for a valuable

consideration, previous to their separation by agreement, which agreement was subsequently avoided by their reconciliation; where it does not appear that the latter ever made any claim for its return.—*Knapp v. Knapp*, (Mich.) 55 N. W. 353.

8. A relinquishment by a wife of all her rights in her husband's property in case she survive him, made for a valuable consideration, previous to their separation by agreement, is avoided by their subsequent reconciliation and cohabitation for a few weeks.—*Knapp v. Knapp*, (Mich.) 55 N. W. 353.

Conveyances between.

9. A widower of means, with three children, married a poor woman, and, in the course of his business of loaning money, began taking notes and securities, and later real estate, in his wife's name. He had prepared, and signed by her, an irrevocable power of attorney, giving him full control of all her loan investments. There was evidence that at that time there had been much complaint about usury, and that he had taken this course so that he could act as a broker and take commissions. He always kept absolute control and management of the business, and had his bank accounts in his own name. At the time of his death, nearly his whole estate, real and personal, was standing in his wife's name, and she claimed it all as given to her in pursuance of an antenuptial agreement, and in consideration of marriage. *Held*, that the facts proven as to the personality overcame the presumption in favor of her claim, but that the real estate was hers.—*Bem v. Bem*, (S. D.) 55 N. W. 1102.

Actions between.

10. Code, § 2204, providing that, should either husband or wife obtain control of property belonging to the other before or after marriage, the owner may maintain an action therefor, or for any right growing out of the same, in like manner as if unmarried, does not apply to property voluntarily given by one to the other.—*Porter v. Goble*, (Iowa,) 55 N. W. 530.

Impaneling.

See "Grand Jury;" "Jury."

Impeachment.

Of officer's return, see "Writs and Notice of Suits," 9.

Of state officer, see "States and State Officers," 2-14.

Of witness, see "Witness," 18-20.

Implied Warranty.

See "Sale," 9-21.

IMPROVEMENTS.

By city, see "Municipal Corporations," 34-42.

Right of former occupant to compensation.

Where defendant has had the benefit of the use of land for about 25 years, which is sufficient to offset improvements made by him, on being evicted he is not entitled to compensation for the improvements.—*Pierson v. Couley*, (Mich.) 55 N. W. 387.

Inadequate Damages.

See "Damages," 28.

INDECENT EXPOSURE.

Evidence.

1. On trial of an indictment for lewdness, committed by the willful exposure of defendant's person on a particular day, in a public place, in the presence of the prosecuting wit-

ness, it is not error to admit evidence of similar acts by defendant at the same place, on the same day, and on the preceding day, and in the presence of other persons than the prosecuting witness, where, by instructions, the consideration of such evidence is limited to the determination of whether or not the act charged was willfully done.—*State v. Stice*, (Iowa,) 55 N. W. 17.

2. It is proper, as bearing on the question of intent, to admit evidence that, in connection with one of such other acts, defendant made an indecent proposal to a lady.—*State v. Stice*, (Iowa,) 55 N. W. 17.

Indemnity.

Of city by negligent abutting owner, see "Municipal Corporations," 31-33.

Independent Contractors.

See "Master and Servant," 1.

INDIANS.

Right to vote, see "Elections and Voters," 1, 2.

Naturalization.

1. Act Cong. Feb. 8, 1887, is not in conflict with Const. U. S. art. 1, § 8, permitting congress "to establish a uniform rule of naturalization," as being confined to Indians, natives of the United States, to whom lands have been allotted in severalty, and who have taken up residence in the United States apart from their tribe, and adopted the habits of civilized life.—*State v. Norris*, (Neb.) 55 N. W. 1088.

On reservations—Subjection to state criminal law.

2. Unless otherwise provided by treaty with an Indian tribe, or by the act admitting the state into the Union, the criminal laws of the state, except so far as restricted by the authority of congress "to regulate commerce with the Indian tribes," extend to all crimes committed on an Indian reservation by persons other than tribal Indians.—*State v. Campbell*, (Minn.) 55 N. W. 553.

8. Indians, while preserving their tribal relations, and residing on a reservation set apart for them by the United States, are the wards of the general government, and as such the subject of federal authority, and the power to legislate for them is exclusively in congress, and for acts committed within the limits of the reservation, they are not subject to the criminal laws of the state.—*State v. Campbell*, (Minn.) 55 N. W. 553.

INDICTMENT AND INFORMATION.

For particular crimes, see "Adultery;" "Fornication;" "Intoxicating Liquors," 5-10; "Rape," 4; "Receiving Stolen Goods," 1.

For placing obstruction on railroad, see "Railroad Companies," 28.

In general.

1. Under Const. art. 5, § 38, providing that all prosecutions "shall be carried on in the name and by the authority of the state of South Dakota," it is not essential that an indictment contain a recital that the prosecution is by the authority of the state, but it is sufficient if the record show that it is so conducted.—*State v. Thompson*, (S. D.) 55 N. W. 725.

Allegation as to time.

2. An indictment containing but one allegation as to the time of the commission of the offense, and stating that it was committed on a future day, is bad; the provisions of Code, § 4306, that no indictment is insufficient for want of an allegation of the time of any ma-

terial fact when the time has once been stated, and of section 4305, that an indictment is good if it can be understood therefrom that the offense was committed some time prior to the finding of the indictment, being inapplicable.—*State v. Smith*, (Iowa.) 55 N. W. 198.

Verification—Waiver of defects.

3. A defect in the verification of an information is waived by pleading to the information.—*Bailey v. State*, (Neb.) 55 N. W. 241.

Conviction of less offense than charged.

4. Where a person is charged with the crime of rape, and the evidence shows a complete sexual intercourse, a conviction of assault with intent to commit rape is not inconsistent with the charge, as such assault is a necessary incident to the commission of the crime.—*People v. Miller*, (Mich.) 55 N. W. 675.

5. A verdict of guilty of an assault with intent to commit rape will be sustained under an information charging the crime of rape, since the lesser crime is necessarily included within the greater. *State v. Shear*, 8 N. W. 287. 51 Wis. 460, distinguished.—*State v. Mueller*, (Wis.) 55 N. W. 165.

Indorsement.

Of negotiable instrument, see "Negotiable Instruments," 4, 5.

INFANCY.

See, also, "Guardian and Ward;" "Parent and Child."

Disabilities.

1. An infant's promise to dismiss a suit brought for him by his father as next friend may be relied on, he possessing apparently good judgment and discretion, and having been permitted by his father to transact the business out of which the action rose.—*Cadwallader v. McClay*, (Neb.) 55 N. W. 1054.

2. Infants are not competent to appoint an agent.—*Holden v. Curry*, (Wis.) 55 N. W. 935.

Information.

See "Indictment and Information."

INJUNCTION.

Against boycott by association, see "Conspiracy."

—execution, see "Execution," 10-12.

—nuisance, see "Nuisance," 5, 6.

—obstruction of street, see "Municipal Corporations," 15.

Discretion of court, see "Appeal," 56.

Of liquor nuisance, see "Intoxicating Liquors," 15.

Jurisdiction.

1. Since an owner of land condemned for a street, having knowledge of the action of the city council, could have protected his interests by certiorari, and, being made a party to the condemnation proceedings, could have defended on the ground that the proceedings were not authorized by the action of the council, he is not entitled to have the opening of the street enjoined for defects in the proceedings of the council.—*Rockwell v. Bowers*, (Iowa.) 55 N. W. 1.

Adequate remedy at law.

2. Action was brought by a number of taxpayers against the treasurer, auditor, and supervisors of a county to restrain payment of certain bonds, said to have been unlawfully issued. Held that, where no suit was then pending on the bonds, and the county officers were about to levy taxes for their payment, plaintiffs had no adequate remedy at law. *Grand Chute v. Winegar*, 15 Wall. 373, distinguished.

—*Anderson v. Orient Fire Ins. Co.*, (Iowa.) 55 N. W. 348.

Wrongs prevented.

3. An injunction will issue to restrain the erection of an unsightly fence, six to seven feet high, on the boundary between complainant's and defendant's lots, in the residence portion of a city, depreciating the value of complainant's property, and constructed maliciously, as the outcome of a quarrel between the parties.—*Kirkwood v. Finegan*, (Mich.) 55 N. W. 457.

Pleading.

4. Where, in an action by the purchaser at foreclosure sale, brought after such sale, against the mortgagor, to enjoin the removal of certain machinery, defendant failed to demur, the bill will not be dismissed on a demurrer clause in the answer because it does not allege that the articles named are fixtures, or show any claim thereto by defendant or threat to remove it, or because the injunction was issued on information and belief, though such objections would have been fatal on demurrer, since such defects could have been remedied by amendment.—*Smith v. Blake*, (Mich.) 55 N. W. 978.

Preliminary injunction.

5. The action of the trial court in granting a preliminary injunction to restrain defendant city from proceeding, under a void statute and ordinance, to make changes in the curbing and sidewalk in front of plaintiff's premises, will not be disturbed on appeal; it being proper to restrain defendant from proceeding thereunder to plaintiff's injury until its right to do so is established by testimony regularly introduced on a trial of the cause on the merits.—*Koeffler v. City of Milwaukee*, (Wis.) 55 N. W. 400.

6. Where a preliminary injunction is improperly granted because the requisite facts are not alleged in the bill, and it is permitted to stand until the hearing, at which time sufficient equity appears on the proofs presented, the injunction will be perpetuated.—*Smith v. Blake*, (Mich.) 55 N. W. 978.

Violation—Contempt proceedings.

7. Contempt proceedings for the violation of an injunction to restrain a liquor nuisance are criminal in character, though the injunction issued in an equity action.—*Grier v. Johnson*, (Iowa.) 55 N. W. 80.

INNKEEPERS.

Lien.

1. An innkeeper's lien does not attach to goods in possession of one who is received as a boarder, and not as a guest or traveler.—*Singer Manufg Co. v. Miller*, (Minn.) 55 N. W. 56.

2. An innkeeper's lien attaches to goods in the possession of his guest though they belong to a stranger, provided the innkeeper has no notice of that fact.—*Singer Manufg Co. v. Miller*, (Minn.) 55 N. W. 56.

INSANITY.

As defense to crime, see "Homicide," 4.

As ground for rescinding contract, see "Equity," 7, 8.

Testamentary capacity, see "Wills," 1-3.

Evidence.

1. The record of proceedings under Comp. St. c. 40, whereby a person has been adjudged insane, is not admissible to prove insanity, in an action to avoid a conveyance made by such person.—*Dewey v. Algire*, (Neb.) 55 N. W. 276.

Avoidance of contract.

2. While weakness of mind in a grantor will not, in the absence of fraud, avoid his deed, actual insanity will do so if of such a character as to induce the conveyance.—*Dewey v. Algire*, (Neb.) 55 N. W. 276.

INSOLVENCY.

See, also, "Assignment for Benefit of Creditors;" "Fraudulent Conveyances."

Of banks, see "Banks and Banking," 7.

Of corporation, see "Corporations," 14-18.

Rights of assignee.

Where an insolvent debtor is entitled to a mechanic's lien, his assignee in insolvency may enforce the same.—*Miller v. Condit*, (Minn.) 55 N. W. 47.

Instructions.

See "Criminal Law;" "Trial," 21-39.

In particular actions and prosecutions, see specific heads.

INSURANCE.

Mutual benefit company, ultra vires contract, see "Corporations," 7.

The contract.

1. In an action on an insurance policy it appeared that defendant's agent wrote the policy, and forwarded it to one S., for tender to plaintiff, in renewal of an expired policy. In the mean time the property covered by the policy had been burned. The agent heard of this on Sunday, and wired S. not to deliver the policy. On the same day, S. told plaintiff that the policy had been received, and had been recalled. On the next day, plaintiff wired S. to hold the policy. The policy, having been returned, was demanded of the agent, and was afterwards again demanded, when the premium was tendered for the first time. *Held*, that no contract of insurance was made.—*New York Lumber & Wood-Working Co. v. People's Fire Ins. Co.*, (Mich.) 55 N. W. 434.

2. In an action on an insurance policy it appeared that defendant's agent wrote the policy, and forwarded it to one S., for tender to plaintiff, in renewal of an expired policy. In the mean time the property covered by the policy had been burned. The agent heard of this on Sunday, and wired S. not to deliver the policy. On the same day, S. told plaintiff that the policy had been received, and had been recalled. On the next day, plaintiff wired S. to hold the policy. The policy, having been returned, was demanded of the agent, and was afterwards again demanded, when the premium was tendered for the first time. *Held*, that the agent's act in recalling the policy on Sunday was not the making of a contract, but was an effort to reclaim the property of the company.—*New York Lumber & Wood-Working Co. v. People's Fire Ins. Co.*, (Mich.) 55 N. W. 434.

3. Defendant insurance company agreed to continue the insurance taken by the N. insurance company by each holder of a policy in the latter, surrendering it to defendant, and receiving in lieu thereof a policy from defendant for the same amount, based on the original application to the N. company, and the contract provided that the holder of such substituted policy, who shall comply with the terms thereof, shall be entitled to all the contracts and privileges that such holder would have had had he taken out a policy from defendant in the first instance. *Held*, that a condition in the substituted policy that, "if this policy shall be terminated by death before the first anniversary of the date hereof," a certain per cent. of its face value should be deducted for a reserve fund, did not refer to the date of the substitution, but to the date of the policy of which it was a continuation.—*Seymour v. Chicago Guaranty Fund Life Co.*, (Minn.) 55 N. W. 907.

Application.

4. An applicant for insurance stipulated that his answers and statements should be taken

as warranties, and the certificate of insurance contained a clause that it should be null and void if any of the statements in the application were false. The applicant falsely stated in his application that he had never had piles. *Held*, that there could be no recovery on the certificate, although his death did not result from the piles, and although he was ignorant that he had them.—*Baumgart v. Modern Woodmen of America*, (Wis.) 55 N. W. 713.

Conditions.

5. A policy provided that, on failure of the insured to pay the premium note described in full at maturity, such policy should cease to be in force, and continue void while said note remained unpaid. Said note not having been paid at maturity, the company accepted as a credit thereon an amount much larger than the premium earned, and left the note with its local agent for collection. Later, before the premium so paid had been earned, and before the note had been paid in full, the property was burned. *Held*, that the policy was voidable only at the election of the company, and that, by receiving and retaining the part payment after default, and retaining the note for collection, it waived the forfeiture.—*Phenix Ins. Co. v. Dungan*, (Neb.) 55 N. W. 1069.

6. Where a clause of an insurance policy provided that the entire policy should be void if the assured had or should procure other insurance, or incumber the property by mortgage, the existence of a mortgage and prior insurance on the insured property invalidated such policy, though the assured was not examined as to whether his property was incumbered, or verbally informed of the effect of such prior insurance or incumbrance, by defendant, such facts not constituting a waiver of the condition.—*Wilcox v. Continental Ins. Co. of New York*, (Wis.) 55 N. W. 188.

7. Under the condition in a policy of insurance that if the premises be used so as to increase the risk, or become vacant or unoccupied, without notice to and consent of the company, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the consent of the company indorsed thereon, the policy shall be void, the words "by any means whatever" do not qualify the words "or become vacant or unoccupied."—*Moriarty v. Home Ins. Co.*, (Minn.) 55 N. W. 740.

8. In an action on a policy which contained a condition that it should be void if plaintiff procured other insurance on the property, it appeared that plaintiff mortgaged the premises, and covenanted to insure the property, and that the policy should be made payable to the mortgagee; and the mortgagee was also authorized to procure insurance at plaintiff's expense in case of the default of the latter so to do. Before the delivery of the mortgage the mortgagee procured insurance (assumed to cover the interest of the owner) without the knowledge of plaintiff, and, after the delivery of the mortgage, informed plaintiff merely that he had procured insurance. *Held*, that plaintiff did not, by acquiescence or ratification, adopt the insurance as covering its interest as owner, since it had no knowledge that such was the nature of the insurance, and owed no duty to defendant to inquire as to the terms of the contract.—*Church of St. George v. Sun Fire Office Co. of London*, (Minn.) 55 N. W. 909.

Waiver.

9. A loss on a policy occurred August, 1888. In October the company notified plaintiff that it denied all liability on the policy. In November a clerk in defendant's office, in the usual course of business, notified plaintiff that his premium note was due, and asked him to remit, which he did. The company, by its officers, at once offered to return the same, and notified plaintiff that it was subject to his order. *Held*,

not a waiver of any defense to the policy.—*Ryan v. Rockford Ins. Co.*, (Wis.) 55 N. W. 1025.

Proofs of loss.

10. Failure to furnish proofs of loss within 60 days after a fire, as required by a policy of insurance, will not forfeit the right of an assured to recover on the policy in the absence of a provision making such failure a cause of forfeiture, even though the policy contained a stipulation that no action could be maintained on it until after full compliance with all its requirements. *Steele v. Insurance Co.*, 53 N. W. 517, 93 Mich. 81, followed.—*Rynalski v. Insurance Co. of Pennsylvania*, (Mich.) 55 N. W. 981.

11. Where an administrator, with the implied consent of an accident indemnity association, adopts and relies upon the act of a third person, who has filed with the association proof of a claim growing out of the accidental killing of such administrator's intestate, who was a member, the association cannot defeat a recovery on the ground that it was incumbent on the administrator to file the proof himself, and that he could not, with its implied consent, adopt as his own that filed by a third person.—*Wilson v. Northwestern Mut. Acc. Ass'n*, (Minn.) 55 N. W. 626.

Actions on policies.

12. Under a policy providing that no action thereon can be maintained unless commenced within 6 months after the loss, and that the company shall have 60 days to make payment, an action cannot be commenced after the 6 months, though there were negotiations for a settlement, where, within 60 days after loss, the company repudiates liability, thereby excusing proof of loss.—*Lentz v. Teutonia Fire Ins. Co.*, (Mich.) 55 N. W. 993.

13. A policy, by which the loss, if any, is payable to a mortgagee as his interest may appear, is a contract for the latter's benefit; and he or his assignee may recover in his own name, without joining the insured as a party, if the loss insured does not exceed the mortgage debt.—*Maxcy v. New Hampshire Fire Ins. Co.*, (Minn.) 55 N. W. 1130.

14. An averment that plaintiff, the mortgagee, to whom the loss was payable as his interest might appear, has sustained loss and damage in a certain amount, sufficiently alleges that the owner has sustained loss and damage, as against a general demurrer.—*Maxcy v. New Hampshire Fire Ins. Co.*, (Minn.) 55 N. W. 1130.

15. In an action on an insurance policy, defendant claimed that plaintiff was not the owner of the premises on which the burned buildings were located. Plaintiff claimed title through a deed from his wife made in 1884. *Held*, that evidence that the printed blank on which the deed was written was not printed until 1888, and that his wife died in 1884, supported a finding that the deed was a forgery.—*Ryan v. Rockford Ins. Co.*, (Wis.) 55 N. W. 1025.

16. In an action upon an insurance policy for damages by fire to household furniture and wearing apparel in actual use, it was proper to instruct the jury that of the property destroyed they should, if possible, find the fair market value; otherwise, that they should find the fair value from the evidence, and that such value was not what a junk-shop or second-hand dealer would give for it, or what it would bring under extraordinary circumstances, or at a forced sale.—*Sun Fire Office of London v. Ayerst*, (Neb.) 55 N. W. 635.

Accident insurance.

17. Where an accident happens to a member of an accident indemnity association, the certificate being in the usual form, a recovery cannot be defeated on the ground of a voluntary exposure to a danger contemplated by the parties.—*Wilson v. Northwestern Mut. Acc. Ass'n*, (Minn.) 55 N. W. 626.

Mutual benefit companies.

18. Defendant mutual benefit society made an ultra vires contract to pay the death losses of another company, which was insolvent, in consideration of a transfer to it of the latter's assets. Defendant also, by a circular letter, induced a majority of the members of the insolvent company to transfer their membership to it. *Held*, in an action on a policy issued by the insolvent company, that defendant was not estopped to deny the validity of the contract between the companies, since it did not appear that plaintiff had been injured by the action of defendant.—*Twiss v. Guaranty Life Ass'n of Iowa*, (Iowa,) 55 N. W. 8.

Deposit of securities with state officials—Withdrawal.

19. Under How. St. § 4227, providing that the securities which section 4224 requires an insurance company to deposit with the state treasurer before engaging in business shall remain in his hands notwithstanding the company ceases to do business, and shall only be withdrawn on the order of the supreme court, or when the company shall show to the satisfaction of the insurance commissioner and state treasurer that the risks of the company are less than the securities, in which case the company may be permitted to withdraw the surplus, an order for withdrawal of securities to pay death losses of a company which has ceased to issue policies because its capital has become so impaired as to render it unprofitable and imprudent to continue business will not be made where, from the company's showing, its death claims and policies outstanding approximate the amount deposited, and the death claims may have been increased since such showing, and policy holders express a desire to be heard in opposition.—*Imperial Life Ins. Co. v. Hamblitzer*, (Mich.) 55 N. W. 365.

Interest.

See "Usury."

Interior Department.

Land office, powers, see "Public Lands," 11-15.

INTERPLEADER.

When allowed.

A bank declined to pay money on deposit to the depositor's daughter, and drew a paper, which the depositor signed, to the following effect: "Allow A., my wife, to sign yr. books, and allow her draw any and all money standing in my name as depositor." The depositor and his wife died before the money was withdrawn. *Held* that, as the writing on its face was only an authority to the wife to receive money for the depositor, but may have been intended as an assignment to the wife, the bank, upon demand being made upon it by the representatives of the depositor and his wife, should be permitted to bring a bill of interpleader to have the question determined.—*Wayne County Sav. Bank v. Airey*, (Mich.) 55 N. W. 355.

Interpretation.

Of contracts, see "Contracts," 9-14.
Of mining leases, see "Mines and Mining."
Of mortgage, see "Mortgages," 1.
Of wills, see "Wills," 6-8.

INTOXICATING LIQUORS.

Mandamus to compel revocation of license, see "Mandamus," 3.
Punishment for second offense, see "Criminal Law," 18.
Violation of injunction, contempt proceedings, see "Injunction," 7.

Licensing traffic.

1. Under the police power of the state the legislature may confer upon municipalities the right to determine, in licensing the sale of intoxicants, the places where saloons may be kept, and to determine that question on each application.—*Sherlock v. Stuart*, (Mich.) 55 N. W. 845.

2. Comp. St. c. 50, § 4, provides that on the hearing of objections to the issue of a liquor license, if any party feel himself aggrieved by the decision, he may appeal to the district court. License was allowed May 9th. Remonstrant immediately gave notice of an appeal, knowing that the court would convene May 18th, and that the next session would be in September. A transcript was first demanded on the 19th, after final adjournment of court, and filed on the 20th. A transcript could, with reasonable diligence, have been procured and filed within 24 hours after license allowed. *Held*, that the appeal was not in time to stay proceedings, and mandamus could not issue to the village board to cancel the license issued on the 18th, after adjournment of court.—*State v. Trustees of Elwood*, (Neb.) 55 N. W. 1074.

3. The Grand Rapids city charter gives the common council power "to enact such ordinances, by-laws, and regulations as they deem desirable, * * * to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof," and that no person shall engage in such occupation, within the city limits, without a license. *Held*, that the charter authorized an ordinance requiring an application for a license to be made to the common council, and prescribing the conditions precedent to its consideration by the council, and conferred on the council power to determine each individual application as far as the location and suitability of the saloon were concerned. *McGrath and Long, JJ.*, dissenting.—*Sherlock v. Stuart*, (Mich.) 55 N. W. 845.

Liquor dealer's bond.

4. 3 How. St. § 2283c6, prescribes the form of bond required of a retail liquor dealer, which recites, *inter alia*, that "whereas, the above-named principal proposes to carry on the business of * * * at * * *, in the county of," etc. *Held*, that a city council could not refuse to approve the bond of the proprietor of a large hotel, as a retail liquor dealer, because such bond designated such hotel, giving its name, as the place where he proposed to carry on the business, and because he had been operating, and proposed to operate, two bars in the hotel, under one license.—*Courtright v. Common Council of Newaygo*, (Mich.) 55 N. W. 808.

Criminal prosecution.

5. 3 How. St. § 2283e, requires saloons and other places, except drug stores, where intoxicating liquors are sold, to be closed on the first day of the week, commonly called "Sunday." *Held*, that a complaint for violation thereof is sufficient which charges that defendant was the proprietor of a place where intoxicating liquors were sold, said place not being a drug store, and that on a stated day, which was the first day of the week, commonly called "Sunday," she kept her said place open, and did not keep it closed, as required by law.—*People v. Wheeler*, (Mich.) 55 N. W. 371.

6. Code, § 1543, provides that whoever shall erect or use any building or place for any of the purposes prohibited in sections 1525, 1540-1542, shall be deemed guilty of a nuisance; section 1525 relates to the illegal manufacture of intoxicating liquor; section 1540 provides for the punishment of persons who, without a permit, sell intoxicating liquor; section 1541 provides that any person who mixes intoxicating liquor with beer, wine, or cider, and sells the same, shall be guilty under section 1540; section 1542 prohibits all persons

from owning or keeping intoxicating liquors to sell within the state, or to permit the same to be sold therein. *Held*, that an indictment under section 1543 need not charge that intoxicating liquors were kept for sale or sold in a place resorted to by persons desiring to buy, as that is not a necessary element of the nuisance, as defined by section 1543.—*State v. McEnturff*, (Iowa,) 55 N. W. 2.

7. An information under the local option law, (Laws 1889, No. 207,) which alleges that defendant sold fermented cider, contrary to the provisions of the resolution adopted by the board of supervisors pursuant to such law, sufficiently alleges that the law has been made and is operative in the county.—*People v. Adams*, (Mich.) 55 N. W. 461.

8. Where an indictment charged defendant with selling brandy and beer, alleged to be intoxicating, an instruction that California brandy was presumptively spirituous and intoxicating liquor is not erroneous.—*State v. Tisdale*, (Minn.) 55 N. W. 903.

9. On an indictment for selling intoxicating liquors without a license, the prosecution is not obliged to prove the quantity of liquor sold, precisely as laid in the indictment.—*State v. Tisdale*, (Minn.) 55 N. W. 903.

10. Where an indictment charged defendant with selling brandy and beer, alleged to be intoxicating, an instruction that the sale of an article purporting to be beer, at a place where intoxicating liquors were sold, will be presumed to be such beer as is usually kept for sale at such places, is not erroneous.—*State v. Tisdale*, (Minn.) 55 N. W. 903.

Evidence.

11. In prosecutions for an unlicensed sale of intoxicating liquor the burden is on defendant to show that he had a license.—*State v. Ahern*, (Minn.) 55 N. W. 959.

12. Since section 17 of the local option law (Laws 1889, No. 207) makes a certified transcript of the record of the preamble and resolution of the board of supervisors evidence that the provisions of the act are in full force in the county, it is unnecessary, on a prosecution under the act, to prove a promulgation of the adoption of such preamble and resolution.—*People v. Adams*, (Mich.) 55 N. W. 461.

13. Since the local option law prohibits the sale of fermented cider, the stage of fermentation or its intoxicating qualities are immaterial questions on a prosecution under such law.—*People v. Adams*, (Mich.) 55 N. W. 461.

Attorney's fee.

14. Acts 21st Gen. Assem. c. 66, § 4, provides that whoever is convicted of keeping a nuisance under Code, § 1543, as amended by Acts 20th Gen. Assem. c. 143, § 12, shall pay a fine and costs, including a reasonable attorney's fee, to be assessed by the court. *Held*, that though the attorney's fee is to be determined by the court, and not by the jury, where the value of the services is disputed, the court should hear any evidence submitted concerning their value.—*State v. McEnturff*, (Iowa,) 55 N. W. 2.

Injunction against sale—Violation.

15. On the hearing of an order to show cause why petitioner should not be punished for contempt for violating an injunction from selling liquors on certain premises, a witness testified to drinking what he believed to be beer, there, after the injunction. An officer testified that on searching the premises, nearly a month after the injunction, he found two kegs of beer. Petitioner testified that after the injunction he sold the premises, and had no connection therewith until he repurchased the same, some time after the acts constituting the alleged violation; but his evidence tended to show an effort to evade the law, rather than a bona fide sale. *Held*, that the court was justified in finding petitioner guilty of contempt.—*Wagner v. Holmes*, (Iowa,) 55 N. W. 473.

Inventory.

See "Assignment for Benefit of Creditors," 2, 3.

Joinder.

Of causes, see "Action," 3.
Of counts, see "Pleading," 6.

Joint Tenancy.

See "Tenancy in Common."

Judge.

Mandamus to, see "Mandamus," 1, 2.

JUDGMENT.

See, also, "Criminal Law," 15-17.

Enforcing mechanics' liens, see "Mechanics' Liens," 30.

For divorce, see "Divorce," 8, 7.

On pleading, see "Forcible Entry and Detainer," 3.

Res judicata, discharge of assignor, see "Assignment for Benefit of Creditors," 7.

— mortgage foreclosure, see "Mortgages," 8.

— on new trial after reversal, see "Appeal," 90-93.

— review on second appeal, see "Appeal," 46.
Vacation of decree for divorce, see "Divorce," 10.

Validity.

1. A decree in an action between a mortgagor and certain mortgagees of chattels, whereby a mortgage not attacked by the pleadings, and the holder whereof is not a party to the action, is declared void, is erroneous.—*Rockford Watch Co. v. Manifold*, (Neb.) 55 N. W. 236.

2. A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity.—*Lincoln Nat. Bank v. Virgin*, (Neb.) 55 N. W. 218.

3. Plaintiff sued for divorce in S. county, and defendant, being properly served, appeared, and answered fully. Plaintiff's attorney then wrote defendant's attorney that he should have notice of any further proceedings in the case, but, without notice, procured an order substituting another attorney, who dismissed the case without prejudice. The same day plaintiff's attorney brought suit in another judicial district, and, by affidavit misstating her residence, obtained service by publication on defendant without her knowledge. *Held* fraud that would wholly vitiate the decree.—*Yorke v. Yorke*, (N. D.) 55 N. W. 1095.

By default.

4. A judgment taken after a settlement between the parties, and contrary to plaintiff's promise to dismiss, defendant having relied thereon, and so suffered default, will be vacated.—*Cadwallader v. McClay*, (Neb.) 55 N. W. 1054.

5. Where plaintiff, a nonresident, gave security for costs on an order therefor made on application by defendant, an entry of default against defendant for failure to plead on the same day that security was filed was premature, and mandamus will lie to set it aside.—*Hankans v. Ottawa Circuit Judge*, (Mich.) 55 N. W. 566.

Operation and effect.

6. Where an action was commenced against an owner to recover the value of material furnished to build a house for which he had agreed to pay if the contractors did not, the fact that plaintiffs had instituted suits against the contractors, and to enforce a lien, did not affect plaintiffs' rights, so long as the judgments therein remained unsatisfied.—*Bice v. Mar-*

quette Opera-House Bldg. Co., (Mich.) 55 N. W. 382.

Res judicata.

7. In a foreclosure proceeding against a bank (a subsequent mortgagee) and the common mortgagor, it was alleged that the bank "claims some interest in the premises, the nature and extent of which is to the plaintiff unknown, but is subordinate to plaintiff's claim, wherefore plaintiff asks that it be compelled to set the same up or be forever barred." The defendants made default, and a decree was entered that the bank had "no right, title, or interest" in the mortgaged property. *Held*, in a subsequent action by the bank to foreclose its mortgage, that the former decree could not be pleaded as a bar by the mortgagor or his grantees.—*Lincoln Nat. Bank v. Virgin*, (Neb.) 55 N. W. 218.

8. A party to a partition suit is estopped, in a subsequent action against him to recover land awarded to complainant, to claim compensation for improvements, such defense not having been made in the suit for partition.—*Pierson v. Conley*, (Mich.) 55 N. W. 387.

9. Where a widow, in ejectment, has recovered a judgment for her dower, and in partition has the land assigned to her as her dower interest, defendant, who was a party to both suits, cannot, in a subsequent action for possession of such land, interpose a defense that he had homestead rights in the lands, and that his wife was not a party to the former suit in ejectment, as it was his duty to so plead in the former suit.—*Bemis v. Conley*, (Mich.) 55 N. W. 387.

10. In a suit by the grantee of complainant in partition to recover the land awarded complainant, defendant, having been made a party to the partition suit, cannot claim title by adverse possession, as he should have set up such title in the partition suit; and, the pleadings and proof in such suit not being before the court, it will be presumed that such defense was made.—*Pierson v. Conley*, (Mich.) 55 N. W. 387.

11. In an action to recover the purchase price of a harvester, on the theory of a breach of the warranty and rescission of the contract, defendant cannot rely on a judgment against plaintiff in favor of an indorsee of a note given by plaintiff on the purchase of such harvester, as settling the issue of a breach of warranty and rescission of the sale against plaintiff, where it is not certain that the indorsee did not recover as an innocent purchaser before maturity.—*Faher v. Esterley Harvesting Mach. Co.*, (N. D.) 55 N. W. 580.

12. A husband exchanged land owned by him for land owned by the wife, giving the wife, as security for the difference, a note and mortgage for \$550 and a chattel mortgage for \$1,600. Having sold most of the chattels, the husband executed a note and mortgage for \$1,000 on real estate, which was credited on the \$1,600 note and mortgage. Afterwards the wife brought suit on the \$550 and \$1,000 notes, and recovered judgment. *Held*, in an action by a creditor who had been made party in such suit, that the judgment was not an adjudication preventing inquiry by plaintiff as to the \$1,600 note and mortgage, but was an adjudication merely as to the other notes.—*Thomas v. McDanel*, (Iowa) 55 N. W. 499.

13. In an action by a creditor against a debtor, the validity of chattel mortgages made by the debtor to other parties cannot, as against such mortgagees, be adjudicated.—*McCord-Brady Co. v. Krause*, (Neb.) 55 N. W. 215.

14. A decree obtained for the purpose of obviating the objection to a deed that the acknowledgment was not shown to have been proved by the certificate of a duly-authorized officer is operative only against parties to the action, and others in privity with them.—*Connell v. Galligher*, (Neb.) 55 N. W. 229.

15. Where there were due a resident of Nebraska, from a railroad company operating a

road through Iowa and Nebraska, wages, which, in Nebraska, were exempt from attachment, but which, nevertheless, by means of an assignment of the claim to a resident of Iowa, were procured, by garnishing the railroad company in Iowa, to be applied to the payment of said claim, the assignor of such claim is liable to such debtor for the amount so appropriated, and, as between them, the proceedings in Iowa were not res judicata.—*O'Connor v. Walter*, (Neb.) 55 N. W. 867.

16. In an action by L. against a corporation, the court found that L.'s alleged title to certain lands was invalid, and the corporation subsequently brought ejectment against L.'s grantees, who set up the same title on which L. had relied. *Held*, that the judgment in the former suit was conclusive of the rights of the parties.—*People's Sav. Bank v. Eberts*, (Mich.) 55 N. W. 993.

17. A decree of foreclosure in a suit by a junior mortgagee, to which the senior mortgagee was made a party, is no defense to an action by the senior mortgagee to foreclose, where it was amended so as to provide that it should not prejudice the senior mortgagee's rights, and, as amended, was affirmed on appeal.—*Scribner v. York*, (Iowa,) 55 N. W. 10.

18. A husband exchanged land owned by him for land owned by the wife, giving the wife, as security for the difference, a note and mortgage for \$550 and a chattel mortgage for \$1,600. Having sold most of the chattels, the husband executed a note and mortgage for \$1,000 on real estate, which was credited on the \$1,600 note and mortgage. Afterwards the wife brought suit on the \$550 and \$1,000 notes, and recovered judgment. *Held*, in an action by a creditor who had been made party in such suit, that an instruction that, if the judgment was collusively obtained, it was no adjudication as against plaintiff, and the jury should inquire whether the wife took any of the mortgaged chattels, the value thereof, and the amounts of payments made to her by the husband, and, if the property and payments so received exceeded in value the indebtedness, they should find for plaintiff, otherwise for defendant, was erroneous in limiting the inquiry, instead of submitting the entire transaction.—*Thomas v. McDanel*, (Iowa,) 55 N. W. 499.

Lien.

19. Where a person's true name is Mary Ann Allely, and she holds land recorded under the name of Mary A. Allely, a judgment against her, indexed and docketed as against May Allely, is not constructive notice to a purchaser from her.—*Phillips v. McKaig*, (Neb.) 55 N. W. 259.

20. Where land is recorded in the name of "Mary A. Allely," a deed which describes the grantor in the body and in the acknowledgment by that name, but which is signed "Mary A. Allely," does not charge the purchaser with notice that a judgment indexed against May Allely was against Mary A. Allely.—*Phillips v. McKaig*, (Neb.) 55 N. W. 259.

21. Where lots are purchased with the proceeds of the sale of a farm owned by a married woman, and occupied as a homestead, and the title to such lots is taken in the name of the husband, the latter holds such title in trust for his wife,—the equitable owner; and the liens of mortgages given thereon by the husband and son, and their wives, who each occupied separate portions of such lots as homesteads, are superior to the liens of prior judgments against the husband and son, in the absence of any equities in favor of the judgment creditors.—*Seeberger v. Campbell*, (Iowa,) 55 N. W. 20.

Collateral attack.

22. The authority of an attorney who has appeared in an action will be presumed, to the extent that relief against the judgment on the ground that he was not authorized will be

granted only in case of direct application.—*Corbitt v. Timmerman*, (Mich.) 55 N. W. 437.

Revival—Limitation.

23. The limitation of one year, in which to revive an action on motion, does not apply to a proceeding to revive a judgment.—*Boyd v. Furnas*, (Neb.) 55 N. W. 865.

Opening and vacating.

24. A motion to vacate a judgment under Comp. Laws, § 4939, is addressed to the sound legal discretion of the trial court, and its action will not be disturbed by the appellate court unless there is a manifest abuse of discretion.—*Evans v. Fall River County*, (S. D.) 55 N. W. 862; *Minnekahta State Bank v. Same*, Id. 863.

25. Where, in order to invalidate a judgment, want of authority to appear for the party against whom judgment was rendered is alleged, the burden of proof is upon the party asserting such want of authority.—*Connell v. Galligher*, (Neb.) 55 N. W. 229.

26. Service of a citation to show cause why a decree should not be set aside is properly made on the attorney of record who procured the decree, since, as long as the decree is for any reason subject to vacation, he cannot be heard to say that the relation of attorney and client no longer exists.—*Yorke v. Yorke*, (N. D.) 55 N. W. 1095.

27. When a decree is annulled for fraud in its procurement, the court should not dismiss the action with costs, but retain it, and grant defendant a reasonable time to plead.—*Yorke v. Yorke*, (N. D.) 55 N. W. 1095.

Equitable relief.

28. A court of equity will not vacate a judgment at law merely on the ground that the officer's return, that he had served the summons on defendant to the judgment by leaving a copy of the process at his usual place of residence, was false; but it must also be averred and proved that defendant to the judgment has a meritorious defense.—*Janes v. Howell*, (Neb.) 55 N. W. 965.

29. Where no special proceeding under the Code is available, equity will enjoin the enforcement of a judgment by default, taken in fraud of a promise to defendant to dismiss.—*Cadwallader v. McClay*, (Neb.) 55 N. W. 1054.

30. A judgment debtor filed a supplemental complaint, alleging that as between the two judgment creditors, B. and G., there was nothing due B. on the judgment claim; that the judgment debtor had obtained from G. a satisfaction of the judgment, admittedly without paying any consideration therefor; that B. was insolvent; and that, if on a fair accounting between B. and G. there was anything found due B., he, the judgment debtor, was ready and willing to pay it; and he prayed that the satisfaction executed by G. be decreed to be a complete discharge of the judgment, and that B. and G. be restrained from collecting any money on account thereof. *Held*, that this did not constitute an action of interpleader, and hence the complaint was not defective in failing to deny collusion between plaintiff and either B. or G., or in failing to allege that the amount of the judgment had been paid by plaintiff into court.—*Gaynor v. Blewett*, (Wla.) 55 N. W. 169.

Judicial Sales.

On mortgage foreclosure, see "Mortgages," 11-13.

Under execution, see "Execution," 4-6.

Jurisdiction.

See "Courts;" "Divorce," 1, 2; "Equity;" "Injunction," 1.

Of appeal, see "Appeal," 1, 2.

JURY.

Province of, see "Contracts," 14; "Criminal Law," Trial," 29-32.

Question for, see "Contracts," 25, 26.

Trial of separate issues, see "Criminal Law," 4.

Urging jury to agree, see "Trial," 3.

View by jury, see "Trial," 2.

Competency of juror.

1. In an action against a railroad company, a juror stated on his voir dire that he was engaged in buying and shipping grain over the railroad; that he had received favors from the company, and desired to retain its favorable consideration; but that he had no personal feeling in the matter, and could render an impartial verdict. *Held*, that a challenge for cause was properly sustained.—*Omaha & N. W. R. Co. v. Cook*, (Neb.) 55 N. W. 943.

2. In a prosecution for keeping a saloon open on Sunday, a juror testified on his voir dire that he had always been "down on liquor selling;" that, when sitting as a juror in a case where a liquor seller was interested as defendant or a witness, he had a prejudice against such person, and that, in the case of respondent, he could not say that such prejudice would be entirely removed. To the court he said that he would not be prejudiced against a liquor dealer by reason of his business; but he was prompted by the prosecuting attorney, who stated that it was his understanding that the juror was prejudiced, not against the person, but against the business. *Held*, that a challenge for cause to the juror should have been allowed.—*People v. Wheeler*, (Mich.) 55 N. W. 371.

Challenges.

3. Where the examination of a juror raises a doubt as to his being an elector of the county where the action is brought, there is no error in sustaining a challenge for cause.—*Omaha & N. W. R. Co. v. Cook*, (Neb.) 55 N. W. 943.

Harmless error in sustaining challenge.

4. The fact that the court, on the challenge of the state, improperly rejected a juror, does not prejudice defendant, if he was tried by an impartial jury; and the jury will be presumed to have been impartial if nothing appear to the contrary.—*State v. Kluseman*, (Minn.) 55 N. W. 741.

5. Where an impartial jury is secured, error cannot be predicated on the rejection of persons who may have been qualified.—*Omaha & N. W. R. Co. v. Cook*, (Neb.) 55 N. W. 943.

Right to jury trial.

6. Where a party states in open court that it is immaterial to him whether the case is tried as a proceeding at law, or in equity, merely directing a trial as in equity is not a denial of a trial by jury, as it was his duty to demand such trial, if he wished it.—*Lothian v. Lothian*, (Iowa.) 55 N. W. 405.

Waiver.

7. In a proceeding in garnishment, where the court went on the theory that the suit was a "court case," but one in which it might order specific questions of fact to be tried by a jury, claimants, by failing to object, and by proceeding on the same theory, waive the right to a jury trial, if such existed.—*Smith v. Barclay*, (Minn.) 55 N. W. 827.

8. The waiver of a jury when a cause is called for trial is a waiver only as to the issues then formed, and not an agreement to waive it as to all new and different issues that may thereafter be formed under amended pleadings.—*McGeagh v. Nordberg*, (Minn.) 55 N. W. 117.

9. A defendant in a criminal case in a municipal court which has the same jurisdiction in criminal cases as a justice of the peace may waive the right of trial by jury.—*State v. Bannock*, (Minn.) 55 N. W. 558.

10. The right, having been waived, cannot be recalled at will.—*State v. Bannock*, (Minn.) 55 N. W. 558.

JUSTICES OF THE PEACE.**Liabilities.**

1. A petition stated that on presentation of an appeal bond by plaintiff to defendant, a justice of the peace, defendant approved same, and agreed to send up proper transcript, expressly waiving any right to payment of fees in advance; that in making up the docket defendant omitted any mention of the appeal, wrote plaintiff he must pay, or the transcript would not be sent, and afterwards entered in the docket that plaintiff was to pay before the appeal was taken, and, not having done so, the appeal was not taken; which entry, it was alleged, was false, and made with intent to injure plaintiff, and prevent his appeal. *Held*, in an action for damages on account of such acts, to show not merely a mistake in judgment, but that the acts were malicious and corrupt; and a demurrer, therefore, should have been overruled.—*Horne v. Pudil*, (Iowa.) 55 N. W. 485.

Filing transcript of judgment in another court—Effect.

2. How. St. § 6949, provides that, when a transcript of a judgment recovered before a justice of the peace is filed in the circuit or district court, it shall have the same effect as a judgment rendered therein, and may in the same manner be enforced, discharged, and canceled, and that execution may be issued thereon in the same manner as if execution were to be issued by the justice; and section 6993 provides that, after filing and docketing such transcript, all executions shall be issued out of the circuit or district court, and the power of the justice in respect to such judgment shall cease. *Held*, that the filing of such transcript divests the justice of jurisdiction, and prevents the party against whom the judgment was entered from thereafter entering a stay with the justice. *McGrath and Long, JJs., dissenting.*—*Hitchcock v. Hosmer*, (Mich.) 55 N. W. 841.

Laches.

See "Equity," 19-21.

LANDLORD AND TENANT.

Lease of homestead, exemption of rent, see "Homestead," 2.

—of state mineral lands, see "Public Lands," 3-7.

Mining leases, see "Mines and Mining," 1.

Subrogation to lessor's rights, see "Subrogation," 4.

Wrongful eviction.

1. A lease required the lessee to plant, properly work, and harvest all crops grown on the premises, and provided that the lessor might re-enter for default in any covenant. During the term the lessor foreclosed a mortgage on the lessee's personal property, so that he was left without any means of cultivating the land. The lessor then gave notice to quit, and afterwards went on the land, and put in a crop, without objection from the lessee. The lease did not permit a subletting without the lessor's consent. *Held*, that the evidence was not sufficient to show that the lessor wrongfully took possession of the land during the term.—*Wright v. Everett*, (Iowa.) 55 N. W. 4.

Leases.

2. A lease of a tract of land including half the bed of a stream gives the lessee whatever rights the lessor has to cut and remove the ice.—*Marsh v. McNider*, (Iowa.) 55 N. W. 469.

3. Plaintiff company, in leasing a theater building owned by it to another company, obtained a covenant from defendant, a stockhold-

or in the latter company, that, if the leasing of the building caused the occupant of a saloon therein to give up his lease, defendant would assume it. *Held*, that the fact that, after default in payment of rent by the saloon keeper, plaintiff terminated the lease and got possession of the premises, did not affect its right of action on the covenant.—*Academy of Music Co. v. Davidson*, (Wis.) 55 N. W. 172.

4. Comp. Laws, § 3741, provides that when a tenant remains in possession of leased property after the expiration of his term, and the lessor accepts rent, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year. *Held*, where a tenant rented premises for one year from April 1, 1886, and held over, and the landlord accepted rent and gave notice March 28, 1889, to leave the premises May 1st, the landlord did not, by making a demand for rent for the month of April, renew the lease for another year, since the demand was not under the lease, but under the license of the notice.—*Banbury v. Sherin*, (S. D.) 55 N. W. 723.

Leases—Termination and surrender.

5. A complaint which alleges the making of a verbal lease for a term not specified, but "from month to month," and the giving of a month's notice to the lessee to quit, shows a termination of the lease.—*Banbury v. Sherin*, (S. D.) 55 N. W. 723.

6. A surrender of a lease by operation of law may arise from any condition of facts, voluntarily assumed, incompatible with the existence of the relation of landlord and tenant between the parties; as, for instance, when a new tenant has, by agreement with the landlord, been substituted and accepted in place of the old.—*Bowen v. Haskell*, (Minn.) 55 N. W. 629.

Tenancies from year to year.

7. Comp. Laws, § 3741, provides that when a tenant remains in possession of leased property after the expiration of his term, and the lessor accepts rent, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year. *Held*, where a tenant rents premises for one year, at a certain rate per month, and holds over for two years, the landlord accepting rent, that the tenancy is not from year to year, but for definite terms of one year each.—*Banbury v. Sherin*, (S. D.) 55 N. W. 723.

Landlord's lien.

8. In an action by an administrator to enforce a lien for rent against grain grown on the leased land, and purchased by defendants from the lessee, it is no defense that in a replevin suit by defendants against the lessee, on refusal of the latter to deliver the grain in accordance with his contract of sale, plaintiff administrator was a witness, and made no claim to the grain, when it does not appear that such action on his part misled defendants to their detriment.—*Durlam v. Steele*, (Iowa,) 55 N. W. 509.

Land Office.

Power to cancel warrants, see "Public Lands," 11-15.

Larceny.

See "Receiving Stolen Goods."

Leases.

See "Landlord and Tenant," 2-6.

Mining leases, see "Mines and Mining," 1.
Of state mineral lands, see "Public Lands," 3-7.

Legacies.

See "Wills."

Legislature.

See "State Legislature."

LIBEL AND SLANDER.

What actionable.

1. A letter, written by one of two rival milk sellers, advising a shipper to sell no more milk to the other unless he had surety for his goods, as such seller paid nothing to his shippers, is libelous per se.—*Brown v. Vannaman*, (Wis.) 55 N. W. 183.

Privileged communications.

2. A letter, written by one of two rival milk sellers, advising a shipper to sell no more milk to the other unless he had surety for his goods, was not a privileged communication.—*Brown v. Vannaman*, (Wis.) 55 N. W. 183.

Question for jury—Meaning of words.

8. In an action of libel, for publishing an article charging a supervisor with receiving unlawful compensation for his services, plaintiff admitted the receipt of the money, but claimed that he received it for committee work, and that the article charged him with receiving it for his services while the board was in session. Defendants claimed that the article charged plaintiff with unlawfully receiving it for committee work. The article was ambiguous as to the services for which the extra compensation was charged to have been received. *Held*, that the meaning of the article was for the jury.—*Ewing v. Ainger*, (Mich.) 55 N. W. 996.

Criminal prosecution—Complaint.

4. A complaint for criminal libel set out three articles, which were published in three consecutive issues of defendant's newspaper, and alleged that the first article intended to charge that complainant had an arm broken under disgraceful circumstances; the second, that complainant bore upon his person the marks of adventures at institutions of a disreputable character; and the third, that a statement by a certain doctor that complainant's arm had been broken while being ejected from a house of ill fame was true. *Held* that, as interpreted by the pleader, each article charged a disgraceful act within the meaning of the statute punishing criminal libel, and consequently that the complaint was bad for duplicity. Grant, J., dissenting.—*People v. Jackman*, (Mich.) 55 N. W. 809.

5. It was proper to introduce extrinsic matter into a complaint for criminal libel to explain the nature of the charge complained of, where its meaning would otherwise have been doubtful.—*People v. Jackman*, (Mich.) 55 N. W. 809.

6. Under Act No. 210, Pub. Laws 1885, which makes it a misdemeanor to falsely and maliciously impute to another by word or writing an infamous or degrading act, a complaint which charges defendant with publishing in a newspaper that complainant's arm was broken while being ejected from a house of ill fame charges a degrading act.—*People v. Jackman*, (Mich.) 55 N. W. 809.

— Evidence.

7. Evidence that the facts alleged in the complaint as libelous had for a long time been currently reported and believed in the community, and that they had been so reported to defendant, was properly excluded.—*People v. Jackman*, (Mich.) 55 N. W. 809.

License.

Of liquor traffic, see "Intoxicating Liquors," 1-3.

To practice medicine, see "Physicians and Surgeons."

LIENS.

See, also, "Mechanics' Liens."

For damage by trespassing animals, see "Animals," 2.

For taxes, see "Taxation," 5.

Of attachment, see "Attachment," 6, 7.

Of attorney, see "Attorney and Client," 5-7.

Of carrier, see "Carriers," 1.

Of innkeepers, see "Innkeepers."

Of judgment, see "Judgment," 19-21.

Of landlord, see "Landlord and Tenant," 8.

Of mortgage, see "Chattel Mortgages," 17, 18; "Mortgages," 2, 3.

On lumber for sawing, see "Logs and Logging," 2-5.

Vendor's lien, see "Vendor and Purchaser," 8.

In general.

1. A contractor, who had guaranteed his subcontractor's purchases of material, terminated the contract, and brought suit on the subcontractor's bond for money paid out for him for material. *Held*, that he had no lien, nor right of possession, on unused material left by the subcontractor in the building.—*Walthers v. Knutzen*, (Neb.) 55 N. W. 1060.

Equitable liens.

2. A contract provided that W. & Co. were to furnish the money, and B. & Co. were to buy corn, place it in cribs, insure it, and incur all lawful expenses of preparing for market; that the corn was to be the property of W. & Co., and that the profits above the actual cost of the corn and expenses were to be equally divided. *Held*, in replevin against a receiver of B. & Co., who denied the title of W. & Co., and their right to possession, that W. & Co. had a lien on the corn for the purchase money and their share of the profits, and were entitled to immediate possession.—*Ogden v. Warren*, (Neb.) 55 N. W. 221.

3. The holder of railroad land contracts mortgaged the land to D., and then quitclaimed and assigned the contracts to a bank. D. brought suit to foreclose, making the bank a party. The bank having appeared and answered, all the parties made a stipulation of the amounts and rank of their interests, on which decree was afterwards entered. A few days after said stipulation, the bank, at D.'s request, paid the railroad a sum due on the land, but did not set up this payment in the foreclosure case. D. bought the land on foreclosure, and his devisee, desiring to get a deed from the railroad, sued the bank for possession of the contracts, and to quiet his title. *Held*, that he must first do equity by paying the bank the sum it had advanced at D.'s request, with interest, which constituted an equitable lien on the premises.—*Dimick v. Grand Island Banking Co.*, (Neb.) 55 N. W. 1066.

Life Estate.

See "Estates;" "Wills," 6-8.

Life Insurance.

See "Insurance."

LIMITATION OF ACTIONS.

See, also, "Adverse Possession."

Barred claim as consideration, see "Contracts," 7, 8.

Laches, see "Equity," 19-21.

Proceedings to revive judgment, see "Judgment," 23.

To enforce lien, see "Mechanics' Liens," 28, 29.

To set aside sale under power, see "Mortgages," 15.

When statute applicable.

1. An action brought under Acts 1873, No. 82, § 17, by the receiver of an insolvent mutual

fire insurance company, to recover an assessment levied against a member, by order of the court, to liquidate the liabilities of the company, is barred by the statute of limitations in reference to actions on contracts if commenced six years after the assessment fell due.—*Wardle v. Hudson*, (Mich.) 55 N. W. 992.

Running of statute.

2. As against a claim upon a county for the amount paid for lands at a void tax sale, under Gen. St. 1878, c. 11, § 97, as amended by Gen. Laws 1881, c. 10, the statute of limitations commences to run on the day of the entry of judgment against the purchaser adjudging and decreeing such sale void.—*Easton v. Sorenson*, (Minn.) 55 N. W. 128.

Nonresidents.

3. The statute of limitations of this state does not bar an action on notes made by a resident of another state, in the absence of proof that the maker has become a resident of this state.—*Way v. Colyer*, (Minn.) 55 N. W. 744.

4. Under Code, § 17, providing that the absence from the state of a nonresident shall not extend the period within which actions in rem may be commenced by and against such nonresident, or his representatives; and under Code Civil Proc. § 77, providing that service may be made by publication in actions which relate to, or the subject of which is, real or personal property in this state, where any defendant claims a lien or interest therein, or the relief demanded consists in excluding him from any interest therein, and such defendant is a nonresident,—a defendant in an action to quiet title may plead adverse possession, though he was a nonresident, and absent from the state, during a portion or all of the period covered by his possession, since such an action is an action "in rem," within the meaning of the statute.—*Lantry v. Parker*, (Neb.) 55 N. W. 962.

Fraud.

5. A debtor who was known by her creditors to be insolvent conveyed all of her real estate by deed duly recorded, and told her creditors at the time that the only object of the conveyance was to beat her foreign creditors; that she had been advised to put her property out of her hands, and intended to do so until she could settle matters; that she could pay all her home creditors, but there were some debts she did not feel bound to pay; that the object of the deed was to secure a debt to the grantee, the surplus to be returned to her. *Held*, that the creditors discovered, on the date of recording the deed, that the same was fraudulent, and hence, under Code Civil Proc. § 12, the statute of limitations commenced to run from that date.—*Gillespie v. Cooper*, (Neb.) 55 N. W. 302.

6. Code Civil Proc. § 12, provides that an action for relief from fraud must be commenced within four years from the discovery of the fraud. *Held*, that the statute began to run against a creditor from the discovery of the fraudulent act on the part of his debtor, whether the creditor's claim had been reduced to judgment or not, since he was not limited to a creditor's bill in order to obtain relief on the ground of fraud, but, under Code Civil Proc. § 108, subd. 8, could attach the property fraudulently conveyed. *Irvine, C., dissents.*—*Gillespie v. Cooper*, (Neb.) 55 N. W. 302.

7. In October, 1884, C., being largely indebted to various parties, conveyed all her property—four city lots—to one R., with a secret agreement between them that R. should sell the lots, and retain the amount of the debt owing him by C., and return the surplus to C., or such person as she might designate. R. agreed with C. that if she would find a purchaser for, or sell, them, he would pay her as commission all that remained of the lots, or their proceeds, after the payment to him of her debt. Two of the lots were sold. R.'s debt paid, and at C.'s request the remaining two

lots were conveyed to her husband, without consideration. *Held*, that the conveyance by R. to O.'s husband was not a continuation or consummation of the fraud of October, 1884, but a new and independent one, and hence a suit by O.'s creditors to set aside the conveyance of October, 1884, and also the conveyance to O.'s husband, commenced within four years from the recording of such conveyance, was not barred as to the latter conveyance.—*Gillespie v. Cooper*, (Neb.) 55 N. W. 302.

8. The lapse of four years after the discovery of alleged frauds, or of such facts as were sufficient to demand such investigation as would have disclosed alleged frauds in the judicial sale of corporate property to an officer of the corporation, bars an action by a stockholder to impress the property with an express trust upon the ground of such fraud.—*Horbach v. Marsh*, (Neb.) 55 N. W. 286.

Running of statute—Trusts.

9. Where a man purchases land with his wife's money, and, contrary to her direction, takes the title in his own name, and they occupy the land as a homestead for more than 20 years after the wife discovers that the title is in him, and, from the inception of the trust until his death, always admits the trust, and never asserts any interest in, or exercises any control over, the land, hostile to such trust, the statute of limitations does not run against the wife prior to his death.—*Fawcett v. Fawcett*, (Wis.) 55 N. W. 405.

10. In an action to discover assets of defendant's deceased father's estate, brought by the administrator, where it is alleged that decedent did business in defendant's name to defraud his creditors, it appeared that the property sought to be recovered came into defendant's possession after her father's failure in business, and he continued to use the property as his own until his death, but did business in her name. *Held*, that as it did not appear that defendant had repudiated the trust before her father's death, the action was not barred by the five-year limitation, when brought within five years after his death.—*Long v. Valteau*, (Iowa.) 55 N. W. 31.

— Interruption by legal proceedings.

11. Where a demurrer is sustained to the declaration in an action for libel because several causes of action are alleged in one count, and leave being given, plaintiff files an amended declaration setting forth each cause of action in a separate count, it is error to compel him to strike out all counts of the amended declaration based on articles published more than two years before leave to amend was given, if the same were not barred when the original declaration was filed, since the filing of the amended declaration is not the commencement of the new action, but a continuation of the original one.—*Randall v. Gartner*, (Mich.) 55 N. W. 843.

Acknowledgment and new promise.

12. In an action against the maker and surety of a note the defense was the statute of limitations. Plaintiff sought to recover on the ground that the note was taken out of the statute by the indorsement of a payment made by the maker at the request or by the direction of the surety, but he was unable to say whether a conversation with the surety, relied on to support his position, took place before or after the payment in question. His testimony tended to show that the indorsement was on the note when the conversation took place. *Held*, that the evidence justified the direction of a verdict for defendants, under Rev. St. § 4248, providing that, "if there are two or more joint contractors, * * * no one of them shall lose the benefit of the provision of the statute of limitations, so as to be chargeable, by reason only of any payments made by any other or others of them."—*Coleman v. Ward*, (Wis.) 55 N. W. 695.

13. Where a joint debtor, on demand of payment, refers the creditor to his codebtor, it amounts to a direction to the latter to make payment for him, and, if he does so, the payment will continue the debt from that date as to both.—*Coleman v. Ward*, (Wis.) 55 N. W. 695.

14. McClain's St. § 3744, provides that "causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same," when made in writing, and signed by the party charged. *Held*, that a cause of action for a tort barred by the statute is not revived by a promise, in writing, to pay the damages claimed therefor.—*Peterson v. Breitag*, (Iowa.) 55 N. W. 86.

Burden of proof.

15. Where a party seeks relief on the ground of fraud more than six years after the commission of the act constituting the alleged fraud, he must allege and prove that the facts were not discovered until within six years before the commencement of the action.—*Morrill v. Little Falls Manufg Co.*, (Minn.) 55 N. W. 547.

Liquor Selling.

See "Intoxicating Liquors."

LIS PENDENS.

Notice—Proof of publication.

In an action to determine adverse claims to certain real estate, in which the summons was served by publication, the printer's affidavit did not mention the publication of notice of lis pendens, but a printed copy of such notice, following the summons, appeared in the newspaper clipping attached to the affidavit, and referred to therein. *Held*, that the proof of publication of notice of lis pendens was sufficient.—*Inglee v. Welles*, (Minn.) 55 N. W. 117.

LOGS AND LOGGING.

Driving in navigable stream, see "Navigable Waters."

Sale—Construction of contract.

1. A written contract for the sale of logs "boomed and delivered to tug" means that the seller is to inclose the logs in a boom, so that a tug could fasten to them and tow them away.—*Gasper v. Heimbach*, (Minn.) 55 N. W. 559.

Lien for sawing.

2. A person who saws a large quantity of lumber for another has a lien on any part of it for the entire bill for sawing.—*Hughes v. Tanner*, (Mich.) 55 N. W. 661.

3. Though it was agreed that all the lumber was to remain on the docks of the sawyer, in his possession, until the sawing bill was paid, such contract is not inconsistent with his right to claim a lien.—*Hughes v. Tanner*, (Mich.) 55 N. W. 661.

4. The fact that part of the lumber was shipped by plaintiffs' vendor and by purchasers without payment of the sawing bill, and without protest by defendant, does not preclude the latter from claiming a lien on what remained, in the absence of a right expressly reserved to ship before payment.—*Hughes v. Tanner*, (Mich.) 55 N. W. 661.

5. Nor does the fact that, as the lumber was sawed and piled, it was marked with certain initials, take it out of the sawyer's possession, where he had an additional duty yet to perform respecting it, and neither party regarded the marking as having any significance as a delivery or transfer of possession.—*Hughes v. Tanner*, (Mich.) 55 N. W. 661.

Lumber.

See "Logs and Logging."

Lunatic.

See "Insanity."

Magistrate.

See "Justices of the Peace."

MALICIOUS PROSECUTION.

Proximate damages, see "Damages," 1.

When action lies.

1. An action will lie for malicious prosecution of a civil action. — *O'Neill v. Johnson*, (Minn.) 55 N. W. 601.

Probable cause.

2. Where information is given on which one institutes a criminal prosecution, but, at the time, knows that upon inquiry it may be ascertained that no offense had been committed, and there is no difficulty in making, or reason for not making, such inquiry, such person will be charged, on the question of probable cause, with knowledge of such facts as he would have learned had he made the inquiry. — *Boyd v. Mendenhall*, (Minn.) 55 N. W. 45.

Pleading.

3. Where defendant charged plaintiff before a justice of the peace with a criminal offense, and the jury made a special finding that "the complaint was made without probable cause," in a subsequent action against defendant for malicious prosecution an error of the court in refusing to strike from the petition an allegation of the special finding was cured by a charge that the record in the criminal case could be considered by the jury only so far as it tended to show the institution and determination of the prosecution. — *Obernalt v. Johnson*, (Neb.) 55 N. W. 220.

Instructions.

4. Where defendant charged plaintiff before a justice of the peace with a criminal offense, and the jury made a special finding that "the complaint was made without probable cause," in a subsequent action against defendant for malicious prosecution an error of the court in permitting the special finding to be read by the jury was cured by a charge that the record in the criminal case could be considered by them only so far as it tended to show the institution and determination of the prosecution. — *Obernalt v. Johnson*, (Neb.) 55 N. W. 220.**MALPRACTICE.**

Degree of skill required.

1. A surgeon, in the treatment of his patient, must exercise that degree of knowledge and skill ordinarily possessed by members of the medical profession. — *Hewitt v. Eisenbart*, (Neb.) 55 N. W. 252.2. Physicians and surgeons are required to exercise ordinary skill and diligence; that is, the average of that possessed by the profession as a body, and not by the thoroughly educated alone, having regard to the improvements and advanced state of the profession at the time of the treatment. — *Peck v. Hutchinson*, (Iowa,) 55 N. W. 511.

Compensation.

3. In the absence of an express contract touching compensation for the services of a physician or surgeon, the law implies a promise to compensate, and hence, in such case, the physician or surgeon must exercise ordinary skill in rendering his services. — *Peck v. Hutchinson*, (Iowa,) 55 N. W. 511.

Evidence.

4. Where, in an action for negligently performing a surgical operation on plaintiff's eye, it is admitted that plaintiff, a minor female, had a sexual disease, which caused the diseased

condition of the eye, evidence that her parents had never been afflicted with such a disease is incompetent, in the absence of any claim by defendant that they had been thus afflicted, or that plaintiff herself had been unchaste. — *Peck v. Hutchinson*, (Iowa,) 55 N. W. 511.5. In an action for negligently performing a surgical operation on plaintiff's eye, alleged to have caused a loss of plaintiff's sight, evidence that the disease from which plaintiff was suffering generally resulted in a loss of sight is competent. — *Peck v. Hutchinson*, (Iowa,) 55 N. W. 511.

— Sufficiency.

6. In an action for malpractice, it is not necessary, to sustain a verdict for plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper, nor will the fact that all such witnesses agree that a portion of the treatment is proper under some circumstances, in itself, defeat a recovery. — *Hewitt v. Eisenbart*, (Neb.) 55 N. W. 252.**MANDAMUS.**

To canvassing board, see "Elections and Voters," 10, 11.

To courts and judicial officers.

1. Mandamus will not lie to compel a probate judge to vacate an order admitting a will to probate. — *Corby v. Wayne Probate Judge*, (Mich.) 55 N. W. 386.

— Sheriff.

2. Mandamus will not issue, on the relation of persons accused of murder, to compel the sheriff to bring them before a certain circuit court commissioner, in order that they be admitted to bail, when the answer shows that the sheriff had good reason to believe such commissioner disqualified, and no issue was asked to try the question, and there appears to be another commissioner as well as the circuit judge, by either of whom presumably relators may be admitted to bail. — *Elder v. Garner*, (Mich.) 55 N. W. 460.

To municipal boards and officers.

3. A board upon which is imposed the duty of hearing and determining applications for licenses to sell liquors will be compelled, by mandamus, to convene, and revoke a license granted, where the essential proceedings requisite to granting a lawful license have not been complied with. — *State v. Johnson*, (Neb.) 55 N. W. 874.4. When the legality of a county warrant has been established by the judgment of a court of competent jurisdiction, and the treasurer refuses to pay the judgment, the court may, on proper application, issue a peremptory writ of mandamus to compel the treasurer to pay the judgment, when no facts are presented to the court tending to impeach the judgment, or show that it has been, or is about to be, appealed from, or otherwise reviewed. — *Evans v. Bradley*, (S. D.) 55 N. W. 721.5. Under the charter of the city of Jackson, a member of the common council cannot, by mandamus, compel his recognition as a member of the board of public works, unless his petition shows his election by a majority of the common council, exclusive of his own vote. — *Tinker v. Board of Public Works of Jackson*, (Mich.) 55 N. W. 461.6. The illegal and void appointment of a president pro tem, by the board of directors of an independent school district, to approve and file a contract of employment with a teacher after the refusal of the regular president to do so, is not a waiver by the teacher of the performance of that duty by the president, and does not bar mandamus proceedings by the teacher and the board to compel him to do so. — *Independent Dist. of Eden, No. 2, v. Rhodes*, (Iowa,) 55 N. W. 524.

Parties—Public interest.

7. Where a private person is clearly within Code, § 3377, which permits mandamus proceedings to be instituted on the petition of a private party aggrieved, the fact that the interest of a school district joined with him as plaintiff is a public interest, and should therefore be represented by the state, as further required by said section, is no ground for dismissing the action, if the result, under the issues, would necessarily be the same as if the state had been joined.—*Independent Dist. of Eden, No. 2, v. Rhodes, (Iowa), 55 N. W. 524.*

Manslaughter.

See "Homicide," 2, 3.

MARRIAGE.

See, also, "Divorce;" "Dower;" "Homestead;" "Husband and Wife."

Validity and proof.

Marriage is a civil contract requiring only the consent of parties capable of contracting, and the fact of marriage may be proved by the testimony of one of the parties.—*Bailey v. State, (Neb.) 55 N. W. 241.*

MASTER AND SERVANT.

Right of child to compensation, see "Parent and Child," 2.

When relation exists.

1. An employe of a fuel company, engaged in delivering coal for the company at a stipulated price per load, is a servant of the company, and not an independent contractor.—*Waters v. Pioneer Fuel Co., (Minn.) 55 N. W. 52.*

Wages.

2. Where plaintiff was employed by defendant for an indefinite time through the latter's manager, and continued his services after the manager himself assumed control of the work, as principal, defendant is liable for his wages if plaintiff had no notice of the change in the employment.—*Tousignant v. Shafer Iron Co., (Mich.) 55 N. W. 681.*

3. In an action for wages it appeared that plaintiff had been employed by defendant company through the latter's manager; that after a certain date the manager assumed control of the work; that plaintiff was again employed at the same work as before, but there was no evidence as to the re-employment, except the manager's testimony that after the date given he made no contracts in defendant's name. *Held*, that plaintiff could not recover in the absence of evidence to rebut the inference that the re-employment was by the manager instead of by defendant.—*Tousignant v. Shafer Iron Co., (Mich.) 55 N. W. 681.*

4. In an action against a corporation for wages accruing after defendant's manager assumed control of the works as contractor, where plaintiff alleges want of notice of any change in the employment, evidence of the method of paying the men prior to the date of the change is admissible, as well as the method after such date.—*Tousignant v. Shafer Iron Co., (Mich.) 55 N. W. 681.*

5. In an action for wages accruing after defendant had turned the work over to its former manager, as contractor, the question whether plaintiff had notice of the change of employment is for the jury.—*Jones v. Shafer Iron Co., (Mich.) 55 N. W. 684.*

6. In an action for wages accruing after defendant had turned the work over to its former manager, actual knowledge by plaintiff of the change of employers, however acquired, is sufficient to release defendant.—*Jones v. Shafer Iron Co., (Mich.) 55 N. W. 684.*

7. On the employment of plaintiff by defendants for a stipulated term it was agreed

that, if defendants continued in the manufacturing business after such term, plaintiff's services should be retained. In an action for wages for such further term, on the issue whether defendants continued manufacturing, it appeared that, when the contract was made, defendants were manufacturing four-horse eveners. After the original term, plaintiff worked for defendants 10 days, during which they were manufacturing, as plaintiff testified, three-horse eveners in the same way, and for the same purposes, as they had been manufacturing the others. There was evidence that such three-horse eveners were made only as an experiment, and that there was no continuation of manufacturing. *Held*, that there was no error in an instruction that if, "to the knowledge of plaintiff," the making of such additional implements was an experiment, it would not be a continuation of the manufacturing business, as, unless plaintiff was informed that such work was experimental, he had a right to assume the contrary.—*Whitworth v. Brown, (Wis.) 55 N. W. 422.*

Master's liability for torts of servant.

8. Where an employe of a fuel company delivers a load of coal through an opening in a sidewalk, and, after the coal has been so delivered, replaces the cover over the opening so imperfectly and insecurely as to render the same dangerous to persons passing along the sidewalk, the jury, in an action for personal injuries, are justified in finding that it was part of the teamster's business to replace the cover, and the submission of that question to the jury was not ground of exception by the defendant.—*Waters v. Pioneer Fuel Co., (Minn.) 55 N. W. 52.*

Master's liability for negligence.

9. In an action by an employe for personal injuries caused by the failure of certain machinery to work properly at the particular time of the accident, plaintiff must prove that defendant was negligent, and it cannot be conjectured from the mere fact of the accident.—*Redmond v. Delta Lumber Co., (Mich.) 55 N. W. 1004.*

10. Plaintiff, employed in a sawmill, was trying to replace a chain used to draw logs up through a "siding machine" on the sprocket wheel which worked the chain, the wheel being 4½ feet behind the machine. The machine was composed of two revolving adjustable disks, with projecting knives to remove the bark from the logs. The frame supporting the disks was covered with a sheet-iron apron, with a semicircular opening, 18 inches across, for the logs to pass on the ways where 8-inch guide blocks were placed, which fitted into the apron, and, when removed, made the hole that much larger. They had been removed at the time of the accident. Plaintiff stood between the machine and the wheel, and tried to pry the chain onto the wheel, when his foot slipped through the hole in the apron, and was cut to pieces by the knives. *Held*, that defendant's negligence in not providing a safer cover for the machine was a question for the jury.—*Mullin v. Northern Mill Co., (Minn.) 55 N. W. 1115.*

11. Plaintiff was injured because a certain machine which he was operating in a sawmill did not stop when he removed the lever in the manner required for stopping it. The evidence showed that the machine worked perfectly immediately before and after the accident, and had worked well for six months prior thereto. *Held*, that there was no evidence of negligence that would justify the submission of the case to the jury.—*Redmond v. Delta Lumber Co., (Mich.) 55 N. W. 1004.*

12. In an action by a railroad employe against the company for personal injuries, it appeared that plaintiff was employed as a section hand; that, on the day of the injury, he and his foreman started from C., for their place of work, on a hand car; that they knew at the time that an irregular freight train was following at a distance of several miles; that the

track was on an embankment, and there were only two places between C. and the place of work where the hand car could be taken from the track; that when they reached the first place the train was about half a mile behind; that the foreman decided to run to the next stopping place; that between the first and second place there was a heavy down grade, and the wind was favorable; that before reaching the second place the train overtook them and collided with the hand car as they were endeavoring to remove the same from the track, whereby plaintiff was injured. *Held*, that the negligence of the foreman was for the jury.—*Slette v. Great Northern Ry. Co.*, (Minn.) 55 N. W. 137.

13. In an action against a railroad company by a fireman for injuries received through the negligence of his engineer in starting the engine, whereby the fireman, while pushing up the water spout with which he had supplied the engine, was thrown therefrom, it was proper to give in evidence rules of the company, providing that the engine should not be started before the spout had been replaced, and that, previous to starting, the engine bell should be rung for five seconds.—*Dugan v. Chicago, St. P., M. & O. Ry. Co.*, (Wis.) 53 N. W. 894.

— Negligence of vice principal.

14. Where a foreman in charge of certain laborers directs one of them to perform certain work in such manner, and under such circumstances, as to subject him to great danger of injury, the company for whom the foreman is acting cannot shield itself from liability for injuries to such laborer caused directly by the negligent order of such foreman, upon the ground that the only negligence imputable to the foreman consisted in the performance of an act of mere manual labor in setting in motion the agency which caused the injury, and that thereby the foreman, as to such act, was reduced to the grade of a coservant of the injured party.—*Crystal Ice Co. v. Sherlock*, (Neb.) 55 N. W. 204.

— Assumption of risk.

15. Plaintiff was employed as blacksmith in a sawmill. At the time he was injured, neither millwright nor foreman was in the mill, which was running. It appeared that, when a machine got out of gear, it was the duty of the man in charge to mend it if he could, and get any assistance possible. The machine in question having become ungearred, the man in charge called on plaintiff, who had before repaired the gear. *Held*, that the jury might properly find that he was acting within the scope of his employment.—*Mullin v. Northern Mill Co.*, (Minn.) 55 N. W. 1115.

— Contributory negligence.

16. Under Laws 1889, c. 438, (Sanb. & B. Ann. St. § 1816a,) making railroad companies liable for injuries sustained by an employe "without contributory negligence on his part," the burden is not put on the employe to show freedom from contributory negligence.—*Dugan v. Chicago, St. P., M. & O. Ry. Co.*, (Wis.) 55 N. W. 894.

17. In an action by a railroad employe against the company for personal injuries, it appeared that plaintiff was employed as a section hand; that on the day of the injury he and his foreman started from C., for their place of work, on a hand car; that they knew at the time that an irregular freight train was following at a distance of several miles; that the track was on an embankment, and there were only two places between the station and place of work where the hand car could be taken from the track; that when they reached the first place the train was about half a mile behind; that the foreman decided to run on to the second stopping place; that between the first and second place there was a heavy down grade, and the wind was favorable; that before reaching the second place the train overtook them, and while plaintiff and his foreman were

endeavoring to remove the hand car from the track the train collided with it, and plaintiff was injured; that the freight train passed C. at the rate of from 16 to 35 miles an hour; that the rules of the company provided that such trains should not pass stations at a speed greater than 8 miles an hour. *Held*, that the question of plaintiff's negligence was for the jury.—*Slette v. Great Northern Ry. Co.*, (Minn.) 55 N. W. 137.

18. In an action by a railroad employe against the company for personal injuries, it appeared that plaintiff was employed as a section hand; that on the day of the injury he and his foreman started from C., for their place of work, on a hand car; that they knew at the time that an irregular freight train was following at a distance of several miles; that the track was on an embankment, and there were only two places between C. and the place of work where the hand car could be taken from the track; that when they reached the first place the train was about half a mile behind; that the foreman decided to run to the next stopping place; that between the first and second place there was a heavy down grade, and the wind was favorable; that before reaching the second place the train overtook them, and while plaintiff and his foreman were endeavoring to remove the car from the track struck them, whereby plaintiff was injured. *Held*, that plaintiff's contributory negligence was for the jury.—*Slette v. Great Northern Ry. Co.*, (Minn.) 55 N. W. 137.

19. Plaintiff was injured in a sawmill, while trying to pry a chain onto a sprocket wheel, whence it had slipped. The wheel was 4½ feet from the siding machine, through which the chain dragged the logs. The apron over the machine was sheet iron, with a hole 18 inches wide for the logs, increased at the time of the accident by the removal of the 8-inch guide blocks. The machine was running when the accident occurred, though it could have been easily stopped. Plaintiff thought it was stopped, as he testified. He was as close to the wheel as possible, but, while he was prying the chain with a crowbar, the chain slipped, and his foot slipped on the ways through the hole in the apron, and was destroyed by the knives. *Held*, that his contributory negligence was a question for the jury.—*Mullin v. Northern Mill Co.*, (Minn.) 55 N. W. 1115.

20. Plaintiff, a conductor on defendant's freight train, was ordered by the train master to hurry and loosen some brakes, and ran to overtake the cars, which were moving at six miles per hour. He climbed up the side of a car, and was struck by an awning of an hotel owned by defendant. The only way in which the brakes could be loosened was as attempted by plaintiff, and in his haste he did not see the awning. *Held*, that though plaintiff knew of its existence, and that it was dangerous, his negligence was a question for the jury.—*Harker v. Burlington, C. R. & N. Ry. Co.*, (Iowa.) 55 N. W. 318.

21. In an action against a railroad company by an employe for personal injuries, it appeared that plaintiff was working at night, as a "car catcher," in defendant's yards. He was walking outside the tracks, which were ballasted to the top of the ties with cinders, towards a stationary car, to couple it to some slowly-moving cars coming from behind him. When about 25 feet from the stationary car, he stepped between the rails, and his foot was caught between the guard and main rails, and cut off. There was evidence from which the jury could have found that the accident was caused by the blocking between the rails being defective. *Held*, that the question of contributory negligence was for the jury.—*Kroener v. Chicago, M. & St. P. Ry. Co.*, (Iowa.) 55 N. W. 28.

Material Men.

Lien of, see "Mechanics' Liens."

Measure of Damages.

See "Damages."

MECHANICS' LIENS.

Merger in mortgage, see "Merger."

Property subject to.

1. A person commencing to furnish material for, or commencing to labor on, an improvement on land must take notice of the interest in the premises of the person with whom he contracts, as shown by the public records, since his lien for labor and material, aside from the improvement itself, attaches only to such interest.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

2. Where the vendor in an executory contract of sale directly, though in conjunction with the vendee, contracts for improvements, he thereby subjects his interest in the land to a mechanic's lien.—*Pickens v. Plattsmouth Investment Co.*, (Neb.) 55 N. W. 947.

3. Where material is furnished for a building erected on two lots, and is used on both, the lien attaches to both lots.—*Lamont v. La Fevre*, (Mich.) 55 N. W. 687.

4. A husband holding a lot by contract of purchase in his own name, who, with his wife's knowledge and consent, makes a written contract for the erection of a building on the lot, and conducts the business throughout in his own name and for himself, without disclosing any agency for the wife, must be deemed the owner of the lot as to mechanics and material men furnishing labor and material on the house; and the wife cannot, as against them, assert ownership to the lot.—*Bartlett v. Mahlum*, (Iowa.) 55 N. W. 514.

5. Mechanic's lien claims which attach to the vendee's interest in real property will extend to the entire estate upon the completion of the contract, and acquisition thereof by him.—*Brown v. Jones*, (Minn.) 55 N. W. 54.

6. The vendee's interest in real property after forfeiture will be treated as still outstanding, for the purpose of enforcing mechanic's liens established against it.—*Brown v. Jones*, (Minn.) 55 N. W. 54.

Who may claim.

7. The fact that the secretary of a railroad company, while acting as clerk of the contractors in the construction of the road, issued to the subcontractors statements of their account with the contractors, on the company's blanks, purporting to bind the company to pay the same, does not render the company liable to the subcontractors, so as to give the latter a mechanic's lien on the company's property, as contractors.—*Blanding v. Davenport, I. & D. R. Co.*, (Iowa.) 55 N. W. 81.

8. The contractor for the construction of a house agreed to take in payment a stock of goods, offer the same for sale at retail and wholesale as soon as delivered, and apply the proceeds to the bills for the house, and turn over the balance to the owner. *Held*, that the delivery of the stock of goods to the principal contractor was not a payment in full of the contract price of the house, so as to deprive a subcontractor, who subsequently furnished material to the principal contractor, of his right to a lien.—*Bartlett v. Mahlum*, (Iowa.) 55 N. W. 514.

Notice of lien.

9. Where the contract to furnish materials is made with the owner, no notice of lien is required.—*Lamont v. La Fevre*, (Mich.) 55 N. W. 687.

Statement.

10. A statement for a mechanic's lien for materials, charging defendant on a certain day "To bill received" for certain amounts, followed by credits, with the month and day of each, and showing a balance due plaintiff, to

which are attached sheets setting out the several items of the bills, is sufficient to show when the material was furnished.—*Novelty Iron Works v. Capital City Oatmeal Co.*, (Iowa.) 55 N. W. 518.

11. A lien statement filed by a subcontractor is not subject to the objection that it is not just and true because he failed to allow a discount, according to his agreement with the principal contractor, where such discount was to be allowed only for cash payments.—*Bartlett v. Mahlum*, (Iowa.) 55 N. W. 514.

12. Where a mistake is made in a statement for a mechanic's lien as to the date of the first item, the lien may still be enforced for the account embraced between the dates of the first and last items; and where such mistake is made as to the first item of an account, but the statement includes all items, and the account is in all other respects correctly stated, and no parties are prejudiced by the error, the mistake is immaterial, and the lien valid for the whole account. *Gillfillan, C. J.* dissenting.—*Miller v. Condit*, (Minn.) 55 N. W. 47.

Verification of account.

13. The oath attached to an "account of the items" for material furnished, and for which a lien was claimed, recited that "J. A. B., being first duly sworn," etc., and was signed "Capital City Planing Mills. Per J. A. B., Sec'y." The account of the items was headed: "M., to Capital City Planing Mills, Dr." *Held*, it sufficiently appeared that the lien was claimed by the Capital City Planing Mills, and not by J. A. B., and there was a substantial compliance with Comp. St. c. 54, § 3, providing for an account verified under oath.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

Priority.

14. Under the Nebraska statute there are no priorities among liens for material furnished or labor performed, but this rule of equality applies only to those lienors who commenced the furnishing of material or the performance of labor on the faith of the same estate.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

15. Where materials and labor are furnished for an addition to a building on which an incumbrance exists, the lien therefor is subordinate to the incumbrance.—*Fletcher v. Kelly*, (Iowa.) 55 N. W. 474.

16. A person taking a mortgage on land is bound at the time to know whether material has been furnished or labor performed in the erection, repair, or removal of improvements on the premises within the previous four months.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

17. The holder of a mechanic's lien is not a "subsequent purchaser for a valuable consideration," within the meaning of Code, § 1941, providing that no instrument affecting real estate is valid, as against such purchaser, unless recorded. Hence, in the absence of statutory provisions therefor, a mechanic's lien on a house is subordinate to that of a chattel mortgage thereon, though the mortgage was not recorded.—*Fletcher v. Kelly*, (Iowa.) 55 N. W. 474.

18. The lien of a mortgage on land, taken while a building is in process of erection thereon, is subject to the claims of material men and laborers for material already and thereafter furnished, and for labor already and thereafter performed in the erection of such building, when the commencement of such furnishing of material or performance of labor was prior to the record of the mortgage.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

When lien attaches.

19. Under the law of Nebraska the lien of a mechanic attaches when he commences to furnish material or to perform labor, and not

at the beginning of the construction of the improvement on which he labors or for which he furnishes material.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

20. Under the mechanic's lien law providing that a statement, when filed, shall operate to continue the lien from the time of "furnishing" the first item of labor, etc., the term "furnish" means furnished on the premises, and a lien attaches at the date of the performance of the first work, or the delivery of the first material on the ground; that is, from the commencement of the improvement on the land.—*Wentworth v. Tubbs*, (Minn.) 55 N. W. 543.

Loss and discharge.

21. Equitable rights of mechanic's lien holders, accruing under a building clause in the contract of purchase, cannot be destroyed by subsequent acts or omissions of the purchaser, notwithstanding a forfeiture by him.—*Brown v. Jones*, (Minn.) 55 N. W. 54.

22. A lien is not lost where by an honest mistake too much was claimed in the statement, or where there is a failure of proof as to the entire amount claimed.—*Lamont v. La Fevre*, (Mich.) 55 N. W. 687.

Waiver of right to lien.

23. Where one puts up an elevator in a building in process of erection and contracts with the owner to retain the title until the fixture be paid for, and reserves the right to retake possession thereof if default be made in the payment, he does not thereby waive his right to a material man's lien on the premises.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

Enforcement.

24. In a suit to enforce a mechanic's lien for lumber alleged to have been furnished, plaintiff's manager testified that he had no personal knowledge whether the lumber was ever delivered or not, but relied on the teamsters and delivery tickets. Another witness testified that it was his duty to superintend the loading, and to make out the dray tickets, but no facts relating to the transaction in issue were elicited. *Held*, that plaintiff failed to show that any lumber was delivered.—*Henry & Coatsworth Co. v. McCurdy*, (Neb.) 55 N. W. 261; *Same v. Starr*, *id.* 262.

25. When more than four months intervene between items of an account for material furnished, a mechanic's lien will not attach for the items preceding the hiatus, unless it is made to appear by competent evidence that all the items were furnished pursuant to one contract; and the affidavit attached to the "account of the items" is not competent evidence to prove that fact.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

26. Under the lien law of 1889 all lien claims against specified property must be consolidated and adjudicated in one general action.—*Miller v. Condit*, (Minn.) 55 N. W. 47.

27. The lien law of 1889, which provides that a second action shall not be brought where one is already pending to foreclose mechanics' liens on property affected by several lien claims, but if such action is brought it must be consolidated with the first action, is a mere regulation of practice, and does not make the second action void.—*Miller v. Condit*, (Minn.) 55 N. W. 47.

Limitation.

28. Where a lien claimant, who has been made a defendant in an action to foreclose a mechanic's lien, does not appear for the purpose of asserting his lien, within the time allowed by statute to bring an action to enforce a lien, is right to enforce it is barred.—*Burns v. Phinney*, (Minn.) 55 N. W. 540.

29. Where a lien claimant appears in an action by another to enforce a mechanic's lien, he makes the action his own for the purpose of enforcing his lien, and, if he is in time, the act that plaintiffs' lien is barred, or that plaintiffs, from any cause, fail to recover, will not

affect him.—*Burns v. Phinney*, (Minn.) 55 N. W. 540.

Judgment.

30. In an action to determine adverse claims to real estate, an order for judgment, directing the partition and apportionment of property upon which mechanics' liens are claimed, between plaintiff, a vendor holding the legal title, and certain lienholders, defendants, according to their respective interests, as found and estimated by the court, upon equitable terms imposed by such order, is error unless all parties consent thereto.—*Brown v. Jones*, (Minn.) 55 N. W. 54.

Medical Board.

Powers, licenses, see "Physicians and Surgeons."

Medicines.

License to practice, see "Physicians and Surgeons," 1.

Regulating practice of, see "Constitutional Law," 2.

Meeting.

Of stockholders, see "Corporations," 8, 9.

Memorandum.

Under statute of frauds, see "Frauds, Statute of," 1.

MERGER.

Of mortgage, see "Mortgages," 5.

Of mechanic's lien in mortgage.

The assignee of a mechanic's lien is subrogated to all the rights of his assignor; and the taking of a mortgage by the assignee on the property affected by the lien, the consideration of which mortgage was used in the purchase of the lien, will not merge the latter in the mortgage, unless it appears that such was the intention of the parties, and justice requires it.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

Mineral Lands.

See "Public Lands," 3-7.

MINES AND MINING.

Lease of state mineral lands, see "Public Lands," 3-7.

Mining leases—Construction.

1. A lease, after giving a company the exclusive right to test, open, mine, and remove coal from certain lands, and to abandon the same if the coal should become unprofitable to work, continued as follows: "It is not the intention or expectation" of the company "to enter on the surface of any of the lands covered by this lease, but to work the coal through the now existing shafts;" the company "reserving the right to use any part of said surface only in case of unforeseen contingencies which may arise, rendering it necessary and profitable to do so." *Held*, that there was no obligation to open new shafts before exercising its judgment to abandon, but an obligation only to work out the existing shafts.—*Van Meter v. Chicago & V. M. Coal-Min. Co.*, (Iowa.) 55 N. W. 106.

2. The provision allowing the company to "abandon the property, and be relieved from obligation," did not require the cancellation of the lease of record, or the cancellation of certain mortgages executed by the company on its interest, before the relief should become effective.—*Van Meter v. Chicago & V. M. Coal-Min. Co.*, (Iowa.) 55 N. W. 106.

Mining leases—Royalties.

8. A lease of land to a mining company, in consideration of the payment to the lessor of a specified royalty on merchantable coal "to be taken out" of such land, required the lessee to conduct thereon the principal mining business in the county, and take from such land a majority in bushels of all the coal mined by it in such county each year, except that the amount need not exceed 200,000 tons per annum. The lease was to continue until the lessee should remove all the "available, merchantable, and salable coal" on the land. On performance by the lessee, and on "condition that it shall have taken out all the available coal from said land, as contemplated," it was entitled to certain specified rights. *Held*, that the chief purpose of the lease was the mining of all available coal on the land, and the payment to the lessor of the specified royalty.—*Carr v. Whitebreast Fuel Co.*, (Iowa,) 55 N. W. 205.

4. At the time such lease was executed, both the lessor and lessee believed that there was sufficient available merchantable coal on the land to enable the latter to take therefrom the amount required by such lease, but in a few years it transpired that the lessee could not take more than one-half of all the coal mined by it in such county without reducing the output from other land. *Held* that, where the lessee had mined all the available coal, and the lessor had received royalty on all the merchantable coal mined, the latter was not entitled to royalty on the difference between the amount actually mined and the amount required by the contract to be mined.—*Carr v. Whitebreast Fuel Co.*, (Iowa,) 55 N. W. 205.

5. Where, by the terms of such lease, the lessee has no right to surrender the premises until the available coal is exhausted, it is not required to surrender them to entitle it to exemption from payment of royalty on coal not mined therefrom.—*Carr v. Whitebreast Fuel Co.*, (Iowa,) 55 N. W. 205.

6. Such lease provided for the payment of royalty on the lump coal. After it was executed the lessee changed the screens for others, having much wider spaces between the bars. Before the change the miners sent out quantities of slack, intended to be left in the mine, and which was carried over the screens into the cars designed for merchantable coal only, causing much complaint by the lessee's customers. *Held*, that the lessee was authorized to change the screens, since merchantable coal, contemplated by the lease, must be presumed to be of a quality to compete with the same grade taken from other mines.—*Carr v. Whitebreast Fuel Co.*, (Iowa,) 55 N. W. 205.

Minor.

See "Guardian and Ward," "Infancy," "Parent and Child."

Misdemeanor.

In office, impeachment, see "States and State Officers," 2-14.

MORTGAGES.

See, also, "Acknowledgment," "Chattel Mortgages."

Action by mortgagee on insurance policy, see "Insurance," 13.

Assignment for gaming debt, see "Gaming."

Merger of mechanic's lien, see "Merger."

Of fixtures, see "Fixtures."

Priority of mechanic's lien, see "Mechanics' Liens," 14-18.

Construction and effect.

1. A reservation in a mortgage, to the mortgagor, of the right to pay off, on the day for making any payment of interest, a portion

of the principal, "so that the principal shall not be reduced to a less sum than five hundred dollars," is not inconsistent with a further provision that such payment "may include the whole of the principal," as it was merely intended that an unpaid balance of less than \$500 should not be left; and there is no necessity to resort to the rule of construction that written words prevail over those printed, the words "five hundred" being written into a printed blank.—*Likes v. Polk*, (Iowa,) 55 N. W. 328.

Lien—Priorities.

2. After plaintiff had taken a mortgage on land to secure a loan, other mortgages were given to H., C., and Y. on said land and other land. Thereafter plaintiff's loan was taken up by an increased loan, and secured by a mortgage on all the lands, a release of the first mortgage being executed and recorded. Plaintiff then foreclosed his second mortgage by action, recognizing the superiority of the liens of the mortgages to H., C., and Y. Thereafter lienholders redeemed from the sale, and their interest was purchased as an investment by defendant, to whom a sheriff's deed was issued. Subsequently the H., C., and Y. mortgages were foreclosed, plaintiff becoming the purchaser of the premises under the decree foreclosing the C. mortgage, and also becoming the owner of the decree foreclosing the H. mortgage. *Held*, in an action to foreclose the lien under the last sale, and to determine the right of redemption of defendant, who claimed that the first mortgage to plaintiff was not released, and that, by reason thereof, she acquired under the foreclosure of the second mortgage a lien superior to the H., C., and Y. mortgages, that, though plaintiff's agent, in all the transactions, was the same person who acted for C. and Y. in taking the mortgages to them, still, it not appearing that it was against plaintiff's interest to discharge in full the first mortgage in consideration of the new note and mortgage, and plaintiff never having complained, and defendant being chargeable with notice that plaintiff, in foreclosing his second mortgage, claimed nothing under his first mortgage, defendant did not acquire any interest by reason of the first mortgage, but an interest junior to those acquired under the foreclosure of the C. and H. mortgages.—*Stanbrough v. Daniels*, (Iowa,) 55 N. W. 466.

3. A mortgagor paid the amount of the mortgage to the mortgagee, who, to his knowledge, had assigned the mortgage, though the assignment was unrecorded, and the deed satisfied. A mortgage company, without knowledge of plaintiff's assignment, made a loan to the original mortgagor, secured by mortgage on part of the land. *Held*, that it was a prior lien on such land.—*Livermore v. Maxwell*, (Iowa,) 55 N. W. 37; *Quincy v. Ginsbach*, Id.; *Same v. Alline*, Id.; *Davis v. Werle*, Id.; *Perkins v. Boever*, Id.

Assignment—Rights of assignee.

4. In a suit to set aside the satisfaction of a trust deed, it appeared that defendant M. borrowed money of defendant D., and gave notes payable to D.'s wife, secured by the deed to D., as trustee. D. sold the notes to plaintiff, a nonresident, of which M. had knowledge. Afterwards, and before maturity, M. paid D. the amount of the notes, who, with his wife, satisfied the deed on the margin of the record, and embezzled the money. *Held*, that as M. knew plaintiff was the owner of the notes, though his assignment thereof was unrecorded, M. was liable for their amount, since through his negligence D. was enabled to embezzle his payment.—*Livermore v. Maxwell*, (Iowa,) 55 N. W. 37; *Quincy v. Ginsbach*, Id.; *Same v. Alline*, Id.; *Davis v. Werle*, Id.; *Perkins v. Boever*, Id.

Merger.

5. Where a mortgagor executes a deed to a second mortgagee, fraudulently including a provision that the grantee shall assume and

pay the first mortgage and a third mortgage, of which the grantee knows nothing, and the deed is not delivered, but put on record by the grantor, and is repudiated by the grantee as soon as its contents are known, and there is no change of possession of the property, and no surrender of the mortgage and note, there will be held to be no merger.—*Cook v. Foster*, (Mich.) 55 N. W. 1019.

Foreclosure—Right.

6. Certain joint owners sold their land, and took back a mortgage for the price. As the owners were then insolvent, the land was subjected to the payments of their joint debts, and it was agreed by the parties thereto that the mortgage debt should be canceled, and the contract of sale rescinded. The purchaser subsequently bought the land under the decree of sale. *Held*, that there was no foundation for an action by the administrator of one of the joint owners on the original mortgage.—*Robb v. Douglass*, (Iowa,) 55 N. W. 72.

7. Where a note given by a trustee for moneys borrowed from the trust estate, and secured by trust deed, is past due, the grantee may maintain an action to foreclose the deed, though there has been no default in the trust, and nothing is due the beneficiaries.—*Wolfe v. Jaffray*, (Iowa,) 55 N. W. 91.

—Effect on persons not parties.

8. One who has received a deed of mortgaged premises prior to the filing of his pendens in foreclosure proceedings, if not made a party thereto, does not have his right to possession cut off thereby, though the proceedings be regular, nor by entry of one claiming under the foreclosure, and he can therefore maintain trespass against such person.—*Thompson v. Smith*, (Mich.) 55 N. W. 880.

—Pleading.

9. In a petition to foreclose a mortgage, the omission of an averment that no proceedings have been had at law for the collection of the debt secured thereby must be raised prior to the rendition of a decree, since it relates to matter in abatement, and is not a fact affecting the validity of the mortgage.—*Henry & Coatsworth Co. v. McCurly*, (Neb.) 55 N. W. 261; *Same v. Starr*, *Id.* 262.

10. Code Civil Proc. § 850, requiring the petition to foreclose or satisfy a mortgage to state whether any proceedings have been had at law for the recovery of the debt, or any part thereof, applies only to formal mortgages, and not to mere equitable mortgages or liens.—*Dimick v. Grand Island Banking Co.*, (Neb.) 55 N. W. 1008.

—Sale.

11. Rev. St. § 3162, postpones sales of mortgaged premises on judgments of foreclosure to one year from the date of the judgment of sale, but "the parties may, by stipulation in writing, to be filed with the clerk, consent to an earlier sale." Section 3167 gives a subsequent mortgagee the right to pay such judgment at any time before sale, and to be subrogated to plaintiff's rights in the foreclosure action. *Held*, that where a mortgage covenanted that, in case of foreclosure, if the mortgage debt should not be paid in 10 days after the date of the judgment, the mortgaged premises might be sold as though the year for redemption had expired, and authorized any attorney of a court of record to enter appearance for the mortgagor in such action, and to stipulate in accordance with such covenant, the consent of a subsequent mortgagee, who was a party to such action, must be obtained before a sale of the premises within the year could be upheld.—*Hiles v. Milwaukee Power & Lighting Co.*, (Wis.) 55 N. W. 175.

12. Under 2 How. St. § 8500, providing that notice of foreclosure sale shall state the amount claimed to be due at the date thereof, the sale will not be void, where the amount stated included a sum due on the day after its

date, but it was not published until several days thereafter, and it does not appear that there was bad faith, or that any one was misled.—*Cook v. Foster*, (Mich.) 55 N. W. 1019.

13. Under 2 How. St. §§ 8501, 8505, providing that a mortgage sale shall be made by the sheriff or undersheriff, and the deed executed by the officer making the sale, where sale is made by an undersheriff the deed executed by him may be acknowledged by the sheriff, acting as a notary public.—*Cook v. Foster*, (Mich.) 55 N. W. 1019.

Foreclosure under power of sale—Notice.

14. In order to foreclose under a power, the notice of sale must be signed with the names of all who appear, of record, to own the mortgage; and if, after the first, and before the last, publication of notice, there is put on record an assignment of a part interest in the mortgage to one whose name is not signed to the notice, a sale pursuant to notice so published will be invalid.—*Dunning v. McDonald*, (Minn.) 55 N. W. 804.

—Action to set aside.

15. Laws 1883, c. 112, providing that no foreclosure sale shall be set aside for defect in notice or publication unless the action calling it in question shall be commenced within five years from the date of the sale, applies to a sale under power, where the notice is not published the proper length of time before the sale. *Russell v. Lumber Co.*, (Minn.) 48 N. W. 3, followed.—*Mogan v. Carter*, (Minn.) 55 N. W. 1117.

Redemption.

16. In an action to redeem land from a foreclosure sale the issue was whether an oral agreement to extend the period for redemption was made. *Held*, that the evidence, which was conflicting, was sufficient to sustain a finding for plaintiff.—*Reynolds v. Curtis*, (Minn.) 55 N. W. 543.

17. Where a lien creditor redeems lands sold on mortgage foreclosure from a prior lienholder and redemptioner, and the property is ample security for all the liens, the court will not, at the instance of such subsequent lienholder, inquire into the validity of the amount due on prior liens in order to enhance the value of the property in the hands of the last redemptioner.—*Parker v. St. Martin*, (Minn.) 55 N. W. 113.

18. A subsequent lienholder cannot be deprived of his right of redemption from a mortgage foreclosure, to the extent of the value of the property over the amount paid to redeem, by the interposition of the liens of fraudulent and simulated securities; and, if thereby prevented, his damages would not exceed the amount of his debt.—*Parker v. St. Martin*, (Minn.) 55 N. W. 113.

Motion.

To strike out answer, see "Pleading," 8.
To vacate attachment, see "Attachment," 8-11.

Multifariousness.

Of bill, see "Equity," 22.

MUNICIPAL CORPORATIONS.

See, also, "Counties," "Drainage," "Highways," "Schools and School Districts," "Towns."

Liability for defects in private bridges, see "Bridges," 5.

Mandamus to boards and officers, see "Mandamus," 3-6.

Notice of action against contractor, see "Writs and Notice of Suits," 10.

Ordinance regulating peddlers, see "Hawkers and Peddlers."

Police power, see "Intoxicating Liquors," 1.
Quo warranto to oust officers, see "Quo Warranto."

Right to obstruct street cars by street contractor, see "Horse and Street Railroads," 9.

Validity of incorporation—How questioned.

1. In an action on the coupons of bonds issued by a de facto school district, the defense that the bonds were void on the ground that the district had no legal existence because of failure to comply with provisions of the statute regulating the organization of such districts in matters which went to the jurisdiction of the county superintendent to organize the district cannot be interposed.—*Coler v. Dwight School Tp. of Richland County, (N. D.)* 55 N. W. 587.

Ordinances and resolutions.

2. How. St. c. 127, § 10, provides that companies incorporated to furnish electricity and electric lights may lay, construct, and maintain conductors for conducting electricity through the streets "with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe." A Manistee city ordinance provides that all poles erected in such city for electric lighting shall be under control of the council so far as to permit their use by other persons for electric lighting on payment of the reasonable portion of their cost. *Held*, that a resolution passed by the council of such city, empowering an electric light company to use the poles of another company without fixing the limits of such use, or regulating the manner in which each is to string its wires, is unreasonable and void.—*Citizens' Electric Light & Power Co. v. Sands, (Mich.)* 55 N. W. 452.

3. A city ordinance cannot be repealed or superseded by the passage, by the city council, of a resolution which undertakes to fix a different compensation for a city attorney than that prescribed in the ordinance.—*Ryce v. City of Osage, (Iowa.)* 55 N. W. 532.

Officers—City attorney.

4. Where a city attorney is elected while an ordinance providing that it is his duty to act for the city in any suit brought by or against it, and generally to attend to its interests as its attorney, is in force, it is part of his duty to conduct the defense to a suit brought to quiet the title to a tract of land therein, known as a "public square."—*Ryce v. City of Osage, (Iowa.)* 55 N. W. 532.

—Removal.

5. In the Duluth city charter providing for the removal of members of the board of fire commissioners for "sufficient cause," the term "sufficient cause" means "legal cause," and must be one that specially relates to and affects the administration of the office,—one touching the qualifications of the officer, or his performance of its duties.—*State v. Common Council of Duluth, (Minn.)* 55 N. W. 118.

6. In proceedings before a municipal body to remove a person from office, the charges should contain a specification of facts constituting a cause for removal sufficient to inform the incumbent of the particular grounds upon which the charges are based.—*State v. Common Council of Duluth, (Minn.)* 55 N. W. 118.

7. The city charter of Duluth vests the power of removing the fire commissioners from office exclusively in the common council. *Held*, that a resolution of that body preferring charges against such commissioners, and fixing a time and place of hearing, did not require the approval of the mayor.—*State v. Common Council of Duluth, (Minn.)* 55 N. W. 118.

—Certiorari to review removal.

8. The Duluth city charter provides that, for sufficient cause, and on service of a copy of the charges preferred, and notice of the time and

place of hearing, the common council may, by a two-thirds vote, remove a member of the board of fire commissioners. *Held*, that the proceedings for removal were of a judicial nature, and could be reviewed by certiorari.—*State v. Common Council of Duluth, (Minn.)* 55 N. W. 118.

9. On certiorari to review the proceedings of a municipal body in removing a person from office, the court will inspect the record to see whether the body had jurisdiction, and kept within it, and whether the charges preferred were sufficient in law, and will examine the evidence only to ascertain whether it furnished any legal and substantial basis for the removal.—*State v. Common Council of Duluth, (Minn.)* 55 N. W. 118.

—Compensation.

10. Where a person accepts the office of city attorney at a fixed salary, he is bound to perform the duties of the office for the salary; and a promise to pay him an extra fee is not binding, though he renders services, and exercises a degree of diligence greater than could legally be required of him.—*Ryce v. City of Osage, (Iowa.)* 55 N. W. 532.

11. Code, § 491, providing that the emoluments of an elective city officer shall not be increased or diminished during the term for which he shall have been elected, prohibits the city council, on its own motion, from making a contract with the city attorney for compensation other than that fixed by ordinance.—*Ryce v. City of Osage, (Iowa.)* 55 N. W. 532.

Contracts.

12. Under How. St. c. 127, § 10, which provides that companies incorporated to furnish electricity and electric lights may lay, construct, and maintain conductors for conducting electricity through the streets "with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe," and Manistee City Charter, c. 20, § 3, giving the council authority to light the public grounds within the city, and chapter 22, § 15, giving the council control over the placing of poles in or over the streets, such city may make contracts for electric lighting with individuals as well as with corporations organized for such purposes.—*Citizens' Electric Light & Power Co. v. Sands, (Mich.)* 55 N. W. 452.

13. Where a city has had the benefit of its attorney's services, rendered under a verbal contract to pay therefor a sum in excess of his salary fixed by ordinance, the city is not estopped from pleading the ordinance in an action to recover such excess, since such contract is against public policy, and void.—*Ryce v. City of Osage, (Iowa.)* 55 N. W. 532.

14. Where the officers of a city pay out its money on a contract which the corporation has no power to make, the payment is not an act of the corporation, and it may recover the money.—*City of Chaska v. Hedman, (Minn.)* 55 N. W. 737; *Griffin v. City of Shakopee, Id.* 738.

Control of streets—Enjoining obstruction.

15. A town has such an interest in a public highway within its limits as will entitle it to maintain an action to enjoin a person from obstructing the same. 2 *Sanb. & B. Ann. St.* § 3180, providing that an equitable action may be brought before a nuisance is established in an action at law, applies to such an action.—*Town of Neshkoro v. Nest, (Wis.)* 55 N. W. 176.

Liability for defective streets.

16. Whether a board with an upturned nail is attached to, and constitutes part of, a sidewalk, makes no difference as to the liability of the town with respect to injuries sustained by one crossing the street to the walk, and stepping on the nail, as the town is liable for any defect so near the traveled portion of the walk

or street as to endanger persons thereon.—*Pittenger v. Town of Hamilton*, (Wis.) 55 N. W. 423.

17. Where, in an action against a city for personal injuries caused by slipping down on the ice on a highway, it appears that from natural causes, without fault upon the part of the city, the ice formed from the snow which fell in the highway, the direction of a verdict for defendant was proper.—*Kannenbergh v. City of Alpena*, (Mich.) 55 N. W. 614.

18. Where the snow on a building melts in a sudden thaw, drips upon the sidewalk and freezes, and there is nothing unusual in the construction of the building or sidewalk, the city is not liable for injuries received by slipping on the walk.—*Hausman v. City of Madison*, (Wis.) 55 N. W. 167.

19. In an action against a city for personal injuries resulting from a defective street, it appeared that in grading such street an excavation some two feet deep had been made on one side thereof; that the city had knowingly and negligently permitted such excavation to remain; that on the night of the injury there were no lights or other protection about such excavation; that plaintiff, having no knowledge of the same, stepped into it, and was thereby injured. *Held*, that the evidence justified a verdict for plaintiff.—*City of Grand Island v. Oberschulte*, (Neb.) 55 N. W. 301.

Contributory negligence of traveler.

20. In an action against a city for injuries received by falling on an icy sidewalk in the daytime, where it appeared that the snow on an adjoining building melted in a sudden thaw and froze on the walk; that plaintiff had previously seen ice form there in the same way; that there was nothing to prevent his seeing the ice if he had looked; and that there was room to pass without stepping on the ice.—he was guilty of contributory negligence.—*Hausman v. City of Madison*, (Wis.) 55 N. W. 167.

21. Where a person, with full knowledge of the defective condition of a sidewalk, and of the risks incident to its use, voluntarily attempts to travel upon it, when the defect could easily have been avoided by going around it, he is not in the exercise of reasonable care, and must be presumed to have taken his chances.—*Wright v. City of St. Cloud*, (Minn.) 55 N. W. 819.

Action.

22. A general denial in an action against a town for injuries resulting from a defective street puts in issue an allegation in the complaint that a statement was filed with the town clerk to be placed before the town board, and hence the burden of proving the same is on plaintiff.—*Eron v. Town of Stevens' Point*, (Wis.) 55 N. W. 410.

23. Under Rev. St. § 824, providing that no action against a town for injuries on a highway shall be maintained unless a statement of the claim be filed with the town clerk, to be laid before the town board, nor until 10 days after the next annual town meeting thereafter, it is not necessary for the complaint to state that the action was not commenced until the expiration of the 10 days after such meeting.—*Welsh v. Town of Argyle*, (Wis.) 55 N. W. 412.

24. In an action against a village for injuries from a defective sidewalk, it was proper, for the purpose of showing negligence on the part of the village, to permit the president thereof to testify that he knew of the condition of the walk, that the defect could have been repaired in twenty minutes, and that shortly before the accident he had called the attention of the village marshal to it.—*Edwards v. Common Council of Three Rivers*, (Mich.) 55 N. W. 1003.

25. It being immaterial whether the president of the village called the attention of the chairman of the street committee to the defect, defendant was properly refused permission to show his failure to do so.—*Edwards v. Common*

Council of Three Rivers, (Mich.) 55 N. W. 1003.

26. Where, in an action for personal injuries caused by being tripped by a loose board in a sidewalk, it appeared that the walk was old, and the stringers decayed, evidence is competent, as tending to show a long continuance of the defect, from which it might be inferred that defendant town had notice of this condition, that no repairs had been made on the walk for more than a year prior to the accident.—*Alberts v. Village of Vernon*, (Mich.) 55 N. W. 1022.

27. Evidence is competent, as tending to show that the boards were loose, that a witness was tripped by a board in the walk eight months before the accident.—*Alberts v. Village of Vernon*, (Mich.) 55 N. W. 1022.

28. Evidence is competent that, shortly after the accident, defendant caused the walk to be taken up and repaired.—*Alberts v. Village of Vernon*, (Mich.) 55 N. W. 1022.

29. In an action against a city for personal injuries resulting from a defective street, a charge that it is the duty of the city to keep and maintain its streets in good repair for safe and "convenient" use is not misleading because of the word "convenient."—*City of Grand Island v. Oberschulte*, (Neb.) 55 N. W. 301.

30. An instruction that the jury might find for the plaintiff if they believed that the defect had continued for such a time prior to the accident that the want of knowledge implied want of due care on the part of defendant, is not open to the objection that it ignores the question of contributory negligence, where the court, in another part of the charge, had instructed on the law applicable to contributory negligence.—*Alberts v. Village of Vernon*, (Mich.) 55 N. W. 1022.

Recovery from property owner.

31. Where, through the negligence of a property owner, a trapdoor over a hatchway in a sidewalk becomes unsafe, and injury results, for which the city is liable because of neglect of its duty to keep its streets in a safe condition for travel, it may, on payment of damages to the person injured, recover over from the owner by whose fault (as between him and it) the injury was occasioned.—*City of Wabasha v. Southworth*, (Minn.) 55 N. W. 818.

32. Where a trapdoor is put in a public sidewalk for the convenience of the abutting property, the duty of maintaining it in a safe condition, as between the owner and the city, devolves upon the owner, and he cannot relieve himself from this duty by merely abandoning the use of the structure.—*City of Wabasha v. Southworth*, (Minn.) 55 N. W. 818.

33. The charter of Wabasha (Sp. Laws 1889, c. 13, subc. 7, § 16) provides that, in an action against the city and an abutting property owner for injuries received by a defective sidewalk, the city may pay any judgment against defendants, and recover the amount from the property owner. *Held*, that this mode of procedure was not exclusive, but that the city might pay the damages, without suit, and then recover in an action against the property owner.—*City of Wabasha v. Southworth*, (Minn.) 55 N. W. 818.

Public improvements.

34. The charter of Duluth provides that the board of public works shall, subject to the approval of the common council, establish a system of grades for all streets, avenues, and alleys within the corporate limits for which grades have not been heretofore established, and that, to change a grade once established, there must be a resolution of the council, passed by a vote of two-thirds of the members elect. *Held*, that it was the intention of the legislature to require the permanent grade to be established before any proceedings for the permanent improvement of a street at the expense of the real property should be commenced, and that such requirement was not affected by the amendment of

1891, providing that "if for any cause any assessment heretofore or hereafter made by the city of Duluth for any local improvement shall be set aside by any court, or, by reason of any irregularity or omission, shall be pronounced invalid, or shall be in fact invalid, the board of public works are authorized to reassess the cost of making said improvement upon the property benefited thereby, in proportion to the benefit that such piece or parcel of land has received."—*State v. Judges of District Court of Eleventh Judicial District*, (Minn.) 55 N. W. 122.

Public improvements—Action for damages.

85. Plaintiff filed with the clerk of defendant city a claim reading, "For damage caused by change of grade, \$1,500." On its being disallowed, an appeal was taken, whereupon plaintiff filed a complaint for damages for unlawful change of grade. *Held*, that the cause of action had not been changed from a claim for damages for a lawful change of grade to damages for an unlawful change.—*Drummond v. City of Eau Claire*, (Wis.) 55 N. W. 1028.

86. For an unlawful change of street grade a city is liable to an abutting owner for all damages naturally resulting therefrom, against which it cannot offset appreciation in value of the property, in common with other property in the locality, caused by the change.—*Drummond v. City of Eau Claire*, (Wis.) 55 N. W. 1028.

Assessments.

87. Under a city charter, authorizing it to require the abutting lot owners to pave a street, a railroad company having a right to lay its track on a lot, but to which it did not have title, is not liable for paving the street.—*City of Muscatine v. Chicago, R. I. & P. Ry. Co.*, (Iowa,) 55 N. W. 100.

88. A notice of the meeting of the board of public works of a city for the purpose of assessing upon property benefited the cost of a public improvement is invalid if, in advance of any hearing, it defines a limited district as embracing the property upon which the assessment is to be made.—*State v. Otis*, (Minn.) 55 N. W. 143.

89. Since judgments for assessments for local improvements under the charter of St. Paul stand like other judgments of the district court, and are valid if the court had jurisdiction of the property and owner, and all matters which might have been objected to the application for judgment are *res adjudicata*, such judgment cannot be impeached collaterally by showing dehors the record that the clerk entered it without authority from the court.—*Hennessy v. City of St. Paul*, (Minn.) 55 N. W. 1123.

40. The provision of the charter of St. Paul taxing 12 per cent. interest on all assessments not paid within 30 days after publication of notice by the treasurer that he has received the warrant for collection is not invalid, under Const. art. 9, § 1, requiring equality and uniformity of taxation.—*Hennessy v. City of St. Paul*, (Minn.) 55 N. W. 1123.

41. Under a charter conferring on a city power to pave its streets, and to require owners of adjacent lots to pave one-half in width of the street contiguous to their respective lots, the owners of lots on each side of the street are required to pay for one-half of the paving, whether the paving covers a part only or the full width of the street, and whether the paving is in the center of the street or on one side only; and, where the paving is on one side only, the adjacent owner on that side is only liable for one-half the expense.—*City of Muscatine v. Chicago, R. I. & P. Ry. Co.*, (Iowa,) 55 N. W. 100.

42. In an action to recover a special assessment for a street improvement direct proof of the assessment is required, and the county tax list is incompetent for that purpose.—*City of*

Muscatine v. Chicago, R. I. & P. Ry. Co., (Iowa,) 55 N. W. 100.

Bonds—Estoppel of city.

43. Municipal corporations are estopped, as against bona fide holders of municipal bonds, from setting up as a defense to an action thereon that all the preliminary steps necessary to authorize the issue of the bonds were not taken, when the officers who have charge of the issue of such bonds are especially or impliedly authorized to determine whether all the conditions precedent to the issue of valid bonds have been complied with, and recite in the bonds so issued that they have been complied with.—*Coler v. Dwight School Tp. of Richland County*, (N. D.) 55 N. W. 587.

44. It is not essential that the officers issuing the bonds should be expressly authorized to determine such questions, but it is sufficient if they are given full control in the matter.—*Coler v. Dwight School Tp. of Richland County*, (N. D.) 55 N. W. 587.

45. It is not necessary to estop the corporation that this statement should set forth in detail that all the preliminary steps have been taken, but it is sufficient that it declare that the bonds are issued in pursuance of a certain statute, specifying it.—*Coler v. Dwight School Tp. of Richland County*, (N. D.) 55 N. W. 587.

Murder.

See "Homicide."

Naturalization.

Of Indians, see "Indians," 1.

NAVIGABLE WATERS.

Duties in driving logs.

Persons using navigable streams for driving logs must do so with due deference to the rights of other persons engaged in the same business, and in most respects such streams are governed by the same rules as are highways upon land.—*Page v. Mille Lacs Lumber Co.*, (Minn.) 55 N. W. 608.

Necessary Parties.

See "Parties," 1-4.

NEGLIGENCE.

Contributory negligence of passengers, see "Carriers," 10.

—of person crossing railroad, see "Railroad Companies," 14-18.

—of servant, see "Master and Servant," 16-21.

—of traveler on street, see "Municipal Corporations," 20, 21.

Defects in highways, see "Highways," 14-17.

—in streets, see "Municipal Corporations," 16-33.

Injuries to passengers, see "Carriers," 4-9.

Liability for defects in bridge, see "Bridges," 1-4.

—of county, see "Counties," 11.

Of bank in collection of paper, see "Banks and Banking," 2-5.

Of hospital superintendent, see "Hospital."

Of master, see "Master and Servant," 9-21.

Of physician or surgeon, see "Malpractice."

Of railroad company, see "Railroad Companies," 6-27.

Of street-car companies, see "Horse and Street Railroads," 1-8.

Overflowing land, see "Railroad Companies," 3, 4.

What constitutes.

1. In an action against a telephone company for personal injuries caused by a pole falling upon plaintiff, it appeared that the pole

was a "corner pole," situated at an angle in the street, and was subject to the lateral strain of a great many line wires strung on the cross-arms, and drawn taut; that the pole was of brittle wood, and only 14 inches at the bottom; and that a dry rot extended inward 2 or 3 inches from the circumference. There was evidence that defendant had a license to extend its guys from the building of S.; that S. subsequently revoked the license, and cut the guys. Defendant contended that the pole would not have fallen, even with the guys removed, had S. removed them in a proper manner, instead of cutting them, and thus throwing the strain on the pole suddenly. *Held*, that the evidence did not require a finding that the falling of the pole was caused by the manner in which the guy wires were removed.—*Johnson v. Northwestern Tel. Exch. Co.*, (Minn.) 55 N. W. 829.

2. In an action against a company for selling a piece of spoiled bacon, it was a question for the jury whether defendant was negligent in such sale.—*Craft v. Parker, Webb & Co.*, (Mich.) 55 N. W. 812.

8. In an action against a blacksmith for personal injuries caused by a "spawl" from defendant's hammer striking plaintiff's eye, where it is alleged that defendant was negligent in working at an anvil opposite his shop door, and six feet away from the sidewalk, it is error to direct a verdict for defendant, where there is evidence, by experienced blacksmiths, that spawls frequently fly from their hammers, and sometimes go a long distance, and inflict serious wounds, and that they cannot control their direction.—*Parish v. Williams*, (Iowa,) 55 N. W. 74.

— Frightening horses.

4. Rev. St. § 1809, provides that an engine, before crossing any highway, except in cities and villages, shall have its whistle blown 80 rods from such crossing. *Held*, that where, in an unincorporated village, an engine whistled at the whistling post for one street, and continued to whistle till it arrived at another whistling post, 400 feet away, this was not negligence on account of which one who was injured by his horse becoming frightened at the noise could recover from the railroad company.—*Cahoon v. Chicago & N. W. Ry. Co.*, (Wis.) 55 N. W. 900.

5. Neither was it negligence to allow steam to escape with considerable noise from the cylinder cocks.—*Cahoon v. Chicago & N. W. Ry. Co.*, (Wis.) 55 N. W. 900.

6. A railroad company is not guilty of negligence in not erecting a screen or fence at its station between the driveway thereto and the tracks, so that horses standing at the station may not be frightened at approaching trains.—*Flagg v. Chicago, D. & C. G. T. J. Ry. Co.*, (Mich.) 55 N. W. 444.

— Careless driving.

7. In an action for injuries alleged to have been caused by defendant's negligence, it appeared that plaintiff was driving along the road at a walk, when defendant's team, with a rope dragging behind, came up from behind at a trot, and turned out to pass plaintiff. Plaintiff did not see the rope until it was opposite his team, when it was dragged under the horses' feet, making them unmanageable. *Held*, that defendant was liable.—*Barnes v. Brown*, (Mich.) 55 N. W. 439.

— Dangerous premises.

8. Defendant, being required by ordinance to provide for its street excavations red lights at night, and fences or other suitable and sufficient barriers against accidents, protected a ditch 6 or 8 feet from the curb, 16 to 20 feet long, 4 wide, and 7 deep, by a mound of earth along and at the ends of the ditch, varying from 1½ to 3 feet high, and stuck in the earth at each end a stick with a lantern covered with red flannel. There was some testimony that only one lantern was alight when the accident occurred. *Held*, that defendant's neg-

ligence was a question for the jury.—*American Waterworks Co. v. Dougherty*, (Neb.) 55 N. W. 1051.

Contributory negligence.

9. When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous, and from which injury results, is not contributory negligence such as will prevent him from recovering for an injury, if the attempt be such as a person acting with ordinary prudence might, under the circumstances, make.—*Lincoln Rapid Transit Co. v. Nichols*, (Neb.) 55 N. W. 872.

10. Where a young horse, standing at a railroad station at which it had never been before, became restless at the sound of an approaching train before it had come in sight, and those in charge of it, instead of driving away, as they might safely have done, attempted to hold it by the head, and plaintiff, who was in the wagon, remained there, instead of alighting, the action of plaintiff as well as those in charge of the team was negligence.—*Flagg v. Chicago, D. & C. G. T. J. Ry. Co.*, (Mich.) 55 N. W. 444.

11. In an action against a company for selling a piece of spoiled bacon, it was a question for the jury whether plaintiff was negligent in eating the bacon after he had smelt peculiar odors arising from it when cooked.—*Craft v. Parker, Webb & Co.*, (Mich.) 55 N. W. 812.

12. Defendants, who owned hay about a mile from plaintiff's stacks, in order to protect them from prairie fires, burned the stubble around them. The fire escaped, and burned plaintiff's hay. There had been fires raging in the vicinity for days, and plaintiff saw the fire which escaped from defendants' stack more than 24 hours before it reached his hay. He apprehended danger, but he did not burn or mow the stubble around his stacks, but attempted to haul his hay away. *Held*, that the question whether plaintiff used reasonable care to protect his hay was for the jury, and that it was error to charge that his failure to remove the stubble was not negligence.—*Brown v. Brooks*, (Wis.) 55 N. W. 395.

13. Intoxication on the part of plaintiff did not constitute contributory negligence if it was in no way the cause of the accident.—*Ward v. Chicago, St. P., M. & O. Ry. Co.*, (Wis.) 55 N. W. 771.

14. The facts that plaintiff had drunk some intoxicants, and was driving after dark in a two-horse wagon at a somewhat rapid pace, are not conclusive of his negligence in driving into an excavation in the street, but are for the jury.—*American Waterworks Co. v. Dougherty*, (Neb.) 55 N. W. 1051.

Evidence—Burden of proof.

15. In an action against a railroad company for damage by fire, the burden of proving that plaintiff was guilty of contributory negligence rests on defendant, unless plaintiff, in making out his case, prove, or give evidence tending to prove, that he was guilty of such contributory negligence; and, when there is no evidence on the subject, it is the duty of the court to assume that plaintiff was not guilty of such contributory negligence, and to so instruct the jury.—*Smith v. Chicago, M. & St. P. Ry. Co.*, (S. D.) 55 N. W. 717.

— Admissibility.

16. In an action against a railroad company for damages caused by an overflow, the testimony of witnesses that they were clearing out a ditch, which would have relieved the overflow, when they heard of the suit, and that they were ordered to stop after working part of two days, could not prejudice defendant, since the work referred to was practically contemporaneous with the bringing of the suit.—*Willits v. Chicago, B. & K. C. Ry. Co.*, (Iowa,) 55 N. W. 313.

17. In an action against a company for selling a piece of spoiled bacon, which made plaintiff sick, it was error not to permit one of defendant's employes to answer whether he knew of any spoiled "meats" that were sold by defendant about the time of plaintiff's purchase.—*Craft v. Parker, Webb & Co.*, (Mich.) 55 N. W. 812.

18. Where, in an action for injuries to a child by being bitten by a bear owned by defendant, there was evidence that defendant was the keeper of the bear, that the place was public, in the sense that the people had free access thereto from the streets, and that the child was bitten at the place alleged, the court properly refused to direct a verdict for defendant.—*Marquet v. La Duke*, (Mich.) 55 N. W. 1006.

19. In an action for injuries to a child by being bitten by a bear owned by defendant, evidence was properly admitted to show how the grounds where the bear was kept were occupied, as bearing on the questions of defendant's negligence and the publicity of the place.—*Marquet v. La Duke*, (Mich.) 55 N. W. 1006.

20. In an action against a company for selling a piece of spoiled bacon, it was error not to permit an employe to testify whether he had seen meat that was spoiled, and unfit for use, prepared by defendant to be sold about the time of plaintiff's purchase.—*Craft v. Parker, Webb & Co.*, (Mich.) 55 N. W. 812.

Instructions.

21. The existence of negligence should be passed upon by the jury as any other fact, and it is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence per se; but at most the jury should be instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence.—*Missouri Pac. Ry. Co. v. Baier*, (Neb.) 55 N. W. 913.

NEGOTIABLE INSTRUMENTS.

Alteration, see "Alteration of Instruments."

Assignment of note by agent, see "Sale," 8.

Checks, evidence of custom relating to, see "Custom and Usage," 1.

Failure of collecting bank to protest, etc., see "Banks and Banking," 3-5.

Municipal bonds, see "Municipal Corporations," 43-45.

Reformation of note, see "Equity," 4.

Promissory note.

1. The fact that an instrument for the payment of a specific sum of money is made payable with current exchange on a place other than the place of payment does not prevent its being a promissory note.—*Hastings v. Thompson*, (Minn.) 55 N. W. 968.

Consideration.

2. S. executed notes payable to G., and delivered them to K., on the understanding that he should deliver them to G., and get from G., for his own benefit, money, or its equivalent. K., who had collected from S. money due G., and had failed to pay it over, turned the notes over to G. in lieu of that much money so collected by him, and they were received by G. as the equivalent for that amount. *Held* that, from the time they were so turned over, there was a full consideration for them, and that G. could recover on them.—*Gotsian v. Steinkamp*, (Minn.) 55 N. W. 602.

Agreement to accept bill.

3. A party who contracts in writing to accept and pay such drafts as shall be drawn by a party named, in favor of another party also named, on compliance with certain conditions, is absolutely liable upon drafts drawn as contemplated, irrespective of the condition of the

general account between the drawer and drawee at the time a draft is made.—*Palmer v. Rice*, (Neb.) 55 N. W. 258.

Indorsement and transfer—Release of indorser.

4. In a suit by an indorsee against the indorser of an ordinary check, where the defense is that the check was not presented for payment within a reasonable time, inquiry as to whether the indorser was damaged by reason of the failure to present the check for payment is immaterial.—*First Nat. Bank v. Miller*, (Neb.) 55 N. W. 1064.

—Bona fide purchasers.

5. Plaintiff purchased from her grandson, at a discount of 27 per cent., several notes, of like amount, given by different persons to a firm consisting of the grandson and his wife, paying therefor chiefly in other notes. The notes were executed in consideration of agreements appointing the makers agents for a patent fencing which the firm agreed should be manufactured in that locality by the firm and plaintiff's son, and out of the commissions on which the notes were to be paid. At the time these agreements were made the grandson was living with plaintiff, or with her son, near her. She claimed to have known nothing about the makers of the note, except what her grandson told her. Though she denied any knowledge of the contracts, there was evidence that she had stated that she knew there were contracts behind the notes. *Held*, that there was evidence to go to the jury on the question of the bona fides of plaintiff.—*Fink v. Chambers*, (Mich.) 55 N. W. 375.

Breach of promise to indorse.

6. An action may be maintained for breach of a promise to indorse, made upon sufficient consideration.—*Birdsell Manufg Co. v. Brown*, (Mich.) 55 N. W. 801.

Checks—Days of grace.

7. Bank checks are due on presentation, and are not entitled to days of grace.—*Wood River Bank v. First Nat. Bank*, (Neb.) 55 N. W. 239.

Demand, protest, and notice.

8. The term "protest," as applied to inland bills of exchange, includes only the steps necessary to charge the drawer and indorsers.—*Wood River Bank v. First Nat. Bank*, (Neb.) 55 N. W. 239.

9. Bank checks, in this country, are regarded as inland bills of exchange, for the purpose of presentment and demand and notice of dishonor, and do not require a formal protest in order to charge the indorsers.—*Wood River Bank v. First Nat. Bank*, (Neb.) 55 N. W. 239.

10. A bank receiving for collection, from a correspondent, checks drawn upon it by a customer, with instructions to protest in case of nonpayment, must, if payment be refused for want of funds, give notice to the bank from which they were received not later than the next day after dishonor; and when they are held for two days in order to enable the drawer to provide funds a jury will be warranted in finding that the bank intended to accept them.—*Wood River Bank v. First Nat. Bank*, (Neb.) 55 N. W. 239.

11. Mere knowledge on the part of an indorser of a note, learned from the maker, that it has been dishonored, is not "notice," since notice must come from a party who is entitled to look to the indorser for payment.—*Jagger v. National German American Bank*, (Minn.) 55 N. W. 545.

—Waiver.

12. A promise to pay a note in case the maker does not, made by an indorser after maturity of the note, and when he has received no notice of nonpayment, is waiver of notice and protest.—*Davis v. Miller*, (Iowa,) 55 N. W. 89.

Actions on—Pleading.

13. Where, in an action on a note, defendant sets forth specifically facts constituting a defense of want of consideration, but such facts are insufficient to establish the defense, the pleading is not aided by a general averment of want of consideration.—*Parker v. Jewett*, (Minn.) 55 N. W. 56.

14. In an action on a check, evidence as to the genuineness of the indorsee's signature is inadmissible, under Code, § 2730, where it is not denied under oath.—*Shaw v. Jacobs*, (Iowa,) 55 N. W. 333.

Newly-Discovered Evidence.

See "Criminal Law," 19-21; "New Trial," 3, 4.

New Promise.

To take case out of statute, see "Limitation of Actions," 12-14.

NEW TRIAL.

In criminal cases, see "Criminal Law," 19-21. Grounds.

1. When a special finding of the jury is not supported by the evidence, and the fact so found is material, though not necessarily of a determinative character, a new trial must be granted.—*Peck v. Hutchinson*, (Iowa,) 55 N. W. 511.

—Accident and surprise.

2. A motion for a new trial, on the ground of "accident and surprise," will not be granted on the affidavit of defendant that he does not understand English very well, and did not know the purport of the word "agent" when he testified that a certain person was his agent, since his attorney presumably understood its meaning, and allowed the trial to proceed without any intimation that defendant had misspoken.—*Nelson v. Carlson*, (Minn.) 55 N. W. 821.

—Newly-discovered evidence.

3. Plaintiff, in several trials on a policy of insurance, had based his claim to title in the property insured on a deed alleged to have been executed by his wife, and, on a final trial, judgment was rendered against him, on the ground that the deed was forged. He moved for a new trial, on the ground of newly-discovered evidence, claiming that his brother would testify that there was a genuine deed to plaintiff, which was lost, and that the deed used on the trial was forged by a magistrate, since deceased. *Held*, that the motion was properly denied.—*Ryan v. Rockford Ins. Co.*, (Wis.) 55 N. W. 1025.

4. A new trial for newly-discovered evidence will not be granted when the applicant went to trial without seeking a postponement to enable him to ascertain the whereabouts, and procure the testimony, of a person known to be a material witness.—*Hendrickson v. Tracy*, (Minn.) 55 N. W. 622.

Statutory new trial as of right.

5. In an action against a railway company to recover land, where defendant puts in issue plaintiff's right to recover, it is entitled, if defeated, to another trial, under Gen. St. c. 75, § 11, notwithstanding in its answer it asks, under Gen. St. c. 34, § 34, for an assessment of the compensation to be paid plaintiff for taking the land for railway purposes, in case plaintiff on the trial establishes his right to recover.—*Kremer v. Chicago, M. & St. P. Ry. Co.*, (Minn.) 55 N. W. 928.

Nomination.

See "Elections and Voters," 3, 4.

Non Compos Mentis.

See "Insanity."

Nonresidents.

Statute of Limitations, see "Limitation of Actions," 3, 4.

Nonsuit.

See "Practice in Civil Cases," 1.

Notes.

See "Negotiable Instruments."

Notice.

Constructive, see "Judgment," 19, 20.

Of appeal, see "Appeal," 9, 10.

Of breach of warranty, see "Sale," 13-16.

Of claim of damages for injuries caused by defective highways, see "Highways," 14-17.

—of lien, see "Mechanics' Liens," 9.

Of dishonor, see "Negotiable Instruments," 8-12.

Of foreclosure sale under power, see "Mortgages," 14, 15.

Of lis pendens, see "Lis Pendens."

Of meeting of directors, see "Corporations," 3.

—of stockholders, see "Corporations," 8.

Of mortgage, see "Chattel Mortgages," 17, 18.

To purchaser of land, see "Vendor and Purchaser," 9-14.

To take deposition, see "Deposition."

NUISANCE.

Obstruction of street, see "Municipal Corporations," 15.

Public nuisance—Action by one specially injured.

1. A nuisance, such as an unreasonable and unnecessary obstruction of a navigable stream, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom, distinct and apart from the common injury.—*Page v. Mille Lacs Lumber Co.*, (Minn.) 55 N. W. 608.

2. Plaintiffs were engaged in driving logs down a navigable stream, and had to pass through defendant's mill ponds. There was evidence that defendant, by means of its ponds and booms, and the manner in which its logs were handled and placed in storage booms, maintained a nuisance in its mill ponds, and unreasonably and unnecessarily obstructed and delayed plaintiffs' driving operations. *Held*, that plaintiffs had shown special injuries differing in kind, not merely in degree or extent, from those suffered by the general public, and could recover damages.—*Page v. Mille Lacs Lumber Co.*, (Minn.) 55 N. W. 608.

Abatement of private nuisance.

3. Where branches of a tree overhang a right of way, constituting a nuisance, the railroad company may remove the projecting parts without giving notice, when the adjoining owner knows that the company claims they are a nuisance, and desires their removal, which he refuses.—*Hickey v. Michigan Cent. R. Co.*, (Mich.) 55 N. W. 989.

4. The fact that the company offered him money to remove them does not give him a right to further notice.—*Hickey v. Michigan Cent. R. Co.*, (Mich.) 55 N. W. 989.

Injunction.

5. In a suit to restrain a discharge of water on plaintiff's land, it appeared that there was a basin on defendant's land in which water from rain and melting snow collected, and that ditches were dug which conducted water from springs to such basin; that defendant also dug a fountain, which increased the water therein;

and that he dug a ditch through an elevation on his own land, and through it precipitated the water from such basin on plaintiff's land, which was greatly injured by such discharge. *Held*, that an injunction was properly awarded. —Wendlandt v. Cavanaugh, (Wis.) 55 N. W. 408.

6. Under Sanb. & B. Ann. St. § 3180, an action to restrain defendant from maintaining a ditch through which water from his land is discharged on that of plaintiff is, if the injury is "continuous and constantly recurring," an equitable action, and it is immaterial that damages for past injuries resulting from such overflow are claimed and awarded. —Wendlandt v. Cavanaugh, (Wis.) 55 N. W. 408.

Objections.

To evidence, see "Criminal Law;" "Trial," 12-16.

Obligation of Contracts.

See "Constitutional Law," 5.

Obstructions.

In streets, see "Highways," 13.
—injunction, see "Municipal Corporations," 15.

Of easement, see "Eminent Domain," 2, 3.

OFFICE AND OFFICER.

See, also, "Justices of the Peace;" "Receivers;" "Sheriffs and Constables."

City officers, see "Municipal Corporations," 4-11.

Compensation of county supervisor, see "Counties," 8.

Of bank, see "Banks and Banking," 6.

Of school district, see "Schools and School Districts," 4, 5.

Of state, impeachment, see "States and State Officers," 2-14.

Quo warranto against, see "Quo Warranto."

Liability for judicial acts.

1. An officer is not liable for a judicial act unless he act willfully, maliciously, or corruptly, and this rule is not limited to judges, but extends to all officers and boards charged with the decision of questions quasi judicial in character. —State v. Hastings, (Neb.) 53 N. W. 774.

Resignation—Right to withdraw.

2. Relator, a member of a school board, tendered his resignation to the president of the board, was nominated for alderman, and was present at a caucus at which one M. was nominated to fill the vacancy caused by his resignation. One C. was also nominated for the same office. Relator was defeated as alderman, and C. was elected, and so declared by the common council. Relator then attempted to withdraw his resignation. *Held*, that relator is in no position to claim a seat in the board, though the resignation from such office should have been tendered to the common council. —Pariseau v. Board of Education, (Mich.) 55 N. W. 709.

Opinion Evidence.

See "Evidence," 17-26.

Ordinance.

Of city council, see "Municipal Corporations," 2, 3.

Other Crimes.

Evidence of, see "Criminal Law," 13, 14.

Overflowing Land.

See "Surface Water."

Liability of railroad, see "Railroad Companies," 3, 4.

Measure of damages, see "Damages," 20, 21.

PARENT AND CHILD.

See, also, "Guardian and Ward."

Custody of children, see "Divorce," 9.

Custody.

1. Where a petition to the probate court, under Gen. Laws 1889, c. 167, § 11, for the admission of a child to the state public school, does not state that the child named is dependent upon the public for support, or that it is in a state of habitual vagrancy, or that it is ill treated, and in peril of life, health, or morality, but simply alleges that it belongs "to one of the classes enumerated by the statutes of the state as admissible" to the state public school, the probate court does not acquire jurisdiction to proceed against the child or its natural or legal guardians. —State v. Kinmore, (Minn.) 55 N. W. 830.

Rights of child—Compensation for services.

2. In an action by a son for work performed for his father while he still continued a member of his family though he had reached his majority, a request by defendant to charge that "the evidence must be clear, direct, and certain" was properly refused, since it might have misled the jury into supposing that, in order to justify a finding that there was an agreement to pay, it must have been directly testified to by some witness who heard it made. —Donahue v. Donahue's Estate, (Minn.) 55 N. W. 602.

Parliamentary Law.

What constitutes quorum, see "Corporations," 9.

Parol Evidence.

See "Evidence," 35-43.

PARTIES.

See, also, "Creditors' Bill," 4.

Exemption from service of process, see "Writs and Notice of Suits," 7, 8.

In equity, waiver of defect, see "Equity," 23.

Right to sue, see "Action," 1, 2.

To mandamus proceedings, see "Mandamus," 7.

Necessary parties.

1. It is not necessary, in proceedings to obtain possession of the assets of an insolvent bank, wrongfully withheld by one of its former officers, to join as parties to the proceedings other individuals, for whose benefit the misappropriation took place. —State v. Commercial & Sav. Bank, (Neb.) 55 N. W. 640.

2. In an action against a town for injury to a team from a defective highway while being properly driven by one who had hired it, such person is not a proper or necessary party. —Welsh v. Town of Argyle, (Wis.) 55 N. W. 412.

3. Action was brought by a number of taxpayers against the treasurer, auditor, and supervisors of a county to restrain payment of certain bonds, said to have been unlawfully issued. *Held*, that the county was not an indispensable party. —Anderson v. Orient Fire Ins. Co., (Iowa.) 55 N. W. 348.

4. In an action to construe a will, a person who was named an executor of the will, and also a trustee of a trust created by a paragraph thereof, and who has declined to act as executor, is a necessary party. —Sawtelle v. Ripley, (Wis.) 55 N. W. 156.

Proper parties.

5. Under Code, § 2545, which provides that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, an independent school district and a teacher employed by the board may join as plaintiffs in an action to compel the president of the board to approve and file the contract of employment, since both are interested in the subject of the action,—the contract,—and in the relief demanded,—its approval and filing.—Independent Dist. of Eden, No. 2, v. Rhodes, (Iowa,) 55 N. W. 524.

—Trustee of express trust.

6. The trustees of a public subscription in aid of a new manufacture, who have acted as the contracting parties to the written agreement with the manufacturers, may sue the latter for breach of the contract, as trustees of an express trust, under Comp. Laws, § 4872, including as such "a person with whom or in whose name a contract is made for the benefit of another."—Hudson v. Archer, (S. D.) 55 N. W. 1099.

PARTITION

Of property of religious society, see "Religious Societies," 4.

Right to.

In an action for partition defendant alleged a partnership between himself and R., who had conveyed to plaintiff; that R. had defrauded him, and that plaintiff was not a bona fide purchaser; and prayed that R. be made a party, and for an accounting. The trial court found that a partnership existed, and that plaintiff had no rights in the premises, and that R., her husband, was a necessary party for an accounting. *Held*, that the testimony failed to show a partnership in the land, but merely in the stock and improvements, and that plaintiff could maintain the action subject to the payment of the improvements made by the firm.—Reed v. Snell, (Neb.) 55 N. W. 249.

PARTNERSHIP.

In land, see "Partition."

What constitutes.

1. Defendant entered into a contract with one L. by which L. was to go on defendant's land, cut logs and bolts, market the same, receive the proceeds, pay the expenses of the undertaking, and pay defendant \$1 per 1,000 stumpage, and 25 cents per cord for bolts. L. was to have \$20 a month for his services, and his wife was to have \$3 a week for boarding the men. The balance of the proceeds of sales were to be divided equally between defendant and L. as profits. *Held*, that defendant and L. were partners in such undertaking, and that defendant was liable for debts incurred by L. in its performance. Montgomery and Hooker, JJ., dissenting.—Dutcher v. Buck, (Mich.) 55 N. W. 676.

2. Plaintiff was employed by defendants, contractors for the steam-heating apparatus in two certain buildings, to do the work and furnish the materials under both contracts for one-half the net profits. *Held* not to constitute a partnership, but an arrangement for measuring plaintiff's compensation.—Sohns v. Sloteman, (Wis.) 55 N. W. 153.

Firm property.

3. Plaintiff, by written agreement, leased a farm for one year to M., furnished him with certain stock, and agreed to let him have all the hay and feed on the place, in consideration of M.'s agreement to feed and winter the stock. It was further agreed that either party might put additional stock on the farm, and that after sale of the stock, in the fall, each party was to be credited with what he had

paid for stock, and the balance of the proceeds divided between them. *Held*, that the property contributed to the joint enterprise, and accumulated in the prosecution of it, was joint property.—Strong v. Hoskin, (Wis.) 55 N. W. 832.

4. Plaintiffs' testator took defendants into partnership, furnishing most of the capital. Several years later testator retired from active business, and went to Europe, where he resided until his death. Defendants were left in charge, and one of them was also confidential adviser and agent with respect to certain large interests of testator outside the firm, which he managed satisfactorily. The articles were silent as to the right of any partner to withdraw money, either profits or otherwise, from the firm. On going abroad, however, testator wrote that he wished defendants to allow him to do most of the drawing "for extraordinary purposes" for a year or two, "after which you can change it, if you desire." Nothing further was said about the matter on either side. Testator drew each year an amount exceeding his share of the profits. Meanwhile defendants bought some land, drawing \$16,000 from the firm's money, and taking the title in their names. The profits undrawn, standing to their credit, at the time were about \$75,000. The transaction was not entered in the personal ledger in defendants' respective accounts, but in the sales ledger, in a joint account. The account extended through a number of ledgers, until the deferred payments were all made, and appeared, presumably, on the balance sheets sent regularly to the testator. One of the defendants testified that he never gave any directions as to where the account should be opened, and the bookkeeper testified that he never received any. There had been no examination by testator of his separate interest for sixteen years previous to his death, and none was attempted for five years afterwards. *Held*, that defendants were not trustees of the firm as to the land, but were entitled thereto in their own right.—Boasworth v. Hopkins, (Wis.) 55 N. W. 424.

Power of partner to bind firm.

5. One partner may execute a chattel mortgage in the firm name for the purpose of securing or paying firm debts.—Robards v. Waterman, (Mich.) 55 N. W. 662.

6. A chattel mortgage by one partner in the firm name is valid as against the exemptions provided in How. St. § 7636, though some of the partners may not have been aware of its execution.—Robards v. Waterman, (Mich.) 55 N. W. 662.

—After dissolution.

7. In an action on two promissory notes it appeared that plaintiffs and one A., being partners, sold to defendant a cornsheller under an agreement that a firm, into which A. was about to go as a partner, would give defendant sufficient work shelling corn to pay the notes given for the price of the sheller. Defendant gave three notes, to the order of plaintiffs. The partnership between plaintiffs and A. shortly afterwards dissolved. At the proper time, defendant applied for the work of shelling corn, but the same was refused him, and, at the request of A., he returned the sheller to him. *Held* that, as a member of the firm which sold the sheller, A. had a right to order it returned after the dissolution of the partnership, for the reason that, while the firm was dissolved, it still existed for the purpose of closing up its business.—J. P. Ketcham & Bro. v. Larkin, (Iowa,) 55 N. W. 472.

Action at law between partners.

8. Where persons enter into a partnership agreement, whereby one of them agrees for a certain amount to assign to the other an interest in a patent which was to be the basis of their partnership, an action at law will lie for failure to make such payment.—Cook v. Canby, (Mich.) 55 N. W. 987.

Dissolution, settlement, and accounting.

9. Plaintiff was not entitled to compensation for his services in settling the partnership affairs, the agreement between the partners whereby each drew \$100 monthly from the firm not implying an agreement for compensation. In that, as there were only two partners, with equal interests, such practice amounted simply to an equal division of profits to that extent.—*Smith v. Knight, (Iowa,) 55 N. W. 189.*

10. A provision in a contract between partners, whereby an adjustment of past accounts should be had, in order to make a rest in the affairs of the firm to furnish a basis for future accountings, is no consideration for another provision in such contract, whereby each agrees to pay the other interest on his monthly balances from the time they first engaged in business up to date of such contract.—*Smith v. Knight, (Iowa,) 55 N. W. 189.*

11. A promise by one partner to pay interest on monthly balances would be no consideration for a like promise by the other, since, there being no provision in the original partnership agreement to pay such interest, there would be no legal obligation to do so; and the agreement to pay interest, where, by the law, no interest could be charged, would be, in effect, a gift by one partner to the other.—*Smith v. Knight, (Iowa,) 55 N. W. 189.*

12. It appearing in an accounting by one partner against the administratrix of the other that, if an agreement to pay interest on monthly balances was enforced, the otherwise balance of \$11,000 to plaintiff's credit would be increased to over \$50,000, such agreement must be deemed too inequitable to warrant a court of equity in enforcing it.—*Smith v. Knight, (Iowa,) 55 N. W. 189.*

13. An agreement that, if plaintiff withdrew, he should forfeit to defendant his undivided one-half share of the earnings of the partnership during the year, meant one half of the net earnings.—*Kemp v. Smith, (Iowa,) 55 N. W. 36.*

14. Plaintiff bought a half interest in defendant's business. It was agreed that the partnership could be terminated by plaintiff at the end of a year, on 30 days' notice, defendant to repay him the purchase price. Each partner was to enter in the firm books all moneys received by him. *Held*, that plaintiff did not forfeit his rights, in the absence of fraud, because of an omission to charge himself with a small amount received in the business.—*Kemp v. Smith, (Iowa,) 55 N. W. 36.*

Surviving partners—Good will.

15. On the dissolution of a partnership by the death of one of its members the surviving partners may carry on the same line of business at the same place without liability to account to the legal representative of the deceased partner for the good will of the firm, in the absence of their own agreement to the contrary.—*Lobeck v. Lee, (Neb.) 55 N. W. 650.*

16. Where the legal representative of a deceased member of a partnership, as such, without words of limitation, joins in the sale of all the stock and fixtures of the firm to the surviving members thereof, he cannot maintain an action against such survivors for the good will of said firm, or for any portion thereof.—*Lobeck v. Lee, (Neb.) 55 N. W. 650.*

Part Payment.

To take case out of statute, see "Limitation of Actions," 12-14.

Passengers.

See "Carriers."

Patent.

Of public land, see "Public Lands," 10.

PATENTS FOR INVENTIONS.**Sale—Consideration.**

Want of consideration in the sale of a patent right is not made out by proof that its practical utility is limited, or that the patented article cannot be manufactured and sold at a profit, if it be capable of use so far as to validate the patent in law.—*Van Norman v. Barbeau, (Minn.) 55 N. W. 1112.*

Pauper.

See "Poor and Poor Laws."

PAYMENT.

See, also, "Release and Discharge."

Of mortgage, see "Chattel Mortgages," 19.

What constitutes.

1. Where one who is neither the debtor, nor under any legal or moral obligation to pay the debt, pays a sum less than the whole debt, in consideration of an agreement on the part of the creditor to discharge the whole, no action will lie against the debtor to recover the balance of his indebtedness.—*Clark v. Abbott, (Minn.) 55 N. W. 542.*

Evidence.

2. As attorneys for plaintiff, defendants recovered a judgment, which was paid in drafts, and at their request plaintiff indorsed the drafts at a bank, defendants receiving therefor a certificate of deposit of \$2,000, which they claimed as for services. In proceedings to recover the amount so deposited, it appeared that plaintiff was a woman 75 years of age; and she testified that she thought the \$2,000 was deposited for her, and that she indorsed whatever checks were presented to her by defendants because she "had nobody else to trust." *Held* that, though there was some evidence that the certificate was given to defendants as payment, it failed to show that plaintiff, understandingly, consented to it.—*Lothian v. Lothian, (Iowa,) 55 N. W. 465.*

Presumption of.

3. Possession of a note by the maker after maturity is prima facie evidence of payment.—*Smith v. Gardner, (Neb.) 55 N. W. 245.*

4. The force of the presumption of payment from the possession of a note by the maker depends upon the circumstances of the particular case, and therefore it is error to instruct a jury that possession of a note raises a strong presumption of payment, or is a strong circumstance to prove payment.—*Smith v. Gardner, (Neb.) 55 N. W. 245.*

Performance.

Of contracts, see "Contracts," 15-20.

Personal Injuries.

See "Negligence."

Measure of damages, see "Damages," 16-21.

Petition.

See "Pleading," 1-6.

Photographs.

As evidence, see "Evidence," 34.

PHYSICIANS AND SURGEONS.

Compensation for attending coroner's inquest, see "Coroner," 3.

Regulating practice, see "Constitutional Law," 2.

License—Powers of medical board.

1. McClain's Code, § 2548, provides that a graduate in medicine, desiring a certificate to practice, must present his diploma to the state board of examiners, who shall determine if it is issued by a medical school legally organized and in good standing. Section 2547 authorizes any member of the board to administer oaths and take testimony in all matters relating to their duties as examiners. *Held*, that the board had power to receive charges against a school that it was conducted in violation of law, to notify its officers to appear before the board, to take testimony, and, if satisfied the charges were true, to withhold certificates from its graduates.—*Iowa Eclectic Medical College Ass'n v. Schrader*, (Iowa,) 55 N. W. 24.

2. Under McClain's Code, §§ 2546, 2547, the board has power to adopt a schedule of minimum requirements as to qualifications of students on entering such school, branches to be taught, how to be taught, length of course and attendance, and facilities for teaching.—*Iowa Eclectic Medical College Ass'n v. Schrader*, (Iowa,) 55 N. W. 24.

3. A board to examine and license physicians is not a corporation, within Const. art. 8, § 1, providing that no corporation shall be created by special laws, but a branch of the government.—*Iowa Eclectic Medical College Ass'n v. Schrader*, (Iowa,) 55 N. W. 24.

4. Where the board had recognized a school as in good standing, it could not afterwards arbitrarily refuse to issue certificates to a graduate of such school until its standing should have been redetermined.—*Iowa Eclectic Medical College Ass'n v. Schrader*, (Iowa,) 55 N. W. 24.

PLEADING.

See, also, "Creditors' Bill," 5; "Damages," 27, 28; "Deceit," 3; "Injunction," 4; "Malicious Prosecution," 3; "Quieting Title," 2, 3; "Replevin," 6, 7; "Specific Performance."

Action on a guaranty, see "Guaranty," 5.

Amendment, see "Ejectment," 2.

Averring facts showing fraud, see "Fraudulent Conveyances," 13.

Bill in equity, see "Equity," 22.

Estoppel by, see "Estoppel," 6, 7.

Filing pleadings, see "Practice in Civil Cases," 7, 8.

In action against railroad for negligence, see "Railroad Companies," 26.

— for flowage, see "Surface Water," 3.

— for injuries on street, see "Municipal Corporations," 22, 23.

— on bonds, see "Bonds," 1-3.

— on note or check, see "Negotiable Instruments," 13, 14.

— on policy, see "Insurance," 14.

— to foreclose mortgage, see "Mortgages," 9, 10.

Joinder of causes, see "Action," 3.

Judgment on pleadings, see "Forcible Entry and Detainer," 3.

Pleading and proof, see "Assumpsit," 2, 3; "False Imprisonment," 5-7.

— fraud, see "Fraud," 1.

— waiver of return of property, see "Sale," 18.

Petition, declaration, or complaint.

1. In an action by an abutting owner for the obstruction of a street by a railroad company the fact that he claims damages for the obstruction of other streets, on which his lot does not abut, does not render his petition vulnerable to a demurrer.—*Hitchcock v. Chicago, St. P. & K. C. Ry. Co.*, (Iowa,) 55 N. W. 337.

2. A count of a petition based on a claim that defendant railroad company violated a city ordinance by running its trains at an excessive rate of speed, and shook his dwelling house,

and the lot on which it is situated, is bad on demurrer because of failure to aver that the lot abuts on the street on which the railroad runs, although it is alleged in another count, seeking damages for obstructing a street, that the track is in S. street, near lot 2, block 51.—*Hitchcock v. Chicago, St. P. & K. C. Ry. Co.*, (Iowa,) 55 N. W. 337.

3. In an action for breach of a contract to repair a machine, an allegation that plaintiff will be obliged to expend a specified sum to put the machine in good condition is equivalent to an allegation that the reasonably necessary cost will be such sum.—*King v. Nichols & Shepard Co.*, (Minn.) 55 N. W. 604.

4. Under Code, § 2648, providing that one prayer for judgment may include a sum based on all accounts looking to a money remedy, it is not necessary that each count in a petition in a suit on account contain a prayer for judgment.—*Perego v. Wheeler*, (Iowa,) 55 N. W. 462.

5. Defendants contracted with plaintiffs that, for a sum of money named, they would erect in plaintiffs' town a mill of specified dimensions, and would operate it for five years, unless "when, for causes not under their control, said mill cannot be operated without loss to them, they using at the time due economy and all proper skill." *Held*, that plaintiffs' complaint against defendants for failure to operate need not allege that they could operate without loss, this fact being proper matter of defense, and peculiarly within defendant's knowledge.—*Hudson v. Archer*, (S. D.) 55 N. W. 1099.

Joinder of causes and election.

6. It is error to compel plaintiff to elect one count in his declaration on which he will proceed to trial, and to strike out all the other counts, since he had the right to join all of his causes of action in one declaration, if he could recover on each in separate suits in the same form of action.—*Randall v. Gartner*, (Mich.) 55 N. W. 843.

Demurrer.

7. Under Comp. Laws, § 4910, providing that the demurrer shall distinctly specify the grounds of objection to the complaint, a demurrer "that there is a defect of parties plaintiff," in the words of section 4909, giving the grounds of demurrer, is sufficient.—*Hudson v. Archer*, (S. D.) 55 N. W. 1099.

Answer—Motion to strike out as frivolous.

8. Plaintiff company, in an action to recover tolls for driving logs, alleged its incorporation; that it made expenditures in improving a named river, and prescribed tolls which it required owners of logs to pay; that during the years 1886, 1887, 1888, and 1889 defendant's decedent was a stockholder in said company, and during the years 1887 and 1888 was a director, and had knowledge of the tolls, and during all such years paid tolls so fixed; that in April, 1890, the executive committee fixed the toll for 1890, which was subsequently adopted by the board of directors; that, in the season of 1890, decedent, with such knowledge, drove a stated number of feet of logs; that in April, 1891, the board of directors prescribed tolls for 1891; and that, in said season, decedent drove a stated quantity of logs. The amount for which decedent was indebted for each season was alleged. The answer denied the existence of the corporation; that decedent was a stockholder prior to December 13, 1886; that he was a stockholder exceeding the nominal value of \$2,605.10; any knowledge of the fixing of tolls prior to May, 1891, and the ratification thereof by the board of directors. It denied that plaintiff ran any logs of defendant since 1888, and each and every allegation of the complaint not specifically denied, except that decedent owned a large quantity of logs on the river during the time mentioned, and that he was a stockholder from 1886 to 1890. *Held*, that since the general denial covered all allega-

tions of the complaint in respect to decedent running logs by the assistance of the improvement in the years 1890 and 1891, and the tolls on the same, and the amount thereof, and in respect to the improvement of the river by plaintiff, and since the ratification of the tolls in 1890 by the board of directors was denied, the answer should not have been stricken out as frivolous.—*Black River Imp. Co. v. Holway*, (Wis.) 55 N. W. 418.

Amendment.

9. Amendments to pleadings may be made at any time, in the discretion of the court, while the action is pending.—*Gerdtsen v. Cockrell*, (Minn.) 55 N. W. 58.

Pleading and proof.

10. In an action against a corporation to determine adverse claims to realty, where plaintiff claimed through a deed from defendant, stockholders who desire to attack the deed on the ground of fraud and have it set aside must allege the facts constituting fraud, and ask the appropriate relief; and they cannot prove fraud under a mere denial of the execution of the deed by the corporation.—*Morrill v. Little Falls Manufg Co.*, (Minn.) 55 N. W. 547.

11. Where, in an action for injuries to a child by being bitten by a bear owned by defendant, the declaration alleged that defendant occupied and controlled the premises where the bears were kept, and that he opened them to the general public, a judgment for plaintiff cannot be assailed because the proof failed to show that such grounds were owned by the public.—*Marquet v. La Duke*, (Mich.) 55 N. W. 1006.

12. The declaration alleged that the grounds "were open as a place of recreation to people in a public way, and were uninclosed, free access being given to said grounds" from certain avenues on the south and north. *Held*, that it was not necessary, to entitle plaintiff to recover, to prove that the grounds were uninclosed, there being evidence that free access to the grounds was given from the streets.—*Marquet v. La Duke*, (Mich.) 55 N. W. 1006.

13. An allegation that a driveway passed through the grounds is sufficiently supported by evidence that a driveway which had no gate at one end had been put across the grounds for the convenience of people passing through who wanted to go to an hotel standing thereon, and that it was frequently used by persons, especially footmen, going from one street to the other.—*Marquet v. La Duke*, (Mich.) 55 N. W. 1006.

14. Where it is alleged in the declaration that the child was passing through the grounds contiguous to the hotel when bitten, and not that it was in the driveway, it is immaterial that there was no evidence to support an allegation that the bears could seize people within the driveway, since such allegation is surplusage.—*Marquet v. La Duke*, (Mich.) 55 N. W. 1006.

— Denial of instrument under oath.

15. Under Code, § 2730, providing that the signature to a written instrument on which suit is brought shall be deemed genuine and admitted unless the person whose signature it purports to be shall deny its genuineness under oath, a denial of the execution of a note, in an action against the executor of the person alleged to have executed it, includes a denial of the genuineness of the signature.—*Smith v. King*, (Iowa,) 55 N. W. 88.

Waiver of defects and aid by verdict.

16. Where plaintiff, after filing an amended petition, proceeds to trial, treating its allegations as in issue, though no answer thereto was filed, he thereby waives the provisions of Code, § 2712, that every material allegation in a pleading, not controverted by a subsequent pleading, shall, for the purposes of the action, be deemed true.—*Long v. Vallean*, (Iowa,) 55 N. W. 81.

17. Where a demurrer to the answer is overruled, plaintiff, by filing a reply, and going to trial on the issues thus formed, waives objections to the overruling of the demurrer.—*Shroeder v. Webster*, (Iowa,) 55 N. W. 569.

18. In an action for breach of a contract to put a machine in good condition, an objection that the complaint does not state specifically the particulars in which the machine was defective ought to be made by motion to require the complaint to be made more definite and certain.—*King v. Nichols & Shepard Co.*, (Minn.) 55 N. W. 604.

PLEDGE.

Garnishment of pledged property, see "Garnishment," 3.

Priority of carrier's lien, see "Carriers," 1.

What constitutes.

1. The fact that one person, claiming under a legal right, however unfounded, declares to another that he will hold certain property of the latter until a debt owing by him is secured, and that the other remains silent, and makes no objection thereto, does not constitute a pledge of the property as security for the debt.—*Taylor v. Jones*, (N. D.) 55 N. W. 593.

Termination.

2. A perfected pledge is not avoided or terminated because, for a special purpose, and for the benefit of the pledgee, he causes the property to be nominally consigned, on a shipment of the same, to the pledgors.—*Cooley v. Minnesota Transfer Ry. Co.*, (Minn.) 55 N. W. 141.

3. A sale of pledged property by the pledgors to the pledgee, subsequent to garnishment by creditors of the pledgors, will not extinguish the rights of the pledgee, as between himself and the garnishing creditor.—*Cooley v. Minnesota Transfer Ry. Co.*, (Minn.) 55 N. W. 141.

Rights of pledgor.

4. Plaintiff and defendant, with a number of others, had placed money in the hands of one D. for investment in leases of school land. D. having absconded, defendant paid certain notes of plaintiff and his brothers, which he and D. had indorsed to raise money for the enterprise. Plaintiff thereupon assigned defendant certain company stock as collateral, but later sued to recover said stock, charging defendant with fraud in obtaining it, and unfair use of it in supplanting plaintiff in the company. No actual fraud or bad faith on defendant's part being established, *held*, that plaintiff's only equity was leave to redeem by paying his debt to defendant, and, on his refusal, defendant's right to the possession must be confirmed.—*Rathmann v. Peycke*, (Neb.) 55 N. W. 1070.

5. A., owning a note secured by mortgage, pledged it to a bank to secure a debt. A senior mortgagee brought foreclosure, and A. appeared by his own attorney and filed a cross bill. A decree foreclosing both mortgages was rendered, and the land sold to a stranger. Thereafter the bank bought the land from the purchaser; A.'s attorney in the foreclosure negotiating the purchase, and receiving a bonus. Later the bank resold at a profit. *Held*, that A., having paid his debt to the bank, could not hold the bank liable as trustee for such profit to the amount of the note.—*Raben v. First Nat. Bank*, (Neb.) 55 N. W. 1055.

POOR AND POOR LAWS.

Liability as between town and county.

Gen. St. 1878, c. 15, made the care of the poor in different counties a county charge. Sp. Laws 1889, c. 273, made each town and incorporated village in certain counties liable for the support of its poor. Gen. Laws 1889 contained provisions relating to both systems, and provided for changes from one to the other. Section 1 made each county liable for the poor

therein as provided under Gen. St. 1878, c. 15, "unless otherwise provided by law." By a special law in 1893, Sp. Laws 1893, c. 273, was expressly repealed. *Held*, that by such repeal, Gen. Laws 1889, c. 170, § 1, became applicable, and the poor became a county charge.—*Pushor v. Village of Morris*, (Minn.) 55 N. W. 143.

Possession.

See "Adverse Possession."

POWERS.

Of agent, see "Principal and Agent," 3, 2.
Of attorney, see "Attorney and Client."
Of foreign receiver, see "Receivers," 3.
Of partners, see "Partnership," 5-7.
Of sale in mortgage, see "Mortgages," 14, 15.

Power of attorney—To sell land.

1. In a power of attorney to convey land, the true function of the description is not necessarily to identify the land, and if the description can be made complete by an examination of the public records, and the records of judicial proceedings clearly indicated in such description, it is a sufficient identification of the subject-matter of the power.—*Connell v. Gallagher*, (Neb.) 55 N. W. 229.

2. A husband and wife executed a power of attorney to sell "all real estate belonging to us, or either of us." Afterwards the husband quitclaimed to the wife his title to the land in question, in which the wife before had only an inchoate right of dower. After the husband's death the land was sold under the power of attorney. *Held*, that the conveyance did not pass title, for the attorney was authorized by the wife to convey only such title as she had at the time of the execution of the power, and when she received the deed from her husband, and became owner of the fee, the inchoate dower was extinguished by merger, and there was nothing on which the power of attorney could operate.—*Penfold v. Warner*, (Mich.) 55 N. W. 680.

3. Each of several tenants in common of land executed a several and separate power of attorney authorizing an agent to sell the land and execute a warranty deed of the tenant's interest in the property, and "to sell and indorse any promissory notes that may be taken and secured by mortgage" on the property. *Held*, that the power did not authorize the agent to bind his principal as indorser, jointly with the other cotenants, of a note taken payable jointly to them all.—*Harris v. Johnston*, (Minn.) 55 N. W. 970.

Testamentary powers.

4. Testator devised certain land to his wife so long as she should live, but without privilege to sell. After her death the land was to be sold, and proceeds divided between a son and daughter. In case, however, the wife and said son and daughter should agree together upon a sale, then the wife might sell and divide the proceeds according to above conditions. *Held*, that the wife, or wife and daughter alone, could not sell without the son.—*Goebel v. Thieme*, (Wis.) 55 N. W. 706.

PRACTICE IN CIVIL CASES.

See, also, "Appeal;" "Appearance;" "Assumpsit;" "Attachment;" "Certiorari;" "Continuance;" "Costs;" "Courts;" "Damages;" "Divorce;" "Ejectment;" "Equity;" "Evidence;" "Execution;" "Garnishment;" "Judgment;" "Jury;" "Justices of the Peace;" "Limitation of Actions;" "Mandamus;" "New Trial;" "Parties;" "Pleading;" "Replevin;" "Set-Off and Counterclaim;" "Trespass;" "Trial;" "Trove and Conversion;" "Venue in Civil Cases;" "Witness;" "Writs and Notice of Suits."

Exhibition of injured member in action for personal injuries, see "Damages," 33.

Nonsuit.

1. In an action to foreclose a land contract and remove the lien of an attachment levied on land, where it was charged that two of defendants were colluding together, and pretending that the attachment lien was valid, in order to compel the payment of the attaching creditor's claim, the fact that the collusion did not appear on the trial did not entitle the attaching creditor to a nonsuit after he had taken issue and tried the case on its merits.—*Ramash v. Scheuer*, (Wis.) 55 N. W. 700.

Voluntary dismissal or nonsuit.

2. Upon the refusal of the court to permit plaintiff in ejectment to amend his declaration on the trial so as to set forth his estate in the land, he should be permitted to submit to a nonsuit.—*Ludeman v. Hirth*, (Mich.) 55 N. W. 449.

3. Dismissal of an action by plaintiff does not affect his right to insist on the prayer of his reply for reformation of a contract, pursuant to which he executed a deed to defendant, for breach of covenant, in which defendant sets up a counterclaim in his answer.—*Hoyt v. McLagan*, (Iowa.) 55 N. W. 18.

Transfer to equity docket.

4. Plaintiff, in a single count, alleged that defendant contracted to assign to him certain stock; that defendant failed to pay certain assessments on said stock; and that the corporation refused to transfer it on its books, to plaintiff's damage. The answer admitted the allegations of the petition, and alleged that the contract was for the assignment of stock on which a certain per cent. had been paid, and prayed for the reformation of the contract. Plaintiff thereupon filed an amendment averring false representations by defendant as to the value of the stock. *Held*, that the parties having mingled legal and equitable issues, it was not error to transfer the cause to the equity docket.—*Thatcher v. Stickney*, (Iowa.) 55 N. W. 488.

Stipulations.

5. Where parties to an action pending in the district court, by an agreement under seal, made a compromise and settlement of their mutual claims involved in the action, and authorized judgment to be entered in accordance therewith, it is within the power of the court, upon motion and a proper showing, to set aside such agreement, and place the parties in statu quo.—*Gerdtsen v. Cockrell*, (Minn.) 55 N. W. 58.

6. Where the relief sought on the renewal of a motion to vacate a stipulation might have been given upon the original application, under the general prayer for relief, it may be granted on the renewed application.—*Gerdtsen v. Cockrell*, (Minn.) 55 N. W. 58.

Filing pleadings.

7. Where a pleading was filed, and so marked by the clerk, and attached to the pleadings, but the filing was not entered on the appearance docket, it is not error for the court, four years after such filing, when the pleading is first attacked because not filed, to order the filing to be entered on the appearance docket as of the date it was delivered to the clerk.—*Snell v. Dubuque & S. C. Ry. Co.*, (Iowa.) 55 N. W. 310.

8. Where a defendant, after answer day, files a pleading, in the nature of a cross petition, against his codefendants who have not appeared in the action, such codefendants can be concluded in respect thereto only by their appearance, or after the service on them of a notice, in the nature of a summons, as to such pleading.—*Arnold v. Badger Lumber Co.*, (Neb.) 55 N. W. 269.

Service of papers—On attorney.

9. Under Gen. St. 1878, c. 63, § 74, service upon an attorney at his office, in his absence therefrom, can be made by leaving the paper in a conspicuous place in the office only when there is in the office no clerk or person having

charge thereof.—*Mies v. Thompson*, (Minn.) 55 N. W. 44.

Precincts.

See "Elections and Voters," 5.

Preferences.

See "Assignment for Benefit of Creditors," 4.

Prescription.

See "Adverse Possession;" "Limitation of Actions."

Highways by, see "Highways," 1-4.

Presumption.

As to foreign law, see "Conflict of Laws," 2.

As to organization of school district, see "Schools and School Districts," 1, 2.

Of payment, see "Payment," 3, 4.

On appeal, see "Appeal," 57-61.

PRINCIPAL AND AGENT.

See, also, "Attorney and Client;" "Factors and Brokers;" "Master and Servant."

Assignment of note by agent, see "Sale," 8.

Possession by agent, see "Adverse Possession," 9.

Power of attorney, see "Powers," 1-3.

— of bank officer, see "Banks and Banking," 6.

— of infant to appoint agent, see "Infancy," 2.

— of partners, see "Partnership," 5-7.

Proposition made to agent, acceptance by principal, see "Contracts," 2.

Purchase of property by real-estate agent, see "Factors and Brokers."

Apparent agency.

1. Plaintiffs, who contracted with W. & F. to perform certain work in the construction of defendant company's railroad, were bound to know the relation between W. & F. and defendant; and, where W. & F. were only contractors, plaintiffs cannot hold defendant liable on their contract with W. & F., on the theory that the latter were agents of defendant.—*Blanding v. Davenport, L. & D. R. Co.*, (Iowa,) 55 N. W. 81.

Evidence of agency.

2. An agent is competent to testify to the fact of his agency.—*Van Sickle v. Keith*, (Iowa,) 55 N. W. 42.

Powers of agent.

3. An agent who has power to sell a machine has power to waive the return of the same under the contract on its failure to meet the requirements thereof.—*McCormick Harvesting Mach. Co. v. Brower*, (Iowa,) 55 N. W. 537.

4. An agent to sell binders has power under Comp. Laws, § 3985, to warrant that they will do as good work as any other machine in the market; and his general authority to so warrant cannot be restricted as to third persons who have no knowledge of such restriction.—*Canham v. Plano Manufg Co.*, (N. D.) 55 N. W. 583.

Rights and liabilities inter se.

5. Defendants were agents of plaintiff corporation for the sale of clover hullers, under a contract by which they were to obtain full settlement for every machine before delivery to the purchaser, and to guaranty payment for each machine. Defendants obtained one machine from plaintiffs for a purchaser on time, but failed to have a settlement with him before sale. The purchaser refused to pay for the machine, as being defective, and four months after the sale returned it to defendants, who notified plaintiff. The latter made no reply, and over a year later defendants sent

the machine to plaintiff, which refused to receive it. The purchaser was able to pay for the machine, but plaintiff did not try to collect the price from him. *Held*, that defendants were not liable for the price of the machine, but merely for any loss which might accrue to plaintiff by reason of their failure to obtain a prompt settlement, as required by their contract.—*Birdsell Manufg Co. v. Brown*, (Mich.) 55 N. W. 801.

6. An agent, for the purpose of selling goods, cannot sell to himself, though the sale be public, and no actual fraud appear; and if he do, he will be required to account to his principals for any profit he may have realized.—*Rockford Watch Co. v. Manifold*, (Neb.) 55 N. W. 236.

7. An agent cannot collect commissions for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency.—*Jansen v. Williams*, (Neb.) 55 N. W. 279.

Rights and liabilities as to third persons.

8. Where, in an action by an agent, in the name of his principal, against a third party for the amount of an order for goods, the evidence does not show the agency, defendant may show the negotiations and conditions upon which the order was given.—*Bronson v. Herbert*, (Mich.) 55 N. W. 359.

9. In an action by an agent to recover for trees sold for a firm which he represented, defendant may show that the agent, and not the firm, is the real party in interest.—*Bronson v. Herbert*, (Mich.) 55 N. W. 359.

PRINCIPAL AND SURETY.

See, also, "Bonds."

Release of guarantor, see "Guaranty," 3, 4.

— of indorser, see "Negotiable Instruments," 4.

In general.

1. Where one of several sureties named in a bond fails to sign it, if all the others sign with the principal obligor, and the bond is unconditionally delivered to the obligee in their presence, and without objection on their part, they will be deemed to have waived the signature of the other surety.—*Van Norman v. Borbeau*, (Minn.) 55 N. W. 1112.

2. The agent of the obligee in an indemnity bond presented the obligation to two persons whom she requested to sign as sureties, promising them that others, whose names were printed in the body of the bond as sureties, would also sign it. These two signed on the agreement that, if the others named as sureties did not sign, the bond should be "invalid." None of the others named as sureties signed, and the agent, without the knowledge of the signers, erased the other sureties' names by drawing an ink line across them, and delivered the bond in this condition to her principal. *Held*, that the signers, by afterwards taking security to protect themselves from loss, (being then ignorant of the fact that the other sureties had not signed,) did not thereby ratify the delivery of the bond.—*Henry & Coatsworth Co. v. Bond*, (Neb.) 55 N. W. 643.

Whether party principal or surety.

3. Plaintiff company, in leasing a theater building owned by it to another company, obtained a covenant from defendant, a stockholder in the latter company, that, if the leasing of the building caused the occupant of a saloon therein to give up his lease, defendant would assume it. The saloon keeper did give up his lease, and the jury found that it was a result of the change in the control of the building. *Held*, that the covenant by defendant was an original undertaking, and he was not merely a surety for the saloon keeper.—*Academy of Music Co. v. Davidson*, (Wis.) 55 N. W. 172.

Release of surety.

4. In an action on a note, defendant answered that he signed as surety, as plaintiffs knew; that later, without defendant's knowledge or consent, the principal agreed with all his creditors to sell out his stock, to be divided among them, whereupon said principal was to be discharged on the note; that said stock was sold, and the proceeds applied on the principal's debt to plaintiffs, and said note was extended, without defendant's knowledge or consent, to his damage; that, after he signed the note, plaintiffs, without his knowledge, agreed with the principal that, in consideration of an extension of all his debts, he would give a mortgage on his stock, which he did, and the time was extended, without defendant's knowledge; and that plaintiffs at the same time agreed to give up to the principal the note in suit. *Held*, a good defense.—*Lee v. Brueggmann*, (Neb.) 55 N. W. 1053.

5. Sureties in a bond of indemnity against liens arising in the construction of a building, under a contract between the owner and contractor, are released by a departure from the terms of the contract in respect to plan and materials.—*Erickson v. Brandt*, (Minn.) 55 N. W. 62.

Remedy against surety.

6. By the terms of an indemnity bond the measure and limit of the surety's liability was the deficiency, if any, after a foreclosure and sale of the premises under a second mortgage. *Held*, that such foreclosure sale was a condition precedent to a right of recovery against the surety, notwithstanding the fact of a subsequent sale under the first mortgage for a sum equal to the market value of the property. *Mitchell, J., dissenting.*—*Beebe v. Canney*, (Minn.) 55 N. W. 61.

Priorities.

Between mortgages, see "Mortgages," 2, 3.
Of mechanic's lien, see "Mechanics' Liens," 14-18.

Privilege.

See "Constitutional Law," 2.

Privileged Communications.

See "Libel and Slander," 2; "Witness," 2.

Probable Cause.

See "False Imprisonment," 2-4; "Malicious Prosecution," 2.

Process.

See "Writs and Notice of Suits."

Promissory Notes.

See "Negotiable Instruments."

Proper Parties.

See "Parties," 5, 6.

Prosecuting Attorneys.

Arguments, see "Criminal Law," 8-10.

Prosecution.

See "Criminal Law," "Malicious Prosecution."

PROSTITUTION.

Soliciting female to enter house of ill fame.

1. A person who solicits a female, who is at the time a prostitute, and inmate of a house
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of ill fame, to become an inmate of another such house, is not guilty of a violation of 3 How. St. § 9286, which provides for the punishment of any person who solicits a female to enter such house for the purpose of "becoming" a prostitute.—*People v. Cook*, (Mich.) 55 N. W. 980.

2. In a prosecution for the violation of 3 How. St. § 9286, which provides that every keeper of a house of ill fame, resorted to for the purpose of prostitution, and every person who shall solicit a female to enter such house for the purpose of becoming a prostitute, is guilty of a felony, etc., it need not appear that the house which the female was solicited to enter had already been resorted to for the purpose of prostitution, but it is sufficient if the house was prepared and intended for such purpose.—*People v. Cook*, (Mich.) 55 N. W. 980.

Protest.

See "Negotiable Instruments," 8-12.

Publication.

Of notice of lis pendens, see "Lis Pendens."
Service by, see "Writs and Notice of Suits," 4-6.

Public Improvements.

See "Municipal Corporations," 34-42.

PUBLIC LANDS.

Swamp lands, see "Counties," 3.

Soldier's additional homestead—Assignment.

1. The right to enter additional lands sufficient to make up, with the original homestead entry, 160 acres, given by Rev. St. U. S. § 2306, an act to provide homesteads for soldiers and sailors, is assignable.—*Whitesides v. Rutan*, (Minn.) 55 N. W. 540.

Donations in aid of railroad.

2. Act Cong. June 3, 1856, granted certain lands to the state of Michigan to aid in constructing the Amboy, Lansing & Traverse Bay Railroad; and the state, by Sess. Laws 1857, No. 120, accepted the grant. Both acts provided for the selection of the land by an agent to be appointed by the governor, the state act providing for his nomination by the railroad company, but neither act required the selection or report of the agent to be preserved or filed. *Held*, that the list of lands filed with the land commissioner by the company, and approved by the secretary of the interior, would be presumed to have been properly selected, after it had been certified as true and correct by the land commissioner, and the secretary of the interior had approved it as such.—*Tillotson v. Webber*, (Mich.) 55 N. W. 837.

Titles from states—Lease of mineral lands.

8. Laws 1889, c. 22, authorizing leases of mineral lands by the state, is applicable only to lands "belonging to the state," and is not applicable to public lands of the United States which have been merely selected by the state to supply deficiencies in the school lands, but which selections have not been approved by the secretary of the interior; hence applications for leases filed with the state land commissioner prior to the approval of the selection are premature, and of no legal effect, though recognized as valid by the commissioner.—*Baker v. Jamison*, (Minn.) 55 N. W. 749.

4. Priority of application for a lease of state mineral lands gives no superior right as between several applicants; but an unauthorized preference by the land commissioner of one of two applicants in the granting of a lease, without affording opportunity for competitive bidding by them, does not justify an

adjudication charging the applicant to whom the lease is granted as a trustee of the same for the disappointed applicant.—*Baker v. Jamison*, (Minn.) 55 N. W. 749.

5. Nor can such a lease be set aside at the suit of the disappointed applicant when the state is not a party to the action.—*Baker v. Jamison*, (Minn.) 55 N. W. 749.

6. Where, after the state acquires such lands, the applicant directs the attention of the commissioner to the premature application on file, and the officer then recognizes it as a valid application, it becomes such.—*Baker v. Jamison*, (Minn.) 55 N. W. 749.

7. When the state land commissioner is guilty of official misconduct by being a party in interest in a favored application for a lease of mineral land, so as to avoid the application, a lease granted thereon might be adjudged to be held in trust for the other applicant.—*Baker v. Jamison*, (Minn.) 55 N. W. 749.

School lands.

8. The state, by merely selecting lands of the United States to supply deficiencies of school lands arising from pre-emption, does not acquire a title to such lands,—not, at least, until such selection is approved by the secretary of the interior; and perhaps not until the lands are certified to the state.—*Baker v. Jamison*, (Minn.) 55 N. W. 749.

9. An action will not lie against a sheriff to recover property seized under execution issued on a judgment rendered by a court of general jurisdiction, where it is not alleged that the court rendering the judgment did not have jurisdiction of the subject-matter, that the execution was defective, or that the property was exempt, but merely that the judgment is void, because there never was any original notice, either actual or constructive, served on plaintiff, and the same was rendered wholly without jurisdiction.—*Morgan v. Zenor*, (Iowa,) 55 N. W. 197.

Patents—Land on meandered lake.

10. A patent issued for a fractional lot appearing by the plat of the United States survey to be bounded on a meandered lake is not void so far as it purports to convey the land under the water, though it was error in the survey to treat the tract covered by water as lake to be meandered, instead of land to be surveyed. Conceding the patent to that extent to be voidable, it can be avoided only by the United States, in a proceeding to which the patentee is a party.—*Lamprey v. Mead*, (Minn.) 55 N. W. 1132.

Land office—Power to cancel warrants.

11. Act Cong. June 23, 1860, authorizes the interior department to cancel bounty warrants which have been lost or destroyed; and where the petition in an action alleges, and the answer does not deny, that a certain warrant was canceled after its location, and the answer alleges that it had been lost, it will be presumed that it was regularly canceled, even conceding that the department would have no power to cancel a warrant unless lost or destroyed; and it is immaterial that the answer also alleges that before the warrant was lost it had been assigned in blank, and that it was found by some one, and purchased in good faith by the person who located it, where such allegations are not proven.—*Durham v. Hussmann*, (Iowa,) 55 N. W. 11.

12. In the absence of any showing to the contrary, it will be presumed that due notice was given to all persons interested before the warrant was canceled.—*Durham v. Hussmann*, (Iowa,) 55 N. W. 11.

13. Where, before a patent is issued, the commissioner of the general land office is advised that the assignment of a bounty warrant which has been located by the assignee is a forgery, he has power to suspend further proceedings under the entry, and, upon a proper showing, to vacate it.—*Durham v. Hussmann*, (Iowa,) 55 N. W. 11.

14. Where neither the person who located the warrant, nor any one claiming under it, complains of the action of the land office in canceling the warrant, complaint cannot be made by one claiming under a sale of the land for taxes after such cancellation, which it is contended was illegal because the title was in the United States.—*Durham v. Hussmann*, (Iowa,) 55 N. W. 11.

15. The fact that it was the practice of the land department to afford a person, where he had located a warrant in good faith, and the location had been set aside for some defect in the warrant, an opportunity to purchase the land, or to locate another warrant, cannot help the title of one who purchased under a sale for taxes which were levied on the land after the location was so set aside, if the person who had made the location did not exercise the privilege.—*Durham v. Hussmann*, (Iowa,) 55 N. W. 11.

Qualification.

Of voters, see "Elections and Voters," 1, 2.

QUIETING TITLE.

When lies.

1. In an action to determine adverse claims to land, defendant asserted title by a conveyance from plaintiff to her (plaintiff's) mother, and by devise from the mother to defendant. In reply, plaintiff alleged that, simultaneously with the delivery of the deed to her mother, the latter executed and delivered to her a written instrument, not under seal, referring to the deed, and declaring it to be the intention of the parties that the grantee hold a life estate only; and plaintiff alleged that this was in accordance with the agreement of the parties, and that the two instruments were parts of the same transaction, and were intended to carry into effect the agreement to convey a life estate. The conveyance was made on considerations of filial duty. *Held*, that the two instruments should be read together, to ascertain the intention of the parties; and, it being apparent that the parties intended the unsealed writing to qualify the deed, equity would afford relief, though the instrument was not so executed as to affect in law the absolute terms of the deed.—*Scotfield v. Quinn*, (Minn.) 55 N. W. 745.

Pleading—Bill.

2. Where plaintiff claims, first, under his patent title, second, that defendant's tax title is void, and, third, that, if the tax title should be held good, he has acquired the interest through another deed, he does not thereby recognize the validity of the tax title, and is not estopped from questioning the validity of any of the subsequent conveyances thereunder.—*Pitts v. Seavey*, (Iowa,) 55 N. W. 480.

—Answer.

3. In an action to quiet title by the holder of the legal title, in possession, against the holder of void tax deeds, defendant cannot set up as a defense that plaintiff derived title from his father's grantee, to whom the land was conveyed in fraud of plaintiff's and his father's creditors.—*Loose v. Navarre*, (Mich.) 55 N. W. 435.

Evidence.

4. In an action to determine adverse claims to platted city property, the question was whether a portion of a lot was east of a certain avenue, or wholly in the street. The deed under which plaintiff claimed quietclaimed to him the lot in question "as now platted." The plat showed that no part of the lot lay east of the avenue. *Held*, that a judgment for defendant was proper.—*Kilgore v. Friabee*, (Minn.) 55 N. W. 63.

Decree.

5. Where an action is brought to quiet title in a parcel of land as an entirety, a prayer for general relief will not authorize a partition of the land on the theory that plaintiffs are the owners of an undivided interest in the land under a different title than that set up in the petition.—*Stivers v. Gardner*, (Iowa,) 55 N. W. 516.

Quorum.

What constitutes, see "Corporations," 2.

QUO WARRANTO.**When lies—Against officers.**

1. Code Civil Proc. § 704, permits information to be filed against any person unlawfully holding or exercising any public office or franchise, or when any persons act as a corporation without being authorized by law. *Held*, that information in the nature of a quo warranto against the persons assuming to be officers was the proper means of ousting them, and declaring void the village incorporation, which they had obtained by fraud.—*State v. Uridil*, (Neb.) 55 N. W. 1072.

—Against corporation.

2. The mere fact that a street-railway company, whose existence is limited to 30 years, is operating under a grant of the "exclusive and perpetual" right to construct and operate its road in a street, is not an exercise of "any franchise or privilege not conferred upon it by law," within the meaning of How. St. § 8046, subd. 5, providing that in such case an information in the nature of a quo warranto may be filed by the attorney general against any corporate body.—*Attorney General v. Detroit Suburban Ry. Co.*, (Mich.) 55 N. W. 562.

RAILROAD COMPANIES.

See, also, "Carriers;" "Eminent Domain;" "Horse and Street Railroads;" "Master and Servant."

Donation of public land, see "Public Lands," 2.

Frightening horses, see "Negligence," 4-6.

Overflowing land, damages, see "Damages," 20, 21.

Road in street, damages, see "Eminent Domain," 2, 3.

Regulation by states.

1. An order of the railroad commissioners that defendant railroad company transfer cars delivered to it by another company, from its station to another point, as a switching service and at switching rates, will not be enforced where such point is beyond the yard limits, and the service rendered is on the main line, and is done under orders, as in case of trains, and not under the direction of the yard master.—*State v. Chicago, M. & St. P. Ry. Co.*, (Iowa,) 55 N. W. 331.

Construction of road—Highway crossings.

2. In enforcing against a railway company the duty imposed by its charter, to construct, when necessary, on a street or highway crossing its tracks, a bridge or viaduct, with the approaches, the court has power to establish the grade therefor, though that involves a change in the grade previously established for the street or highway. *Mitchell, J.*, dissenting. *State v. Minneapolis & St. L. Ry. Co.*, 39 N. W. 153, 39 Minn. 219, and *Robinson v. Railway Co.*, 51 N. W. 384, 43 Minn. 445, followed.—*Parker v. Truesdale*, (Minn.) 55 N. W. 901.

—Overflowing land.

3. In an action against a railroad company for damages caused by an overflow, where it appeared that an embankment constructed

as a roadbed through plaintiff's land by defendant's predecessor in title prevented the surface water from passing off, and that plaintiff's land would have been relieved from the overflow if a ditch which was constructed along the embankment for the purpose of carrying off the water had been kept open, a verdict for plaintiff was justified.—*Willits v. Chicago, B. & K. C. Ry. Co.*, (Iowa,) 55 N. W. 813.

4. In an action against a railroad company for damages caused by an overflow, the fact that defendant acquired the railroad after the embankment was constructed, and that it was not served with express notice of the nuisance, and demand for its abatement, was no defense to the action, where defendant's officers were fully informed of the injury, as they had no right to presume that this damage had been paid for in the original procurement of the right of way.—*Willits v. Chicago, B. & K. C. Ry. Co.*, (Iowa,) 55 N. W. 813.

Taxation.

5. A railroad company organized for and doing the business of an ordinary railroad, transporting passengers and freight, is subject to taxation only in accordance with Gen. Laws 1887, c. 11, by the rule of percentage on its gross earnings, though the road is only three miles in extent, and the cars are operated by a steam locomotive over two miles of the road, and by cable up a steep ascent of one mile.—*State v. District Court of Eleventh Judicial District*, (Minn.) 55 N. W. 816.

Liability for negligence—Statutory signals at crossing.

6. The provision of Rev. St. § 1809, that the whistle shall be blown 80 rods before a locomotive crosses a street, does not make it unlawful for it to stop and move in the direction from which it has come, at a distance of less than 80 rods from the street it has last crossed.—*Cahoon v. Chicago & N. W. Ry. Co.*, (Wis.) 55 N. W. 900.

Injury to child stealing ride.

7. In an action against a street-railroad company for alleged negligence causing the death of plaintiff's infant child, who had gotten on defendant's car without permission, plaintiff testified that he had warned the child to keep off the cars, and had punished him on finding that he did get on the cars, but there was no evidence that plaintiff explained the danger to the child. *Held*, that it was error to charge that, if "the boy knew what his father meant when he warned him not to go on the cars, then he was not entitled to the same degree of care as an innocent child who goes upon a car without warning."—*McCahill v. Detroit City Railway*, (Mich.) 55 N. W. 608.

Accidents at crossings.

8. There was no error in an instruction that the blowing of the whistle and the ringing of the bell a mile away from the crossing would give no warning to those about to cross the track, when taken in connection with the further instruction that the object of the signal was to warn people about to cross, and hence should be given within such a reasonable distance as would fairly notify those about to cross, and when also considered in connection with defendant's request to charge that the law required a railroad company to sound its warning signals not less than 40 rods from the crossing, but it did not require them to be sounded within 40 rods of the crossing, nor within any other distance except a "reasonable distance."—*Van Auker v. Chicago & W. M. Ry. Co.*, (Mich.) 55 N. W. 971.

9. In an action against a railroad company for personal injuries, it appeared that plaintiff, a boy 11 years old, was sent by his parents on an errand which obliged him to cross defendant's tracks at a certain street; that he found the crossing obstructed by defendant's freight train, but, seeing the engineer looking at him, undertook to climb over the bumpers between

two freight cars, as was the custom when the crossing was so obstructed; that, while one foot was on the connecting link, the train was suddenly and negligently backed, and the foot crushed. *Held*, that the evidence justified a verdict for plaintiff.—*Henderson v. St. Paul & D. Ry. Co.*, (Minn.) 55 N. W. 53.

10. In an action for injuries received at a railroad crossing, the train hands and W., living in the vicinity, testified that the signal for the crossing was given at a whistling post 1,000 feet away, and all but the conductor and W. testified that the bell was sounded from that time until the crossing was reached. Two witnesses who were near the crossing testified that they did not hear the bell, and five others testified that they heard the danger signal at the crossing, which signal was admitted to have been given, but no other. Two witnesses testified as to contradictory statements made by W. as to the time the signals were given. *Held*, that a verdict for plaintiff was justified by the evidence.—*Hughes v. Chicago, St. P. & K. C. Ry. Co.*, (Iowa,) 55 N. W. 470.

11. In an action against a railroad company, where it appeared that defendant had taken up the planking at a crossing without placing anything there to give warning; that deceased was found lying across one of the rails at the crossing; that the ground was covered with snow, and his horses stood near by, attached to a sleigh loaded with wood, a forward bob being upon one of the rails, and a singletree broken,—the jury was justified in finding that while deceased was attempting to cross the track the runners of his sleigh struck the rails, which projected a few inches above the snow, with such violence as to throw deceased from the sleigh.—*Lillstrom v. Northern Pac. R. Co.*, (Minn.) 55 N. W. 624.

12. In an action against a railroad company for injuries received at a crossing, it appeared that plaintiff, when about to cross in his wagon, waited till an approaching train had passed, and, then proceeding, was struck by a single car following the train at a distance of about 150 feet, which had been cut off to make a flying switch, and which he had not seen. The conductor was on the car, and saw plaintiff, but, thinking that the car would pass before plaintiff reached the crossing, did not stop it by applying the brakes, though by so doing he could have avoided the accident. He testified that he shouted to plaintiff, and a brakeman at a neighboring switch testified that he did the same. *Held*, that a verdict for plaintiff was proper.—*Ward v. Chicago, St. P., M. & O. Ry. Co.*, (Wis.) 55 N. W. 771.

13. In an action against a railroad company for injuries received at a crossing, it was proper to charge that making a "flying switch" over a street crossing "was a most dangerous proceeding," and that "it was the duty of the defendant to have taken special pains to give the public full warning of the danger," and that it was the duty of the conductor to see persons approaching the crossings, unaware of the danger, and give them sufficient warning.—*Ward v. Chicago, St. P., M. & O. Ry. Co.*, (Wis.) 55 N. W. 771.

Accidents at crossings — Contributory negligence.

14. In an action against a railroad company for injuries received at a highway crossing, it appeared that the railroad crossed the highway obliquely; that the night was very dark; that the horses approached the crossing on a walk, but no stop was made to listen before crossing. The driver and those in the carriage testified that they looked and listened, but saw and heard nothing. The engine was moving backward, and the evidence was conflicting as to whether there was any light at the rear end of the cab. *Held*, that the question of plaintiff's contributory negligence was for the jury. *Grant and Long, JJ.*, dissenting.—*Van Auker v. Chicago & W. M. Ry. Co.*, (Mich.) 55 N. W. 971.

15. A woman approaching a railroad crossing, in a lumber wagon drawn, at a walk, by two horses, when on high ground, about 100 feet from the track, looked for approaching trains, but, without stopping, she drove on, not hearing or seeing the train until the horses were on the track. From the hill to a wood pile 13 or 20 feet from the track, and parallel with it, the track, in one direction, could not be seen, but from there to the track there was an unobstructed view in either direction. *Held*, that it was contributory negligence for her not to stop, and listen and look, before going on the track, and it was proper to direct a verdict for defendant. *Montgomery and McGrath, JJ.*, dissenting.—*Shufelt v. Flint & P. M. R. Co.*, (Mich.) 55 N. W. 1013.

16. In an action for injuries received at a railroad crossing it appeared that the road approached the track at an angle of 25 degrees, over a hill about 25 feet higher than the crossing, and 300 feet from it, and that just before reaching the crossing the road passed through a cut. The track approached the crossing on a descending grade, and, when near it, passed through a cut, the bank of which was 9 feet higher than the crossing at a point 108 feet away. From the top of the hill the track could be seen for quite a distance, but, according to plaintiff's evidence, there were several points between that and the crossing from which the track could not be seen. The engineer, fireman, and brakemen on the train which caused the accident corroborated plaintiff in this by testifying that they could not see plaintiff from the time when he was on the hill till he was within 10 or 15 feet of the crossing. *Held*, that a finding that plaintiff could not see the train while between 20 and 40 feet from the crossing was justified by the evidence.—*Hughes v. Chicago, St. P. & K. C. Ry. Co.*, (Iowa,) 55 N. W. 470.

17. Where one attempts to cross a railroad track at a street crossing without looking to see if there is danger, when there is nothing to prevent his looking, and by so doing he must have discovered the danger in time to avert it, he is guilty of negligence.—*Magner v. Truesdale*, (Minn.) 55 N. W. 607.

18. In an action against a railroad company for personal injuries, it appeared that plaintiff, a boy 11 years old, was injured while attempting to cross a street between the cars of an obstructing freight train; that he had been warned by his parents of the danger, but had safely made the crossing before, and, seeing the engineer looking at him, supposed he could cross in safety at this time. *Held*, that the question of plaintiff's contributory negligence was for the jury.—*Henderson v. St. Paul & D. Ry. Co.*, (Minn.) 55 N. W. 53.

Killing and injuring animals.

19. Rev. St. § 1810, as amended by Laws 1881, c. 193, (Saub. & B. Ann. St. § 1810.) provides that every railroad corporation shall erect on both sides of its road (depot grounds excepted) sufficient fences, with openings and suitable farm crossings, and construct cattle guards at all highway crossings, and connect their fences therewith. *Held*, that a railroad company is bound to fence its track where it is crossed by a private logging railroad, by providing suitable guards or means to prevent domestic animals from going on its right of way, and is liable for damages to stock caused by its failure to do so.—*Caldon v. Chicago, St. P., M. & O. Ry. Co.*, (Wis.) 55 N. W. 955.

20. In an action against a railroad company for cattle killed by a train it appeared that a storm had, the night before, washed out part of the fence between the field where the cattle were and defendant's track, and that the cattle, having escaped, were driven back by defendant's section men, who left without repairing the fence. Between 5 and 6 o'clock on the same day the cattle were again found on the track by the section men and foreman, who drove them into an adjoining field, not belong-

ing to plaintiff. The fence of this field had also been washed out by the storm, and plaintiff's cattle escaped therefrom, and were struck by a train. The storm had seriously damaged defendant's track, roadbed, and bridges for 50 miles; had broken the telegraph line, and destroyed 12 miles of fence. But the fence at that particular point could have been repaired by the section men in an hour. *Held*, that a finding that defendant did not exert ordinary diligence in repairing the fence was justified by the evidence.—*Peet v. Chicago, M. & St. P. Ry. Co.*, (Iowa,) 55 N. W. 508.

21. In an action for killing a horse at a public crossing, plaintiff's theory was that the horse's hoof caught in the space between the plank in the crossing and the rail, and he was unable to extricate himself. It was conceded that the horse was carried some distance from the crossing, and that one of his hoofs was pulled off, and wedged between the plank and the rail. The train man testified that the horse was not caught, but there was other evidence that he stopped when he came upon the track, and "had plenty of time to get across." *Held*, that a finding that the horse was caught would not be disturbed.—*Criss v. Chicago & N. W. Ry. Co.*, (Iowa,) 55 N. W. 523.

22. In an action for killing a horse at a public crossing, plaintiff's theory was that the horse's hoof caught in the space between the plank in the crossing and the rail, and he was unable to extricate himself. Some of the witnesses testified that the opening was from 2½ to 3½ inches wide, and others that it was as wide as the breadth of their hands. A civil engineer testified that 3 inches was the limit in width of a properly constructed crossing. *Held*, that a finding that defendant was negligent in permitting the crossing to remain in that condition would not be disturbed.—*Criss v. Chicago & N. W. Ry. Co.*, (Iowa,) 55 N. W. 523.

Fires.

23. In an action against a railroad company for damages by fire caused by sparks from a locomotive, it appeared that the fire was set outside the right of way, while a strong wind was blowing, and while the locomotive was working at its full capacity to get a train over a grade. *Held*, that a verdict for plaintiff was justified, since the jury could either find that the locomotive was defective, or that it was negligently operated.—*Hockstedler v. Dubuque & S. C. Ry. Co.*, (Iowa,) 55 N. W. 74.

24. Evidence that a locomotive which caused a fire also set two other fires about the same time is not, as a matter of law, necessarily overcome by evidence that the engine was properly equipped with the best known appliances for arresting sparks, was in good condition, and managed by a competent and trustworthy engineer; but such evidence raises a conflict as to the negligence of defendant, which must be determined by the jury, and the court cannot say that the jury, from such evidence, were not justified in finding that the engine was not in good condition.—*Smith v. Chicago, M. & St. P. Ry. Co.*, (S. D.) 55 N. W. 717.

25. In an action against a railroad company for damages by fire, in determining defendant's negligence the jury should consider the condition of the locomotive at the time of the fire "and other times, in so far as established by the evidence," where there was evidence that it was in perfect condition for some time before and after the fire.—*Hockstedler v. Dubuque & S. C. Ry. Co.*, (Iowa,) 55 N. W. 74.

Pleading.

26. An allegation in a complaint that a locomotive "was so negligently, carelessly, and insufficiently constructed and equipped" as to emit large sparks of fire properly includes the "condition" of such engine for arresting sparks, whether its defects in that respect result from its original construction, or from defects caused

by use, wear, or injury to its parts.—*Smith v. Chicago, M. & St. P. Ry. Co.*, (S. D.) 55 N. W. 717.

Evidence.

27. An instruction that evidence of the setting of two other fires about the same time by the same locomotive that caused the destruction of plaintiff's property is admissible, as tending to prove negligence on the part of defendant, is proper, and the fact that this is repeated in an instruction given on the request of plaintiff's counsel does not constitute error.—*Smith v. Chicago, M. & St. P. Ry. Co.*, (S. D.) 55 N. W. 717.

Crimes against—Indictment for obstructions.

28. An indictment alleging that defendant did "feloniously place an obstruction, to wit, five piles of large, heavy, oak, railway cross-ties, all of which piles being within a distance of seven hundred feet upon the track of a certain railway," sufficiently charges defendant with placing an obstruction upon a railroad track.—*State v. Kluseman*, (Minn.) 55 N. W. 741.

RAPE.

Conviction of less offense than charged, see "Indictment and Information," 4, 5.

Evidence of other crimes, see "Criminal Law," 13, 14.

Female under age of consent.

1. The word "child," as used in 8 How. Ann. St. § 9094, which provides that if any person shall unlawfully and carnally know and abuse any female child under the age of 14 years he shall be punished, includes every female child under the age of 14 years, whether or not she has reached a state of puberty.—*People v. Miller*, (Mich.) 55 N. W. 675.

Consent.

2. Where the prosecuting witness is under the age of consent, it is unnecessary to prove want of consent.—*Proper v. State*, (Wis.) 55 N. W. 1035.

Aider and abettor.

3. An instruction that if defendant aided and assisted A. to commit rape upon the prosecuting witness he was guilty of the offense was proper.—*People v. Flynn*, (Mich.) 55 N. W. 834.

Indictment and information.

4. Rev. St. § 4381, provides that "any person who shall ravish and carnally know any female of the age of 12 years or more by force and against her will" shall be guilty of a felony. Section 4069 provides that an information for a statutory offense shall be good, after verdict, if it describes the offense in words of substantially the same meaning as those of the statute. *Held*, that an information which charged that defendant did with force and arms "violently" and "feloniously" make an assault on such female, and did "violently" and against her will "feloniously" ravish and carnally know her, sufficiently stated the statutory offense.—*State v. Mueller*, (Wis.) 55 N. W. 165.

Evidence.

5. Evidence of statements made by the child as to the treatment she had received from defendant are admissible, not to prove the substantive charge, but to show that she had reported what she claimed had occurred.—*Proper v. State*, (Wis.) 55 N. W. 1035.

6. Evidence of a physician that the condition of the child's person, as shown by an examination made by him, could be caused by the acts testified to by the child, is admissible.—*Proper v. State*, (Wis.) 55 N. W. 1035.

7. The theory of the prosecution, on a trial for rape, was that the prosecuting witness and B., another girl, attended a dance together,

where they met defendant and one A.; that the girls permitted them to take them home in a buggy, but instead of going home they started in another direction; that E. jumped from the buggy and escaped, but the prosecuting witness was forcibly taken to a secluded spot, and subjected to sexual intercourse by both young men, under threats of personal violence. The defense was that the intercourse was voluntary. *Held*, that evidence of E. that the last she knew of the prosecuting witness after jumping from the buggy she was "hollering" for help was admissible as part of the res gestae.—*People v. Flynn*, (Mich.) 55 N. W. 834.

8. And for the same reason, her testimony as to which way the buggy went after she got out was admissible.—*People v. Flynn*, (Mich.) 55 N. W. 834.

9. There was no error in allowing E. to testify that after jumping from the buggy she was at police headquarters a while, where nothing was said as to what happened there.—*People v. Flynn*, (Mich.) 55 N. W. 834.

10. It was proper to ask the prosecuting witness whether she believed they intended to kill her.—*People v. Flynn*, (Mich.) 55 N. W. 834.

11. It was also proper to ask her whether the intercourse caused her pain.—*People v. Flynn*, (Mich.) 55 N. W. 834.

12. The question whether she had experienced her monthly period was proper in connection with her statement that she found blood on her drawers after the intercourse.—*People v. Flynn*, (Mich.) 55 N. W. 834.

13. It was also proper to ask her why she did not struggle against defendant.—*People v. Flynn*, (Mich.) 55 N. W. 834.

14. The statements of the prosecuting witness as to her consent to the intercourse, and as to the force used, made at the jail, in the presence of defendant, was admissible.—*People v. Flynn*, (Mich.) 55 N. W. 834.

Sufficiency of evidence—Assault with intent.

15. Prosecutrix testified that she was walking along a railroad track with defendant to her home; that, when about halfway, at his solicitation they cut across the fields; that he then made improper proposals to her; that she walked away; that on his calling to her to come back, that he had something to say to her, she finally came; that he renewed his proposals, which she rejected, and finally, in a bantering way, gave him to understand that he was not strong enough; that he then seized her, and had improper relations with her against her wishes, she at the time endeavoring to free herself. It appeared that he had made such proposals to her before. She did not make known the occurrence until her delicate condition made it necessary. *Held*, that the evidence would not support a conviction of assault with intent to commit rape.—*State v. Chapman*, (Iowa,) 55 N. W. 489.

— **Corroboration of prosecutrix.**

16. Testimony that defendant and prosecutrix were seen walking together along a railroad track is not sufficient corroboration in prosecution for assault to commit rape.—*State v. Chapman*, (Iowa,) 55 N. W. 489.

Ratification.

Of acts of officers, see "Corporations," 6.

Real-Estate Agents.

See "Factors and Brokers."

RECEIVERS.

Appointment.

1. A receiver should not be appointed on account of unpaid taxes, where a reversioner,

occupying jointly with a life tenant, mortgages the reversion, agreeing with the mortgagee to pay the taxes.—*Jenks v. Horton*, (Mich.) 55 N. W. 372.

2. The rule of the district court relative to hearing orders to show cause on affidavits, only, has no application on a petition for the appointment of a receiver, under the insolvency laws; and the court, on hearing such a petition, should proceed on the merits, receiving such evidence as may be pertinent, without regard to the manner in which the alleged insolvent has been brought into court.—*Prouty v. Hallowell*, (Minn.) 55 N. W. 623.

Powers—Foreign receiver.

3. A receiver appointed by a court of record of another state to take charge of the business of a partnership there, and to wind up its affairs, may take charge of the property of the firm in this state; but in such case there is a mere substitution of parties, and the receiver has no greater rights in the property than the parties themselves.—*Ogden v. Warren*, (Neb.) 55 N. W. 221.

Actions against—Leave of court.

4. Trover may be brought against a receiver, as such, without leave of court.—*Kenney v. Ranney*, (Mich.) 55 N. W. 982.

RECEIVING STOLEN GOODS.

Indictment.

1. An indictment for receiving stolen goods alleged that defendant, at a specified time and place, "22 pairs of striped pants, not all of same color, but all striped, each pair of the value of \$5, and all of the value of \$110, of the goods and chattels and property of [naming the owner,] then and there being lately feloniously stolen, did receive, buy, and conceal, with the intent to defraud the said [owner] thereof, and he, the said [defendant,] then and there well knowing said goods and chattels and property to have been feloniously stolen as aforesaid, contrary," etc. *Held*, that the indictment is neither ambiguous nor uncertain.—*State v. Smith*, (Iowa,) 55 N. W. 16.

Sufficiency of evidence.

2. Under an indictment for receiving goods, knowing them to have been stolen, it is not necessary to show a guilty intent, further than the fact that defendant knew the goods were stolen.—*State v. Smith*, (Iowa,) 55 N. W. 16.

Reception.

Of evidence, see "Criminal Law," "Trial," 4-11.

Reconvention.

See "Set-Off and Counterclaim."

Recording.

Assignment, see "Assignment," 3.
Chattel mortgage, see "Chattel Mortgages," 11-16.

Records.

Estoppel by, see "Estoppel," 6, 7.
On appeal, see "Appeal," 20-39.

Redemption.

From execution sale, see "Execution," 7-9.
— foreclosure sale, see "Mortgages," 16-18.
— tax sale, see "Taxation," 13.

Reformation.

Of contracts, see "Equity," 2-6.

Rehearing.

See "Appeal," 40.

RELEASE AND DISCHARGE.

See, also, "Merger;" "Payment."

Of guarantors, see "Guaranty," 3, 4.

Of indorser, see "Negotiable Instruments," 4.

Of lien, see "Mechanics' Liens," 21, 22.

Of mortgage, see "Chattel Mortgages," 19.

Of surety, see "Principal and Surety," 4, 5.

Effect.

A bill alleged that defendant's ancestor, F., had taken in his own name, as security for a loan, certain property bought by complainant, and that a land contract was executed by which F. agreed to sell the property to plaintiff on payment of the sum loaned. *Held*, that such arrangement, if made, was merged in a lease of the property made by F. to complainant, and in a release by which the latter, in terms, released F. "from all the conditions and covenants on his part to be performed, contained" in said contract, and the intention of which release was stated to be "to cancel and annul the said contract wholly."—*Loth v. Friederick*, (Mich.) 55 N. W. 369.

RELIGIOUS SOCIETIES.**Power of majority of members.**

1. Where the conditions under which a religious society is formed and its property acquired require a particular doctrine and discipline, a minority of the members may insist upon carrying out the purposes for which the society was organized, and a majority will not be permitted to divert the common property to other uses, or to use it for the support and maintenance of doctrines or discipline at variance with its original constitution.—*Schradi v. Dornfeld*, (Minn.) 55 N. W. 49.

2. Changes in the form of worship of a religious society, or in the administration of the ordinances, not affecting the substance of doctrine or discipline, may be made by a majority of the members entitled to vote, in the absence of any other lawfully established rule.—*Schradi v. Dornfeld*, (Minn.) 55 N. W. 49.

3. The constitution of a religious society required adherence to the creed of the Evangelical Lutheran Church and the Augsburg Confession, and that the church should be connected with an orthodox synod, and recognized the synod of Buffalo, with which it became connected, to be an orthodox synod. *Held*, that a determination by a majority of the congregation to change its synodical connection to another orthodox synod, and the confession of private members, in anticipation of the communion, was not in violation of the constitution of the society, or contrary to Lutheran standards or established usages.—*Schradi v. Dornfeld*, (Minn.) 55 N. W. 49.

Rights in property on division of society.

4. Where the property of a religious society is lawfully applied to the common purpose to which it was devoted, and none of the members are prevented from participation in its use and enjoyment for such purpose, the court will not, at the instance of a seceding faction of the congregation, order a partition and division of the property.—*Schradi v. Dornfeld*, (Minn.) 55 N. W. 49.

Remainder.

See "Wills," 6-8.

Removal.

Of city officers, see "Municipal Corporations," 5-7.

REMOVAL OF CAUSES.**Separable controversy.**

Action was brought by a number of taxpayers against the treasurer, auditor, and

supervisors of a county to restrain payment of certain bonds, said to have been unlawfully issued. *Held*, that there was no separable controversy with relation to the county officials and bondholders, such as would authorize removal to the federal court on the ground of non-residence of one of the bondholders. *Anderson v. Bowers*, 40 F. 708, followed.—*Anderson v. Orient Fire Ins. Co.*, (Iowa,) 55 N. W. 348.

Rent.

See "Landlord and Tenant."

Repeal.

Of statute, see "Statutes," 14-16.

REPLEVIN.

Of property seized for taxes, see "Taxation," 6, 7.

When action lies.

1. Replevin in the detinet will lie against an assignee for the benefit of creditors, who has invoiced and sold, as assets of his assignor, lumber ordered before the assignment, but refused on delivery, as not of the quality ordered, where the assignee was notified as to its true ownership, and warned not to invoice it.—*Starke v. Paine*, (Wis.) 55 N. W. 185.

2. Plaintiff mortgaged his stock in trade, credits, and accounts to secure certain creditors, and, after the latter had been in possession for some time, making sales and collecting accounts, he brought replevin for some of the property mortgaged, on the ground that the mortgagees had collected sufficient to pay their claims and expenses, which they denied. *Held* that, as plaintiff had no legal title, replevin would not lie, and he must proceed by a bill to redeem and for an accounting.—*Holtzhausen v. Parkhill*, (Wis.) 55 N. W. 892.

— Demand.

3. Where a defendant lawfully in the possession of property denies the title and right of possession of the owners, no demand is necessary, in order to maintain replevin.—*Ogden v. Warren*, (Neb.) 55 N. W. 221.

4. Where defendants, in replevin, obtained possession of the goods by fraud, no demand by plaintiff is necessary.—*Reeder v. Moore*, (Mich.) 55 N. W. 436.

5. Where, in replevin, the evidence is conflicting as to whether or not the possession of one of defendants is collusive, it cannot be said as a matter of law that there must be proof of demand by plaintiff.—*Reeder v. Moore*, (Mich.) 55 N. W. 436.

Pleading.

6. In replevin to recover mortgaged chattels, a petition is not objectionable because it fails to allege that a note which the mortgage was given to secure was due, when it states the date the note matured, which was prior to bringing the suit.—*Rodgers v. Graham*, (Neb.) 55 N. W. 243.

— Variance between declaration and writ.

7. It is too late after plea to take advantage of a variance between the description in the writ and in the declaration of property replevied.—*Reeder v. Moore*, (Mich.) 55 N. W. 436.

Verdict and findings.

8. In claim and delivery, where each party claims the right of possession by virtue of absolute ownership, a verdict that plaintiff is entitled to the possession of the property, and which fixes its value, will support a judgment for plaintiff for possession of the property, or its value as found by the jury, and is not open to the objection that it does not pass on the question of ownership.—*Branstetter v. Morgan*, (N. D.) 55 N. W. 758.

Right to costs.

9. When defendant in replevin contests the case in the trial court on an affirmative claim of ownership and right of possession of the property in himself, no proof of demand and refusal is necessary to entitle plaintiff to recover costs, if the verdict be in his favor.—*Rodgers v. Graham*, (Neb.) 55 N. W. 243.

Rescission.

Of contract, see "Contracts," 21, 22.
— in equity, see "Equity," 7-17.
Of sale, see "Vendor and Purchaser," 5-7.

Residence.

As determining venue, see "Venue in Civil Cases," 1, 2.

Resignation.

Of officer, see "Office and Officer," 2.

Res Judicata.

See "Judgment," 7-18.
Effect of discharge of assignor, see "Assignment for Benefit of Creditors," 7.
On new trial after reversal, see "Appeal," 90-93.
Review on second appeal, see "Appeal," 46.

Resolutions.

Of city council, see "Municipal Corporations," 2, 3.

Restitution.

Of premises, see "Forcible Entry and Detainer," 4.

Resulting Trusts.

See "Trusts," 1, 2.

Retrospective Laws.

See "Constitutional Law," 3.

Return.

Of officer, see "Writs and Notice of Suits," 9.

Revenue.

See "Taxation."

Reversion.

See "Estates."

Review.

On appeal, see "Appeal," 41-84; "Criminal Law."
On certiorari, see "Certiorari," 2.

Riparian Rights.

Right to accretion, see "Adverse Possession," 10.

Risk, Assumption of.

See "Master and Servant," 15.

Roads.

See "Highways."

Royalty.

Mining leases, see "Mines and Mining," 3-6.

SALE.

See, also, "Vendor and Purchaser."

Evidence of custom to explain, see "Custom and Usage," 2.

Measure of damages for breach of contract, see "Damages," 2-15.

Mortgage or conditional sale, see "Chattel Mortgages," 1.

Of foreclosure, see "Mortgages," 11-18.

Of logs, see "Logs and Logging," 1.

Of patent right, see "Patents for Inventions."

Proposition made to agent, acceptance by principal, see "Contracts," 1, 2.

The contract.

1. A contract of sale is valid though no time of payment is agreed on, the law implying payment on delivery.—*Lamont v. La Fevre*, (Mich.) 55 N. W. 687.

2. Where defendants contracted to sell "steel bow sockets for the year 1888" on stipulated terms, it was a question for the jury whether defendants were bound to fill orders for sockets to be sent direct to purchasers from the original buyers, such purchasers and the original buyers living in different cities and states.—*Shadbolt & Boyd Iron Co. v. Topliff*, (Wis.) 55 N. W. 854.

— When title passes.

3. In an action of trover and conversion there was evidence that plaintiffs sold the chattels in issue to C.; that he orally agreed to retransfer them to plaintiffs; and that they agreed to take them in payment of their account against him. There was no evidence of a delivery or a payment for them, or that anything was said indicating that the parties understood it to be a completed retransfer of the property. *Held*, that the evidence failed to show a resale from C. to plaintiffs in praesenti.—*Hart v. Kessler*, (Minn.) 55 N. W. 742.

4. Plaintiff, after receiving a telegram from defendant in answer to his dispatch asking the price of a horse, wired that he would take it if perfectly sound, in reply to which defendant wrote him that the horse was sound, and if he took him it must be closed and the horse taken away without delay. Plaintiff then wrote a third person to call on defendant, pay him the money, and procure the horse, which he did some time thereafter. *Held*, that the contract was not completed till the horse was delivered to such person.—*Deyo v. Vaughn*, (Mich.) 55 N. W. 991.

5. Where the purchaser of a threshing machine at the time of the delivery of the machine gives the seller his note for the purchase price, and mortgages on the machine and other property to secure the note, containing covenants to pay the deficiency, should there be one, on their foreclosure, such sale is an absolute one, with a mortgage back, even though the note provided that the title was to remain in the seller until payment was made.—*C. Aultman & Co. v. Silha*, (Wis.) 55 N. W. 711.

— Delivery and acceptance.

6. Where, in an action for the price of a wheel, the issue is whether or not defendant accepted the wheel after taking it on trial, evidence is competent, as showing an acceptance, that defendant gave plaintiff a note for the price, and several times renewed such note, even though, on giving the first note, defendant reserved the question of acceptance for further consideration.—*Valley Iron-Works Manufg Co. v. Grand Rapids Flouring-Mill Co.*, (Wis.) 55 N. W. 693.

7. Where, in an action for the price of a wheel, the issue is whether or not defendant accepted the wheel, it is competent to show, by a witness to whom defendant had sold the wheel, the manner in which it operated after his purchase of it, it appearing that all material conditions remained substantially as they did at the time of purchase.—*Valley Iron-*

Works Manuf'g Co. v. Grand Rapids Flouring-Mill Co., (Wis.) 55 N. W. 693.

— **Delivery as to third persons.**

8. Code, § 1923, providing that no sale or mortgage of personal property, "where the vendor retains actual possession thereof," is valid, against existing creditors or subsequent purchasers without notice, unless conveyance thereof is recorded in the county where the holder of the property resides, does not apply to an assignment of notes held by another as agent of the assignor.—*Dorsey v. Banks*, (Iowa,) 55 N. W. 574.

— **Warranty.**

9. A contract for the sale of a harvesting machine recited that it was "warranted to be well made, of good material, and durable with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to" the company, etc. *Held*, that the warranty was not all embraced in the provision that it was "well made, of good material, and durable with proper care," but the contract warranted the machine to "work well."—*McCormick Harvesting Mach. Co. v. Brower*, (Iowa,) 55 N. W. 537.

10. Where one contracts to supply a commodity in which he deals, to be applied to a particular purpose, of which he is aware, the buyer necessarily trusts to his judgment, and there is an implied warranty that the commodity shall be reasonably fit for the purpose to which it is to be applied.—*Omaha Coal, Coke & Lime Co. v. Fay*, (Neb.) 55 N. W. 211.

11. Where plaintiff purchases a bull of defendants for breeding purposes, to the knowledge of defendants, paying full price therefor, and there was no misrepresentation or fraud, and no express warranty, and the bull proves impotent, no warranty can be implied.—*McQuaid v. Ross*, (Wis.) 55 N. W. 705.

12. In the sale of a special kind of a known general material for a particular purpose, the circumstances implying a warranty that the material is reasonably fit for the purpose intended, if the special material sold requires a different manner of treatment in applying it to the purpose intended than that required in the use of the same general material of other kinds, and this different requirement is known to the seller and not to the buyer, the warranty is broken if the buyer treats the material as similar material is customarily treated, and if, so used, it does not prove reasonably fit for the purpose.—*Omaha Coal, Coke & Lime Co. v. Fay*, (Neb.) 55 N. W. 211.

— **Breach and notice.**

13. Where an agent, after receiving notice that a machine sold by him will not work well, proposes to telegraph for an expert, and have him at the purchaser's house the next morning, to put the machine in order, and the latter will not permit him to do so, the purchaser fails to comply with a provision of the contract to allow the sellers time to put the machine in repair, and cannot rescind the sale.—*McCormick Harvesting Mach. Co. v. Brower*, (Iowa,) 55 N. W. 537.

14. Where the warranty of a machine provides that "if, upon one day's trial," it does not work well, "the purchaser shall give immediate notice to" the sellers or their agent, a notice that it did not work well, given by the purchaser to the agent after about one-half day's trial, is premature, and not a compliance with the contract.—*McCormick Harvesting Mach. Co. v. Brower*, (Iowa,) 55 N. W. 537.

15. Where the warranty of a machine provides that "if, upon one day's trial," it does not work well, "the purchaser shall give immediate notice to" the sellers or their agent, and such notice is given to the agent two days after the expiration of the one day's trial, and the latter requests him not to return it, and says he will see the company, and thinks it will take it away, it is for the jury to deter-

mine whether there is a compliance with the provision of the contract requiring such notice to be given "immediately."—*McCormick Harvesting Mach. Co. v. Brower*, (Iowa,) 55 N. W. 537.

16. Where a warranty on a sale of a harvester provided that the buyer give written notice of defects, not only to the agent from whom the machine was received, but also to the company at its headquarters, he cannot recover the purchase price on breach of warranty when he returned the machine without having given notice at headquarters of the defects.—*Fahey v. Esterley Harvesting Mach. Co.*, (N. D.) 55 N. W. 580.

— **Return of property on breach.**

17. Where the purchaser of a binder was induced to keep the machine by repeated promises and attempts to fix the same, made by the agent who sold it, a return of the binder immediately after discovering that it would not work as warranted, after the last attempt to fix it, is in time to entitle purchaser to claim that he has rescinded the contract for breach of warranty promptly, within the provisions of Comp. Laws, § 3591.—*Canham v. Plano Manuf'g Co.*, (N. D.) 55 N. W. 583.

— **Pleading waiver of return.**

18. In an action for the price of a harvesting machine, the answer alleged a breach of the contract of warranty; that defendant gave notice to plaintiffs' agent, and offered to return the machine, but the latter requested him to retain it where it was, and he would have it boxed and shipped to plaintiffs; and that the agent then agreed to receive the machine on defendant's premises. *Held* that, though the waiver was not clearly pleaded, the facts stated were sufficient to justify the admission of evidence of waiver.—*McCormick Harvesting Mach. Co. v. Brower*, (Iowa,) 55 N. W. 537.

— **Evidence of breach.**

19. Where, in an action for the price of a harvesting machine, defendant alleges a breach of warranty in that the machine does not "work well," it is error to permit defendant to ask a witness how the draught of such machine compared with the draught of other similar machines, and, if it was greater, how much greater, and to permit the witness to answer that he "could not say just how much greater, but it was very hard; it would just kill a team,"—since such evidence does not aid in determining the issue as to whether or not the machine "worked well."—*McCormick Harvesting Mach. Co. v. Brower*, (Iowa,) 55 N. W. 537.

— **Burden of proof.**

20. A contract for the sale of a harvesting machine recited that it was "warranted to be well made, of good material, and durable with proper care. If, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to" the company, etc. In an action by the sellers for the price of such machine, defendant alleged a breach of the contract of warranty in that the machine did not work well. *Held*, that it was not incumbent on defendant to prove wherein the machine was not well made.—*McCormick Harvesting Mach. Co. v. Brower*, (Iowa,) 55 N. W. 537.

— **Damages for breach.**

21. Defendant sold plaintiffs lime for plastering a building, under an implied warranty that the lime was fit for the purpose intended, but the work proved defective, on account of quality of the lime. Plaintiffs papered the side walls, replastered the ceilings with another material, and sued the defendant for the cost of such papering and replastering. *Held*, that they could not recover unless it was shown that the defect in the lime could not, by a person accustomed to use such materials, have been discovered before it was used, and also that the mode of remedying the defect was reasonable and did not exceed in cost that of replas-

tering with the same kind of material, of good quality.—*Omaha Coal, Coke & Lime Co. v. Fay*, (Neb.) 55 N. W. 211.

Action for price—Instructions.

22. In an action for the price of goods, the issue being whether they were sold on the credit of defendants or of one C., defendants requested a charge that the fact that the goods were charged on plaintiffs' books to C. was evidence that the credit was given to him, and not to defendants. *Held*, that it was not error to modify the request by instructing the jury that this fact was a circumstance in the case, which should be considered by them in determining to whom the credit was given.—*Culver v. Scott & Wolston Lumber Co.*, (Minn.) 55 N. W. 552.

Buyer's rights and remedies—On rescission.

23. Where a purchaser of property gives his note therefor, and afterwards rescinds the sale on the ground of breach of warranty, he may recover the amount of the note and interest, without first paying the same, when the note was negotiated before maturity to an innocent purchaser for value; but the judgment should provide that on the return of the note to plaintiff, and his release from all liability thereon growing out of any judgment which might have been recovered thereon, and on payment of costs within a specified time, the judgment be satisfied.—*Fahey v. Esterley Harvesting Mach. Co.*, (N. D.) 55 N. W. 580; *Canham v. Plano Manufg Co.*, Id. 583.

Bona fide purchasers.

24. In replevin it appeared that S. purchased the goods in question of plaintiffs by samples on credit, withholding the fact that he was insolvent; that, before the goods were examined with reference to acceptance, they were transferred to R., a creditor, with S.'s entire stock to be credited on account, S., at the time, stating to R. that plaintiffs' goods ought to be sent back; that R. immediately transferred the stock to defendant; that defendant paid nothing on account of the transfer to him until after the replevin was brought. *Held* that, as against plaintiffs, defendant was not a bona fide purchaser.—*Schloss v. Feltus*, (Mich.) 55 N. W. 1010.

— Purchaser from bailee.

25. The custody of personal property by a bailee is consistent with the title of the owner, and, in the absence of conduct on the part of the owner operating to mislead a purchaser, the latter can acquire no title through a fraudulent sale by the bailee.—*Hodderly v. Backus*, (Minn.) 55 N. W. 116.

SCHOOLS AND SCHOOL DISTRICTS.

School lands, see "Public Lands," 8, 9.

Incorporation—Presumption.

1. Gen. St. 1878, c. 36, § 1, providing that "every school district shall be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of one year," establishes a conclusive presumption of law in the nature of a statute of limitation, and does not merely shift the burden of proof to the party impeaching the incorporation.—*State v. School Dist. No. 152*, (Minn.) 55 N. W. 1122.

2. The term "organized" relates to the establishment or formation of the district, and not merely to the action of the voters in electing school officers.—*State v. School Dist. No. 152*, (Minn.) 55 N. W. 1122.

School township—Liability for debts of districts.

3. A school township organized under Laws 1883, c. 44, becomes, immediately upon such

organization, liable for the debts of a district, and the schoolhouse and furniture become the property of the township. And this liability is complete, and does not depend upon the settlement of equities between several districts included in the new school township, under Laws 1883, c. 44, §§ 136-138.—*Coler v. Dwight School Tp. of Richland County*, (N. D.) 55 N. W. 587.

Officers—Power to issue bonds.

4. Laws Dak. T. 1883, c. 45, § 1, provides that school township bonds shall be signed by the township clerk and director. Section 2 provides that all moneys received from the sale of bonds shall be paid to the treasurer. *Held*, that the treasurer has no authority as such to issue or sell bonds.—*Prairie School Tp. v. Haseleu*, (N. D.) 55 N. W. 938.

5. Laws Dak. T. 1883, c. 44, § 35, requires the treasurer of a school township to give a bond for the discharge of the duties of the office, and for the rendition of a true account of money which shall come into his hands as treasurer. *Held*, that where bonds were issued and sold by the school board, consisting of the treasurer, clerk, and director, but the proceeds thereof were not paid to the treasurer, the sureties on his bond, drawn substantially in the terms of the statute, were not liable for the loss of the funds.—*Prairie School Tp. v. Haseleu*, (N. D.) 55 N. W. 938.

Contracts.

6. Where the officers of a district, without authority, borrow and expend money to complete a schoolhouse, no liability attaches to the district therefor, notwithstanding the benefit received, since it has not had opportunity to reject it.—*Young v. Board of Education of Independent School Dist. No. 47*, (Minn.) 55 N. W. 1112.

— Personal liability of director.

7. Defendant, as a sub school director, entered into a written contract with plaintiff, employing her as a teacher. She having no certificate, the contract was not approved by the president of the board, and she was notified to stop teaching. *Held*, that defendant was not individually liable for her services.—*Slone v. Berlin*, (Iowa,) 55 N. W. 341.

Authority to employ teachers.

8. Code, § 1757, which requires teachers to be employed by the subdirector of the district township, does not apply to independent school districts organized from parts of district townships, and having neither subdistricts nor subdirectors, but such authority rests with the board of directors, which is the only official power in an independent district. *Athearn v. District, 33 Iowa, 105*, explained.—*Independent Dist. of Eden, No. 2, v. Rhodes*, (Iowa,) 55 N. W. 524.

9. After a teacher has been employed by the board of directors of an independent district, and the contract has been signed by himself and the secretary, the president of the board cannot refuse to approve and file the contract because the teacher is not of good moral character, and not personally fit to teach, since these are matters for the board to determine. *Place v. Township, 9 N. W. 917*, 56 Iowa, 573, limited.—*Independent Dist. of Eden, No. 2, v. Rhodes*, (Iowa,) 55 N. W. 524.

Seal.

Imports consideration, see "Covenants," 2.

Secondary Evidence.

See "Evidence," 1-3.

Security.

See "Pledge," 1.

SEDUCTION.**Criminal prosecution—Evidence.**

1. On a trial for seduction the prosecutrix was sufficiently corroborated where there was testimony by several witnesses that the parties kept company, and acted as lovers usually do, and that defendant had said that they were to be married.—*State v. Baldoser, (Iowa,) 55 N. W. 97.*

2. It was error to exclude evidence that the prosecutrix had visited the witness with another man, who introduced the prosecutrix as his wife, during the time defendant was going with her.—*State v. Baldoser, (Iowa,) 55 N. W. 97.*

Sentence.

See "Criminal Law," 15-17.

Separable Controversy.

See "Removal of Causes."

Servant.

See "Master and Servant."

Service.

Of papers, see "Practice in Civil Cases," 9.

Of process, see "Writs and Notice of Suits," 2-8.

SET-OFF AND COUNTER-CLAIM.

Of depositor against claim due insolvent bank, see "Banks and Banking," 7.

Of judgment, attorney's lien, see "Attorney and Client," 7.

When allowable.

1. Under Gen. St. c. 66, § 27, providing that a judgment may be assigned without prejudice to any set-off or other defense existing at the time of the assignment or before notice thereof, and under chapter 66, § 97, providing that, in an action arising on contract, any other cause of action, arising also on contract, and existing at the commencement of the action, may be set off, a judgment debtor, in an action on the judgment by an assignee thereof, may set off notes made by the assignor, the original judgment creditor, which represent a debt owing to the judgment debtor at the time of the assignment.—*Way v. Colyer, (Minn.) 55 N. W. 744.*

2. An action by a river improvement company to recover tolls on logs driven on the river improved, being in its nature an action of assumpsit, damages sustained during the years the services were rendered, by the owner of the logs, in consequence of the company's failure to perform its obligations under its charter, and running booms entirely across the river, and closing booms, and delaying the running of logs by such owner, are a proper subject of counterclaim.—*Black River Imp. Co. v. Holway, (Wis.) 55 N. W. 418.*

3. Under Laws 1880, c. 46, § 113, which provides that defendant, in an action by an administrator, may set off any claim he has against deceased, it is not error to allow such set-off after a final order of distribution has been made in the probate court.—*Gerdtsen v. Cockrell, (Minn.) 55 N. W. 58.*

4. In proceedings to obtain possession of the assets of an insolvent bank, wrongfully withheld by one of its former officers, the latter cannot require the allowance of a set-off or counterclaim as a condition precedent to the delivery of the possession of such assets.—*State v. Commercial & Sav. Bank, (Neb.) 55 N. W. 640.*

5. In an action by an agent to recover for trees sold for a firm which he represented,

defendant may show that some of the trees ordered never came from the firm, and were worthless, and can set off the amount paid for the same as money paid without consideration.—*Bronson v. Herbert, (Mich.) 55 N. W. 359.*

6. In an action on two promissory notes it appeared that plaintiffs and one A., being partners, sold to defendant a cornsheller under an agreement that a firm, into which A. was about to go as a partner, would give defendant sufficient work shelling corn to pay the notes given for the price of the sheller. Defendant gave three notes, to the order of plaintiffs. The partnership between plaintiffs and A. shortly afterwards dissolved. At the proper time, defendant applied for the work of shelling corn, but the same was refused him, and, at the request of A., he returned the sheller to him. *Held*, that the sale of the sheller and the agreement to furnish corn to shell constituted an entire contract, and that the fact that a firm other than the sellers was to provide the work would not preclude defendant from setting up, as a defense to the notes, the failure to furnish such work.—*J. P. Ketcham & Bro. v. Larkin, (Iowa,) 55 N. W. 472.*

7. In an action for the price of goods sold and delivered, and for services rendered, a cause of action in defendant against plaintiffs for wrongful attachment of defendant's property on the claims set forth in the present action, and also for neglect and misuse of the property, is not a counterclaim.—*Jones v. Swank, (Minn.) 55 N. W. 1120.*

Settlement.

See "Payment;" "Release and Discharge."

Between partners, see "Partnership," 9-14.

Sham Answer.

See "Pleading," 8.

SHERIFFS AND CONSTABLES.

Mandamus to, see "Mandamus," 2.

Liabilities—Unlawful seizure and sale.

1. In attachment a garnishee, who held property of the debtor under a chattel mortgage, was ordered to hold enough to satisfy the attachment creditor. After the garnishment, another creditor levied on a part of the property in the garnishee's hands, and, on satisfaction of the garnishee's mortgage, sold the remainder under the second attachment, neither the officer nor his attorney having notice of the garnishment. *Held*, that the officer under the second attachment was not liable to the attaching creditor under the first attachment for the amount of his claim, when he took no part in the sale, and the proceeds thereof did not come into his hands.—*Downing v. Overmire, (Neb.) 55 N. W. 890.*

2. Where a sufficient inventory has been filed to entitle an execution debtor to the exemptions provided in Code Civil Proc. §§ 522, 523, it is the duty of the officer to proceed further only as provided in said sections, and if, without compliance with the statute, he sells the property held by him under his execution, he is liable on his bond for the value of the property sold, at least to the limit of \$500.—*Kriesel v. Eddy, (Neb.) 55 N. W. 224.*

— Failure to pay over money.

3. Money paid to a sheriff to redeem land from a foreclosure sale is money received "by virtue of his office," within the meaning of Gen. St. 1878, c. 8, § 198, as amended in 1885, which provides for a summary proceeding against the sheriff on failure to pay over such money.—*Williams v. Grundysen, (Minn.) 55 N. W. 557.*

Slander.

See "Libel and Slander."

Societies.

See "Corporations;" "Religious Societies."

SPECIFIC PERFORMANCE.

Pleading.

In a complaint for specific performance of a contract to convey land, an allegation of a demand for a deed is unnecessary where defendants utterly deny the contract.—*Pawlak v. Granowski*, (Minn.) 55 N. W. 831.

STATE LEGISLATURE.

Legislative powers, see "Constitutional Law," 1.

Powers of extra session.

The enabling act for the admission of North Dakota into the Union provided that state officers might be elected at the same term that the proposed constitution was submitted, and that they should exercise all the functions of their offices when North Dakota was admitted as a state, and that the legislature might assemble and elect two United States senators. The schedule to the constitution required the governor, as soon as qualified, to issue a proclamation convening the legislature within a specified time for the purpose of electing such senators. Const. § 41, provides that the term of office of members of the legislature shall begin on the first Tuesday in January following their election, and section 53 provides that the legislative assembly shall meet on the first Tuesday after the first Monday in January in the year next following the election of the members. The governor, by proclamation, convened the legislature at a time prior to the first Tuesday in January next succeeding the election, for the purpose of electing United States senators, and "for the performance of such other legislative duties as may be in accordance with the provisions of said constitution." *Held*, that the legislature so convened had full power to enact general statutes.—*State v. Barnes*, (N. D.) 55 N. W. 883.

Statement.

For lien, see "Mechanics' Liens," 10-12.

STATES AND STATE OFFICERS.

Lease of mineral lands, see "Public Lands," 3-7.

Boundaries of state.

1. A railroad bridge across the Mississippi river between Iowa and Illinois was constructed across a channel of the river to an island, and thence across another channel to the other shore. The island was permanent, and not a shifting sandbar. The channel on the west side of the island, between it and the Iowa shore, was the main channel, having greater depth of water, and being the one generally used for navigation. *Held*, that such channel was the boundary line between the states for the purposes of taxation. *State of Iowa v. State of Illinois*, 13 S. Ct. 239, followed.—*Chicago & N. W. Ry. Co. v. City of Clinton*, (Iowa,) 55 N. W. 462.

Officers—Impeachment for misdemeanor in office.

2. An asylum board, following a practice which had prevailed for years, required all vouchers for supplies to be certified by the superintendent as correct, and, when so certified, they were compared with the contracts on file, and, if found to correspond, and the extensions correct, were allowed. Through negligence or credulity, a superintendent was induced to certify to accounts largely in excess of supplies actually received, and which were allowed by the board, relying in good faith on

such certificates. The board at that time were required to disburse large sums, which necessitated the examination of hundreds of vouchers monthly. *Held*, that the failure of the board to detect and prevent the fraud was not per se a misdemeanor in office, especially when the legislature, after investigation, had appropriated money to pay part of the fraudulent bills. *Maxwell, C. J., dissenting*.—*State v. Hastings*, (Neb.) 55 N. W. 774.

3. It is not a misdemeanor in office to advance money appropriated by the legislature to a disbursing agent to enable him to procure material and labor for the erection of a public building of the state when such advancement is not prohibited by law, especially when the state is protected by a sufficient bond. *Maxwell, C. J., dissenting*.—*State v. Hastings*, (Neb.) 55 N. W. 774.

4. The board of public lands and buildings used \$500 of money appropriated for building a cell house at the penitentiary to defray the cost of visiting prisons in neighboring states, to gain information with regard to the best cells, the improved systems of ventilation, and other methods of bettering the sanitary condition of the prison. It appeared that they were advised by the attorney general that this sum could be lawfully used for the purpose named. *Held*, that if they in good faith construed the law as authorizing them to apply the money to the object named, and actually used it for such purpose, they were not guilty of a misdemeanor in office, though the court might construe the law differently. *Maxwell, C. J., dissenting*.—*State v. Hastings*, (Neb.) 55 N. W. 774.

5. The legislature appropriated a sum for building a cell house at the penitentiary by days' work, and the board of public lands and buildings, having the building in charge, selected for superintendent of construction one who was known to be the agent and manager of the lessee of the prison labor, with the understanding that he would have to contract with his principal, in behalf of the state, for the necessary labor. It did not appear that the labor could have been procured for less than the rate obtained, and it was admitted to have been worth more than that amount. *Held*, that the action of the board in making the selection of superintendent, while highly censurable, as unbusinesslike, and wanting in that intelligent regard for the interest of the public which the state exacts from its officers, was at most an error of judgment, not amounting to a misdemeanor in office. *Maxwell, C. J., dissenting*.—*State v. Hastings*, (Neb.) 55 N. W. 774.

6. Through the negligence, incompetency, or fraud of a superintendent of construction, the state was charged for building material greatly in excess of the reasonable or market value thereof, and for labor which had not been performed. The bills rendered therefor were presented in the usual course of business, and allowed by the board of public lands and buildings, acting in good faith, and in the belief that such claims were legitimate charges against the state. *Held*, that the allowance of such claims was not a misdemeanor in office, for which the members of the board were impeachable. *Maxwell, C. J., dissenting*.—*State v. Hastings*, (Neb.) 55 N. W. 774.

7. Whether an act of official delinquency consists in violating some positive provision of the constitution or statute, which is denounced as a crime or misdemeanor, or in a mere neglect of duty, willfully done, with a corrupt intention, or with a negligence so gross, and a disregard of duty so flagrant, as to warrant the inference that it was willful and corrupt, it is a "misdemeanor in office," within the meaning of Const. art. 5, § 5, providing for impeachment.—*State v. Hastings*, (Neb.) 55 N. W. 774.

8. Where the board of public lands and buildings paid out of the money appropriated

to build a cell house the expenses of the warden and chaplain of the penitentiary as delegates to the National Prison Congress, the act, while unauthorized, and rendering the members of the board liable to the state for the money so expended, does not warrant their impeachment, if done in good faith, and without the possibility of personal gain.—*State v. Hastings*, (Neb.) 55 N. W. 774.

9. Where an act results from a mere error of judgment or omission of duty, without the element of fraud, or where the alleged negligence is attributable to a misconception of duty, rather than a willful disregard thereof, it is not impeachable, though it may be highly prejudicial to the interests of the state. *Maxwell, C. J., dissenting.*—*State v. Hastings*, (Neb.) 55 N. W. 774.

10. The functions of the board of public lands and buildings in passing upon claims against the state, and in the selection of subordinate officers and agents, authorized by law, are in their nature quasi judicial. *Maxwell, C. J., dissenting.*—*State v. Hastings*, (Neb.) 55 N. W. 774.

11. Impeachment is, with respect to the production of evidence and quantum of proof required to warrant a conviction, essentially a criminal prosecution, and consequently the guilt of the accused must be established beyond a reasonable doubt.—*State v. Hastings*, (Neb.) 55 N. W. 774.

12. Where the legislature has adopted articles of impeachment, which have been filed in the supreme court, no amendment thereof, in any matter of substance, can be made by the managers appointed by the legislature to prosecute the impeachment; but the authority to adopt and present other or amended articles of impeachment rests alone with the joint convention of the two houses of the legislature.—*State v. Leese*, (Neb.) 55 N. W. 798.

13. Under Const. 1875, art. 3, § 14, the supreme court did not succeed to any of the political functions of the senate as a court of impeachment under the prior constitution; and the provision for the trial of impeachments before this court was intended to insure a strictly judicial investigation in such cases according to judicial methods.—*State v. Hastings*, (Neb.) 55 N. W. 774.

—Impeaching ex-official.

14. The legislature has no authority to prefer articles of impeachment against ex-officials.—*State v. Hill*, (Neb.) 55 N. W. 794; *Same v. Benton*, Id.

Fiscal management—Appropriations.

15. Act approved April 8, 1893, provides that money be appropriated "for the payment of the current expenses of the state government, for the years ending March 31st, 1894, and March 31st, 1895, and to pay miscellaneous items of indebtedness owing by the state of Nebraska: Miscellaneous: Arrest and return of fugitives from justice; rewards offered; officers' fees and mileage for conveying prisoners to and from the penitentiary," etc. *Held*, that no money was appropriated for the payment of indebtedness classified under "Miscellaneous," unless incurred after March 31, 1893.—*State v. Moore*, (Neb.) 55 N. W. 635.

—Approval of vouchers.

16. Const. art. 9, § 9, requiring all claims on the state treasury to be examined and adjusted by the auditor, and approved by the secretary of state, before any warrant be drawn, applies to specific, as well as general, appropriations, and the original vouchers approved by the commissioner general must be presented to the auditor, to satisfy him that the claim is covered by an appropriation.—*State v. Moore*, (Neb.) 55 N. W. 1078.

Statute of Frauds.

See "Frauds, Statute of."

Statute of Limitations.

See "Limitation of Actions."

STATUTES.

Constitutionality, see "Constitutional Law."
Legislative powers, see "Constitutional Law," 1.
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Retrospective laws, see "Constitutional Law," 3.

Enactment and approval.

1. The governor is a part of the lawmaking power of the state, and every bill, before it becomes a law, even if passed by a two-thirds majority of each house, must be approved by him, or be passed over his veto, or remain in his hands more than five days, Sundays excepted.—*State v. Crounse*, (Neb.) 55 N. W. 246.

2. A general appropriation bill, appropriating an amount for a specific purpose, was duly passed by both houses of the legislature, but by the error of an enrolling clerk such amount was afterwards increased, and the bill, in this condition, was presented to and signed by the presiding officers of the two houses, and approved by the governor. *Held*, that the bill appropriated only the original amount for the purpose specified therein.—*State v. Moore*, (Neb.) 55 N. W. 299.

3. Where a bill has been attested by the signatures of the presiding officers of both branches of the legislature, and signed by the governor, it will not be declared invalid because of irregularities in the proceedings of the legislature, no express provision of the constitution being violated.—*State v. Moore*, (Neb.) 55 N. W. 299.

Amendment.

4. Act approved March 29, 1889, entitled "An act to amend sections thirty (30) and one hundred and seventy-six (176) of chapter twenty-three (23) of the Compiled Statutes of the State of Nebraska of 1887, entitled 'Decedents,' and to repeal said original sections, and to repeal sections' 1 to 29, inclusive, 'of chapter twenty-three (23) of the Compiled Statutes of Nebraska of 1887, and section seventeen (17) of chapter thirty-six (36) of the Compiled Statutes of Nebraska of 1887, entitled 'Homesteads,' and all acts and parts of acts in conflict herewith," is void because it is, in effect, amendatory of other acts which it does not contain.—*Trumble v. Trumble*, (Neb.) 55 N. W. 869.

5. Under the title of an act to amend a certain other act, no amendment can be enacted which is not germane to the subject of the original act.—*Trumble v. Trumble*, (Neb.) 55 N. W. 869.

Subject and title of acts.

6. Act approved March 29, 1889, entitled "An act to amend sections thirty (30) and one hundred and seventy-six (176) of chapter twenty-three (23) of the Compiled Statutes of the State of Nebraska of 1887, entitled 'Decedents,' and to repeal said original sections, and to repeal sections' 1 to 29, inclusive, 'of chapter twenty-three (23) of the Compiled Statutes of Nebraska of 1887, and section seventeen (17) of chapter thirty-six (36) of the Compiled Statutes of Nebraska of 1887, entitled 'Homesteads,' and all acts and parts of acts in conflict herewith," is void because its object is not expressed in its title.—*Trumble v. Trumble*, (Neb.) 55 N. W. 869.

7. A general appropriation bill, entitled "A bill for an act making an appropriation for the current expenses of the state government for the year * * * and to pay miscellaneous items of indebtedness owing by the state," etc., is sufficient to include an item for impeachment proceedings.—*State v. Moore*, (Neb.) 55 N. W. 289.

8. An act (Sp. Laws 1887, c. 80) entitled "An act to amend chapter one hundred and

thirty-five (185) of the Special Laws of Minnesota of one thousand, eight hundred and eighty-three, (1883)" violated Const. art. 4, § 27, by not expressing the subject of the attempted legislation in the title of the act.—*Kedzie v. Town of Ewington*, (Minn.) 55 N. W. 864; *Farson v. Town of South Brook*, Id.

9. Under Const. art. 4, § 27, which provides that no law shall embrace more than one subject, which shall be expressed in its title, Sp. Laws 1887, c. 8, entitled "An act to amend and consolidate the charter of the city of Mankato, state of Minnesota," Sp. Laws 1889, c. 12, entitled "An act entitled 'An act to amend the charter of the city of Mankato in the state of Minnesota,'" and Sp. Laws 1891, c. 47, entitled "An act to amend chapter 8 of the Special Laws of the State of Minnesota for the year 1887, entitled 'An act to amend and consolidate the charter of the city of Mankato, state of Minnesota,'" as amended by chapter 12 of the Special Laws of the State of Minnesota for the year 1889, entitled "An act entitled an act to amend the charter of the city of Mankato, in the state of Minnesota," as far as they relate to the term of office of judges of the municipal court for the city of Mankato, are unconstitutional and void.—*State v. Porter*, (Minn.) 55 N. W. 134.

10. Sess. Laws 1889, c. 57, providing for the descent of real property and the distribution of personal property of intestates, the disposition of homesteads of intestates, the barring of an insane wife's interest in the lands of her husband by deed of her guardian, and the abolition of the estates of dower and curtesy, is void, for containing more than one subject.—*Trumble v. Trumble*, (Neb.) 55 N. W. 809.

11. The title of Act Feb. 15, 1877, "To regulate the purchase of supplies for the public institutions and executive offices of the state," is not broad enough to include or repeal by implication the provision of Act Feb. 13, 1877, for audit by the board of public lands and buildings of accounts for money disbursed for the support of the state institutions. *Norval, J.*, dissenting, on the ground that the court had no jurisdiction of the case as brought.—*In re Board of Purchase and Supplies for State Institutions*, (Neb.) 55 N. W. 1092.

Retrospective effect.

12. The charter of Duluth, as amended by Sess. Laws 1891, c. 55, § 15, authorizing any person who has not been paid for labor performed or for materials furnished to a contractor or with the city to bring a suit in his own name against the contractor and his bondsmen, is retrospective, and applies to actions brought to enforce a liability on a bond executed under the original charter, which required an action to be brought in the name of the city.—*Tompkins v. Forrestal*, (Minn.) 55 N. W. 813.

Effect of partial invalidity.

13. When portions of an act are invalid because not within the title, the whole act must be declared void, if it is apparent from an inspection of the act itself that the invalid portions formed an inducement to its passage.—*Trumble v. Trumble*, (Neb.) 55 N. W. 809.

Repeal.

14. Laws 1889, c. 110, § 27, providing for the appointment of a "secretary" for the commissioners of railroads, and fixing his salary at \$1,500 a year, is repealed by Laws 1890, cc. 9, 10, providing for a "clerk" for the railroad commissioners, and fixing his salary at \$1,000 a year, and repealing all previous laws in conflict with it.—*State v. Currie*, (N. D.) 55 N. W. 858.

By constitution.

15. Comp. Laws, §§ 5345, 5346, providing that the remedies heretofore reached by writ of quo warranto, and proceedings by information in the nature of quo warranto, might be obtained by civil action, as provided in those sections, being intended merely to give an additional remedy, were not repealed by the adoption of the state constitution, (article 5, § 14,) giving the courts jurisdiction to issue writs of quo warranto.—*Wright v. Lee*, (S. D.) 55 N. W. 931.

16. Comp. Laws, §§ 3881-3910, making telegraph companies common carriers of messages, are not repealed by Const. art. 17, § 11, imposing upon the legislature the duty of providing reasonable regulations for such companies.—*Kirby v. Western Union Tel. Co.*, (S. D.) 55 N. W. 759.

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SUBROGATION.

When allowed.

1. Where one takes a mortgage and loans money on condition that it be used to pay certain lienable claims against the premises, and to obtain releases, and there is no evidence of an intention on the part of the mortgagee to keep the claims alive, he is not entitled to be subrogated to the rights of the holders of such claims as have been paid.—*Wentworth v. Tubbs*, (Minn.) 55 N. W. 543.

2. A testator devised to his son a mortgage which the latter had given deceased, on condition that the son pay his sister a certain sum. Under an agreement between them, the sister gave the executor a receipt "in full for the legacy" to her on the surrender by him of a note against her husband, of about the same amount; and the son gave the executor his note for the amount that he was to pay his sister, plus a small sum owing by him to the payee, and the latter agreed to cancel the mortgage to deceased. *Held*, that the executor, on failure of the son to pay his note, was not entitled to foreclose the mortgage to enforce payment of the legacy to the sister. *Grant, J., dissenting.*—*De Coo v. Woodworth*, (Mich.) 55 N. W. 987.

—To rights of vendor.

3. Where a person lends to a vendee money with which to pay for the land, and as security therefor obtains from the vendor a conveyance of the title to the land, he is subrogated to the rights of the vendor.—*Heyderstadt v. Whalen*, (Minn.) 55 N. W. 958.

—To rights of lessor.

4. Plaintiff company, in leasing a theater building owned by it to another company, obtained a covenant from defendant, a stockholder in the latter company, that, if the leasing of the building caused the occupant of a saloon therein to give up his lease, defendant would assume it. The saloon keeper was evicted for failure to pay his rent. *Held*, that defendant was not entitled to be subrogated to plaintiff's rights against the saloon keeper.—*Academy of Music Co. v. Davidson*, (Wis.) 55 N. W. 172.

Summoning.

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Summons.

See "Writs and Notice of Suits,"

SUNDAY.

Contracts, see "Conflict of Laws," 1.

Unlawful enterprise—Personal injuries.

How. St. § 2015, provides that no person shall do any manner of labor, business, or work, or take part in any sport, game, or play, on the first day of the week. *Held*, that plaintiff was not engaged in an unlawful enterprise, within the statute, in riding from a railway station to her home in a quiet manner, on a Sunday evening.—*Van Auken v. Chicago & W. M. Ry. Co.*, (Mich.) 55 N. W. 971.

Supervisors.

Compensation, see "Counties," 8.

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See "Principal and Surety."

SURFACE WATER.

Liability of railroad for overflow, see "Damages;" "Railroad Companies," 3, 4.

Natural flowage as servitude, see "Easements."

Rights of landowners.

1. Where an owner improves his land for purposes for which it is ordinarily used, doing only what is necessary for such purposes, and being guilty of no negligence in the manner of doing it, he is not liable because, as an incident of such improvement, surface waters accumulate and flow in a stream upon the lands of others.—*Brown v. Winona & S. W. Ry. Co.*, (Minn.) 55 N. W. 123.

2. When surface water from plaintiff's land has been carried off for 20 years through a ditch maintained for that purpose on defendant's land, plaintiff has a prescriptive right to the unobstructed use of such ditch for that purpose.—*Leidlein v. Meyer*, (Mich.) 55 N. W. 367.

Action for flowage.

3. In an action for the wrongful obstruction of a natural flow of surface water from plaintiff's to defendant's land, under a declaration framed on the theory that there was an original channel through which the water flowed, which had been widened, deepened, and used for more than 30 years, a recovery could be had, whether the proofs showed a natural water course, an artificial one to which plaintiff had obtained a right by use, or a natural flow without any channel whatever.—*Leidlein v. Meyer*, (Mich.) 55 N. W. 367.

Surgeons.

See "Physicians and Surgeons."

Surprise.

As ground for new trial, see "New Trial," 2.

Surrender.

Of lease, see "Landlord and Tenant," 5, 6.

Surviving Partners.

See "Partnership," 15, 16.

Swamp Lands.

Application of proceeds, see "Counties," 3.

TAXATION.

Assessment for public improvements, see "Municipal Corporations," 37-42.

By town, see "Towns."

Duty of life tenant to pay, see "Estates."

Of railroad, see "Railroad Companies," 5.

Validity of statutes, see "Constitutional Law," 6-8.

Taxable persons and property.

1. Where, before a patent was issued, a bounty warrant located by an assignee thereof was canceled by the land office, and the entry vacated, on the ground that the assignment was forged, no title, legal or equitable, passed out of the United States, and a levy of taxes on the land, and sale thereunder, were void and of no effect.—*Durham v. Hussmann*, (Iowa.) 55 N. W. 11.

2. Sanb. & B. Ann. St. § 1040, provides that no change of location or sale of personal property after May 1st shall affect the assessment in such year. *Held*, that an assessor had no authority to change an assessment from the sellers to the buyers of property, where the sale was made after May 1st; and the fact that the buyers unnecessarily listed the property for taxation against themselves as manufacturers did not affect the assessment against the sellers.—*Town of Eagle River v. Brown*, (Wis.) 55 N. W. 163.

Place of taxation.

3. Pine logs kept for sale are "merchants' goods, wares, and commodities," within the meaning of Sanb. & B. Ann. St. § 1040, providing that such property shall be assessed in the district where located.—*Town of Eagle River v. Brown*, (Wis.) 55 N. W. 163.

Assessment and levy.

4. Pub. Acts 1891, No. 200, provides that, in computing the taxable property of insurance companies organized under the laws of the state, the value of the land on which the company pays taxes shall be deducted from its net assets above all liabilities, as shown by the last report of the insurance commissioner, and the remainder shall be the amount for which the company shall be assessed. *Held*, that the fact that the assessors of a certain city have not assessed any mortgages against an insurance company therein does not render an assessment by them, without deducting such mortgages from its assets, legal, where no deduction has been made from its assets for mortgages held by it in other counties, which have been assessed or are liable to assessment.—*Standard Life & Acc. Ins. Co. v. Board of Assessors of Detroit*, (Mich.) 55 N. W. 112.

Lien.

5. Gen. St. 1878, c. 11, § 69, provides that when taxes have become delinquent, and the treasurer has returned the lists to the auditor, one who desires to pay the taxes may get a list from the auditor, and then pay the treasurer. *Held* that, the land never having been adjudged against, nor sold for, taxes, the mistake of the auditor in omitting a year's taxes from a list he furnished would not divest the lien of such taxes remaining unpaid, though the rest were discharged.—*Croswell v. Benton*, (Minn.) 55 N. W. 1125.

Replevin of property seized.

6. Replevin will not lie for the recovery of personal property seized by a township treasurer for the payment of a tax, part of which is valid, as the Michigan statute prohibits it.—*Scott v. Whelan*, (Mich.) 55 N. W. 1025.

7. A lessee of personal property sought to be taken to satisfy a tax against the lessor may maintain replevin against the officer seizing such property. *Touzey v. Post*, 52 N. W. 57, 91 Mich. 631, followed.—*Whittaker v. Fuller*, (Mich.) 55 N. W. 612.

Collection — Publication of delinquent list.

8. Laws 1881, c. 185, § 1, requiring "the amount of taxes, principal and interest due thereon, according to the provisions of this act," to be stated opposite each description in the delinquent list, does not require the taxes to be stated in detail year by year; and it is enough, therefore, to state the amount.—*Whitney v. Wegler*, (Minn.) 55 N. W. 927.

9. Where a person against whom a tax is assessed makes a pretended sale of personal property for the express purpose of preventing a levy for the tax, retains possession of the property, and receives no consideration for the sale, and the vendee takes the bill of sale in order to assist in defeating the collection of the tax, the officer charged with the collection of the tax can levy on the property notwithstanding such sale.—*Gray v. Finn*, (Mich.) 55 N. W. 615.

— Sale for nonpayment.

10. Where there is no record of the laying out of any drain in a certain township, on which land is assessed in a certain year, and the tax list does not show for what drain the tax is assessed, a sale of such land for delinquent drain tax of such year, and the tax deed issued in pursuance thereof, are void, when, also, the sale and deed were made by the county treasurer, instead of the auditor general.—*Loose v. Navarre*, (Mich.) 55 N. W. 435.

11. A sale of land for taxes of 1878, made after the tax list of 1879 was in the hands of the treasurer, is invalid where the delinquent tax of the former year was not brought forward and entered on the tax list of the latter year before such sale, as required by Code, § 845.—*Snell v. Dubuque & S. C. Ry. Co.*, (Iowa.) 55 N. W. 310.

12. A tax sale is void if any portion of the tax for which it was made was illegal.—*Tillotson v. Webber*, (Mich.) 55 N. W. 837.

Redemption.

13. Where the notice of expiration of the time for redemption of land from tax sale is not served on the person in possession, a tax deed issued in pursuance of the sale is void.—*Snell v. Dubuque & S. C. Ry. Co.*, (Iowa.) 55 N. W. 310.

Tax titles.

14. Where a tax deed of premises is of no effect as against a life tenant because given before the latter's right of redemption from the tax sale has expired, and the grantee in the tax deed subsequently takes a warranty deed from the life tenant of the property, such deed operates as a redemption from the tax sale, since it conveys to him simply the life estate, and imposes on him the duty of paying the taxes.—*Little v. Edwards*, (Wis.) 55 N. W. 43.

— Tax deed.

15. A tax deed to premises while they are in possession of a life tenant, the widow of the former owner, and before her right of redemption expires, gives the grantee therein no title, as against her.—*Little v. Edwards*, (Wis.) 55 N. W. 43.

— Action to try and confirm.

16. In an action to quiet title, where it appears that the land was patented to one John F. in 1860; that one Margaret F., widow, and

her daughter, Nellie, conveyed the land to plaintiff in 1886; that the husband of Margaret was named John, who died intestate in 1884, leaving, surviving, his widow and a daughter, Nellie; and that he had possession of papers relating to the land; and where no evidence is offered to show that the patentee was not the same person who had been Margaret's husband,—it is sufficiently established that Margaret was the widow of the patentee, and her daughter the only heir, and that plaintiff has title, within Code, § 897, providing that no person shall be permitted to question a tax title without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale. — *Pitts v. Seavey*, (Iowa,) 55 N. W. 490.

17. It is proper for the court to treat an action by the owner to quiet title to land sold for taxes as an action to redeem, and require plaintiff to reimburse the holder of the tax title. — *Snell v. Dubuque & S. C. Ry. Co.*, (Iowa,) 55 N. W. 310.

18. Where, in an action by the owner to quiet the title to land sold for taxes, the pleadings, filed within five years from the date of the tax deed, allege generally that such deed is void, and no motion is made for a more specific statement, they are sufficient. — *Snell v. Dubuque & S. C. Ry. Co.*, (Iowa,) 55 N. W. 310.

Taxation of Costs.

See "Costs," 3-5.

Teacher.

See "Schools and School Districts," 8, 9.

TELEGRAPH COMPANIES.

Duties and liabilities.

1. Comp. St. c. 89a, § 12, declaring telegraph companies liable for nondelivery, mistakes in transmission, and failure to perform any other legal duty, in spite of any condition on its printed blanks, annuls a condition that persons injured must present their claim within 60 days from the time the message was sent; and such condition, if valid, could not apply in an action sounding in tort. — *Pacific Tel. Co. v. Underwood*, (Neb.) 55 N. W. 1057.

2. Where a telegraph company refuses to accept and transmit an offered message because the person offering will not sign an agreement that the company shall not be liable for any damages if a claim be not presented, in writing, within 60 days after the message is filed, it violates its duty, under Comp. Laws, §§ 3881-3910, as a common carrier; and the fact that the person offering the message subsequently returns, and sends the message on the condition prescribed, does not cure the wrong or constitute a waiver. — *Kirby v. Western Union Tel. Co.*, (S. D.) 55 N. W. 759.

Telephone Companies.

Defective poles, see "Negligence," 1.

TENANCY IN COMMON.

Adverse possession.

Possession by a tenant in common and joint tenant is not adverse where no claim is made adverse to the titles of the other tenants, and they are in possession with him; and it is immaterial that, under such circumstances, he pays taxes and makes improvements. — *Pierson v. Conley*, (Mich.) 55 N. W. 387.

Tenant.

See "Landlord and Tenant."

TENDER.

Sufficiency.

1. Where a chattel mortgage runs to several mortgagees, jointly, to secure a joint debt, a tender to either mortgagee is good, and operates as to the interests of all. — *Flanigan v. Seelye*, (Minn.) 55 N. W. 115.

2. Defendant appointed plaintiff agent for the sale of books in a certain territory of which defendant was a nonresident. After receiving the books, plaintiff sought to rescind the contract, and deposited the books in the railroad warehouse, notifying defendant that they were subject to his order. *Held*, that the tender of the books to defendant was sufficient. — *Angell v. Loomis*, (Mich.) 55 N. W. 1008.

Testamentary Capacity.

See "Wills," 1-3.

Testamentary Powers.

See "Powers," 4.

Timber.

See "Logs and Logging."

TIME.

Of bringing action, see "Limitation of Actions." Computation.

The statutory rule for computing time does not apply to ascertain the day, or the last day, on which a thing may be done, where such day is expressed by its date. — *Northwestern Guaranty Loan Co. v. Channell*, (Minn.) 55 N. W. 121.

Title.

See "Quieting Title."

Title of Acts.

See "Statutes," 6-11.

Torts.

See "Assault and Battery;" "Conspiracy;" "Deceit;" "False Imprisonment;" "Libel and Slander;" "Negligence;" "Nuisance;" "Trespass;" "Trove and Conversion."

Measure of damages, see "Damages," 16-21. Of servant, see "Master and Servant," 8.

TOWNS.

See, also, "Counties;" "Drainage;" "Highways;" "Schools and School Districts;" Support of paupers, see "Poor and Poor Laws."

Taxation.

1. Under Comp. Laws 1871, § 1002, providing for the delivery to the township treasurer of a copy of the tax roll, with the school and library taxes in one column, "the highway taxes in another," and "the township taxes in another," taxes raised for roads or bridges under the authority of section 477, subd. 15, or section 1269, cannot be blended in the same column with the township taxes. — *Tillotson v. Webber*, (Mich.) 55 N. W. 837.

2. A tax for the contingent and poor funds of a township is void if voted by the township board without first having been submitted to the voters. — *Tillotson v. Webber*, (Mich.) 55 N. W. 837.

3. A sale of land for taxes assessed for township contingent purposes, and which were not voted or authorized to be raised in the township for such purposes, is void. — *Loose v. Navarre*, (Mich.) 55 N. W. 435.

Transfer.

To equity docket, see "Practice in Civil Cases," 4.

TRESPASS.

By animals, see "Animals."

When action lies.

1. Defendants, special administrators, entered deceased's house by leave of his widow, and demanded from her certain chattels, to whose possession they were entitled. The widow refused to surrender them, or to unlock the rooms where they were. She asked defendants to leave the house, but they remained from 6:30 P. M. till after midnight, so that plaintiff was frightened and made sick. *Held* an actionable trespass.—*Mitchell v. Mitchell*, (Minn.) 55 N. W. 1134.

Findings and judgment.

2. In trespass, plaintiff claimed under a deed from the auditor general, conveying the land to him on account of delinquent taxes assessed thereon. The court found that the levy for township, highway, and school purposes was in excess of the amount authorized, and that there were irregularities in the proceedings to levy and collect the tax. *Held*, that a judgment for defendant, based on such findings, would not be disturbed on the ground that there was no finding that the land was sold for the unauthorized tax.—*Hecock v. Van Dusen*, (Mich.) 55 N. W. 1024.

Trespassing Animals.

See "Animals."

TRIAL.

See, also, "Appeal;" "Certiorari;" "Continuance;" "Evidence;" "Judgment;" "Jury;" "New Trial;" "Pleading;" "Practice in Civil Cases;" "Witness."

Remarks and misconduct of judge.

1. By agreement of the parties, and on request of the jury, the latter were brought into court for the purpose of hearing the evidence of three certain witnesses read as to a certain point. After the evidence of one of such witnesses had been read, the court stated the substance of the evidence of the other two on the point in question. *Held*, that this was not such an abuse of discretion as warranted a reversal.—*Salladay v. Town of Dodgeville*, (Wis.) 55 N. W. 696.

View by jury.

2. It was within the discretion of the lower court to refuse to allow the jury to take a view of the premises.—*Leidlein v. Meyer*, (Mich.) 55 N. W. 387.

Urging jury to agree.

3. When a jury report that they cannot agree, the court may send them out for further deliberation, and urge them to use all reasonable efforts to come to an agreement, stating, as a reason, that the case is an expensive one to try.—*Watson v. Minneapolis St. Ry. Co.*, (Minn.) 55 N. W. 742.

Reception of evidence.

4. The trial court may, in its discretion, require that offers of evidence be made so as not to reach the ears of the jury, and it should adopt this course when the offer to be made threatens to prejudice the party objecting, if heard by the jury.—*Omaha Coal, Coke & Lime Co. v. Fay*, (Neb.) 55 N. W. 211.

5. Where, in answer to proper questions, a witness volunteers irresponsible matter in his answers, which, on motion, is promptly stricken out by the court, in the hearing of the jury, such action amounts to a withdrawal of the matter from the jury, and, in the absence of a request, no duty rests on the court, either

at that time or in the general charge, to caution the jury to disregard such matter.—*State v. McGahey*, (N. D.) 55 N. W. 753.

6. A plaintiff may properly introduce evidence to refute an improper inference that might arise from matters drawn from him on cross-examination, though such evidence has no direct bearing on the issues; and the time for the introduction of such evidence is peculiarly within the discretion of the trial court.—*Branstetter v. Morgan*, (N. D.) 55 N. W. 758.

7. Under Code, § 2799, authorizing the court at any time before a cause is finally submitted to permit the introduction of further testimony to correct an evident mistake, where there is an affidavit showing newly-discovered evidence and diligence, there will be no interference on appeal with the court's exercise of discretion in permitting further evidence, though the record shows an entry, "Cause submitted."—*Thatcher v. Stickney*, (Iowa.) 55 N. W. 488.

8. Refusal of intervenor's request to introduce notes in evidence several days after the closing of the evidence, and after it had made its argument and plaintiff had begun his, will not be considered an abuse of discretion, where no reason is given why it was not offered sooner, and no offer to connect the notes with the case is made, except as that fact might be presumed from their dates and the indorsements thereon.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa.) 55 N. W. 496.

9. Where, in an action to recover for personal injuries, plaintiff offered at the close of defendant's evidence to prove the probable length of plaintiff's life by mortality tables, it was within the sound discretion of the court to reject such testimony.—*McDermott v. Chicago & N. W. Ry. Co.*, (Wis.) 55 N. W. 179.

10. It is not an abuse of discretion to refuse permission to allow a party, after close of a trial, to amend his pleading, and offer additional, newly-discovered evidence, where the witness whose testimony was to be introduced testified in the cause, and the testimony proposed was such as the pleadings and evidence should have suggested inquiry for, and no diligence to procure it is shown.—*Le Moyne v. Braden*, (Iowa.) 55 N. W. 14.

11. It is within the discretion of the trial court to allow the introduction of additional evidence after the evidence in the case has been closed.—*Des Moines Sav. Bank v. Colfax Hotel Co.*, (Iowa.) 55 N. W. 67.

Objections to evidence.

12. Evidence admitted without objection in the lower court cannot be rejected on a trial de novo in the appellate court.—*Grafton v. Moorman*, (Iowa.) 55 N. W. 308.

13. After testimony has been taken, objection thereto should be made by motion to strike it out.—*Payne v. Dicus*, (Iowa.) 55 N. W. 483.

14. Where an objection to evidence offered is of such a character that other evidence may remove it the objection must be specifically stated when the evidence is offered.—*King v. Nichols & Shepard Co.*, (Minn.) 55 N. W. 604.

15. Exceptions based on an objection to evidence in the form of "I object" cannot be considered.—*Hutchinson v. Whitman*, (Mich.) 55 N. W. 438.

16. A party excepting to the admission of objectionable evidence does not waive his exception by subsequently moving that the evidence be stricken out and failing to except to the overruling of the motion.—*Gasper v. Heimbach*, (Minn.) 55 N. W. 559.

Argument of counsel.

17. In his opening to the jury, plaintiff's counsel said, "He sends to the slums down here, and gets his bond," but immediately withdrew the statement. The record failed to show in what connection the remark was made. *Held* not reversible error.—*Evans v. Montgomery*, (Mich.) 55 N. W. 362.

18. While counsel have no right to read law to the jury, they may state so much of the

law as they claim it to be as may enable them to lay before the jury an intelligent idea of the force, effect, and bearing of the testimony.—*Edwards v. Common Council of Three Rivers*, (Mich.) 55 N. W. 1003.

19. The remark of plaintiff's counsel, in his address to the jury, that defendant can bring experts from one end of the world to the other to defeat plaintiff; that it has money enough to do it,—having been expressly discounted by the court, will not be held error, in the absence of an affirmative showing.—*Dugan v. Chicago, St. P., M. & O. Ry. Co.*, (Wis.) 55 N. W. 894.

20. Where, in an action for the price of a wheel, the issue is whether or not defendant accepted the wheel, it is competent for plaintiff's counsel, in argument, to comment on the fact, proven in evidence, that defendant had sold the wheel after the commencement of the action, as showing an acceptance before the institution of the action.—*Valley Iron-Works Manufg. Co. v. Grand Rapids Flouring-Mill Co.*, (Wis.) 55 N. W. 693.

Instructions.

21. In an action on a contract, it is proper to change a request to charge that the jury are not authorized to find, except on "clear and convincing proof," etc., so that it will read, except on "a fair preponderance of proof," etc.—*Evans v. Montgomery*, (Mich.) 55 N. W. 362.

22. The contradiction between an instruction that it was incumbent on intervener to establish the material averments of its petition, and another, that it was admitted intervener was incorporated, and as to that fact no evidence was necessary, but it should be accepted as established, is not misleading.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa.) 55 N. W. 496.

23. A defendant cannot complain that the instructions were not sufficiently full, when he asked no instructions himself.—*Shroeder v. Webster*, (Iowa.) 55 N. W. 569.

24. In an action for the conversion of timber, and iron dogs used to hold it together, where the jury are told that the burden is on plaintiff to prove his case by a preponderance of evidence, and expressly directed that they are to judge of the facts, the fact that in several instructions they are told that they must be "convinced" of certain facts to entitle plaintiff to recover is not necessarily misleading.—*Davidson v. Kolb*, (Mich.) 55 N. W. 373.

25. It is not error to refuse an instruction requested, though it correctly states the law, and is applicable to the case, when the court, in its general charge, has fully covered the same points.—*State v. McGahey*, (N. D.) 55 N. W. 753.

26. Where the fact to be found is to be determined on the consideration of numerous facts and circumstances proved, whether the trial court, after it has clearly stated to the jury the general rules that are to control them in their deliberations, shall call their attention to particular facts and circumstances, is in its discretion.—*Watson v. Minneapolis St. Ry. Co.*, (Minn.) 55 N. W. 742.

Pleading to support.

27. When the defense to an action for the price of sheep is that they were warranted sound, but were diseased, so that the consideration failed, and the warranty was broken, an instruction, three times repeated, that a failure of consideration, breach of warranty, or fraud is a valid defense, is prejudicial error, no fraud being alleged.—*Farmers' & Merchants' Bank v. Upham*, (Neb.) 55 N. W. 1044.

Evidence to support.

28. An instruction submitting to the jury the reasonableness of the compensation voted by defendant to its officers, and charging the jury that, if they found that the sum voted when defendant was insolvent was unreason-

able, such fact should be considered in determining the intent and purpose of the assignment of the claim to intervener, is not given, in the absence of evidence as to the reasonableness of the compensation, where it appears that the compensation voted covered a period of several months prior to defendant's incorporation.—*Hamilton Buggy Co. v. Iowa Buggy Co.*, (Iowa.) 55 N. W. 496.

Invading province of jury.

29. In an action against a town to recover for injuries caused by an obstruction in the highway, where the undisputed testimony is that there was a stone or stones in the traveled track, it is not error for the court to state to the jury the substance of the testimony on both sides as to the size and situation of the stone, and say that "there is no question at all under the testimony that there was a stone there. Its size and character and location you are to determine."—*Salladay v. Town of Dodgeville*, (Wis.) 55 N. W. 696.

30. On presentation of a claim against the estate of a decedent for conversion of certain logs, where there was some evidence that the sale of the logs by decedent was with claimant's consent, it was proper to refuse to charge that claimant was entitled to the value "at the time of the conversion," with interest, the question of conversion being for the jury.—*Pratt v. Ross' Estate*, (Mich.) 55 N. W. 613.

31. In an action for the conversion of timber, and iron dogs used to hold it together, where the court charges that there is evidence also that some iron dogs went along with the timber, and got into defendants' possession, and that "I think in fact defendants acknowledge that there are some of these articles in their possession, and have been," plaintiff has no ground for complaint.—*Davidson v. Kolb*, (Mich.) 55 N. W. 373.

32. An instruction which might lead the jury into supposing they could find a certain fact from the evidence is erroneous, unless there is no evidence as to such fact.—*Rugland v. Tollefsen*, (Minn.) 55 N. W. 123.

Directing verdict.

33. On the employment of plaintiff by defendants for a stipulated term it was agreed that, if defendants continued in the manufacturing business after such term, plaintiff's services should be retained. In an action for wages for such further term, on the issue whether defendants continued manufacturing, it appeared that, when the contract was made, defendants were manufacturing four-horse eveners. After the original term, plaintiff worked for defendants 10 days, during which they were manufacturing, as plaintiff testified, three-horse eveners in the same way, and for the same purposes, as they had been manufacturing the others. There was evidence that such three-horse eveners were made only as an experiment, and that there was no continuation of manufacturing. Held, that the court properly refused to direct a verdict for defendants.—*Whitworth v. Brown*, (Wis.) 55 N. W. 422.

Harmless error.

34. A judgment will not be disturbed because of an instruction submitting to the jury an issue not within the pleadings, where the only effect of such instruction is in favor of the party complaining.—*Fitzgerald v. Meyer*, (Neb.) 55 N. W. 296.

35. Though instructions are not clear and without contradiction, still the verdict will not be set aside, if, upon the evidence, no other verdict could be sustained.—*Jansen v. Williams*, (Neb.) 55 N. W. 279.

Exceptions.

36. An exception "to each of the instructions given by the court to the jury, respectively," is not such an exception as entitles appellant to a review of the general instructions.—*Banbury v. Sherin*, (S. D.) 55 N. W. 723.

37. Where no exceptions are taken to instructions, they must stand as the correct law of the case.—*Peet v. Chicago, M. & St. P. Ry. Co., (Iowa.)* 55 N. W. 508.

Instructions—Estoppel to object.

38. Error cannot be predicated on an instruction given in language substantially like an instruction requested by appellant.—*Alberts v. Village of Vernon, (Mich.)* 55 N. W. 1022.

39. Where a party asks an instruction, he cannot complain, though it incorrectly states an issue to be tried.—*Dawson v. Williams, (Neb.)* 55 N. W. 284.

Verdict.

40. Where, on request of defendant, an administrator was permitted to be made a party defendant, the omission of his name from the title of the case as given in the verdict is not such a defect as to prevent the entry of a judgment on it.—*Parrish v. McNeal, (Neb.)* 55 N. W. 222.

41. A verdict for plaintiff in an action for personal injuries, clearly inadequate, under the evidence, as to the amount of damages, may be set aside.—*Henderson v. St. Paul & D. Ry. Co., (Minn.)* 55 N. W. 53.

42. It is ground for a new trial for a juror to tell his fellow jurors, while they are considering their verdict, facts in the case within his own personal knowledge, but not given in evidence. He should make them known during the trial, and, if desired, testify as a witness.—*Wood River Bank v. Dodge, (Neb.)* 55 N. W. 234.

Trial by court.

43. A judgment in a case tried without a jury will not be disturbed because of the admission of immaterial testimony, where the testimony properly admitted justifies the finding.—*Dewey v. Algira, (Neb.)* 55 N. W. 276.

44. An objection that conclusions of law are not justified by the findings of fact may be raised on a motion for a new trial.—*Tilley v. Wolverton, (Minn.)* 55 N. W. 822.

45. A fact found by the court, though expressed as a conclusion of law, will be treated as a finding of fact.—*Cushing v. Cable, (Minn.)* 55 N. W. 786.

46. Where a complaint shows that a contract was joint, and alleges that the liability thereon had been assumed by one of the obligees, and he is accordingly sued alone, and defendant raises an issue on such allegations, a finding by the court simply that there was a joint obligation, and the amount due thereon, will not justify a judgment against the party named as sole defendant.—*Little v. Lee, (Minn.)* 55 N. W. 737.

47. Though there is no exception to the finding of the court, an exception to an erroneous refusal to find is available as ground for reversal.—*Valley Lumber Co. v. Hogan, (Wis.)* 55 N. W. 415.

TROVER AND CONVERSION.

Against receiver, see "Receivers," 4.

What constitute conversion.

1. One who sells property as under a mortgage which was not included therein is liable for the conversion, whether he knew it was not included or not.—*Kenney v. Ranney, (Mich.)* 55 N. W. 982.

2. In an action by junior mortgagees to recover of senior mortgagees of the same chattels the value thereof in excess of the senior mortgage debt, it appeared that defendants were permitted to remove the property from the state to sell it to satisfy the mortgages; that they removed it, and used it in opening and running a saloon for themselves; that they intended to open the saloon when they removed the property, and concealed their purpose from the other parties interested in such property. *Held* to

show a conversion.—*Perego v. Wheeler, (Iowa.)* 55 N. W. 462.

Evidence.

3. In an action by an executor for the conversion by defendant corporation of bonds alleged to have been deposited with it by his testator for safe-keeping, it is error to exclude questions asked of plaintiff as to whether his testator owned any such bonds at and prior to the time at which they are claimed to have been placed in defendant's custody.—*McNamara v. Corporation of New Melleray, (Iowa.)* 55 N. W. 322.

4. In an action by an executor for the conversion by defendant corporation of bonds alleged to have been deposited with it by his testator for safe-keeping, a receipt for such bonds, signed by one M. individually, is admissible when evidence had been introduced that M. acted for the defendant in all its dealings, and uniformly signed his individual name to receipts for money and property received by the corporation.—*McNamara v. Corporation of New Melleray, (Iowa.)* 55 N. W. 322.

Instructions.

5. In an action for the conversion of timber, and iron dogs used to hold it together, it is not error to charge that the iron dogs "follow the same rule as the timber. The damage was just what they were actually worth at that time and place. I do not know how many you will find that the defendants have ever had anything to do with."—*Davidson v. Kolb, (Mich.)* 55 N. W. 373.

Trustee Process.

See "Garnishment."

TRUSTS.

Deed of trust, see "Mortgages."

Effect on statute of limitations, see "Limitation of Actions," 9, 10.

Resulting trusts.

1. Complainant and his mother employed H. to buy land for them, and furnished the money for the first payment, H. taking the contract of sale in his name. Subsequently they paid the balance of the price, whereupon a deed was made to H. by the vendor, with the knowledge and consent of complainant and his mother. The title was put in H. for the sake of convenience, he agreeing to convey to the complainant and his mother, when requested. *Held* that, under *How. St. § 5569*, providing that "when a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made," the persons furnishing the money had no rights in the property as against H.'s creditors, and a sale under execution against H. would not be enjoined.—*Barnes v. Munroe, (Mich.)* 55 N. W. 431.

2. The rights of the execution creditors would not be affected by a conveyance of the land, subsequent to the levy, by H. to complainant.—*Barnes v. Munroe, (Mich.)* 55 N. W. 431.

Constructive trust.

3. Persons who, by the fraudulent conduct of themselves or their agents, obtain possession of the assets of an insolvent bank, and are unable to return to the receiver such assets in kind, will be held strictly accountable for their value.—*State v. Commercial & Sav. Bank, (Neb.)* 55 N. W. 640.

Sale of trust property.

4. Defendant, who owned an undivided one-third interest in land, and held the balance as trustee, sold it without notice to the cestui que trust, as ordered by the court. Shortly thereafter he filed a report with the court in

which the estate was being administered, and, on notice to the cestuis que trustent, such sale was confirmed. *Held* a valid sale, the irregularity in failing to give notice to the cestuis que trustent of intent to sell being cured by the ratification and affirmance.—*Dorsey v. Banks*, (Iowa,) 55 N. W. 574.

Following trust property.

5. Where money has been deposited by a treasurer of a township in a bank which subsequently makes an assignment for the benefit of its creditors, it is not necessary, in order to follow the money as a trust fund, to trace the deposit into specific property; but it has no greater interest than an ordinary creditor in land purchased before any money was deposited by its treasurer, and to which its deposits in no way contributed.—*District Tp. of Eureka v. Farmers' Bank*, (Iowa,) 55 N. W. 342.

Enforcement of trust.

6. An allegation, in a complaint to declare a favored applicant for a lease of state mineral land a trustee for plaintiff, that an agreement and combination were formed between the favored applicant and other persons for the purpose of acquiring leases of state mineral land, and that the land commissioner "became a member of such combination," is not an allegation that the commissioner had, or that it was ever agreed that he should have, any interest in the leases applied for.—*Baker v. Jamison*, (Minn.) 55 N. W. 749.

7. Where money has been deposited by a treasurer of a township in a bank which subsequently makes an assignment, a decree in an action to establish a trust that, if the property in the hands of the assignee shall not prove sufficient to all claims for trust funds of equal equities with that of plaintiff, pro rata payments shall be made, is unauthorized when no party to the action asked such relief.—*District Tp. of Eureka v. Farmers' Bank*, (Iowa,) 55 N. W. 342.

Turnpikes and Toll Roads.

Impairing obligation of contracts, see "Constitutional Law," 5.

Ultra Vires.

Contracts of corporation, see "Corporations," 7.

Undue Influence.

Over testator, see "Wills," 4, 5.

Unions.

See "Conspiracy."

United States.

Adverse possession against, see "Adverse Possession," 1.

Usage.

See "Custom and Usage."

USURY.

What constitutes.

1. Where one buys an accommodation note of the payee, not knowing that it is accommodation paper, but supposing that it is already a valid subsisting security in the hands of the payee, the transaction is not usurious, though the paper be bought at a discount greater than the legal rate of interest.—*Holmes v. State Bank*, (Minn.) 55 N. W. 555.

2. Plaintiff applied to defendant for a loan of \$300 for six months at a given interest, to be secured by a chattel mortgage on personal property, and agreed to pay defendant, "for acting as my agent in procuring such loan, and for

examining said property, and drawing the necessary papers, * * * the sum of \$60." Plaintiff was unable to pay the principal when due, and an extension of one month was obtained, on payment of \$10. The time was extended, on payment of \$10 each month, for nearly a year. Plaintiff claimed that the \$60 withheld from the original loan, and the monthly payments of \$10, were in fact payments of interest on the loan, and brought action to recover the amount of such payments exceeding 10 per cent. as usurious. There was evidence that defendant obtained the loan from his father-in-law, who had been engaged in such transactions for years. There was also evidence that the money really belonged to defendant. *Held*, that on either theory a verdict for plaintiff would not be disturbed.—*Dayton v. Dearholt*, (Wis.) 55 N. W. 147.

Vacation.

Of highway, see "Highways," 8-12.
Of judgment, see "Judgment," 24-27.

Variance.

Between declaration and writ, see "Replevin," 7.
—pleading and proof, see "Pleading."

VENDOR AND PURCHASER.

See, also, "Covenants;" "Deed;" "Frauds, Statute of," 3-6; "Fraudulent Conveyances;" "Sale;" "Specific Performance."

Power of attorney, see "Powers," 1-3.

Property subject to mechanic's lien, see "Mechanics' Liens," 1-6.

Subrogation to vendor's rights, see "Subrogation," 3, 4.

The contract.

1. Plaintiff agreed with defendant to sell him certain land for \$23,500 at any time within the next nine months, giving him, in effect, an option for that time. Improvements on the property having been burned, defendant accepted the option, and at the same time, and as a part of the same transaction, demanded the insurance money on the property destroyed by fire, claiming that it should be applied on the purchase price. Plaintiff refused to deed the property on such condition, but offered to make the deed on payment of \$23,500, and this defendant refused. Plaintiff did not tender a deed of the property at this time, but later, having discharged a mortgage on the property with the insurance money, tendered a deed for \$23,500, which defendant refused to accept. *Held*, that there was no completed contract of sale.—*Clark v. Burr*, (Wis.) 55 N. W. 401; *Burr v. Clark*, *Id.*

—Time of performance.

2. Defendant conveyed land to plaintiff, subject to a mortgage, agreeing to pay the mortgage "as soon as it can be according to its terms." In the mortgage was a reservation to the mortgagor of the right to pay off the mortgage on any day named for making a payment of interest. *Held*, that it was the duty of defendant to avail himself of the earliest opportunity to pay off the mortgage at which the mortgagor could have paid it.—*Likes v. Polk*, (Iowa,) 55 N. W. 328.

Rights and remedies.

3. Where, in an action for breach of contract to sell land because of the inability of the vendor to convey good title, the vendee claims as items of damage interest on all sums paid on the contract, taxes, and the cost of improvements, the vendor may offset the rental value of the premises, to be estimated without the improvements placed thereon by the vendee.—*Lancouree v. Dupre*, (Minn.) 55 N. W. 129.

4. In an action by a vendee for a breach of contract to sell real property because of the

inability of the vendor to convey good title, the vendee may recover interest upon all moneys paid on the contract from the date of payment, whether paid as principal or interest, taxes upon the premises, with interest from the dates of payment, and the value of improvements put on the land by him in good faith, in so far as such improvements may, at the time of the rescission of the contract, permanently enhance the value of the land.—*Lancoure v. Dupre*, (Minn.) 55 N. W. 129.

Rights and remedies—Rescission.

5. Where the grantee of lots obtains, by agreement, a rescission of the sale, as to part of the lots, because of the failure of title, after knowledge by him of the true state of the title to the remaining lots, and agrees that the grantor may perfect the title to the latter, he cannot afterwards rescind the sale as to the latter on the ground of fraudulent representations.—*McLennan v. Prentice*, (Wis.) 55 N. W. 764.

6. A contract for the sale of land stipulated that the agreement should be void, at the election of the vendors, if the vendee defaulted in the payment of a part of the purchase price according to the conditions of his note. The note was made payable at a certain bank, was there for collection when due, and was not paid. The vendors gave immediate notice that they had elected to declare the contract void, and returned the note. *Held*, that it was not necessary for the vendors to have at the bank, in readiness for delivery when the note matured, a deed of conveyance of the premises, in order to exercise their right to declare the contract void.—*Grant v. Munch*, (Minn.) 55 N. W. 902.

7. It is not necessary that a vendor return the part of the purchase price which had been paid in order to exercise a right to rescind.—*Grant v. Munch*, (Minn.) 55 N. W. 902.

Vendor's lien.

8. In an action by an administrator to foreclose a vendor's lien on land conveyed by plaintiff's intestate to defendant, a son-in-law of the intestate, defendant's evidence was that the consideration of the conveyance, in addition to a cash payment made at the time of the purchase, was that defendant should support the intestate during her lifetime; that the notes for the balance of the price were given to protect the intestate in case she did not live amicably with defendant; that the intestate lived with defendant until her decease, and that during her lifetime she did not ask for the payment of either the principal or the interest on the notes. *Held*, that a decree dismissing the bill was properly entered.—*Huston v. Waldron*, (Mich.) 55 N. W. 610.

Bona fide purchasers.

9. The record of an instrument, required by law to be sealed, which does not show a copy of the seal, or any device representing it, is nevertheless valid and sufficient as notice, if it shows in any way that the instrument was sealed.—*Beardsley v. Day*, (Minn.) 55 N. W. 46.

10. A purchaser at a foreclosure sale of a usurious mortgage who pays the purchase money without notice of the usury will be protected; and so also will a person who, after the sale, and before the expiration of the time for redemption, buys without notice the estate of the mortgagee who bid in the property.—*Holmes v. State Bank*, (Minn.) 55 N. W. 555.

11. A purchaser of land from one who appears by the records in the register's office to be the owner is not chargeable with notice that it is assessed to another person for taxation.—*Roussain v. Norton*, (Minn.) 55 N. W. 747.

12. The presence of graves in a part of a tract of land, some with gravestones bearing the names of those buried, where the burying spot is uninclosed, and does not appear to be cared for, is not indicative of the present continued exercise of dominion over the land,

so as to be notice to a purchaser from the record owner that some other person claims it.—*Roussain v. Norton*, (Minn.) 55 N. W. 747.

13. An unsuccessful attempt was made to create a trust by conveying land to C., as "trustee," without designating a beneficiary. Subsequently C. declared a trust in favor of P. and others, which was not recorded, and P. mortgaged his interest. *Held*, that a purchaser from C., who, on inquiry as to the trusteeship, was told by C. that he was trustee for F., and that the latter wished to sell, used due diligence in making inquiry, and took the land free from the claim of P. and others.—*Mercantile Nat. Bank v. Parsons*, (Minn.) 55 N. W. 825.

14. A purchaser of certain land, after the satisfaction of a mortgage by the mortgagee, and without notice of an unrecorded assignment, held the land freed from the lien thereof.—*Livermore v. Maxwell*, (Iowa.) 55 N. W. 37; *Quincy v. Ginsbach*, Id.; *Same v. Alline*, Id.; *Davis v. Werle*, Id.; *Perkins v. Boever*, Id.

VENUE IN CIVIL CASES.

Domicile of parties to divorce suits, see "Divorce," 1, 2.

Residence of defendants.

1. Action was brought by a number of taxpayers against the treasurer, auditor, and supervisors of a county to restrain payment of certain bonds, said to have been unlawfully issued. After judgment against the treasurer, who was the only one served, a continuance was had for several terms. Leave having been granted to make certain other persons defendants, plaintiffs then amended their petition so as to allege that such persons were owners of the bonds, and asking that the bonds be brought into court and canceled. *Held*, that the proceeding under the amendment was not a new action, but merely a further prosecution of the original, and hence was not without parties defendant actually resident in the county, within Code, §§ 2586, 2589, relating to venue, although the defendants last mentioned may none of them have resided in that county.—*Anderson v. Orient Fire Ins. Co.*, (Iowa.) 55 N. W. 348.

2. Code, § 2586, provides that, with certain exceptions, personal actions must be brought in a county wherein some of the defendants actually reside. Section 2581 provides that, when a written contract is to be performed in any particular place, action for a breach thereof may be brought in the county wherein such place is situated. *Held*, that the blank indorsement of a note payable at a particular place does not require the indorser to pay at that place, and unless, therefore, he is a resident of the county, no action can be brought against him therein.—*Davis v. Miller*, (Iowa.) 55 N. W. 89.

Action against corporation.

3. How. St. § 7986, provides that any creditor shall be entitled to proceed by attachment in the circuit court of the county in which the creditor or debtor resides. Section 8137 provided, prior to 1887, that suits against corporations might be commenced in the same manner as against individuals, and the writ or copy of the declaration shall be served on any officer or agent thereof, etc. In 1887 the section was amended by adding a proviso (§ 8137) that in any county where plaintiff resides, other than the one where the principal office of such corporation is located, a writ of attachment may be the first process against such corporation, and on return of service the latter shall be deemed to be in court, and repealing all inconsistent acts. *Held*, that such amendment did not repeal section 7986 by implication, and that a creditor of a corporation may maintain an action in attachment against it in the county in which it is

located, and in which he resides.—*Michigan Dairy Co. v. Runnels*, (Mich.) 55 N. W. 617.

Change of venue.

4. Defendant's motion for a change of place of trial to the county in which he resided at the commencement of the action may be denied on the ground that the convenience of witnesses and the ends of justice will be promoted by such denial.—*Jones v. Swank*, (Minn.) 55 N. W. 1126.

Verdict.

Direction of, see "Trial," 33.
Sufficiency, see "Trial," 40-42.
Urging jury to agree, see "Trial," 3.

Verification.

Of account, see "Mechanics' Liens," 13.
Of information, waiver of defects, see "Indictment and Information," 3.

Vested Rights.

See "Constitutional Law," 4.

Vice Principal.

See "Master and Servant," 14.

View by Jury.

See "Trial," 2.

Wages.

See "Master and Servant," 2-7.

Waiver.

Of defects in information, see "Indictment and Information," 3.
—in pleading, see "Pleading," 16-18.
Of jury trial, see "Jury," 7-10.
Of mechanic's lien, see "Mechanics' Liens," 23.

Warrant.

Arrest without warrant, see "Arrest."
Cancellation by land office, see "Public Lands," 11-15.

Warranty.

Covenant of, see "Covenants," 3, 4.
Of goods sold, see "Sale," 9-21.

WATERS AND WATER COURSES.

See, also, "Navigable Waters;" "Surface Water."

Natural flowage as servitude, see "Easements."

Diversion.

1. In an action to enjoin the diversion of the water of a stream, it appeared that it came from springs, one of which was on defendant's land; that for many years it flowed across the road running between defendant's and plaintiff's land, and over the latter into a river; and that, if there was ever any change in its course, it was so gradual that the fact could not be easily shown. *Held*, that the course of the water was over plaintiff's premises, though it may have been changed by deposits from adjacent hills.—*Hinkle v. Avery*, (Iowa,) 55 N. W. 77.

2. In an action to enjoin the diversion of the water of a stream, it appeared that the water from certain springs ran for a few rods in a ravine to low land, where the stream widened; that where it left defendant's land it passed through a culvert across a road, and then on plaintiff's land, where a pond was formed in part thereby; that below the pond it was in

some places several rods in width, and at other places quite narrow, and ran into a small branch; and that at all times it had the characteristics of a flowing stream with a visible current. *Held*, that this constituted a water course which defendant had no right to divert.—*Hinkle v. Avery*, (Iowa,) 55 N. W. 77.

Ways.

See "Highways."

WILLS.

See, also, "Executors and Administrators."

Devise to alien, see "Allens."

Election to take devise in lieu of dower, see "Dower."

Jurisdiction to set aside probate, see "Courts," 3.
Testamentary powers, see "Powers," 4.

Testamentary capacity.

1. Testatrix, aged 63 years, made her will a short time before her death, and while suffering great pain. She had no children, and, after giving a number of legacies, left over half her estate to a nephew and niece. Several witnesses testified as their opinion that she was not competent to make a will, but they did not give circumstances on which the opinion was based. Testatrix's doctor, lawyer, and pastor testified that she was fully competent to make a will at the time she did. *Held*, that the evidence justified a finding of testamentary capacity.—*In re Pitt's Estate*, (Wis.) 55 N. W. 149; Appeal of McMaster, Id.

2. There was evidence that at the time the will was made testator was very sick and weak. He gave \$1,200 to an illegitimate daughter, and \$7,000 to a lifelong friend in England, to the exclusion of his brothers and sisters, giving at the time as a reason therefor that his friend had offered to care for his wife during her sickness in England, which seemed to increase his former attachment to him. *Held*, that testator's disposition of his property should not be disturbed on account of incapacity induced by sickness.—*Bennett v. Hibbert*, (Iowa,) 55 N. W. 93.

3. In a proceeding to contest a will the evidence showed that testator made it during his last sickness, when about 70 years old; that he was a man of filthy and profane habits, and of many eccentricities, most of which were accounted for from his inclinations and education. *Held* insufficient to show want of testamentary capacity.—*Bennett v. Hibbert*, (Iowa,) 55 N. W. 93.

Fraud and undue influence.

4. On a contest of a will, the facts that proponent and wife occupied testatrix's house with her, nursed her in her last illness, and were bequeathed half of her estate, do not raise a presumption of undue influence where there is no evidence that they had any control over testatrix, or that they tried to prejudice her against any relative, or even that they knew what the provisions of the will were until after it was executed, though proponent employed his attorney to draft the will.—*In re Pitt's Estate*, (Wis.) 55 N. W. 149; Appeal of McMaster, Id.

5. Where an attempted revocation of a will is thwarted by the fraudulent act of a beneficiary, and the testator is subsequently informed of the fact, and acquiesces in the preservation of the will, no action will lie for the alleged fraud.—*Graham v. Burch*, (Minn.) 55 N. W. 64.

Construction.

6. A devise of all testator's land to his wife, "to have to hold . . . in fee simple," was followed by an expression of trust and confidence that the wife would provide by last will for equitable distribution among their children, with a further provision that "this expression of trust and confidence is not to be interpreted as limiting her right of ownership or

power of distribution." *Held*, that the wife took an estate in fee simple.—*Tabor v. Tabor*, (Wis.) 55 N. W. 702.

7. A devise of real and personal property to trustees, for the benefit of testator's wife during her lifetime, "and after her death for the benefit of my children, (or their survivors,) in the proportion that each would be entitled to under law—that is, share and share alike—had this will not been executed, until my children shall become of lawful age," where the clause refers to the principal of the estate, and not to the income, creates contingent remainders.—*Armstrong v. Armstrong*, (Minn.) 55 N. W. 971.

8. Testatrix devised her land to her husband, and on his death to her children, but if "he should get married after my death, in that event all of my said property, both real and personal, to revert" to the children. *Held*, that the provisions as to the disposition of the property after the husband's death or marriage were not mere precatory words, and that he took only a life estate in the land, subject to be defeated by his remarriage.—*Stivers v. Gardner*, (Iowa,) 55 N. W. 516.

Action to construe.

9. Where doubt has arisen as to the construction of a paragraph in a will, one who is named as a beneficiary in the will, but who has no interest under such paragraph, is not a proper person to maintain an action for the construction thereof, but where the executor in his answer asks for the construction of the paragraph, and it is manifest that a judicial construction of the same is imperatively necessary, a court of equity will retain jurisdiction of the action.—*Sawtelle v. Ripley*, (Wis.) 55 N. W. 156.

WITNESS.

See, also, "Evidence."

Cross-examination, see "Fraudulent Conveyances," 14.

Competency—Husband and wife.

1. Under Code Civil Proc. § 331, which provides that the husband or wife cannot be a witness against each other, except in criminal proceedings, for a crime committed by one against the other, neither can, in an action to set aside a deed from husband to wife, be required to testify as to facts which, it is claimed, would show the conveyance to be fraudulent.—*Niland v. Kalish*, (Neb.) 55 N. W. 295.

Privileged communications.

2. Where an attorney who drew a will signs it as a witness at the request of testatrix, he is free, in an action to contest the will, to testify to any fact in regard to the will and its execution which he learned by virtue of his professional relation.—*In re Pitt's Estate*, (Wis.) 55 N. W. 149; *Appeal of McMaster, Id.*

Transactions with decedents.

3. Under Gen. St. 1878, c. 73, § 8, providing that it shall not be competent for any party to an action, or "interested" in the event thereof, to testify to any conversation with a deceased party relative to any matter at issue, the interest in the event of the action which disqualifies a person as a witness must be a direct and immediate pecuniary interest, adverse to that of the party against whom his testimony is offered.—*Bowers v. Schuler*, (Minn.) 55 N. W. 817.

4. Under Gen. St. 1878, c. 73, § 8, providing that it shall not be competent for "any party to an action" to testify to any conversation with a deceased party relative to any matter at issue, the term "party to an action" means a party to the issue to which the testimony relates, and not a mere party to the record.—*Bowers v. Schuler*, (Minn.) 55 N. W. 817.

5. Under Comp. Laws, § 5260, providing that in actions by or against executors, etc.,

neither party shall testify against the other as to any transaction with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party, a party is prohibited from testifying to a conversation with plaintiff's intestate, notwithstanding the fact that an agent of decedent was present at the time the conversation took place.—*Hutchinson v. Cleary*, (N. D.) 55 N. W. 729.

6. A person having a direct legal interest in the result of an action in which the adverse party is an administrator of a deceased person is not precluded by Code, § 329, from testifying to a transaction between himself and such deceased person, where the administrator first introduced a witness who testified to the same transaction.—*Parrish v. McNeal*, (Neb.) 55 N. W. 222.

7. When a person, who is precluded by Code, § 329, from testifying against the representative of a deceased person, is permitted to testify without objection, the benefit of the statute is waived.—*Parrish v. McNeal*, (Neb.) 55 N. W. 222.

Examination.

8. In answer to an interrogatory to name some of the prominent members of a certain association "at that time," witness stated, "Most of the state and city officers at Richmond, Va., were members, and there were other prominent members in various states whose names I cannot tell." *Held*, the answer was properly excluded, as not responsive to the question.—*Angell v. Loomis*, (Mich.) 55 N. W. 1008.

9. In a rape case, where the prosecuting witness is a girl 10 years old, permitting leading questions to be put to her in her examination is within the discretion of the court.—*Proper v. State*, (Wis.) 55 N. W. 1035.

10. The question, "Do you know whether or not he [defendant] bought his father's homestead?" is not leading, and does not call for a conclusion.—*Robertson v. Craver*, (Iowa,) 55 N. W. 492.

11. Plaintiff was injured in alighting from defendant railroad company's car, and in an action therefor was asked: "You may state whether you were directed by defendant, or any one of its employes or its agents, to get off of the opposite end of this coach from the end that you did get off." *Held*, that the question was not leading.—*McDonald v. Illinois Cent. R. Co.*, (Iowa,) 55 N. W. 102.

Memorandum to refresh memory.

12. It is not necessary that a memorandum used by a witness to refresh his memory should have been made by himself, but he may use a memorandum made by any one, if, after inspecting it, he can testify to the facts from his own recollection.—*Culver v. Scott & Wolston Lumber Co.*, (Minn.) 55 N. W. 552.

Cross-examination.

13. A presiding judge is vested with judicial discretion as to limiting the cross-examination of a witness; and where the same question has been three times propounded it is not error to prohibit a like question to be again asked, under penalty of forbidding further cross-examination.—*Jones v. Stevens*, (Neb.) 55 N. W. 251.

14. In an action for breach of promise of marriage, where a brother of plaintiff testified on direct examination that, while defendant was courting his sister, no one else was going with her, it was error not to permit the witness, on cross-examination, to answer whether he told defendant that witness' sister had made a "mash" on another man.—*Robertson v. Craver*, (Iowa,) 55 N. W. 492.

15. The state has the right, on cross-examination, to show the nature of the relations existing between a witness and the accused, so far as their relations are such as would create a bias on the part of the witness that might reasonably be supposed to affect his testimony, and this rule cannot be changed by the fact that these relations may be such as to

prejudice the accused in the minds of the jury.—*State v. McGahey*, (N. D.) 55 N. W. 753.

16. It is improper, on cross-examination, to ask a witness as to the contents of a written instrument not in evidence; but if the party cross-examining desire to show the contents, and cross-examine upon them, he should, if the instrument be admitted, introduce it, and make it part of his cross-examination.—*O'Riley v. Clamptet*, (Minn.) 55 N. W. 740.

— Redirect examination.

17. On redirect examination in a criminal case, it is proper to permit the witness to state facts and circumstances that tend to correct any wrong inferences that arise from matters drawn out on cross-examination, and this rule is not changed because such facts may be of a character to prejudice defendant in the minds of the jury.—*State v. McGahey*, (N. D.) 55 N. W. 753.

Credibility—Impeachment.

18. While a party to an action cannot object to questions asked a witness on cross-examination, tending to elicit proof that the witness had been guilty of practices that would affect his credit before the jury, yet, when such matters are purely collateral to the issue, the answer of the witness is final, and it is not proper to introduce contradicting evidence.—*State v. McGahey*, (N. D.) 55 N. W. 753.

19. Evidence of the general reputation of a witness for untruthfulness, to be available for his impeachment, must have reference to his reputation at his present or recent place of residence, and should not relate to a residence which had ceased two and a half years before he testified.—*Sun Fire Office of London v. Ayerst*, (Neb.) 55 N. W. 635.

20. A party is not precluded from proving material statements made by the opposite party at other times by calling him as a witness, nor because such party is present in court.—*Thomas v. McDanel*, (Iowa.) 55 N. W. 490.

WORDS AND PHRASES.

"Take care of."

1. "To take care of" matured paper means to take it up by payment or renewal, or to secure an extension of the time of payment.—*Yale v. Watson*, (Minn.) 55 N. W. 957.

"Viewing."

2. The word "viewing" in Comp. St. c. 28, § 7, means not merely looking, seeing, beholding, but it means inspection and investigation by a coroner and a jury.—*Lancaster County v. Holyoke*, (Neb.) 55 N. W. 950.

WRITS AND NOTICE OF SUITS.

See, also, "Attachment;" "Certiorari;" "Execution;" "Garnishment;" "Injunction;" "Mandamus;" "Quo Warranto;" "Replevin."

False return of service, see "Judgment," 28.

Validity.

1. Where the original summons and complaint in an action are properly subscribed by plaintiff's attorneys, with their place of business, and the summons is indorsed in like manner, and the copies thereof served on defendant are accurate except that the attorneys' names are omitted in the subscription to the summons, such omission is a mere irregularity, and if defendant wishes to take advantage thereof he may do so by motion to set aside the service.—*Lee v. Clark*, (Minn.) 55 N. W. 127.

Service.

2. Where a person disappears from home, without any expression of an intention not to

return, process left with his wife, nine days after his disappearance, at his usual place of abode, is a sufficient service to give the court jurisdiction.—*Hershey v. Botna Val. State Bank*, (Iowa.) 55 N. W. 342.

3. A person 14 years old is *prima facie* a person of "suitable age and discretion," within the meaning of Gen. St. 1878, c. 66, § 59, subd. 4, regulating the service of a summons in a civil action.—*Temple v. Norrie*, (Minn.) 55 N. W. 133.

— By publication.

4. Under Sanb. & B. St. § 2639, providing for service by publication where defendant is a nonresident and has "property," the word "property" includes debts having a situs in the state.—*Bragg v. Gaynor*, (Wis.) 55 N. W. 919.

5. Under Sanb. & B. St. § 2640, providing that an application for service of summons by publication "shall be based upon the complaint, duly verified and filed, and an affidavit, together showing the facts required to exist," it is not necessary, as formerly, that the affidavit allege all the facts.—*Bragg v. Gaynor*, (Wis.) 55 N. W. 919.

6. An affidavit for the publication of summons alleged that the action was brought under Gen. St. 1878, c. 75, § 2, to determine adverse claims to certain real estate; that all defendants named, except one, were nonresidents, and their residences unknown; that affiants had searched for such defendants, but neither they nor their places of residence could be found. *Held*, that the affidavit sufficiently showed the nature of the action, and the non-residence of defendants.—*Inglee v. Welles*, (Minn.) 55 N. W. 117.

— Privilege of parties and witnesses.

7. A nonresident suitor, coming into the state for the sole purpose of attending the trial of his case, such attendance being shown to be necessary, is privileged from service of civil process while coming, returning, and attending the trial.—*Fisk v. Westover*, (S. D.) 55 N. W. 961.

8. Comp. Laws, § 5274, providing that a witness shall not be liable to be sued in a county in which he does not reside by being served with a summons in such county while going, returning, or attending in obedience to a subpoena, covers only the subject of the immunity of witnesses, and does not assume to regulate the exemption of suitors.—*Fisk v. Westover*, (S. D.) 55 N. W. 961.

Return—Impeachment.

9. In order to impeach the return of an officer of due service of a summons by him the evidence must be clear and satisfactory.—*Counell v. Galligher*, (Neb.) 55 N. W. 229.

Action against contractor—Notice to city.

10. The charter of Duluth (Sess. Laws 1891, c. 55, § 15) provides that, when an action is brought by a laborer in his own name against a city contractor and his bondsmen, notice that the action has been commenced shall be given to the city, and no judgment shall be entered unless plaintiff prove to the satisfaction of the court that this notice was served upon the city 20 days before the time of the trial, and that a complaint in intervention may be filed by the city, if deemed advisable, within the 20 days, for the benefit and protection of others. *Held*, that the notice was no part of plaintiff's cause of action, and proof of service need not be made until after judgment has been ordered.—*Tompkins v. Forrestal*, (Minn.) 55 N. W. 818.

Wrongful Eviction.

See "Landlord and Tenant," 1.

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